



TO ALL MEMBERS

19 June 2009

Dear Sirs

## **VESSEL RESPONSE PLANS (VRPS) – CONFORMITY WITH INTERNATIONAL GROUP GUIDELINES & OTHER RECENT DEVELOPMENTS**

Members who trade to the United States will be aware that Federal Regulations require that all tank ships, and non-tank ships of 400 gross tons or more, which are US flagged, operate in US waters or transfer oil in a port or place subject to the jurisdiction of the US, must have on board the ship vessel response plans (“VRPs”) approved by the US Coast Guard for responding to an oil spill. These plans must identify, for each geographic area where the ship operates, a Qualified Individual resident in the United States with full authority to implement the plan, an oil spill response organisation, and a spill management team. Other countries outside the US such as Argentina, Canada and Panama have similar requirements.

There are a number of organisations with which members may contract to provide these services. Members have previously been advised of the terms of contract which are required under US Federal Regulations on VRPs and of the contractors whose contracts conform with the International Group (IG) Guidelines on VRPs. The list of contractors whose contracts conform to the IG Guidelines has since been amended and the number of jurisdictions that require owners to maintain VRPs has increased. The IG Guidelines are contained in the Annex to this circular, which serves to remind members of the main issues. It should be noted that the Guidelines for contracts for use in the United States differ from those applicable to other jurisdictions to take account of differences in legislation.

Previous advice to members on the terms of VRP contracts has concentrated on four issues which are of importance to members and their clubs, namely the scope of indemnities contained in these contracts, provisions for control of the contractor’s operations by the owner, provisions for funding of the contractor’s activities and warranties by the contractor that he is competent to perform the contracted service.

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**The Standard Steamship Owners’ Protection and Indemnity Association (Bermuda) Limited**  
Incorporated in Bermuda No.01837 Registered office: Burnaby Building, 16 Burnaby Street, Hamilton, Bermuda  
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Website [www.standard-club.com](http://www.standard-club.com)

The Managers’ London Agents: **Charles Taylor & Co. Limited**  
Registered in England No.2561548 Registered office: International House, 1 St. Katharine’s Way, London E1W 1UT  
Telephone: +44 (0)20 7488 3494 Fax: +44 (0)20 7481 9545 E-mail: [p&i.london@ctcplc.com](mailto:p&i.london@ctcplc.com)  
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As many contractors have made amendments to their contracts since members were previously advised of the terms of contract required under the US Federal Regulations and there have been similar developments in other jurisdictions on VRPs, the following clarification is provided on the significance of conformity with the IG Guidelines.

### **1 Indemnity Provisions**

Confirmation from the club that the wording of an indemnity provision in the contract conforms with the IG Guidelines is an affirmative statement that the owner's liability to indemnify the contractor pursuant to that clause is covered by the club under the rules, subject, as always, to the member not being in breach of the rules or his terms of entry.

Conversely, if the club states that the terms of an indemnity do not conform with the IG Guidelines this means that club cover does not fully extend to the liabilities that may be incurred under the indemnity. Such liabilities must then either be separately insured or, if not, cover is at the sole discretion of the board of directors of the club in the event of the member becoming liable for a claim under the indemnity.

Any member being requested to agree to a variation of a contract, which when originally submitted to the Club conformed with the IG Guidelines, is advised to check with the club to ensure that such variations do not cause the initial confirmation to become invalid.

### **2 Control of the Contractor's Operations**

The club continues to suggest that it is important for such contracts to clearly give the owner the right to control the operations of the contractor (rather than allowing the contractor to proceed with the contracted operations at his own discretion and to charge the owner accordingly). Contracts which the club has stated conform with the IG Guidelines contain provisions which are considered adequate to give such control to the owner. However, members should note that some contractors offer more than one service. Members are therefore recommended to ensure that the entities appointed by them to perform the various services named in the VRP remain independent of each other, for example, that persons performing the roles of QI/Spill Managers are genuinely independent from OSROs.

The extent to which control can actually be exercised over a contractor may depend upon the circumstances of a particular incident. To the extent that a member fails in practice to exercise adequate control over a contractor, the member may still be liable for the costs that are incurred under the contract but will be at risk of failing to make a complete recovery from the club in respect of those costs to the extent that adequate control has not been exercised.

### **3 Funding of Contractors' Services**

Certain contractors have requirements concerning proof of financial viability to be given either on signing the contract or prior to the contractor performing services. Reliance should not be placed on the club to provide any form of financial guarantee or evidence of insurance, other than the normal certificate of entry for the ship. In particular, some of the contracts which conform with the IG Guidelines contain a provision that enables the contractor to request that payment for his services is secured by means of a deposit or a club letter of undertaking as a condition of continuing to perform.

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Confirmation that a contract containing such a term conforms with the IG Guidelines does not constitute a commitment by the club to provide a club letter on behalf of the member.

As in all cases, the provision of club security is at the discretion of the club and agreement to provide such a letter of undertaking and the terms on which it is to be provided can only be determined by the club in the light of all the circumstances of the incident. In addition to the usual pre-conditions of agreement to provide security, the club will also need to be satisfied that the member is exercising sufficient control over the operations of the contractor so that the costs incurred can form a proper claim on the club.

#### **4 Contractors' Warranties**

In general terms, contracts which the club has stated conform with the Guidelines do contain some form of warranty on the part of the contractor that he is legally and professionally competent to perform the contracted service.

However, in no case has the club been able to verify the legal or technical qualifications of any contractor and confirmation of conformity with the IG Guidelines in no way constitutes a recommendation that a particular contractor or contract should be used by the member concerned. In the event that the contractor fails to perform the contracted service, confirmation of conformity with the IG Guidelines does not constitute a commitment by the club to cover the member against the potential consequences of his contractors' failure.

It should also be noted that, although a number of contracts do contain schedules or appendices of rates to be charged by the contractor for his services, in no case does the club's confirmation that the contract conforms with the IG Guidelines extend to agreement that all rates quoted are reasonable. ITOPF review the rates charged by contractors from time to time.

#### **Other Recent Developments in VRP Requirements**

Whilst under US Federal Law VRPs are technically only required from tanker owners, non-tank ship owners are strongly advised to file them as well. The Coast Guard and Marine Transportation Act of 2004 instructed the US Coast Guard to issue regulations requiring an owner or operator of a non-tank ship to prepare and submit to the Coast Guard an oil spill response plan by 8 August 2005. Whilst the US Coast Guard has not yet published final regulations requiring such plans to be filed, it did publish guidance on the content of the plans in the form of Navigation and Vessel Inspection Circular (NVIC) 01-05 members should be aware that the US Coast Guard has recently announced its intention to check non-tank VRPs for ships trading in US waters. The Captain of the Port has the discretion to deny entry into a port until the VRP is compliant and members are therefore advised to ensure that their VRPs are submitted for approval at least 30 days prior to arrival.

Under State Law in the US such plans are usually required from owners of both tank and non-tank ships in any event.



The US Coast Guard has also recently issued a final rule amending the VRP salvage and marine firefighting requirements for tank ships carrying oil. This final rule, effective on 30 January 2009, clarifies the salvage and marine firefighting services that must be contracted in VRPs for such ships, establishes new response time requirements for each of the required salvage and marine firefighting services, establishes criteria for vetting salvage and marine firefighting service resource providers, and ensures that salvors and marine firefighters are adequate to provide the equipment and manpower needed for responding to incidents up to and including worst case scenarios.

Owners and operators who are required to have a VRP have until 1 June 2010 to prepare and submit revised plans that comply with these new salvage and marine firefighting requirements. These new regulations apply specifically to tank ships only. Members should contact their hull underwriters to discuss any implications with regard to their hull cover.

Detailed information on this rule change can be found at:  
<http://edocket.access.gpo.gov/2008/pdf/E8-30604.pdf>

All clubs in the International Group of P&I clubs have issued similar circulars.

Yours faithfully

Alistair Groom  
Chief Executive  
Charles Taylor & Co Limited

Direct Line: +44 (0)20 7522 7422  
E-mail: [alistair.groom@ctcplc.com](mailto:alistair.groom@ctcplc.com)



## ANNEX

### INTERNATIONAL GROUP GUIDELINES ON VRP CONTRACTS IN THE US

#### 1 **Control**

It should be clear in the contract that the ultimate control of the clean-up operation remains with the owner.

#### 2 **Funding (particularly important for contracts with OSROs)**

The club will not provide advance funding guarantees. It may be possible in the appropriate cases to guarantee payment by the member of invoices relating to the services provided under the contract in accordance with the contract terms within a reasonable time after the incident. Such a guarantee will be subject to the following provisos:

- (i) A fixed US dollar amount.
- (ii) A fixed time limit for the services, i.e. the letter would guarantee expenses incurred in providing response services up to a fixed period of time as appropriate (e.g. seven days from the incident date) subject to extension by written agreement of the Association; and
- (iii) A haul-off clause which provides for the club's liability to be terminated upon twenty four hours' notice.

#### 3 **Insurance and Indemnity**

The club will not agree to provide co-assurance for OSROs or to warrant the owners' cover directly to the contractor.

It will agree to provide cover for limited indemnities to QIs and OSROs in the following form:

- (i) Contractor indemnifies owner/operator for liabilities arising from gross negligence or wilful misconduct of contractor or a breach of the contract, or breach of applicable law or regulation by the contractor.
- (ii) Owner/operator indemnifies the contractor against liabilities arising from gross negligence or wilful misconduct or a breach of the contract, or breach of the applicable law or regulation by the owner/operator.
- (iii) Owner/operator indemnifies the contractor against liabilities for removal costs and damages arising out of a discharge of oil from the vessel, except to the extent that:
  - (a) responder immunity applies under Federal or State law;
  - (b) the liabilities arise from the gross negligence or wilful misconduct of the contractor;

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- (c) owner/operator would not have been liable if sued direct;
- (d) owner/operator would have been able to limit his liability; and
- (e) the liability arises in respect of death or personal injury.

It is advisable that the contracts include a limit so that the total aggregate of all liabilities incurred cannot exceed the limit of club cover.

4 **Warranties**

Contracts should contain warranties that the contractors (particularly for removal actions) will have and maintain all necessary Federal and State approvals/licences/classifications.

5 **Classification**

The OSRO contract should contain a warranty that the OSRO maintains classification under Federal and State law (if applicable).

6 **Insurance**

Care should be taken to ensure that the contractor warrants that they will carry and maintain in full force and effect general liability and contractor liability insurance in excess of US\$ 2m.

7 **Law and jurisdiction**

With regard to choice of law and jurisdiction it is preferable to name the State of New York.

8 **Disputed invoices**

If the contractor inserts payment time limits in his contract, then a provision should be inserted that payment of eighty per cent is made within a certain time limit (approximately thirty days) and the balance when the dispute is settled.

9 **Interest**

If interest is charged on outstanding balances it is recommended that it be one or two percent above normal commercially available bank lending rates.

10 **Confidentiality**

Some contracts contain a confidentiality provision. Any provision inserted should at least ensure that an owner can discuss the contract with his P&I insurer.



## INTERNATIONAL GROUP GUIDELINES ON VRP CONTRACTS OUTSIDE THE UNITED STATES OF AMERICA

### 1 **Control**

It should be clear in the contract that the ultimate control of the clean-up operation remains with the owner.

### 2 **Funding (particularly important for contracts with OSROs)**

The club will not provide advance funding guarantees. It may be possible in the appropriate cases to guarantee payment by the member of invoices relating to the services provided under the contract in accordance with the contract terms within a reasonable time after the incident. Such a guarantee will be subject to the following provisos:

- (i) A fixed limit.
- (ii) A fixed time limit for the services, i.e. the letter would guarantee expenses incurred in providing response services up to a fixed period of time as appropriate (e.g. seven days from the incident date) subject to extension by written agreement of the club; and
- (iii) A haul-off clause which provides for the club's liability to be terminated upon twenty four hours' notice.

### 3 **Insurance and Indemnity**

The clauses should be even-handed as regards the liabilities of the owner and the contractor and should be based on simple negligence rather than gross negligence. Thus the contractor should be liable for the negligent acts of himself and his employees, etc. and the owner should be liable for the negligent acts of the owner and his employees, etc. and losses which would not have arisen but for the nature of the spill.

### 4 **Applicable Limit**

It is advisable that the contracts include a limit for owners' liabilities so that these are limited to the ship's limit under national law or if there is no limit under national law the total aggregate of all liabilities incurred cannot exceed the limit of club cover.

### 5 **Warranties**

Contracts should contain warranties that the equipment is fit for the purpose for which it is hired.



6 **Insurance**

Care should be taken to ensure that the contractor maintains adequate insurance.

7 **Law and jurisdiction**

England.

8 **Disputed invoices**

If the contractor inserts payment time limits in his contract, then a provision should be inserted that payment of eighty per cent is made within a certain time limit (approximately thirty days) and the balance when the dispute is settled.

9 **Interest**

If interest is charged on outstanding balances it is recommended that it be one or two percent above normal commercially available bank lending rates.

10 **Confidentiality**

Some contracts contain a confidentiality provision. Any provision inserted should at least ensure that an owner can discuss the contract with his P&I insurer.