

## Frequently Asked Questions Regarding the Application of the SAFETY Act to the Chemical Industry

**Q:** “How big is the umbrella” of plant vulnerability assessment/security measure coverage, i.e., can I obtain coverage for multiple plants through a single application, or do I need to separately apply for each plant?

**A:** If the plant assessment and security measures at multiple plants have sufficient commonality in terms of process, procedures and methodologies, a single application will suffice. The vulnerability assessments deployed by individual companies typically are based on a single, often proprietary, methodology. The subsequent deployment of security measures will be specific to each facility’s needs, but can nevertheless be identifiably common if the company requires that certain practices, or modules, be adopted. Critical to the exercise will be common practices with respect to the training of plant and community personnel, including first responders, fire department personnel, etc. Additional common modules might address, e.g., physical barriers, guard personnel, leak detection, maintenance requirements, etc.

**Q:** Will the Department of Homeland Security expedite processing of my application for coverage of my integrated system of plant vulnerability assessments and security enhancements and/or for my products/services?

**A:** Yes. DHS will shorten the 150 day schedule where an applicant demonstrates the need for expedited approval, e.g., where a pending procurement decision would be awarded during the 150 day period.

**Q:** If a chemical company uses a vendor/consultant to perform a vulnerability assessment at its plant and such vendor has itself received SAFETY Act coverage for its vulnerability assessment methodology, does that mean that the plant is fully protected, and does not need its own coverage?

**A:** As the customer of a vendor that has supplied a SAFETY Act covered methodology, the chemical plant is protected for its adoption and use of that methodology. That protection is, however, limited to the scope of the assessment phase. Thereafter, as the company analyzes the results of the assessment, identifies areas in need of additional or enhanced security measures, identifies, considers and chooses from a range of options, makes technology selections, and so on, its independent discretionary acts do not fall within the assessment methodology. Accordingly, in order to ensure that the plant is fully covered for its security enhancement decisions and deployments, it needs its own SAFETY Act coverage.

**Q:** If I am obligated by a federal or state law to conduct the vulnerability assessment, does this mean I cannot obtain SAFETY Act coverage?

**A:** No. To the contrary, evidence of a governmental approval can be a positive factor in the evaluation of the application by DHS.

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### CONTACTS

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**Q:** If a terror attack occurs in a foreign country, can the SAFETY Act protect me from liability?

**A:** According to DHS, SAFETY Act coverage can extend to acts of terrorism occurring outside the United States if the attack causes harm to a person, property or entity in the U.S. If an attack occurs at a U.S. chemical company facility located overseas, the chemical company in the U.S. can be “harmed,” for example, if suit is brought against it in the U.S. SAFETY Act protections would then be applicable, i.e., the claim would be subject to dismissal (if the security measures were covered by a Certification) or limited (if covered by a Designation). If, however, the action were filed in a foreign jurisdiction, there would be no expectation that the benefits of coverage would apply. Finally, if a foreign verdict were presented to a U.S. court, it is possible, but by no means certain, that the court would dismiss the action based on the application of the SAFETY Act.

**Q:** Are there any efforts to introduce SAFETY Act legislation in the European Union?

**A:** Yes. We are participating in discussions with and through the defense industry in Europe.

**Q:** If I obtain protection for one of my products, what protections are afforded to my upstream supplier?

**A:** We perceive two supplier coverage issues. First, we have included in numerous SAFETY Act applications the supplier selection criteria that the applicant uses for, e.g., purchasing component parts of a product that it manufactures. By so doing, the applicant’s SAFETY Act coverage extends to that selection process, further protecting the applicant from tort liability claims. Second, based on the SAFETY Act language itself and DHS interpretations thereof (with which we agree), where a seller has obtained SAFETY Act coverage for its anti-terror product or technology, a component supplier to the seller also obtains significant SAFETY Act tort protection. Specifically, in DHS’ and our view, a court lacks jurisdiction over a component supplier sued after an act of terrorism for the contribution it made to the SAFETY Act approved anti-terror product or technology because the only proper defendant in such suit is the seller of the approved product or technology. As such, a component supplier’s tort protection may be superior to that of the seller, which could be held in the suit if it acted with fraud or willful misconduct.

**Q:** (A) In the wake of the current news stories regarding security at our nation’s ports, can we also be protected if a terror attack at a port facility results in the dispersion of one of our substances/products, with resulting third-party property damage or personal injury?

(B) And on a related point, can we be protected in the event that the terror incident occurs during the transport of our substances/products between our facility and the port (or other destination)?

**A:** (A) Protection covering such scenarios can be obtained, but it would require that the port authority obtain coverage for its vulnerability assessment and port security measures. In order for you to receive this “derivative protection,” the port authority’s application should identify the nature (or better yet the precise content) of the substances/products it receives, stores, handles and transfers for you, and the types of containers in which the substances/products will be stored. Thus, companies that are aware that a port with which it does business is pursuing SAFETY Act coverage should proactively provide the port with as much detail as possible about the nature and content of the materials that are, or may in the future be, handled by the port on your behalf, and assure that such information is in their application.

(B) Transportation, by truck or rail, presents additional points of exposure. In order to obtain protection for such exposures, we believe that the only way to obtain wall-to-wall protection is for both the company and the transporter to obtain coverage, which would address their respective vulnerability assessment and security measure programs.

**Q:** Can I obtain coverage for anti-terror products I have previously deployed?

**A:** Yes. We have obtained for numerous clients SAFETY Act coverage for prior deployments of anti-terror technologies and services so long as they are substantially similar to the SAFETY Act approved technology or service and have a material anti-terror purpose and usage.

**Q:** Should a SAFETY Act provision be added to the Collins plant security legislation?

**A:** Because chemical companies that implement the kind of plant assessment and security measures that a new federal plant security law would require can obtain coverage under the existing SAFETY Act, the inclusion of such provisions in the new law could be seen as a “belt and suspenders.” The value of pursuing this additional, but arguably unnecessary, assurance would need to be weighed against political and tactical considerations relating to the efforts to pass such a bill.

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