

## The SAFETY Act: Mitigating Risk for Manufacturers, Providers and Buyers of Anti-Terrorism Products and Services

The final interim rules for the SAFETY Act (“Support Anti-Terrorism by Fostering Effective Technology”) were released in the Federal Register on October 16, 2003. As part of the Homeland Security Act of 2002, this piece of tort legislation offers a variety of legal protections to qualified sellers, vendors, subcontractors **and buyers** of anti-terror technology products and services. The key element of the Act is that it provides protection for not only the manufacturers, suppliers and providers of anti-terrorism products and services, but also for possible **terrorist targets** that will need to employ such products and services.

McKenna Long & Aldridge LLP authored significant portions of this landmark legislation. For the past year, the Firm’s attorneys have been working on behalf of industry associations, public and private companies, and government contractors to ensure that the liability protections afforded by the SAFETY Act are fully implemented in the emerging regulations. This Advisory provides a definition of anti-terror products and services, discusses the impact of the SAFETY Act on manufacturers and buyers, and notes current areas of concern for those applying for protection under the SAFETY Act.

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### Anti-Terror Products and Services Defined

Since 9/11, many companies have embarked on the development of homeland security products and services for sale to federal, state and local governments and commercial entities. The Act defines anti-terrorism products and services as:

[A]ny product, equipment, *service (including support services)*, device, or technology (including information technology) designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, that is designated as such by the Secretary.  
(Emphasis added)

Typical anti-terror products and services include:

- perimeter security devices
- government and private security support services
- airport reconfiguration
- information technology linking federal, state and local law enforcement
- anthrax detection systems
- biological/chemical sensors
- vaccines for biological pathogens
- bomb detection systems
- “smart cards” containing biometric chips, facial and iris recognition systems

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## **The SAFETY Act: Protection for the Manufacturer/Supplier**

The most significant threat facing companies that provide anti-terrorism products and services is the potential for catastrophic damages arising from tort liability should these products or services allegedly fail to interdict the criminal, terrorist act on a given day. The SAFETY Act provides comprehensive liability protection for these companies. In over simplified terms, the Act works in this manner:

1. A Manufacturing Company applies to the Department of Homeland Security (DHS) for protection under the SAFETY Act.
2. In determining whether to grant a Designation, DHS will evaluate a proposed product or service using the following criteria:
  1. Prior U.S. Government use or demonstrated substantial utility and effectiveness.
  2. Availability of the product or service for immediate deployment in public and private settings.
  3. Existence of extraordinarily large or extraordinarily unquantifiable potential third party liability risk exposure to the Seller or other provider of such product or service.
  4. Substantial likelihood that such product or service will not be deployed unless protections under the system of risk management provided under the SAFETY Act are extended.
  5. Magnitude of risk exposure to the public if such product or service is not deployed.
  6. Evaluation of all scientific studies that can be feasibly conducted in order to assess the capability of the technology to substantially reduce risks of harm.
  7. Product or service that would be effective in facilitating the defense against acts of terrorism, including technologies that prevent, defeat or respond to such acts.
  8. Any other factor that DHS may consider to be relevant to the determination or to the homeland security of the U.S.

In each case, DHS will exercise discretion and judgment in interpreting and weighting these criteria, and in determining their overall significance.

3. If the product or service “passes the test,” the technology is put on the approved list and the Manufacturing Company is issued a certificate of conformance.

The SAFETY Act contains significant incentives for providers to submit their products/services for the Department’s consideration. First, should any tort suits be filed against contractors who sell such approved technologies, a “rebuttable presumption” arises that the claims must be dismissed on the basis of the government contractor defense. The contractor should not need to amass all of the traditional evidence supporting the traditional “government contractor defense,” which is both expensive and time consuming, but should only need to inform the court that its technology has been reviewed and approved by the Department of Homeland Security, submitting the certificate of conformance and Approved Products Listing.

The Act also provides that the only basis upon which a plaintiff can overcome this rebuttable presumption is a showing that the provider acted fraudulently or with willful disregard in the submission of the product or service to the Department of Homeland Security. It is important to note that this rebuttable presumption protects not only contractors who sell anti-terror products/services to the federal government (to which the government contractor defense has been limited by some caselaw), but also ***protects contractors who face tort suits arising from such sales to commercial entities and state and local governments***. This is a significant new protection provided to contractors by the Act.

Additional incentives are built into the Act. Those contractors whose products/services are approved by the Department of Homeland Security cannot be sued for punitive damages. Non-economic damages can be awarded only in proportion to a party’s percentage of fault but, in any event, a contractor’s liability is limited to its available insurance, if any. Finally, any such lawsuit must be filed in federal district court.

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## **The SAFETY Act: Protection for the Buyer**

The SAFETY Act also provides liability protection for companies that might be targets of a terrorism act, and hence, would be purchasing anti-terrorism products and services. The most visible examples are infrastructure companies such as power plants, water and sewage facilities, and communications companies. Other examples are companies that provide places for large numbers of people to congregate, such as larger office buildings, shopping centers, and recreational venues.

The key for terrorist targets is to buy products and services that are on the DHS approved list. In the unfortunate incident of a terrorist attack, the plaintiffs’ attorneys will more than likely name everyone possible on the suit. Under the SAFETY Act, if the product or service that failed is on the approved list, all vendors and buyers of the product or service are immune from liability. Only the manufacturer can be held liable. However, the manufacturer will have a certificate of conformance and will be entitled to a presumption of dismissal and therefore protected as well.

Boards of Directors and senior officers need to understand the implications of the SAFETY Act on mitigating risk for their company. While only time will tell what the

total economic impact will be of ignoring the protections of the SAFETY Act, failing to take advantage of the Act's safeguards could have material adverse consequences.

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## Current Areas of Concern

John Clerici, an attorney from McKenna Long & Aldridge, recently appeared as an expert witness before the Government Reform Committee of the United States House of Representatives regarding the SAFETY Act. This testimony raised a number of issues that are important to companies that invest in and provide anti-terror products and services for the nation, and for these entities to be provided the full protections intended when Congress passed the Homeland Security Act. Two of the these issues are discussed below: Retroactive Application of SAFETY Act Protections and Streamlining the Application Process.

### ▶ **Retroactive Application of SAFETY Act Protections**

Several technologies already have been deployed without the protections of the SAFETY Act. However, while the interim regulations attempt to address the issue of retroactive application of the protections of the SAFETY Act, the Department appears to have too narrowly limited the possibility of such retroactive application. Clearly, Congress did not intend to limit the scope of the SAFETY Act to only newly developed technology.

So long as no cause of action has accrued (i.e., there has been no terrorist incident involving an anti-terror technology resulting in a lawsuit against a seller), the Department may provide SAFETY Act protection, retroactively, to previously deployed technologies that are substantially identical to a qualified anti-terrorism technology. Efforts to have this issue clarified in the interim rule are underway.

### ▶ **Streamlining the Application Process for Providers of Anti-Terror Products and Services**

While the one-hundred fifty (150) day time period provided by the interim regulations for both designation and certification of anti-terror products/services under the SAFETY Act attempts to balance the need for urgency with the requirements for certain reviews and evaluations of anti-terrorism technologies, the time frame is considered by many to be too lengthy and rigid. This is particularly true for those anti-terrorism technologies that are ready and urgently needed for deployment but which companies will not deploy until SAFETY Act coverage is provided.

Early indications from DHS suggest that the application process may be unnecessarily burdensome, leading to both a lengthy review period post-application as well as extensive expenditures of both time and money by sellers during the application preparation process. This will, obviously, have a greater adverse impact upon small businesses where both time and money are scarce resources. In short, it appears the entire process - both pre and post application - may be open to further streamlining.

If you would like more information about the SAFETY Act, please contact Ray Biagini at 202-496-7687 or John Clerici at 202-496-7574.

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McKenna Long & Aldridge LLP is a full-service law firm of approximately 375 lawyers and public policy advisors. The firm provides business solutions in the areas of corporate law, government contracts, intellectual property and technology, complex litigation, public policy and regulatory affairs, real estate, environmental, energy and finance.

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