

Appendix E

Federal Trust Fund Models and Analysis

We focused on two federal trust funds as potential models for a CCS trust fund:¹

1. Oil Spill Liability Trust Fund, established under the Oil Pollution Act of 1990; and
2. Vaccine Injury Compensation Trust Fund, established under the National Childhood Vaccine Injury Compensation Act of 1986.

Below is a description and analysis of each trust fund.

1. Oil Spill Liability Trust Fund, established under the Oil Pollution Act of 1990.

The Oil Pollution Act of 1990 was enacted in response to the Exxon *Valdez* oil spill of 1989. It created the following liability scheme:

- Vessel owner or operator responsible for spills, but limits on liability. For maritime oil spills, the vessel owner or operator who is responsible for a spill (the “responsible party”) pays for both removal costs (cleaning up the spill) and damage claims (restoring the environment and paying compensation to parties who are economically harmed by the spill) up to a limit that varies based on the type and tonnage of the vessel, with a separate limits for deepwater ports.² Figure 1 describes the current limits on liability.
- No limits on liability for gross negligence, willful misconduct, etc. The responsible party is not entitled to limits on liability if the spill is caused by gross negligence, willful misconduct, or a violation of federal operating, construction or safety regulations, or if the responsible party failed or refused to report the incident as required by law, to provide all reasonable cooperation and assistance requested by the federal on-scene coordinator in connection with removal activities, or to comply with an order issued by the federal on-scene coordinator without sufficient cause.³

¹ Other federal trust funds include the Federal Disability Insurance Trust Fund, the Airport and Airway Trust Fund, the Black Lung Disability Trust Fund, the Inland Waterways Trust Fund, and the Harbor Maintenance Trust Fund. See TreasuryDirect, Trust fund financial reporting, <http://www.treasurydirect.gov/govt/reports/tfmp/tfmp.htm> (last visited February 25, 2010).

² 33 U.S.C. § 2704(a).

³ *Id.* § 2704(c).

Figure 1. Limits on responsible party liability under the Oil Pollution Act of 1990.⁴

Source of spill	Limit of liability
Vessels:	
Single-hull tank, > 3,000 gross tons	Greater of \$3,200 per gross ton or \$23,496,000
Double-hull tank, > 3,000 gross tons	Greater of \$2,000 per gross ton or \$17,088,000
Single-hull tank, < 3,000 gross tons	Greater of \$3,200 per gross ton or \$6,408,000
Double-hull tank, < 3,000 gross tons	Greater of \$2,000 per gross ton or \$4,272,000
Any other vessel (such as fishing vessels, cargo ships, freighters)	Greater of \$1,000 per gross ton or \$854,400
Offshore facility, except deepwater port	Total of all removal costs <i>plus</i> \$75,000,000
Deepwater ports:	
Louisiana Offshore Oil Port	\$87,606,000
All other deepwater ports	\$373,800,000
All removal costs incurred by any U.S., state, or local official or agency in connection with a discharge of oil from any Outer Continental Shelf facility, or a vessel carrying oil as cargo from such a facility, are borne by the owner or operator of such facility or vessel.	

- Adjustments on liability limits. The liability limits may be adjusted in two ways:
 - through recommendations to Congress “from time to time” on the desirability of adjusting the limits of liability; and
 - through required adjustments every three years to reflect significant increases in the consumer price index.⁵ However, no such adjustments were made between 1990 and 2006, during which time the consumer price index rose approximately 54 percent.⁶

⁴ 33 U.S.C. § 2704(a), (c); 33 C.F.R. § 138.230. Note that 33 C.F.R. § 138.230 increases the limits of liability for all categories other than “offshore facility, except a deepwater port,” which remains at the total of all removal costs plus \$75 million, as provided in the statute. An “offshore facility” is defined as “any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel.” 33 U.S.C. § 2701.

⁵ 33 U.S.C. § 2704(d); *see* Exec. Order No. 12777 of Oct. 18, 1991, 56 Fed. Reg. 54763, at § 4, for delegation of functions of the President.

⁶ U.S. GOV’T ACCOUNTABILITY OFFICE (“GAO”), MARITIME TRANSPORTATION: MAJOR OIL SPILLS OCCUR INFREQUENTLY, BUT RISKS TO THE FEDERAL OIL SPILL FUND REMAIN 32 (2007).

- Uses of the Fund. The Oil Spill Liability Trust Fund is used for the following purposes:⁷
 - Spill response and the initiation of natural resource damage assessments;
 - Response costs and damages that exceed the liability limits;
 - Response costs and damages that are not paid by the responsible party because the responsible party cannot be located, does not pay, or does not have the ability to pay, or where the source of the spill is unknown;
 - Reimbursement of government agencies' removal costs;
 - Access by State officials for removal costs required for the immediate removal of a discharge, or the mitigation or prevention of a substantial threat of a discharge, of oil; and
 - Payment of Federal administrative, operational, and personnel costs and expenses through annual appropriations to the Coast Guard and other agencies. According to the Government Accountability Office ("GAO"), from 1990 to 2006, annual appropriations to agencies amounted to a majority – 61% – of the Primary Fund's expenditures.⁸
- Financing of the fund. The fund is financed primarily through a per-barrel tax on petroleum produced in or imported to the U.S. This tax expired at the end of 1994 and was reinstated in the 2005 Energy Policy Act. Other sources of revenue are interest on the fund principal, cost recoveries from responsible parties, and penalties.⁹
- Minimum balance of the fund is \$2 billion. The balance of the Oil Spill Liability Trust Fund is mandated to be at least \$2 billion. While the Fund previously had a maximum balance of \$2.7 billion, the Emergency Economic Stabilization Act of 2008, Troubled Assets Relief Program ("TARP") did away with this cap.¹⁰

In 2007, the Government Accountability Office ("GAO") analyzed oil spills that have occurred since the enactment of the Oil Pollution Act for which removal costs and

⁷ 33 U.S.C. § 2712(a).

⁸ GAO, *supra* note 6, at 8-9.

⁹ National Pollution Funds Center, The Oil Spill Liability Trust Fund (OSLTF), http://www.uscg.mil/npfc/About_NPFC/osltf.asp (last visited February 25, 2010).

¹⁰ 26 U.S.C. § 4611(f); *see* Public Law 110-343, Oct. 3, 2008, Sec. 405.

damage claims exceeded \$1 million (“high-cost spills”).¹¹ GAO estimated that 51 such high-cost spills occurred between 1990 and 2007, at a total cost of between \$860 million and \$1.1 billion. Of this amount, the responsible parties spent approximately \$620 million to \$840 million, and the Fund spent \$240 million.¹² Ten of these spills exceeded responsible parties’ liability limits. The limit of liability claims of these 10 spills ranged from less than \$1 million to over \$100 million, and totaled over \$252 million in claims on the fund.¹³

Even though there is general agreement that the three primary cost drivers of an oil spill cleanup are the spill’s location, the time of year the spill occurs, and the type of oil spilled, the GAO report found that no factor was clearly predictive of the eventual cost of the 51 high-cost spills that the GAO identified. These 51 high-cost spills occurred on all U.S. coasts, across all seasons, and with all major types of oil, but each spill’s particular location, time, or product contributed to making it expensive.¹⁴

The GAO report also looked at how often the Oil Spill Liability Trust Fund is used to cover costs. Looking at the 51 high-cost oil spills described above, and excluding spills where the costs exceeded the liability limits, the GAO found that 35% of the costs of these high-cost spills were not reimbursed to the fund by the responsible party because the responsible party did not pay or did not have the ability to pay, could not be located, or the source of the spill was unknown. These nonreimbursed costs amounted to \$53.9 million.¹⁵

Lessons learned from the Oil Spill Liability Trust Fund. The following lessons learned from the Oil Spill Liability Trust Fund may be useful in considering how to structure a trust fund for CCS:

- It may not be possible to predict the most costly adverse events. The ongoing oil spill in the Gulf of Mexico reinforces this lesson. In the case of oil spills, even though there is general agreement about what factors affect the costs of an oil spill, no one factor is clearly predictive of the outcome. The 51 major spills identified by GAO occurred on all U.S. coasts, across all seasons, and with all

¹¹ GAO, *supra* note 6, at 2-3. The report notes that, because responsible parties are not required to report that costs they incur for spills, the private-sector costs for cleaning up spills and paying damages are largely unknown. The GAO obtained the best available cost data from a variety of sources and presented the cost estimates in ranges.

¹² *Id.* at 15.

¹³ *Id.* at 28.

¹⁴ *Id.* at 4-5.

¹⁵ *Id.* at 12.

major types of oil. The specific combination of factors, rather than a single, predictable factor, led to the high cost of each spill.¹⁶

- If liability limits are included in a CCS trust fund, a self-implementing mechanism to properly increase these limits over time may be advisable. While the liability limits for the Oil Spill Liability Trust Fund are required to be adjusted every 3 years to account for significant increases in inflation, no such increases were made between 1990 and 2006.¹⁷ In addition, although the Coast Guard found in 2007 that liability limits for tank barges are low relative to their historic spill costs (specifically, the fund in the past has been responsible for paying 69% of the costs of spills from tank barges), the Coast Guard did not thereafter (as of the date of the GAO report) make recommendations for how to address this discrepancy, despite having the authority to do so.¹⁸ This experience suggests that self-implementing mechanisms may be needed to ensure that liability limits are adjusted appropriately over time.
- A trust fund structure must adequately take into account costs incurred when responsible parties cannot be located or do not pay their liabilities. The Oil Spill Liability Trust Fund covers costs when responsible parties cannot be located or do not pay their liabilities, where the source of the spill is unknown, and where the responsible party does not have the ability to pay. When analyzing the 51 major oil spills described above (excluding spills with limit of liability claims), the GAO found that the responsible party paid 65% of the oil spill costs, while 35% of costs were not reimbursed to the fund. These nonreimbursed costs amounted to \$53.9 million.¹⁹
- Administrative costs of the trust fund may be significant. The GAO report found that appropriations to agencies for administrative, operational, personnel, and enforcement costs amounted to 61% of the fund's expenses between 1990 and 2006.²⁰ The Oil Spill Liability Trust Fund differs from proposals for a CCS trust fund in that the federal authority directs and conducts the response efforts, and several agencies are involved. It is unlikely that a federal agency would be similarly involved in a response effort at a CCS site during the operational period. Nonetheless, the example of the Oil Spill Liability Trust Fund suggests that administrative, personnel, and enforcements costs should not be discounted.

¹⁶ *Id.* at 4-5.

¹⁷ *Id.* at 32. The limits were increased again on January 6, 2010, in a final rule adopted by the Coast Guard. Federal Register Vo. 75, No. 3, January 6, 2010, at 750.

¹⁸ GAO, *supra* note 6, at 31-32, 35.

¹⁹ *Id.* at 12.

²⁰ *Id.* at 8-9.

2. Vaccine Injury Compensation Trust Fund

The National Vaccine Injury Compensation Program was established in 1988. The program established a new system for vaccine injury compensation. Following are the basic elements of the fund:

- Recourse for vaccine injuries is first through the U.S. Court of Federal Claims. Rather than filing a lawsuit against a vaccine manufacturer or vaccine administrator in the civil tort system, an individual claiming injury from vaccines covered by the program must first file a petition for “no-fault” compensation with the U.S. Court of Federal Claims. Special masters conduct informal hearings to determine whether the petitioner is entitled to compensation and, if so, how much.²¹
- Lawsuits may be filed if the petitioner is not satisfied with the outcome. If a petition is dismissed or judged noncompensable under the Vaccine Injury Compensation Program, if the award granted by the Vaccine Injury Compensation Program is rejected by the petitioner, or if the vaccine is not covered under the Vaccine Injury Compensation Program, the petitioner may file a lawsuit against manufacturers or health care providers.²²
- The program pays petitioners’ attorney fees and costs, regardless of whether the petitioner is awarded compensation. The purpose is to ensure access to the program.²³
- Injuries listed in the Vaccine Injury Table are presumed to be caused by the vaccine if incurred within specific time period. For example, if anaphylaxis or anaphylactic shock occurs within 4 hours of administration of a vaccine for measles, mumps, or rubella, this injury is presumed to be caused by the vaccine.²⁴
- For other injuries, the claimant must prove that the vaccine caused the injury. If the injury or condition is not listed on the table, the claimant may still receive compensation if the claimant can prove, through medical records or opinion, that the vaccine caused the injury or condition.²⁵

²¹ U.S. GENERAL ACCOUNTING OFFICE (“GAO”), VACCINE INJURY COMPENSATION: PROGRAM CHALLENGED TO SETTLE CLAIMS QUICKLY AND EASILY 5 (1999).

²² GAO, *supra* note 21, at 5.

²³ *Id.*

²⁴ 42 CFR 100.3. *See also* GAO, *supra* note 21, at 6.

²⁵ U.S. Department of Health and Human Services (“HHS”), Health Resources and Services Administration, National Vaccine Injury Compensation Program (VICP): Vaccine Injury Table, available

- Fund is currently funded by a \$0.75 excise tax on each disease prevented in a dose of vaccine. For example, the excise tax imposed on a dose of trivalent influenza vaccine is \$0.75 because it prevents one disease, whereas the excise tax imposed on a dose of the measles-mumps-rubella vaccine is \$2.25 because it prevents three diseases.²⁶ For vaccines administered prior to October 1, 1988, payments were made from general revenues appropriated by Congress each year.²⁷
- The fund balance was approximately \$2.9 billion in 2009. Since the inception of the program in 1988, over 2,300 awards have been made, and petitioners have received over \$1.8 billion in awards in total (not including attorneys' fees and costs).²⁸ As of 2009, the Trust Fund balance was nearly \$2.9 billion and is expected to grow to over \$3.1 billion in 2010.²⁹

Lessons learned from the Vaccine Injury Compensation Trust Fund. The following lessons learned from the Vaccine Injury Compensation Trust Fund may be useful in considering how to structure a trust fund for CCS:

- Trust fund income exceeds need for claims payments. According to the GAO, the Vaccine Injury Compensation Trust Fund has historically received more in vaccine excise taxes than it has paid out for claims and related administrative costs. The vaccine excise tax rate is not based on an assessment of how future claims payments will be. The trust fund balance is expected to continue growing over time.³⁰
- Various parties have different ideas regarding how to address the growing trust fund balance. According to GAO, some vaccine manufacturers support proposals to reduce the tax rates; some parent groups advocate a less restrictive injury table that would increase the number of petitioners compensated from the trust fund;

at <http://www.hrsa.gov/vaccinecompensation/table.htm> (last visited February 16, 2010); *see* 42 U.S.C. § 300aa-13.

²⁶ U.S. Department of Health and Human Services, Health Resources and Services Administration, National Vaccine Injury Compensation Program (VICP): Vaccine Injury Compensation Trust Fund, http://www.hrsa.gov/vaccinecompensation/VIC_Trust_Fund.htm (last visited February 16, 2010).

²⁷ GAO, *supra* note 21, at 7.

²⁸ U.S. Department of Health and Human Services, Health Resources and Services Administration, National Vaccine Injury Compensation Program (VICP): Statistics Reports, http://www.hrsa.gov/vaccinecompensation/statistics_report.htm#claims_filed (last visited February 16, 2010).

²⁹ BALANCES OF BUDGET AUTHORITY, BUDGET OF THE U.S. GOVERNMENT, Fiscal Year 2011, Table 9., <http://www.gpo.gov/fdsys/pkg/BUDGET-2011-BALANCES/pdf/BUDGET-2011-BALANCES.pdf> (accessed March 9, 2010).

³⁰ *See* GAO, *supra* note 21, at 17-18; BALANCES OF BUDGET AUTHORITY, *supra* note 29.

and some officials from FDA and CDC support dedicating a portion of the trust fund to provide funding for vaccine injury surveillance systems and for research examining links between vaccines and delayed-onset or chronic diseases.³¹

- Slowing the growth of the trust fund would have implications on the federal budget. Excise tax revenue received by the trust fund that is not spent on the program is invested in Treasury securities. These proceeds are used by the general fund. Therefore, options to control the growth of the trust fund balance would affect not only the trust fund, but also revenue and spending for the overall federal budget.³²

³¹ GAO, *supra* note 21, at 18.

³² GAO, *supra* note 21, at 18-19.