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# White Collar Watch

The Newsletter of the White Collar and Government Enforcement Practice

## Indictment of BP Employee Highlights Importance of Taking Control in Response to a Government Subpoena

By Nicholas J. Nastasi and Jennifer A. DeRose

On April 23, 2012, Kurt Mix, a former engineer for BP plc, was charged with two counts of intentionally destroying evidence requested by federal law enforcement authorities investigating the Deepwater Horizon oil spill disaster. The details of the criminal complaint highlight the importance of diligent handling of both internal investigations and document collections in response to government subpoenas. The issuance of one, or even several, legal hold notices may not deter every employee from destroying potentially incriminating emails or texts, and the destruction of evidence will likely lead to criminal liability for employees, and potentially for employers, too.

The Deepwater Horizon rig explosion in April 2010 killed 11 workers and spilled an estimated 4.9 million barrels of oil into the Gulf, leading the U.S. Department of Justice to launch a criminal investigation of the spill. The Mix indictment is the first criminal indictment in that investigation, which is ongoing.

According to charging documents, Mix was a BP drilling and completions project engineer who worked on the company's efforts to stop the flow of oil, including the ultimately unsuccessful "Top Kill" strategy. In the course of his work, Mix allegedly created and reviewed BP data regarding the rate at which oil was flowing from the well in the days after the explosions, a key factor for the projected viability of the Top Kill effort. The indictment alleges that BP's internal estimates of the oil flow rate, as reflected in certain text messages between Mix and others, were several times higher than the company was publicly acknowledging at the time – too high, according to BP's own engineers, for the Top Kill effort to have a reasonable chance of success.

In August 2010, government investigators contacted Mix's attorney to set up a collection of his PDA and laptop for imaging, and subsequent forensic analysis allegedly revealed that after government investigators had requested access to his devices, Mix deleted "all of the over 100 text messages" between Mix and a contractor working with BP. Then, in late September, Mix was contacted by a third-party vendor hired by BP's attorneys to collect documents. The government claims that after having been contacted by the ven-

dor, Mix also deleted “his entire string of over 200 texts” with his supervisor. Forensic analysis allegedly revealed that the deleted texts included messages showing Mix’s real-time flow-rate analysis during the Top Kill operation.

Mix allegedly received a total of six legal hold notices in the two months during and immediately after the spill, but if the forensic analysis of his devices proves to be correct, BP may face liability for failing to prevent Mix’s alleged noncompliance. In certain circumstances, the law may hold BP accountable even if a litigation hold had been properly implemented, because “discovery obligations do not end with the implementation of a ‘litigation hold’—to the contrary, that’s only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant” evidence. *Zubulake v. UBS Warburg L.L.C.* (*Zubulake V*), 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

While the charging documents do not suggest that BP was in any way liable for Mix’s activities, the indictment serves as a timely reminder that employees may benefit from training or other reminders about the importance of compliance with legal hold notices, because an employee’s efforts to destroy documents in a misguided attempt to protect him or herself or the

company may ultimately expose the individual, and potentially the company, to charges of obstruction of justice and witness tampering even in circumstances where no underlying criminal conduct exists.

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