

THE SAFETY ACT

The SAFETY (Support Anti-terrorism by Fostering Effective Technologies) Act provides broad liability protections, caps and other legal incentives for qualified entities that sell, use, integrate, manage or deploy anti-terrorism products and services. Part of the Homeland Security Act of 2002, the SAFETY Act was enacted by Congress to ensure that the threat of potential liability suits would not limit or deter the use of products and services that could help save lives.

WHAT IS A DESIGNATED ACT OF TERRORISM?

An “act of terrorism” is any act that the Secretary of Homeland Security determines meets the requirements under the SAFETY Act. The act does not differentiate foreign or domestic terrorism.

WHAT IS PROTECTED UNDER THE SAFETY ACT?

The SAFETY Act is broad in scope, covering a wide range of services and hard products. A single, specific technology can be protected as well as a comprehensive terrorism prevention, response and mitigation program. Such a program could include multiple integrated elements, such as vulnerability assessments, physical protection of assets (including proprietary information and cyber security), emergency preparedness, backup and response services, ongoing security training and audit processes.

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The act's protections can also apply to systems integration and the overall decision-making process of selecting, implementing, managing and integrating anti-terrorism products and services, such as access control, software, building design and construction, security procedures, training or any other services used for preventing, detecting, identifying, mitigating or deterring terrorism. SAFETY Act protection can be granted to both new and existing services and technologies and can be applied retroactively at the discretion of the Department of Homeland Security (DHS) during the approval process.

WHO CAN APPLY FOR SAFETY ACT PROTECTION?

Any entity that uses, sells or otherwise provides anti-terrorism products, technologies or services, or products and/or services that aid in the response to, recovery from or limiting the harm from a terrorist act can apply for SAFETY Act protection.

TERM OF THE QUALIFICATION

The term of a SAFETY Act designation is typically five to seven years and must be renewed with the DHS each subsequent term.

THE BENEFITS OF SAFETY ACT-DESIGNATED PRODUCTS

Under DHS interpretation, the use of SAFETY Act-approved products, facilities or services confers key benefits to the ultimate user in addition to the broad protections provided to the provider or seller of those qualified products or services.

WHY APPLY FOR YOUR OWN SAFETY ACT PROTECTION?

If your company is involved with homeland security or terrorism prevention, response or mitigation in any way, whether for yourself or others, it is critical to know if, and how, you can benefit from the SAFETY Act. Owners, directors and officers of entities with these types of exposures have a fiduciary responsibility to explore the protections that could potentially be afforded them under the SAFETY Act. Applying will require some effort and pose some challenges. However, neglecting to apply for available protection could give rise to more severe challenges in the future.

The ramifications of organizations failing to seek SAFETY Act protection when they would otherwise qualify can be severe, due to Sarbanes-Oxley (SOX) & Directors and Officers-related liabilities. Sarbanes-Oxley requires CEOs to certify they have reviewed their company's financial practices and understand risks that may affect the financial reporting process. Although Sarbanes-Oxley's application to homeland security risks is unclear, SOX obligates companies to use best efforts to discover all potential financial risks through a process that is rigorous enough to ensure a reasonable chance of uncovering them. Again, this is implied and not specific in SOX.

Even if the products or services you use are already SAFETY Act designated, you must evaluate the need to apply for *your own* SAFETY Act protection. If you use multiple products and suppliers, or manage, provide or integrate anti-terrorism products or services yourself, or are involved in making decisions on what to use or buy, applying for SAFETY Act protection is important.

Without your own designation, your protection is incomplete for several reasons. First, the SAFETY Act's wording is not explicit; it is a DHS interpretation of Congress' intent, and a direct designation from DHS is necessary to guarantee protection. Second, if you rely on the protection afforded a vendor or other third-party providing terrorism products or services, you will not have the degree of protection that you could obtain on your own. Finally, if a plaintiff complains about the use of a product that you may have sold or implemented, and that product is protected through the product's original manufacturer, the plaintiff may try to get around that protection by blaming your negligence in the product's use or implementation. Without your own protection, you may be vulnerable. You should apply under the SAFETY Act to protect every role you may have in the delivery of terrorism-related products or services.

MARKETING ADVANTAGES

Although not the purpose of the legislation, SAFETY Act-qualified products, facilities and services have a significant marketing edge over those not qualified. The detailed DHS review process tells others that your products, facilities and/or services have passed stringent review. Also, your customers benefit from significant liability protection by selecting your product, facility or service. More and more procurements, in both the private and governmental sectors, require SAFETY Act consideration, qualification or eligibility. This trend is expected to increase and is actually addressed in a recent change to the Federal Acquisition Regulations (FAR).

APPLYING FOR SAFETY ACT PROTECTION

The SAFETY Act requires that an application be qualified by the DHS. Assuming the application is complete, the decision must be given within 120 days. Once formally qualified by the DHS, the SAFETY Act automatically confers its broad liability protections to the applicant, now deemed the "Seller."

WHO IS THE "SELLER" UNDER SAFETY ACT?

The SAFETY Act uses the term "Seller" throughout. The Seller is actually the applicant, once their products or services are approved by the DHS. The Seller does not have to actually sell or manufacture anything to qualify for protection. *Seller* is the term used for any direct beneficiary of SAFETY Act liability protections.

LIABILITY PROTECTIONS & DEFENSES PROVIDED UNDER SAFETY ACT

Once the products and/or services are qualified, the applicant (now deemed the Seller) is automatically entitled, under federal law, to significant limitations of their liability stemming from a designated terrorist act or event.

- **A maximum cap on your liability** EQUAL TO the amount of terrorism liability insurance required for the qualified products or services involved
- **Exclusive jurisdiction in federal court** for all related suits
- **Punitive damage claims barred**
- **Non-compensatory damages barred**
- **Pre-judgment interest barred**
- **Non-economic damages barred** unless the plaintiff was physically harmed (“noneconomic damages” are defined under the act and include things such as pain and suffering, mental anguish, loss of consortium)
- **Prohibition on joint and several liabilities** for non-economic damages (in other words, only that percentage of the ultimate claim amount that is directly attributed to a defendant’s negligence is recoverable)
- **Other plaintiff recoveries** – the SAFETY Act provides that a defendant’s liability will be reduced for other compensation available to the claimant from other collateral sources, such as insurance recoveries, other defendants

THE GOVERNMENT CONTRACTOR DEFENSE

The government contractor defense can also be applied for under the SAFETY Act. If granted, or certified by the DHS, the government contractor defense can be invoked for any claims stemming from a designated act of terrorism that involves the applicant’s certified products and/or services. Unprecedented and unique to the SAFETY Act, this defense can be invoked for claims arising entirely within the civilian sector. ***You do not have to be a government contractor to use this defense under the SAFETY Act!***

While the Act does not delineate the scope of this defense, its legislative and precedent history does. Based on case law, the scope is broad and it is apparent that under the government contractor defense, a SAFETY Act-certified entity could not be held liable for design defects or a failure to warn – two of the common allegations made in these types of liability cases.

NON-TERRORISM RELATED EVENTS

Because certain anti-terrorism-related products and services (e.g., weapons, electric fences, chemicals, explosives, x-rays and vaccines) have inherent risks, it is important to understand that the SAFETY Act’s protections will not apply to any claim that does not stem from a designated act of terrorism. **The SAFETY Act will not protect against non-terrorism related risks.**

COMMERCIAL INSURANCE REQUIREMENTS

The SAFETY Act is not a government-provided insurance or indemnification program. The act requires the applicant to maintain insurance that provides coverage for third-party claims arising out of an act of terrorism when the Seller's approved products or services are deployed. The limits of liability required will depend on both the premium cost and the actual exposures at the time of application. The law specifies that applicants will not be required to obtain more insurance than is available at reasonable prices – prices that do not unreasonably distort the price or cost of providing the product or service.

Unique requirements in the SAFETY Act make it imperative you understand the insurance-related impact on both new and existing insurance programs. Coverages MUST BE carefully placed and dovetailed to make sure you are fully protected.

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NOTE: The information contained in this document is NOT legal advice and cannot be relied upon as such. It is a summary and opinion based on current understanding of the SAFETY Act, the SAFETY Act Final Rule, recent DHS seminars, meetings and approvals, as well as our familiarity with the commercial insurance market and new insurance products.