

April 15, 2009

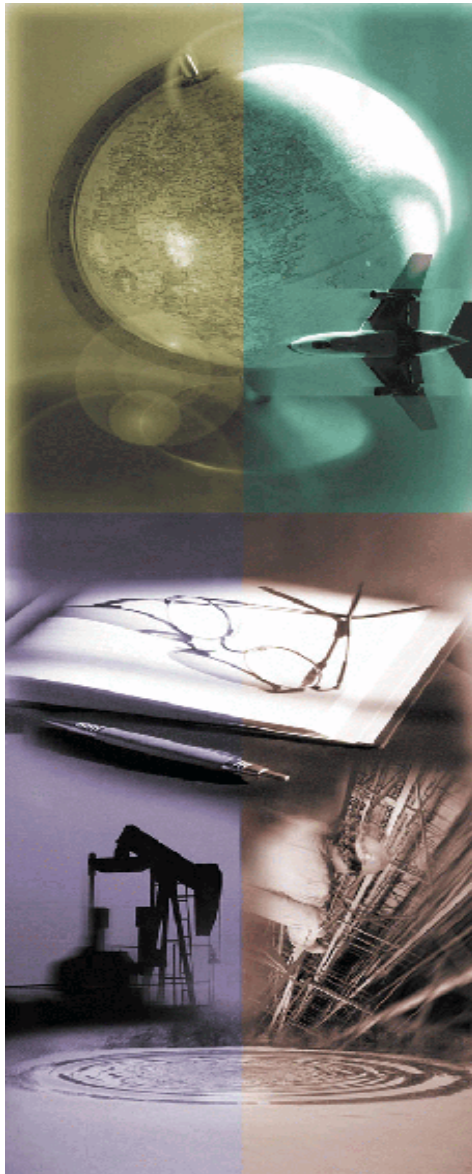
*The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.*

*Thomas Jefferson*

### Regulatory Compliance – Increased Regulation in Store

President Bush's administration was seen by some critics as being lax in developing and enforcing federal regulations. President Obama promised that his administration will be just the opposite, and, with a Democratic majority in the House and Senate, he looks poised to make this happen. Look for his administration to increase federal regulations, especially at several key agencies, including the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA), Food and Drug Administration (FDA), and Consumer Product Safety Commission (CPSC).

President Obama made campaign promises that the EPA will address reducing greenhouse gas emissions, improving the strength and enforcement of clean air and water laws, preventing damage to drinking water, and enforcing Superfund cleanup regulations. At OSHA, existing regulations and inspections will be more aggressively enforced and new regulations introduced. The FDA will undergo reorganization and changes necessary to try to promote the goal of improving health care. President Obama plans to continue to implement the Consumer Product Safety Improvement Act of 2008 which increases the CPSC's budget and staffing and makes changes to consumer product safety laws. In addition, it is expected the CPSC, and its newly-created Imports Surveillance Division, will be more active in search and seizure operations for imports that do not comply with U.S. law.



## Electronic Information – You’ve Got (Someone Else’s) Mail

A recent 4th Circuit case has made it a bit more difficult for victims of email theft to get damages. In the case at issue, an employee sued her employer for sexual harassment. During discovery, she learned that the employer had accessed her password-protected personal email account. It turned out that her boss had copied 258 of her emails.

The employee sued her boss and the company for violations of the Stored Communications Act (SCA), which is part of the Electronic Communications Privacy Act. She was awarded nearly \$400,000 in damages and costs, \$175,000 in statutory damages, \$100,000 in punitive damages and \$135,000 in attorney fees and costs. The employer appealed and the court of appeals reversed the statutory damages portion of the award. According to the court, the SCA does not provide for statutory fees unless actual damages are proofed. The court somehow said punitive damages were allowed and upheld these.

*Employers should consider policies prohibiting the use of company computers with “personal” email accounts. Such accounts are often the source of viruses and other “malware” that end up on business-owned information systems. Employees using such accounts on company time are obviously not doing their jobs, and this may in many cases rise to the level of criminal conduct such as theft or fraud.*

## Security Law – Electrical Grid at Risk

The U.S. electrical grid has been hacked. “Cyberspies” have penetrated parts of the national grid and left behind software that could be used to shut down our electrical system. It does not appear these spies have done any damage as of yet, but they may just be waiting until a more opportune time, such as a national crisis or war.

The electrical grid, or “grid” as it is commonly called, is actually composed of three separate networks, the East, the West, and Texas. The electricity is produced, for the most part, by non-government-owned entities, with significant oversight by the federal government. While it is distressing that the system was compromised, equally troublesome is that most power companies did not detect the intrusions and only became aware of them when alerted by U.S. intelligence agencies. The Obama administration is contemplating expanding a program geared at protecting government networks to address vulnerabilities in private networks.

## Litigation – Cooperation, Privilege, and Internal Investigations

As reported in *The National Law Journal*, new policies of the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) regarding factual cooperation during internal investigations and the effect on attorney-client privilege and attorney work-product protection involves new risks that may outweigh the benefits of attaining status as a cooperating entity during an investigation. On their face, these new policies appear to provide greater attorney-client privilege and work-product protection in that they no longer equate factual cooperation with a waiver, but merely require disclosure of “relevant facts” in order to attain status as a cooperating entity. Despite these new policies and attorney efforts to carefully control the information disclosed under them, courts have found that a disclosure of “relevant facts” to the government operates to waive the privilege on underlying notes and memoranda for which

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production may be ordered to third-party litigants. One court, in ordering the production of interview notes used during discussion with the government, considered it irrelevant that the notes were never actually shared with the government because “the transmission of privileged information is what matters, not the medium through which it is conveyed.” *Sec. and Exch. Comm’n v. Roberts*, 254 F.R.D. 371, 377 (N.D. Calif. 2008).

*Potentially even more disturbing than the careful planning that may be required to preserve attorney notes and memoranda under the new policies is the fact that not all of these decisions were out of California courts, indicating that such precedence could be closer to home than one might expect.*

### Regulatory Compliance – Procurement Rules are Changing

As reported in *The National Law Journal*, federal enforcement against procurement fraud has surged in the past few years and will remain on the front burner for 2009. An existing trend toward new procurement and contracting reform is expected to continue. As a result, government contractors will be required to adapt to new regulations and modify their compliance programs. For example, an amendment to the Federal Acquisition Regulation (FAR), 73 Fed. Reg. 67,064 – 093 (Nov. 12, 2008), effective December 12, 2008, requires disclosure of specified violations of law by contractors to the government on penalty of suspension and debarment. Specifically, under the new rules, *all* contractors are now required to make a written disclosure whenever in connection with a contract the contractor has “credible evidence” that a principal, employee, or other affiliate has committed a violation of certain federal criminal laws or the civil False Claims Act. Further, the new rules establish standards required for large contractors to follow in implementing internal control systems, such as assignment of high-level responsibility to ensure effectiveness and awareness, periodic reviews, establishment of a confidential internal reporting mechanism, and implementation of appropriate disciplinary measures in the event of improper conduct, among others.

### Criminal Law – OK House Backs Greater Penalties for Home Invasion

Due to the growing occurrences of home invasion robberies, a newly-proposed bill, House Bill 1030 by State Rep. John Wright, will establish home invasion as a specific crime subject to the Oklahoma Truth in Sentencing Law, which will require those convicted to serve at least 85 percent of their sentences. House Bill 1030 generally defines home invasion as a crime involving two or more armed persons who enter a dwelling while the owners are present with the intent to commit some crime. The Bill treats home invasion much more seriously than simple burglary, setting a minimum sentence of 10 years imprisonment. Currently, the Bill has passed the Oklahoma House and has proceeded on to the State Senate.

*But why is it that a burglar’s “luck” as to whether someone is home or not even makes a difference?*

### Environmental Law – EPA Poised to Require New Registration for Nano Pesticide Ingredients

It appears likely that the Environmental Protection Agency (EPA) will formalize a long-standing Agency position regarding the status of nanoscale versions of conventional ingredients in

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pesticides in light of a high-profile petition, filed in May 2008 by groups led by the International Center for Technology Assessment (ICTA), asking for increased regulation of nanosilver. For some time, EPA has considered the formulation of such nanoscale versions as “new active ingredients” under the Federal Insecticide, Fungicide & Rodenticide Act (FIFRA). Many groups believe that FIFRA is better suited for regulation of nanomaterials than the Toxic Substances Control Act (TSCA) because FIFRA is more stringent and places the burden of proof for safety on the manufacturer. If the May 2008 petition is ultimately granted, FIFRA requirements will fully apply to products containing nanosilver and potentially other nanomaterials.

*The question that remains is whether this new policy will apply retroactively to materials in existing formulations.*

### **BP to Pay Large Fine for Violations of the Clean Air Act**

BP Products North America, Inc. (BP) has agreed to spend \$161 million on various pollution controls, \$6 million on a supplemental project, and \$12 million in civil penalties for violations of the Clean Air Act (CAA). The violations at BP’s Texas City, Texas, plant were discovered after a March 2005 explosion that killed 15 people. The enhanced pollution controls will improve maintenance, monitoring, and internal management practices as well as reduce emissions of volatile organic compounds like benzene by 6,000 pounds annually. The supplemental project consists of converting 100 diesel municipal vehicles to operate on compressed natural gas. The project also includes construction of four refueling stations.

### **Security Law – SOX-Type Legislation for Cyber Security a Possibility?**

With the Conficker worm still a sharp memory for many businesses and individuals, the debate over cyber security regulation is starting to take shape. A recent Senate hearing highlighted potential areas where future legislation may be seen. Particular attention was paid to the areas of education, loss prevention, and critical infrastructure. It seems likely that Sarbanes-Oxley type legislation specific to cyber security is imminent. At a time when so many critical national resources are dependent on the functionality of computer systems, perhaps detailed legislation could do for (or some say, to) cyber security what Sarbanes-Oxley did for financial reporting.

Experts note the vulnerability of the U.S. infrastructure to cyber attacks. The real problems seem to be the lack of adequate control system vendors and a shortage of qualified human resources necessary to understand control system cyber security. In some cases, the U.S. no longer manufactures key pieces of the nation’s infrastructure. Recent indictments and threats of global cyber espionage have drawn attention to potential weaknesses. For example, a contract worker was recently charged for hacking into his previous employer’s computer system after failing to obtain a full-time job offer. His actions temporarily disabled leak detection systems for three oil derricks off the Southern Coast of California. With the nation’s power grid almost completely reliant on computer technology, similar cyber attacks, if successful, could take months to repair (*see related article, above*).

As an initial measure, a Bill soon to be introduced by Senator John D. Rockefeller will advance the cause of cyber security education curriculums at universities across the country. The Bill includes provisions for scholarships and course development. With significant expansion predicted in the information technology sector, cyber security professionals will likely be in high

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demand. Other prospective regulation includes the possible mandate that National Institute of Standards and Technology standards be used in the cyber security arena. It is thought by some that the use of these standards could help in the prevention of data loss, which is the main threat of cyber assaults.

### Environmental Law – Atlanta to Launch Zero Waste Zone

Atlanta Recycles, in conjunction with the Green Foodservice Alliance and the Environmental Protection Agency (EPA), will launch one of the nation's first Zero Waste Zones. These zones operate through the participation of local businesses to recycle grease and other food waste for the creation of biofuel and compost. In addition to creating greener energy sources, the recycling also decreases the amount of waste in local landfills. The project, based out of Atlanta, Georgia, is still in phase one. So far the project has more than 10 participants, including the Georgia World Congress Center and the Georgia Dome. Response thus far has been favorable. Phase two of the project will include creating a model to help expand the program, while phases three and four will focus on expanding the program first to other parts of Atlanta and then to the rest of the state and beyond.

### Environmental Law – Environmental Protection Agency Names Ashe Head of Midwest Criminal Investigation Division

The Environmental Protection Agency (EPA) has just announced that Randy Ashe will be the new special agent in charge of the Criminal Investigation Division's (CID) office in Chicago. Areas under his control include Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. Ashe, no stranger to the CID, joined the EPA division in 1996, with later promotions to assistant special agent in 2003. Ashe spent 15 years in the U.S. Air Force, 10 of those years being spent as an investigator in the Air Force Office of Special Investigations. The EPA has been pursuing criminal environmental violations since 1983. The total EPA division has about 200 investigators spread throughout 10 regional offices. Ashe has already completed some criminal cases, including the Crown Chemical case and the Northwestern Plating Works case.

### Community Service – H.R. 1388: The Generations Invigorating Volunteerism and Education Act

H.R. 1388, otherwise known as the Generations Invigorating Volunteerism and Education Act (the GIVE Act), is a massive overhaul on the AmeriCorps Act of 1993. This overhaul, which has already passed the House of Representatives, includes increased spending for volunteer programs for people of all ages. Total spending amounts to around \$6 billion. This may seem excessive in the midst of an economic crisis, but government statistics as recent as 2007 claim that for each dollar spent on volunteer work, four dollars is recouped in benefits.

The GIVE Act will revise the National and Community Services Act of 1990 (NSCA) to include more school-based and community-based service learning programs. The GIVE Act will also establish two new learn and serve programs, including one on college campuses and one in elementary and secondary schools. Four programs will be established under the existing AmeriCorps programs, including an Education Corps, a Healthy Futures Corps, a Clean Energy Corps, and a Veterans Corps. In addition, the GIVE Act creates new programs aimed at providing service opportunities for those 55 years or older as well as 17 years or younger.

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Opportunities for these age groups are subsidized through scholarship and fellowship financial assistance.

Perhaps the most controversial section of the GIVE Act is a section which creates a Congressional Commission on Civic Service aimed at determining “whether a workable, fair and reasonable mandatory service requirement for all able young people could be developed and how such a requirement could be implemented in a manner that would strengthen the social fabric of the nation.”

*Two comments. First, mandatory service to “strengthen the social fabric of the nation” sounds like it came right out of Mein Kampf. Second, with GIVE there is the TAKE (Tax All Kinds of Enterprises) part which Congress is hiding in changes to the Tax Code.*

### Constitutional Law – Employer Had Right to Ban Guns on its Property

The 6<sup>th</sup> U.S. Circuit Court of Appeals added its opinion to the debate over employers’ rights in keeping guns off company property. In the *Plona v. United Parcel Service, Inc.* decision issued March 6, the court applied a valid Ohio law that allows private employers to prohibit firearms on their property. Mr. Plona, an employee at a Cleveland UPS, was fired when UPS officials learned he had been keeping an unloaded gun in his vehicle parked on company property. To be successful in his case against UPS, Mr. Plona would have needed to demonstrate that his removal violated a clear public policy. Neither the District Court nor the 6<sup>th</sup> Circuit Court of Appeals found this standard met.

### Employment Law – OK House Bill 1025 Makes It a Misdemeanor to Ask About Guns

When prospective employees filled out job applications for openings in President Obama’s administration, they were confronted with an unusual question: Do you own any firearms? Based on privacy concerns and the constitutional protections of the Second Amendment, Representative Rex Duncan (R-Sand Springs) would like to make it a misdemeanor in Oklahoma to ask this question during the employment application process. Representative Duncan prefiled House Bill 1025 for the 2009 Oklahoma Legislative Session and it has already passed the House Judiciary Committee. The bill as filed would punish violators with a fine of up to \$1,000 and/or imprisonment for up to 90 days.

The National Rifle Association has been quick to lend its support, noting the inappropriate nature of a question that has such clearly-defined ties to constitutional protections. While Representative Duncan is confident Oklahoma employers already refrain from asking such an offensive question, he felt the need for official legislation given President Obama’s recent actions. This bill is expected to progress through the legislative process quickly.

*Perhaps the Obama team should have asked: “Do you pay your taxes?” More information will be provided as it becomes available.*

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