



American Bar Association

Homeland Security and *National Defense Newsletter*

Volume 2, Number 1, Spring/Summer 2009

LETTER FROM THE EDITOR

JOE D. WHITLEY

I have had the privilege of being part of the ABA's Administrative Law and Regulatory Practice Section for the last few years and I have served as Co-chair of the Homeland Security and National Defense Committee of the AdLaw section. Currently, my Co-Chair is Lisa Branch, who comes to this position after a period of distinguished service in the DHS Office of General Counsel and at OMB's OIRA.

We were fortunate, with the excellent help of Larry Storch of Fulbright and Jowarski, to begin publication of a newsletter in 2008. We are now in a period of change to new editorial leadership. David Goodwin of Greenberg Traurig and Lynne Zusman of Lynne K. Zusman and Associates have agreed to facilitate future articles for upcoming editions of the newsletter.

Instead of four newsletters per year, we will be transitioning to two newsletters, one in the Spring/Summer and a second in Fall/Winter. David and Lynne will be soliciting your thoughts, ideas and participation for the development of the upcoming Fall/Winter newsletter.

Now a word or two about the content of the Spring/Summer newsletter. In this edition you will find articles about the 4th Annual Homeland Security Law Institute by Lisa Branch; a solicitation by David Goodwin and Lynne Zusman for articles for the Fall/Winter newsletter; an overview of the AdLaw Section's Upcoming Book *Homeland Security: Legal and Policy Issues* to be published in the fall of this year; and finally a piece on the creation of the Homeland Security Coordinating Committee (HSCC) at the direction of the current Chair, H. Russell Frisby and incoming Chair, William Luneburg.

Thank you for your attention and interest. We are stronger and better through your participation in the ABA. We hope you will consider serving on the HSCC or submitting an article for the Fall/Winter edition of the newsletter. Finally, I encourage those of you who are interested in the discipline of Homeland Security, to purchase the upcoming publication *Homeland Security: Legal and Policy Issues*. I believe you will not be disappointed in its quality or content.

THE 4TH ANNUAL ABA ADMINISTRATIVE LAW AND REGULATORY PRACTICE SECTION HOMELAND SECURITY LAW INSTITUTE

**FEBRUARY 26-27, 2009
WASHINGTON, DC**

ELIZABETH L. BRANCH

The American Bar Association Administrative Law and Regulatory Practice Section's Fourth Annual Homeland Security Law Institute was a two-day program, providing a comprehensive look at some of the most critical issues and initiatives being undertaken as part of the nation's Homeland Security agenda. Whether your background is procurement and public contract law, communications law, health law, administrative law, or general practice, this program provides nuts and bolts information and answers.

This year's 2009 Homeland Security Law Institute, held in Washington, DC at the L'Enfant Plaza Hotel on February 26 and 27, enlisted more than 80 speakers, moderators, and panelists to participate in this program. Keynote speakers included Kenneth L. Wainstein, a Partner at *O'Melveny and Myers LLP* and former Assistant to the President for Homeland Security Counterterrorism, Gus Coldebella, former Acting General Counsel of the Department of



Homeland Security and Phillip J. Perry, a Partner at Latham & Watkins and former General Counsel of the Department of Homeland Security, Paul McHale, a Partner at McKenna Long & Aldridge, LLC and former Assistant Secretary of Defense for the Homeland Defense, Department of Defense and former Congressman, Pennsylvania (15th District) and David A. Martin, Acting General Counsel of the Department of Homeland Security.

DAY ONE

Over 312 participants were welcomed by *Section Chair H. Russell Frisby, Jr., a Partner at Fleischman and Harding, LLP, who introduced the Institute's Chair, Joe D. Whitley. Mr. Whitley is a Shareholder at Greenberg Traurig, LLP and the former first General Counsel for the Department of Homeland Security. Mr. Frisby also introduced the Institute's two Vice-Chairs, George A. Koenig, who is the Senior Counsel at Kemp Partners and former Counsel to the former first General Counsel of the Department of Homeland Security and Elizabeth ("Lisa") L. Branch, a Partner at Smith, Gambrell & Russell, LLP and former Associate General Counsel for Rules and Legislation, Department of Homeland Security and former Counselor to the Administrator of the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB). Assisting with the program this year was Jason Klitenic of Klitenic Robertson PLLC, who was the former Deputy General Counsel for the Department of Homeland Security.*

The first Keynote Address of the program was delivered by **Kenneth L. Wainstein** who discussed his former role as Advisor to the President on Homeland Security Issues. He spoke about the accomplishments of the Department of Homeland Security (DHS) and other cabinet agencies in better defending America and he also addressed some of the challenges that will be encountered by the Obama Administration.

Following Mr. Wainstein's presentation was a session by **Phillip J. Perry** and **Gus Coldebella**, who each provided their perspectives on the Department of Homeland Security's authorities and accomplishments over the last six years.

The first plenary panel on "**REGULATORY DEVELOPMENTS FOR 2009**" was moderated by Lisa Branch. Current and former public sector panelists included Susan E. Dudley, *former Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget*, Neil R. Eisner, *Assistant General Counsel for Regulation and Enforcement, Department of Transportation*, Jessica Fantinato, *Deputy Director, Office of Homeland Security, Department of Agriculture*, and Mary Kate Whalen, *Associate General Counsel for Regulatory Affairs, Department of Homeland Security*. These panelists provide their predictions for the new administration and looked at what these cabinet agencies had recently done regarding homeland security regulations in 2009, as well as the oversight role that OMB would play.

Following lunch, there were three breakout sessions. Phillip J. Perry moderated the first panel on "**CHEMICAL AND HAZARDOUS MATERIALS SECURITY**" that discussed DHS' Chemical Facility Anti-Terrorism Standards (CFATS) and related regulatory and implementation issues. Serving as panelists were Chad N. Boudreaux, a Partner at *Baker Botts LLP and former Deputy Chief of Staff, Department of Homeland Security*, James W. Conrad, Jr. of *Conrad Law & Policy Counsel*, Joseph B. Maher, *Deputy General Counsel for the Department of Homeland Security*, and Judah Prero, *Assistant General Counsel at the American Chemistry Council*.

J. Patrick Rowan, *former Assistant Attorney General, National Security Division at the Department of Justice*, moderated the second panel on "**FINANCIAL TRANSACTIONS & TRADE ISSUES & TERRORISM**" with panelists Thomas E. Crocker, a Partner at *Alston & Bird, LLP*, Patrick M. O'Brien, *former Assistant Secretary for Terrorist Financing for the Department of the Treasury* and Michael F. Zeldin, a Principal of Forensic & Dispute Services at *Deloitte Financial Advisory Services LLP*.

Brian Finch, a Partner at *Dickstein Shapiro, LLP*, moderated the third panel on "**THE PRIVATE SECTOR AND SECURITY: ROLES & RESPONSIBILITIES**" that focused on the liability issues faced by all companies, not just those directly regulated by DHS. The panelists



for this plenary panel were Brigham A. McCown, a Partner at *Hunton & Williams, LLP*, John M. Mitnick, Vice President and General Counsel at *Raytheon Technical Services Company LLC*, Joel A. Webber, a Partner at *Couri and Couri* and Hon. Albert R. Wynn, a Partner at *Dickstein Shapiro LLP* and former Member, *U.S. House of Representatives (MD)*.

After a short afternoon break, there were three breakout sessions. Jonathan K. Waldron, a Partner at *Blank Rome*, served as Moderator for the first panel session on “**MARITIME & TRANSPORTATION SECURITY – TRANSPORTATION WORKER IDENTITY CREDENTIAL (TWIC)**.” Mr. Waldron led a discussion about the authority for, the status of, implementation of, enforcement and regulatory oversight for, and the legislative outlook for the TWIC program. Christine Beyer, *Assistant Chief Counsel, Regulations, Transportation Security Administration, Department of Homeland Security*, Denise Krepp, from the *House Committee on Homeland Security*, Kristyn Noeth, Senior Counsel at *American Petroleum Institute* and Rear Admiral James Watson, *Director of Prevention Policy for Marine Safety, Security & Stewardship, U.S. Coast Guard, Department of Homeland Security*, served as panelists.

The second afternoon breakout session was moderated by Baruch Weiss, a Partner at *Arent Fox PLLC* and former Acting Deputy General Counsel and former Associate General Counsel, *Department of Homeland Security*. The panelists for “**HOMELAND SECURITY – THE LAW ENFORCEMENT AGENDA FOR 2009**” included Rear Admiral William Baumgartner, *Judge Advocate General, U.S. Coast Guard, Department of Homeland Security*, Michael H. Neifach, former *Principal Legal Advisor, U.S. Immigration and Customs Enforcement, Department of Homeland Security*, J. Patrick Rowan, former *Assistant Attorney General, National Security Division, Department of Justice* and Steven N. Siegel, *Acting Deputy General Counsel, National Security Law Branch, Federal Bureau of Investigation, Department of Justice*. Panel members discussed the law enforcement initiatives of DHS and other departments and agencies that relate to homeland security, including initiatives against

terrorism, export violations, worksite immigration violations, international intellectual property violations, piracy on the seas, and drug smuggling.

For the third afternoon breakout session, James W. Conrad, Jr. of *Conrad Law & Policy Counsel*, moderated the panel on “**HOMELAND SECURITY & INFORMATION SHARING: STATE, LOCAL & PRIVATE SECTOR PERSPECTIVE**” that included panelists Ava A. Harter, Environmental Health & Safety and Emergency Services and Security Counsel at *The Dow Chemical Company*, Grace L. Mastalli, President of *Ethos International, Inc.*, Rodney Nydam of *Nydam Law Practice, PC* and Evan D. Wolff, Director of the Homeland Security Practice at *Hunton & Williams LLP*. Panelists discussed the interaction and tension between imperatives that the public and private sectors share security-sensitive information among themselves and at the same time protect this information from public release.

To close out day one of the Institute, **Paul McHale**, a Partner at *McKenna Long & Aldridge LLC*, former *Assistant Secretary of Defense for the Homeland Defense*, former *Domestic Crisis Manager for the Department of Defense*, and former *Congressman for Pennsylvania’s 15th Congressional District*, shared his perspective on the evolving role of the military in the provision of Homeland Defense together with state, federal, and local law enforcement. He examined the challenges that the Obama Administration may encounter in the coming months in finding the right balance between civilian and military resources in protecting American’s infrastructure and citizens.

DAY TWO

The Institute kicked off its second day with a Keynote Address from **David A. Martin**, *Principal Deputy General Counsel at the Department of Homeland Security*. Mr. Martin, then newly-appointed, shared his perspective on the Office of General Counsel and its role in DHS.

Three breakout sessions followed Mr. Martin’s presentation. The first panel on “**BUSINESS OF**



HOMELAND SECURITY: A PUBLIC & PRIVATE SECTOR PERSPECTIVE ON PROCUREMENT AND DEVELOPMENT OF HOMELAND SECURITY TECHNOLOGY & SERVICES,” was moderated by Mark J. Robertson of *Klitenic Robertson PLLC and former Associate General Counsel for the Science & Technology Directorate and former Chief of Staff to the General Counsel, Department of Homeland Security.* Panelists included Dr. Thomas A. Cellucci, *Chief Commercialization Officer, Science & Technology Directorate for the Department of Homeland Security,* Elaine David, *Senior Director, Government & Regulatory Affairs of Lockheed Martin Washington Operations,* Bruce B. Davidson, *Deputy Director, Office of SAFETY Act Implementation, Department of Homeland Security,* Christopher J. Furlow, *Principal of Ridge Global LLC* and John M. Mitnick, *Vice President and General Counsel at Raytheon Technical Services Company, LLC.*

James H. Burnley a Partner at *Venable LLP and the former Secretary for the Department of Transportation,* moderated the second panel on **“AIRPORTS, AIRLINES & AVIATION: PROFILE OF AN INDUSTRY.”** Francine J. Kerner, *Chief Counsel, Transportation Security Administration, Department of Homeland Security,* Carter Morris, *Senior Vice President at American Association of Airport Executives,* Yvette A. Rose, *Senior Vice President at Cargo Airline Association* and Peggy E. Sterling, *Vice President, Safety, Security, and Environmental at American Airlines,* were the panelists for this session. They discussed recent developments and trends in the regulation of aviation security as well as possible actions by the Obama Administration and the new Congress, including DHS’s general aviation proposed rule.

Mark Plotkin, a Partner at *Covington & Burling,* moderated the third breakout session on **“DEVELOPMENTS IN FOREIGN INVESTMENT IN THE UNITED STATES”** that included discussions of how the Committee on Foreign Investment in the United States (CFIUS) has evolved and the approach of the Obama Administration to national security issues in the context of foreign direct investment. Panelists included Stephen R. Heifetz, *Deputy Assistant Secretary for Policy Development for the Department of Homeland*

Security, J. Welby Leaman, *Senior Advisor to the Department of the Treasury,* Scott A. Morris, *Senior Professional Staff, Committee on Financial Services, U.S. House of Representatives* and Theodore W. Kassinger, a Partner at *O’Melveny & Myers LLP and former Deputy Secretary of the Department of Commerce.*

After a short break, a plenary session on **“PRIORITIES IN THE 111TH CONGRESS,”** was moderated by Jim Turner, a Partner at *Arnold & Porter, LLP and former Ranking Member, U.S. House of Representatives, Homeland Security Committee.* Panel members were Christian Beckner, *Democratic Professional Staff Member, Senate Homeland Security and Governmental Affairs Committee,* Michael D. Bopp, a Partner at *Gibson, Dunn & Crutcher LLP and former Staff Director, Senate Homeland Security and Governmental Affairs Committee,* Phillip J. Crowley, *Director of Homeland Security at the Center for American Progress,* Jessica Herrera-Flanigan, a Partner with the *Monument Policy Group and former Staff Director, U.S. House of Representatives Homeland Security Committee,* and Pamela J. Turner, *Managing Director, BKSH & Associates Worldwide and former Assistant Secretary for Legislative Affairs, Department of Homeland Security.* These panelists identified the major homeland security issues that will be addressed by the 111th Congress and discussed the likelihood of legislation being passed and the major legislative obstacles to these proposals.

Next on the days’ schedule was a working lunch moderated by Stewart Baker, *former Assistant Secretary for Policy, Department of Homeland Security,* on **“MAKING POLICY IN A TIME OF TRANSITION AT DHS,”** that discussed what is on the policy agenda for DHS. Panelists included Clark Kent Ervin, *Director, Homeland Security Initiative at The Aspen Institute* and Juliette N. Kayyem, *Undersecretary for Homeland Security and Advisor to Governor Deval Patrick, Commonwealth of Massachusetts.*

After this luncheon, participants attended one of three breakout sessions. The first session on **“SECURITY & IMMIGRATION 2009 POLICY & LEGAL ISSUES – “HOT**



TOPICS” was moderated by C. Stewart Verdery of the *Monument Policy Group, LLC and former Assistant Secretary for Policy & Planning, Border and Transportation Security Directorate, Department of Homeland Security*. Panelists, Dan Brown of *BAL Global Corporate Immigration and former Acting Director of Policy, U.S. Immigration and Customs Enforcement, Department of Homeland Security*, together with Lynden Melmed, *former Chief Counsel, U.S. Citizenship and Immigration Services, Department of Homeland Security* and Julie Myers Wood, *President, Immigration & Customs Solutions and former Assistant Secretary, U.S. Immigration and Customs Enforcement, Department of Homeland Security*, examined the policy priorities on immigration for 2009, including immigration legislation, the Border Fence, the Secure Border Initiative, US-VISIT, fugitive operations, employer enforcement, and E-verify.

The second breakout session on **“PRIVACY & CIVIL LIBERTIES”** was moderated by Hugo Teufel, *former Chief Privacy Officer, Department of Homeland Security*, and involved discussions regarding the work of the Privacy Office and Civil Rights and Civil Liberties Office of DHS, the current state of privacy at the federal level, and the privacy perspective from the States. Daniel W. Caprio, Jr., *President & CEO, DC Strategies, LLC, former Chief Privacy Officer, former Deputy Assistant Secretary for Technology Policy and former Acting Assistant Secretary for Technology Policy, Department of Commerce*, Juliette N. Kayyem, *Undersecretary for Homeland Security and Advisor to Governor Deval Patrick, Commonwealth of Massachusetts*; Daniel W. Sutherland, *former Officer for Civil Rights and Civil Liberties, Department of Homeland Security* and Peter P. Swire, *Professor at Moritz College of Law, The Ohio State University, and Senior Fellow, Center for American Progress* were the panel members for this session.

The third breakout session on **“PUBLIC HEALTH & SAFETY ISSUES”** was moderated by Nancy Bryson, a Partner at *Holland & Hart LLP and the former General Counsel for the Department of Agriculture*. This panel explored current developments in public health and safety as they relate to safeguarding the food supply

and controlling the transmission of communicable diseases among people and animal reservoirs of such diseases, current national and international issues in the food safety arena, the threat of an avian influenza pandemic, and HHS authorities for quarantine and preventive detention of people at the borders and associated legal issues. The panelists for this particular session were Dr. David Acheson, *Associate Commissioner for Foods, Food & Drug Administration, Department of Health & Human Services*, Dr. Joseph F. Anelli, *Chief of Emergency Programs Staff, Veterinary Services, Department of Agriculture* and Daniel Meron, *Global Co-Chair, Healthcare & Life Sciences Practice Group at Latham & Watkins and the former General Counsel for the Department of Health & Human Services*.

The final plenary session was moderated by Joe D. Whitley. This panel focused on observations of **“THE PRIVATE SECTOR AND HOMELAND SECURITY 2009—GENERAL COUNSELS AND CHIEF SECURITY OFFICERS.”** Panelists included Leslie A. Glick, a Partner at *Porter, Wright, Morris & Arthur*, Nate Harrison, Vice President and Director of Security at *United Parcel Service*, Thomas Jenks, Vice President and Managing Director at *Kroll Security Group* and Robert Liscouski, President of *Steel City Re and former Assistant Secretary for Infrastructure Protection, Department of Homeland Security*. This panel discussed their efforts post-9/11 and post-Katrina in dealing with issues of business continuity, the growing relationship between the private sector and DHS, and areas that could use improvement in catastrophic crisis management.

Joe Whitley closed out the Institute with remarks of appreciation to those individuals who worked to make the 4th Annual Homeland Security Law Institute a huge success. The ABA received very positive feedback from survey’s submitted by those who attended. Information and pictures from the 2009 Institute can be found by going to the website at <http://new.abanet.org/calendar/2009-4th-annual-homeland-security-law-institute/Pages/default.aspx>.



American Bar Association

Homeland Security and National Defense Newsletter

Volume 2, Number 1, Spring/Summer 2009

REGISTER NOW !

**The 5TH Annual
ABA Administrative & Regulatory Law
Practice Homeland Security Law Institute**

February 22-23, 2010

**Capital Hilton Hotel
Washington, DC**

Please contact Anne Kiefer, Director of the ABA Administrative Law and Regulatory Practice Section at (202) 662-1690 or kiefere@staff.abanet.org, if you would like additional information or to pre-register for next year's Institute.

SOLICITATION OF ARTICLES FOR FALL/WINTER 2009 ISSUE

The ABA Administrative Law and Regulatory Practice Section's Committee on Homeland Security and National Defense would like to solicit articles for our Fall/Winter 2009 issue. This particular issue may address some of the following themes: 1) immigration, 2) money laundering and drug-trafficking security threats, 3) DOD influence within the information and intelligence gathering functions of government, and 4) the ramifications of private contracting of traditional military and security functions.

Articles should be approximately 1500 to 2000 words in length. Outlines of potential articles for publication in the Fall/Winter 2009 issue should be submitted no later than July 15, 2009. Draft articles will be due no later than August 15, 2009.

If you are interested in submitting an article for the Fall/Winter 2009 newsletter, please contact either David Goodwin at (202) 331-3100 (goodwind@gtlaw.com) or Lynne Zusman at 202-659-1971 (lynnzusman@aol.com).

Coming Soon! from the ABA
**Section of Administrative Law and
Regulatory Practice**

Homeland Security: Legal and Policy Issues

Joe D. Whitley & Lynne Zusman, Editors

For many years the American Bar Association Section on Administrative Law and Regulatory Practice (AdLaw) has published books and other materials of interest to lawyers and non-lawyers focused on various aspects of government operations such as rulemaking and processes that affect government such as lobbying. This new book on Homeland Security Law is a natural continuation of this established tradition.

By way of background, in recent years, the AdLaw Section has taken on a key role together with other sections of the ABA in reviewing the new Homeland Security function of the government and in promoting Homeland Security Law as an expanding and growing area of legal practice that impacts both the private sector and public sector. Beginning in 2006 and continuing through 2009, the AdLaw Section with numerous ABA Co-Sponsors has held a two-day program called the Homeland Security Law Institute with speakers who are experts in their aspects of Homeland Security Law and practice.

Out of this experience of building the Institute, at its meeting in the Spring of 2008, the AdLaw Section Council and the Publications Committee of the Council endorsed the concept of a book that would capture for practitioners and the public alike, a number of areas critical to Homeland Security Law. The book chapters present in an easy to use fashion and make accessible to the reader, a select number of topics, as follows:

Chapter One, "*Homeland Security: An Inside Perspective of the Last Seven Years & A Look Ahead,*" focuses on the Department of Homeland Security from concept to present day. As the DHS undergoes its first



Presidential transition since its creation, this chapter examines the processes leading to today's homeland security efforts. It evaluates the policy shifts and outcomes to date, as well as the challenges that exist for the Obama Administration.

Chapter Two, "*State and Federal Emergency Powers*," provides an overview of the statutory and constitutional authority for state and federal response to emergencies, including a description of typical state emergency management statutes, a summary of the major federal statutes related to public health emergency response, and a discussion of the constitutional limits on federal actions during a public health emergency.

Chapter Three, "*Understanding the Role of Northern Command in the Defense of the Homeland: The Emerging Legal Framework – Authorities and Challenges*," briefly examines USNORTHCOM's collaborative work with a broad spectrum of entities in order to fulfill its missions. The chapter examines, in depth, some of the particular functional areas in which USNORTHCOM operates, such as support to DHS and FEMA after a man-made or natural disaster and support to law enforcement.

Chapter Four, "*The USA PATRIOT Act and the Federal Anti-Money Laundering Regime*," focuses on compliance with the federal anti-money laundering laws in a post-September 11, 2001 world. A summary of federal anti-money laundering laws is presented along with an evaluation of the impact of the USA PATRIOT Act on the federal anti-money laundering regime. Regulatory guidance, enforcement trends and practical advice to ensure compliance with the USA PATRIOT Act are highlighted.

Chapter Five, "*Compliance is Not Enough: What it Really Takes to Maintain Responsible Information Security*," lays out the responsibility of the private and governmental organizations to recognize that cyber intrusions and attacks, insider threats, and other virtual disruptions pose a real threat to their mission and reputations. Accordingly, the chapter conveys how organizations should proactively build business

information and other data into their risk management planning and infrastructure and how to address confidentiality, integrity, and availability of data. And although organizations should meet compliance requirements, it will show how these entities should focus on managing and incorporating a risk management culture into the businesses processes of the organization, including IT operations, security, business continuity, and disaster recovery.

Chapter Six, "*Information Protection*," explains what sorts of legal protections may exist to prevent the public release of private security documents in the possession of a federal agency. The chapter begins by discussing the Freedom of Information Act (FOIA). The next part of the chapter addresses a variety of labels that may appear to justify withholding information but perhaps really do not. Finally, the chapter explains a number of statutes that give the government the ability to protect certain types of security information from public release, focusing on "Sensitive Security Information" (SSI), "Chemical-terrorism Vulnerability Information" (CVI), and "Protected Critical Infrastructure Information" (PCII).

Chapter Seven, "*2008 The Year of Increased Worksite Enforcement*," discusses 2008's dramatic increase in the "culture of compliance" called for by former Secretary Chertoff. The chapter walks through the increased and forceful worksite enforcement actions which put issues of immigration enforcement front and center on the national political stage, while also making the best of the absence of immigration legal reforms from Congress. It explains how the Department of Homeland Security also expanded application of the Social Security No-Match regulation, and the E-Verify program. This chapter explores the fact that with this heightened environment of enforcement comes the real need for employers to ensure that they have the benefit of specialized and able counsel to track the rapidly changing enforcement landscape and ensure compliance.

Chapter Eight, "*Succession Planning and Business Continuity*," introduces the concepts of succession and business continuity planning and discusses the



developments in these areas since the events of September 11th, 2001. This chapter discusses the federal and state legislative developments in succession and business continuity planning. It also discusses reactions from the private sector to business continuity planning. Lastly, this chapter examines potential corporate liability for failing to implement a business continuity plan or failing to monitor the effectiveness of an existing business continuity plan.

Chapter Nine, *"The SAFETY Act – A Practitioner's Guide to the Homeland Security Technology Catalyst,"* seeks to familiarize counsel with the liability protections available under the Support Anti-Terrorism By Fostering Effective Technology Act of 2002 (the "SAFETY Act"), passed by Congress as a part of the Homeland Security Act of 2002. The chapter addresses the background of the SAFETY Act, provides a detailed discussion of the system of risk and litigation management provided under the Act, and summarizes the responsibilities of companies offering SAFETY Act approved technologies. The chapter puts the SAFETY Act into context with other liability protection approaches and addresses practicalities involved in obtaining SAFETY Act approvals.

Chapter Ten, *"Security-Based Re-Regulation of Transportation After 9/11: Giving Coherent Client Advice in a Volatile Rules Climate,"* focuses on security-based re-regulation of transportation after 9/11 and giving advice in a changing rules climate. Since 9/11, federal agencies have been quietly re-regulating with security protocols a transportation sector whose pricing and market-entry limits they de-regulated thirty years ago. This new climate is marked by (i) a fast pace of new rules releases, (ii) overlapping jurisdiction between departments, and (iii) resulting new constraints across entire supply chains. Consequently, this rules environment calls for an approach to legal advice that (i) is readily translated into operational terms, (ii) is frequently updated, and (iii) that captures in a comprehensive manner all federal requirements imposed on a shipper's or carrier's freight business processes.

Chapter Eleven, *"Maritime Security Developments and TWIC Tribulations,"* reviews the most significant port related security changes enacted in legislation following enactment of the Maritime Transportation Security Act of 2002 "MTSA" following the terrorist attacks in 2001. This legislation made a number of significant adjustments to programs within the U.S. port security framework.

One of the key and most controversial measures undertaken to improve maritime security is the Transportation Worker Identification Credential ("TWIC") which will be required in order to gain unescorted access to maritime facilities when fully implemented. Accordingly, one of the topics this chapter will focus on is the implementation of the TWIC program, including the problems and delays in such implementation.

Chapter Twelve, *"Chemical Facility Anti-Terrorism Standards,"* describes the elements and operation of DHS's Chemical Facility Anti-Terrorism Standards (CFATS) rule and its current implementation status. The chapter, also, explains the concept of "inherently safer technology" (IST) and the challenges of mandating it. The last part of the chapter briefly discusses the prospects for and merits of future legislation.

Chapter Thirteen, *"CFIUS and Foreign Investment,"* examines the interagency Committee on Foreign Investment in the United States (CFIUS) and the process by which it reviews corporate transactions resulting in foreign control of U.S. businesses. A process, that until recently, has been conducted entirely in secret, with a "common law" developed over the years known only to a relative few.

The chapter addresses CFIUS reform efforts since the Dubai Ports World controversy – specifically, the Foreign Investment and National Security Act of 2007 (FINSA) and implementing Treasury regulations effective December 22, 2008 – have yielded a review process that is more streamlined and substantive standards that, though still very broad and flexible, are better understood. This chapter also explores these



developments, as well as industry-specific foreign ownership restrictions and investment review regimes in other countries.

Our final chapter, Chapter Fourteen, “*Export Control Enforcement Developments*,” provides a summary overview of major export control enforcement developments in 2007-2008. This period has seen significant changes in U.S. export control enforcement aimed at stemming illicit defense-related exports and other transfers that implicate the proliferation of weapons of mass destruction (“WMD”). As a result, both companies and practitioners need to be alert to the changed landscape and to the implications for compliance and the penalty risks that these developments entail.

In conclusion, *The Homeland Security: Legal and Policy Issues* book, in many ways, is a reflection of the annual ABA Administrative Law and Regulatory Practice Section’s Homeland Security Law Institute and should prove to be a useful resource for the lawyers and others who work in this exciting new legal discipline. We would like to encourage you to purchase a copy of the book. Publication is scheduled for August of this year.

ORDER NOW

Homeland Security: Legal and Policy Issues

only \$99.95 per copy

(Product Code: 5010060)

Publication Date of August 2009
6 x 9 paperback - 350 pages

For more information on purchasing a copy of this book, log onto www.ababooks.org.

Homeland Security Coordinating Committee (HSCC)

In recent years the ABA Administrative Law and Regulatory Practice Section (AdLaw Section) has developed a Homeland Security and National Defense Committee (HSNDC). Looking ahead to the next stage in the development of the HSNDC, the Chair of the AdLaw Section, H. Russell Frisby, Jr., will be appointing the members of a Homeland Security Coordinating Committee (HSCC). Frisby has appointed Joe Whitley as Chair of the HSCC. The HSCC will be open to members of the ABA who have an interest in this exciting cross disciplinary area. It is contemplated that the HSCC will, with time, have a number of subcommittees that will capture the many different specialties that comprise Homeland Security practice, such as:

- 1) Transportation - Airports, Airlines, & Aviation
- 2) Shipping - Import/Export Control
- 3) Immigration
- 4) Critical Infrastructure
- 5) Chemical and Hazardous Materials Security
- 6) Financial Transactions, Trade Issues, and the relationship with Terrorism
- 7) Private Sector and Security Roles & Responsibilities
- 8) TWIC - Maritime & Transportation Security
- 9) Information Sharing
- 10) Business Liability/Continuity
- 11) Foreign Investments
- 12) Privacy & Civil Liberties
- 13) Public Health & Safety

The HSCC subcommittee chairs will be appointed by the Chair of the HSCC with the approval of the AdLaw



Section Chair. A central mission of the HSCC and each subcommittee will be to conduct effective liaison with committees, Sections, and other entities of the ABA having key and significant responsibility for developing the legal and policy positions of the ABA with regard to Homeland Security.

In addition, the HSNDC will continue to host “Brown Bag” lunches on interesting topics. Also, the HSNDC Newsletter will continue in publication on at least a bi-yearly basis.

I encourage you to contact Anne Kiefer at (202) 662-1690 kiefiera@staff.abanet.org, if you have an interest in participating in the HSCC as a member, subcommittee chair, or otherwise. An initial meeting of the HSCC will take place in Chicago during the ABA Annual Meeting. Please also notify Anne whether you will be available in Chicago on Friday July 31, 2009 from 2:00 pm – 3:30 pm for this meeting.

2009 Annual Meeting Section of Administrative Law & Regulatory Practice



July 30 - August 2, 2009

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The Homeland Security and National Defense Newsletter is sponsored by the ABA Section of Administrative Law and Regulatory Practice, Committee on Homeland Security and National Defense. The views expressed in this publication are not necessarily those of the Committee, the Section, the ABA or any governmental agency or private enterprise.

Correspondence regarding the newsletter should be addressed to the Editor: Joe D. Whitley, Greenberg Traurig, LLP, 2101 L Street, NW, Washington, DC, 20037 whitleyj@gtlaw.com

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We look forward to seeing you.