

Final Rule Provides Significant Improvements to SAFETY Act Implementation

On Friday, June 2, 2006, the Department of Homeland Security (“DHS”) made available the final rule implementing the SAFETY Act (“Support Anti-Terrorism by Fostering Effective Technology”) (“the Act”), available at <http://www.dhs.gov/dhspublic/display?theme=13&content=5679>. The final rule is a huge step in responding to the concerns of applicants over the way in which the SAFETY Act has been implemented and administered over the past three and a half years and is clearly intended to stimulate the use of the SAFETY Act by industry and government alike.

The SAFETY Act, which our firm helped author and was enacted on November 25, 2002, is ground-breaking legislation intended to stimulate the research, development and sale of important anti-terror products and services to all market segments – federal, state and local governments as well as commercial – by eliminating or dramatically reducing the tort liability of sellers should their anti-terror products or services allegedly fail to prevent, interdict or mitigate a terrorist act in these markets. Claims stemming from a certified act of terrorism relating to a DHS-qualified anti-terror technology (“ATT”) product or service designed to prevent, detect, deter or limit the harmful effects of terrorist attacks: (1) may only be brought against “Sellers” of the ATT; (2) may only be brought in federal court; (3) may not result in the imposition of punitive damages; and (4) can, at most, result in a damage award up to the limit of the Seller’s insurance coverage. Sellers who receive a Certification from DHS for their products and/or services receive these same protections, plus one significant additional level of tort protection: claims against such Sellers arising out of acts of terrorism are subject to presumptive dismissal unless fraud or willful misconduct in the application process is established by clear and convincing evidence.

In addition to these significant tort protections afforded to Sellers of SAFETY Act approved technologies, DHS has interpreted the Act as also providing significant tort protection to customers and users of such technologies. Coverage for these parties is obtained through the grant of a Designation or Certification issued by DHS, following review and approval of an application for SAFETY Act coverage.

Since its inception, over 70 ATT have been granted SAFETY Act coverage. The significant improvements in interpretation and implementation of the Act presented in the Final Rule should provide the necessary clarity and incentives for any company considering the further development or marketing of ATT products or services to seek, for themselves and their customers, the benefits of SAFETY Act coverage.

Significant Changes in the Final Rule

The final rule is extensive and covers numerous areas. This *SAFETY Act Update* highlights some of the most significant changes addressed in the final rule. In particular, the final rule:

- Clarifies that SAFETY Act protections are applicable to acts of terrorism occurring

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outside the U.S. that cause “harm” inside the U.S. by amending the definition of “Act of Terrorism” to include any act that “is unlawful” and “causes harm, including financial harm, to a person, property, or entity in the United States . . .”. 6 C.F.R. § 25.2 (emphasis added).

DHS’ comments make clear that there is no geographical limitation on an “Act of Terrorism” under the Act and that the inclusion of the term “including financial harm” in the definition of an “Act of Terrorism” is intended to provide a broad definition that includes acts of terrorism that occur abroad involving domestically or internationally sold ATT.

- **Describes a program to align SAFETY Act reviews with government procurements** when appropriate so that DHS can rely upon the review and evaluation of an ATT performed by a procuring agency during the SAFETY Act evaluation.

An alignment of the procurement process and SAFETY Act review will streamline awards of SAFETY Act coverage and provide certainty to bidders that their ATT products and services will be awarded SAFETY Act coverage if they are the successful bidder. Procuring agencies can seek pre-qualification under the SAFETY Act for their selected products and services or “DHS can unilaterally determine that the subject of a procurement is eligible for SAFETY Act protections and give notice of such determination in connection with a government solicitation.” While DHS made clear that it will be providing internal guidance to DHS and other federal and non-federal procurement officials on how to coordinate the process, applicants should remain proactive in promoting the SAFETY Act and encouraging procuring agencies and DHS to coordinate grants of SAFETY Act coverage for procurements of ATT products and services.

- **Recognizes that SAFETY Act coverage is appropriate for Sellers of integrated systems and services** and confirms the varied types of products and services eligible for SAFETY Act protections by expanding the definition of “Technology” to include “[d]esign services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security.”

There is no longer any doubt that Sellers of anti-terror services and integrated systems can enjoy the protections of the SAFETY Act and can seek these protections in one application for multiple component services and products that can work in concert together to combat terrorism. In addition, the Final Rule is clear that it is only the “Seller” that is an appropriate defendant in any lawsuit resulting from an act of terrorism providing the basis for customers, users, subcontractors, vendors, and others to seek immediate dismissal from any such lawsuit.

- **Assures applicants that ALL information submitted as part of the SAFETY Act application process will be held in the strictest confidence** and makes this part of its rule at section 25.10.

DHS conclusively states that it “has been the Department’s intention, policy, and practice from the outset” to treat all applications as confidential and reassures applicants that DHS will take all the appropriate measures to protect such information from disclosure. In addition, DHS recognizes that applicant information may be Protected Critical Infrastructure Information pursuant to sections 211-215 of the Homeland Security Act of 2002.

- **Confirms that there may be situations that warrant the application of both SAFETY Act coverage and Public Law 85-804 indemnification** and states that DHS is working to support coordination of the processes for applying for both coverages.

DHS recognizes that some ATT may need Pub. L. 85-804 protections to mitigate the unusually hazardous risks faced by a Seller that are not covered by SAFETY Act (i.e., independent of terrorism risks) protections and reiterates that the 2003 amendment to the Executive Order on indemnification allows for such simultaneous coverage with the Office of Management and Budget’s concurrence. As such, applicants should be proactive in seeking coverage for terrorism risks involving their ATTs under the SAFETY Act and for unusually hazardous risks outside acts

of terror under Pub. L. 85-804.

- **Creates a new form of SAFETY Act coverage for technologies in development** under a “Developmental Testing and Evaluation (“DT&E”) Designation” by recognizing that Sellers of such developmental ATT face exposure to liabilities stemming from the testing and evaluation of developmental ATT.

By recognizing this new form of SAFETY Act coverage, DHS effectively addresses the need for SAFETY Act protections to be in place while anti-terrorism technology is being developed, tested, evaluated, modified or otherwise prepared for deployment in an anti-terror setting (e.g., field testing of a prototype of a particular technology or controlled operational deployment to validate safety and efficacy).

- **Conclusively states that DHS can not “require the Seller to self-insure if appropriate insurance is unavailable.”**

While this comment from DHS appears to be a step in the right direction, it is still unclear how this will be implemented in practice in the setting of liability insurance limits. Administratively, companies will no longer be required to certify annually that they are maintaining the required insurance coverage unless asked to do so by DHS.

Other Notable Changes

Other notable changes in the final rule include the following:

- **Government Contractor Defense.** DHS affirms that the only way to terminate a Certification and rebut the presumption of the Government Contractor Defense is to provide “clear and convincing evidence showing that the Seller acted fraudulently or with willful misconduct in submitting information to the Department” during the application process. DHS further states that “[t]he Certification of a Technology as an Approved Product for Homeland Security shall be the only evidence necessary to establish that the Seller of the Qualified Anti-Terrorism Technology . . . is entitled to a presumption of dismissal from a cause of action brought against the Seller.”
- **Certification at Submission.** DHS recognizes that applicants can only certify the accuracy of factual information and submit estimated information requested by DHS in good faith “with a reasonable belief they are as accurate as possible at the time of submission.” DHS plans to amend the application form to reflect this understanding and consider applications submitted to date to use this standard.
- **Modifications.** Applicants need only apply for modifications to their SAFETY Act coverage if they are significant (i.e., outside the scope of the definition). New procedures for seeking modifications are supplied in the Final Rule. DHS also clarifies that the Seller is not required to notify DHS of modifications made post-sale without the consent of Seller. Significant modifications known to the Seller and not approved by DHS will result in prospective, not retroactive, termination of SAFETY Act coverage after DHS’ issuance of public notice of termination.
- **Evaluation Time.** The final rule reduces the overall time frame for DHS to issue a coverage decision from 150 days to 120 days. However, DHS may unilaterally extend the review period. Applicants should expect this shorter timeline to result in greater scrutiny of their applications within the first 30 days and rejection of the application as incomplete unless the application includes all the information necessary for the substantive review to take place.
- **Earliest Date of Sale Determined by Applicant.** DHS clarifies and reiterates that SAFETY Act protections may apply to deployments of the ATT products or services prior to the date of decision. The earliest date of deployment is based on information supplied by applicants.

Conclusion

Seeking and invoking SAFETY ACT coverage can protect your company from exposure to unquantifiable damages should an act of terrorism occur involving your anti-terror products or services. The final rule posted by DHS implementing the SAFETY Act increases the incentives for companies to seek SAFETY Act protections and provides significant improvements to the application process, including a new application kit which DHS promises to issue shortly. However, only those Sellers who submit an application for SAFETY Act protections and whose products and/or services are reviewed and approved by DHS will reap the benefits of such tort protections. For information on the SAFETY Act application process and the Act's protections, please contact us.

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