

TAKING ADVANTAGE OF THE HOMELAND SECURITY DEPARTMENT'S SAFETY ACT

*by William M. Simmons, Of Counsel, Burns & Levinson LLP, 125 Summer St., Boston MA
02110, Direct Dial: 617-345-3241 email: wsimmons@burnslev.com Fax: 617-345-3299*

I. WHAT IS THE SAFETY ACT?

Over the years Congress has passed many "Safety Acts." The SAFETY Act discussed herein and whose latest regulations became effective July 2006 is a subtitle of the Homeland Security Act of 2002 and now part of the United States Code as Sections 441-444 of Title 6, that is 6 U.S.C. § 441-444. SAFETY is an acronym for "Support Anti-terrorism by Fostering Effective Technologies."

Essentially, Congress designed the SAFETY Act to ensure that the threat of massive liability in a round of lawsuits such as those following 9/11, involving payments by insurers and the government of most of the \$38 billion awarded to victims so far, does not deter the development and sale of technologies that could prevent terrorism or save lives in a terrorist attack. Upon an organization or applicant being certified as a seller of qualified anti-terrorism technologies, the SAFETY Act provides this assurance by creating incentives for the development and deployment of anti-terrorism technologies via system of "risk management" and a system of "litigation management" involving specific liability limitations for "claims arising out of, relating to, or resulting from an act of terrorism" where qualified anti-terrorism technologies have been deployed.

Here are the specific protections for sellers of ("qualified anti-terrorism technologies") as determined by the Department of Homeland Security (DHS):

- exclusive jurisdiction in Federal court for any suits against sellers concerning the technology;
- a limitation on the liability to an amount of liability insurance coverage specified for each technology, and the seller will not be required to obtain any more insurance coverage than is reasonably available "at prices and terms that will not unreasonably distort the sales price" of the technology;
- a prohibition on joint and several liability for non-economic (pain, suffering, etc.) damages, so that sellers will only be liable for what the trier-of fact finds to be the percentage of such damages proportionate to the seller's responsibility for the harm;
- a complete bar on punitive damages and prejudgment interest;
- a reduction of the plaintiff's recovery by any amounts that plaintiffs will receive or have received from "collateral sources," such as insurance benefits; and
- where the seller obtains a certification of an already designated qualified technology as "an approved product for Homeland Security," a rebuttable

presumption that the seller is entitled to the “government contractor defense.” This provision is based upon the Supreme Court's 1988 decision in *Boyle v. United Technologies Inc.* that, under certain circumstances, government contractors may enjoy qualified immunity from state tort law claims for design defects in products provided pursuant to a Department of Defense contract. The SAFETY Act provides that the presumption can be overcome only by a showing that the Seller acted fraudulently or with willful misconduct in submitting information for the Secretary's consideration of the technology.

II. HOW THE SAFETY ACT WORKS: DESIGNATIONS AND CERTIFICATIONS OF TECHNOLOGIES.

The designation process begins with the completion and submission to DHS of an application by the organization or applicant seeking a designation of its product or service. The application can be obtained in the DHS SAFETY Act Application Kit, which can be downloaded from the DHS website <<https://www.safetyact.gov/>>. This kit was a bone of contention when it first appeared because of its complexity and the time required to complete the paperwork. DHS designated just three “Qualified Anti-terrorism Technologies” (QUATTs) in 2004 and 46 in 2005 before a revised, simplified kit was released in 2006, when 65 unique technologies and services were approved. As of March 2007, 40 applications were under evaluation.

DHS recommends that an organization or applicant first register with it to establish contact points for each party, and ask for a “Pre-Application Consultation” to obtain guidance as to whether the technology is likely to receive a designation as a QUATT or whether, for example, to seek a “Developmental Testing and Evaluation (DT&E)” designation or apply as part of a Block designation. (The DT&E designation would cover a technology prior to its reaching its production phase, e.g., if test versions were being deployed for use. The Block designation covers products that are all related to a single approved technology). Forms for all of these requests and applications are contained in the Application Kit.

Applicants for a designation must submit details concerning, among other things:

- the technology and its performance;
- aspects of terrorism with which it deals;
- costs;
- past and projected sales; and
- insurance needs and availability.

Organizations or applicants seeking certification must themselves certify and submit supporting material showing that the technology performs as intended, conforms to the seller's specification and is safe for the intended use.

The wide variety of approved technologies described at DHS's web site can be illustrated by a short list:

- a method for testing biometric identification products;
- a crane-mounted radiation scanning device;
- trained security personnel to protect commercial and government nuclear reservations, agencies and installations;
- a service that identifies foreign companies that meet C-TPAT Minimum Security Requirements and transmits the findings to government agencies;
- a rapid, portable surface decontamination technology; and
- integrated software, hardware and infrastructure to access data to identify and intercept high-risk shipments in the international supply chains.

III. SAFETY ACT ISSUES YOU SHOULD KNOW ABOUT.

Timing—DHS's regulations say that the applicant will be notified within 30 days whether the application is complete or what is missing. Ninety days after the application is complete, DHS will either approve it or specify any additional information needed. In short, the process should be complete in about four months. However, if needed information is lacking, this can stretch out. Such delays may be important where planned or on-going procurements are involved.

Governmental Procurements— A federal, state, or local government agency can seek a DHS Pre-Qualification Designation Notice for a technology that the agency is seeking to procure, permitting the selected contractor to receive expedited review of a streamlined SAFETY Act application. In certain circumstances, if the other criteria for SAFETY Act approval are satisfied, DHS can advise the procuring entity that the successful offeror's technology will receive a QUATT designation. In short, there may be issues involved with bidding on a procurement contract for an anti-terror technology not yet designated as approved by DHS. These issues should be determined early in contacts with the Department and the procuring agency.

Insurance— Once its application is approved, the Seller must maintain the specified level of liability insurance.

Protecting Information—Under the SAFETY Act regulations, information and data submitted to DHS is "SAFETY Act Confidential Information" which will not be disclosed except as otherwise required by applicable law or regulation or a final order of a court of competent jurisdiction, or as expressly authorized in writing by the Under Secretary. It is recommended that applicants indicate by label on the data that it constitutes SAFETY Act Confidential Information, though that is not required to obtain protection. However, since competitors and others may still file Freedom of Information Act (FOIA) requests for such data, sellers should mark qualification-related data and proprietary information with appropriate

restrictive legends to take advantage of FOIA exemptions, including those for critical infrastructure information and proprietary business information.

Protecting Possible Patents— While the SAFETY Act application process should be completed in around four months as described above, it could take more than a year. Thus, consideration should be given to the one year bar pertaining to offers for sale when considering the filing of a patent application. Similarly, the question whether DHS refusal to grant a Designation, giving insufficient or unfavorable reasons, may have an impact on future patent protection for lack of utility has yet to be answered. Once again, careful coordination with DHS during the application process should help avoid such issues.

IV. CONCLUSION: PROS AND CONS.

Advantages:

- Reduced risk in lawsuits against technology developers and sellers;
- reduced insurance costs for anti-terrorism technology developers and sellers; and
- related problems and issues can be handled with relatively small effort.

But:

Disadvantages

- the Application Kit may take an “average” of 120 hours to complete and much higher times time have been reported;
- changes in an approved technology must be reported to DHS; and
- the insurance amount as determined by DHS in the application process must be kept in force.