

The SAFETY Act As A Tool To Manage Risk

A Question and Answer Session:

What it is, and
How to Take Advantage of it!

The Aviation Symposium Webinar Series



Presenters



Mark McKinnon



Darcy Osta



The SAFETY Act – What is it?

- Support Anti-Terrorism by Fostering Effective Technologies Act of 2002
- Subtitle G of Title VII of the Homeland Security Act of 2002
- Passed in response to 9-11 terrorism and the resulting litigation
- Purpose of the Act is to limit liability for those involved in protecting public from terrorism



Who runs the SAFETY Act Program?

- Program is administered by the Secretary of DHS
- The duties of the Secretary are delegated to the Under Secretary for Science and Technology and the Office of Safety Act Implementation within DHS is responsible for most of the work
 - Prepares SAFETY Act Application Kit
 - Receives and facilitates evaluation of the applications
 - In charge of providing information to the public
- Reviewers from the FFRDCs (Federally funded research and development centers), non-profits, Federal Government, Federal & National Labs, and Academia



What counts as “Technology?”

- Congress gave the Secretary wide latitude in determining what qualifies as “technologies”
- Products
- Equipment
- Services
- Devices or technology (including IT technology)



What makes a technology an Anti-Terrorism Technology?

- Congress gave the Secretary wide latitude in making this determination
- Designed, developed, modified, or procured for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm from such attacks
- Does not have to have counterterrorism as its sole purpose, but must have a material anti-terrorism use



Isn't a “Terrorist Attack” limited in scope?

- 18 USC 2331(5)
 - (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
 - (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping



What is a Terrorist Attack under the SAFETY Act?

- 6 USC 444(2)
 - (B) Requirements.—An act meets the requirements of this subparagraph if the act—
 - (i) is unlawful;
 - (ii) causes harm to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel
 - (iii) uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.



What are the different levels of approval?

- DT&E
 - Developmental Test and Evaluation
 - Provides similar protection to Designated technology, but for a limited deployment
- Designation
 - Medium level of approval, provides substantial benefits in litigation regarding jurisdiction, venue, and damages
- Certification
 - Provides access to the Government Contractor Defense



Where can a lawsuit governed by the SAFETY Act be brought?

- The statute creates a federal cause of action for any claim “arising out of, relating to, or resulting from an act of terrorism” and the use of a qualified anti-terrorism technology
- The Act preempts any other cause of action
- Act grants original and exclusive jurisdiction in federal district court



How does the SAFETY Act affect damage awards?

- Punitive Damages
 - No punitive damages, exemplary damages, or any other damages that go beyond compensating the victim
- Non-economic damages
 - Includes physical and emotional pain and suffering, inconvenience, impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of consortium, society and companionship, hedonic damages, and injury to reputation
 - Several liability only in proportion to fault
 - No non-economic damages unless the plaintiff suffered physical harm



The SAFETY Act – Effect on lawsuits

- Reciprocal claims
 - The Act requires the Seller to make every effort to enter into reciprocal waivers with any contractors, subcontractors, suppliers , vendors and customers to bear their own responsibility for any losses including injury to employees and business interruption.
- Collateral Sources
 - Liability is reduced by the amount of collateral source compensation the plaintiff has received or will receive.



The SAFETY Act – Risk Management

- Liability Insurance
 - Insurance must cover all third party claims arising out of use of the technology
 - Insurance is required in an amount certified by the Secretary as adequate to compensate third-party claims
 - Insurance must cover own liability and liability of contractors, subcontractors, vendors and suppliers of the seller and any customers
 - Total liability for damages cannot exceed the limits of liability insurance



How Much Insurance Will I Need?

- The particular Technology at issue;
- The amount of liability insurance the Seller maintained prior to application;
- The amount of liability insurance maintained by the Seller for other Technologies or for the Seller's business as a whole;
- The amount of liability insurance typically maintained by Sellers of comparable Technologies;
- Information regarding the amount of liability insurance offered on the world market;
- Data and history regarding mass casualty losses;
- The intended use of the Technology; and
- The possible effects of the cost of insurance on the price of the product, and the possible consequences thereof for development, production, or deployment of the Technology.



What additional protections do I get for a Certified Technology?

- Government Contractor Defense
 - Automatic application of a rebuttable presumption that the Government Contractor Defense applies where the Secretary has given it the appropriate designation
 - Presumption can only be overcome by evidence of fraud or willful misconduct in submitting information to the Secretary
 - The doctrine is applied regardless of whether the product or service was provided to a government or non government customer



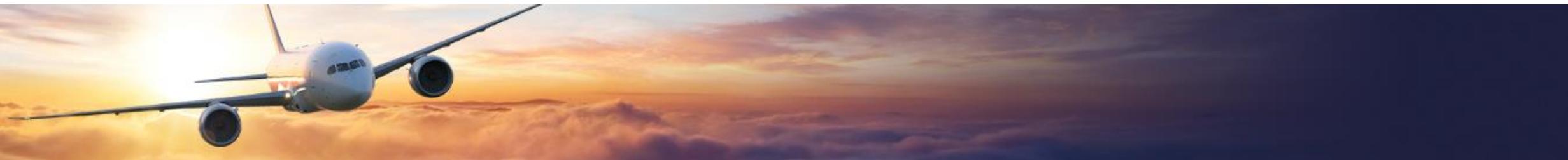
What other benefits are there from SAFETY Act approval?

- Approved Product for Homeland Security
 - A heightened level of certification for products or systems that are designated Qualified Anti-Terrorism Technology
 - Provides additional protection against liability
 - Applicant can seek designation as an approved product in parallel to qualification or at a later time



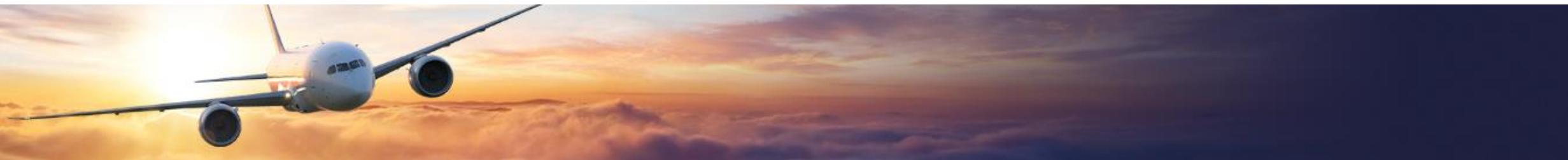
What Standards are Applied to Evaluate My Technology?

- Under the statute, the Secretary must consider whether the technology:
 - Demonstrates substantial utility and effectiveness,
 - Is available for immediate deployment in public or private settings,
 - Is used in a situation where there is a large, unquantifiable risk of third-party liability,
 - There is a risk the technology will not be deployed due to the risk,
 - There is a risk to the public if the technology is not deployed
- The weight given any factor can vary in light of the type of system and the risks involved
- The technology does not have to meet all of the criteria to be approved



What is the Approval Process?

- Register with the Office of Safety Act Implementation (OASI)
- Request a pre-application consultation
 - Not required but highly recommended, OSAI believes these meetings can avoid later delays and misunderstandings
 - Written summary of the technology, its effectiveness, description of the market and potential scope of liability
- Fill out and submit the application and supporting documentation
- Within 30 days, received an Initial Notification that the application is complete and will be reviewed or that the application is incomplete and a list of missing or additional information that is required



What information needs to be collected and submitted?

- Detailed and complete description of the technology/service and how it is designed to work
- How the technology is deployed and operated
- Readiness of the technology to be used
- Magnitude of the risk from terrorism that your technology will counter
- How would denial of SAFETY act designation affect your plans for the technology
- Whether the technology is used by federal/state/local government



What information does DHS need about my Company?

- Financial data
 - If public company, Form 10-K or Form 10-Q
 - If not publicly traded, income statement, cash flow and balance sheets, pro forma financial statement
- Complete insurance information, including coverages, limits, premiums, deductible and self insured retentions, terrorism coverages and limits, or unavailability of insurance for the risk



What additional Information is needed for Certification?

- Designation is a prerequisite for granting Certification.
- To receive Certification, a QATT must also be shown to:
 - Perform as intended
 - Conform to the Seller's specifications
 - Be safe for use as intended
- Seller is required to provide safety and hazard analyses



How do I show it will perform as Intended?

- Consistent positive results (e.g., long-term low failure rates and false alarms)
- Reliability/Availability is high (e.g., MTBF)
- Performs in accordance with performance specifications
- Installation, use, maintenance procedures proven
- Documented processes (e.g., training, hiring, technology refresh) are being followed
- Standards are identified and met
- QA/QC processes are effective



What is DT&E Approval for?

- The regulations give discretion to afford SAFETY Act protection to technology that is not fully developed and ready to use or sell.
- The purpose is to give protection where the technology is being field tested or has to be deployed on an emergency basis during a time of heightened risk.
- The designation cannot exceed a period of time beyond what is “reasonable” for the testing and evaluation of the technology (presumptively 36 months maximum)
- The Secretary can terminate the designation at any time with notice to the seller.
- The Secretary can put any restrictions on the use of the designations he deems appropriate technology.



What additional information is needed for DT&E Approval?

- What additional information needs to be collected and submitted for Developmental Testing and Evaluation Designation?
 - Test Scenarios
 - Time frame for testing
 - Test methodology
 - Locations for testing
 - Rationale for conducting the tests



What is the timeline for Action by DHS?

- At any time during review, the office may:
 - Request additional information
 - Meet with the seller
 - Consult with other federal or non-federal entities with required expertise
 - Perform studies of the technology or the insurance market
- Within 90 days of notification that the application was complete, the secretary must grant itself a one time 45 day extension or:
 - Approve the application and provide certification
 - Notify that the technology is potentially eligible for approval but additional specified information is needed
 - Deny the application



What happens once my Technology is Approved?

- If the Secretary certifies the Technology, then the petitioner is given a certificate of conformance.
- The certification is proof that Secretary has found the technology will perform as expected, conforms to the Seller's specifications, and is safe for its intended use.
- The Technology is placed on Approved Product List for Homeland Security
- The certification is valid for 5-8 years at the discretion of the Secretary
- An application for renewal can be made at any time within two years of the expiration date



Example of Certification – Southwest Airlines

- Granted September 26, 2017
- Southwest Airlines Co. (“Southwest”) provides Southwest Aircraft Operator Standard Security Program (the “Technology”). The Technology is the development and implementation of a TSA-approved Aircraft Operator Standard Security Program (AOSSP), inclusive of physical and electronic security measures, tools, and procedures. The Technology does not include security screening of airline passengers or passenger carry-on or checked baggage at airport terminals. This Designation will expire on September 30, 2022



Example of Certification – K-2 Solutions

- Granted December 15, 2017
- K-2 Solutions, Inc., provides Single Purpose Explosive Detection Dogs. The Technology is explosive detection canine teams comprised of one handler and one canine deployed to locate explosives in stationary objects such as vehicles, luggage, bags, and cargo at commercial and U.S. Government locations in the United States. The Technology also includes hiring and vetting of personnel, policies and procedures for screening, hiring, training, quality control, and operational deployment, and training of its single purpose explosive detection dog teams.



Example of Certification – Detroit Little Caesar Arena

- Granted November 2017
- The SAFETY Act Certification applies to Little Caesars Arena and the 100-foot perimeter around the arena, the parking deck, office buildings on Henry and Woodward, the Via and the Chevrolet Plaza. It includes the security design development process, supporting policies and procedures, and the implementation, management, and continuous oversight by employees, contractors, and consultants. This designation and certification will expire on December 31, 2022



Example of Designation – Universal Protection Service, LP

- March 4, 2019 - Trans-Pak, Inc. provides a Certified Cargo Screening Facility (the “Technology”). The Technology is designed to aid in meeting the congressional mandate that 100 percent of cargo placed on passenger airplanes be screened. The Technology includes, and provides, screeners and programmatic personnel for the screening of cargo in accordance with the Transportation Security Administration (“TSA”)’s Certified Cargo Screening Program at TSA-approved Certified Cargo Screening Facilities. This Designation will expire on March 31, 2024.



Do I Get to Advertise my SAFETY Act Coverage?

- Certificate provided by DHS
- Product listed on DHS public website

