

# Terrorism Liability Protections Available Under the SAFETY Act

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**PRACTICES** Government Contracts, Construction, Energy, Power and Natural Resources, Energy Litigation, Nuclear Energy

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Providers and users of products or services designed to prevent or mitigate the effects of terrorist attacks may face substantial liability exposure in the wake of a terrorist act. This exposure can be greatly reduced through mechanisms provided by the Support Anti-Terrorism by Fostering Effective Technologies (SAFETY) Act, 6 U.S.C. §§ 441-444, which the United States government enacted to incentivize the development and deployment of anti-terror technologies and services by limiting the potential liability associated with their use. Under the SAFETY Act, the Department of Homeland Security (DHS) may Certify and/or Designate<sup>1</sup> a Qualified Anti-Terrorism Technology (QATT), significantly limiting or eliminating liability and litigation exposure in the event of a terrorist attack where said QATTs are employed but face claims of inadequate performance.

## Eligible “Technologies”

Eligibility for Designation or Certification applies beyond “technology” in a narrow sense to encompass “any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security...”<sup>2</sup> Given this broad scope, thousands of products and services have been Designated or Certified.

## Protected Parties

Protection is available to providers of QATTs, but, importantly, extends to the end-users of those products and services as well. For example, a company creating body scanners for use in an airport would be able to receive Certification for the scanner technology, and an airport using that scanner would receive flow-down liability coverage – exempting them from liability, as lawsuits involving QATTs can only be brought against the seller of the QATT.

Despite benefiting from this extended liability umbrella, end-users of technologies often seek Designation or Certification themselves to cover potential liability gaps related to the manner a QATT is used or how different QATTs are integrated into an overall security plan. An airport, for example, might use scanners, a private security company screening airport workers and cameras scanning the perimeter, all of which may have their individual SAFETY Act Designations. Additionally, the airport itself could also be Designated for its oversight and quality assurance of its overarching security regimen.

As a result, the list of Designated and Certified QATTs includes numerous critical infrastructure locations which are unfortunately likely targets for terrorism. These include airports, sports stadiums, bus terminals and other public venues

Beyond the physical world, an increasing number of cybersecurity implementations and solutions are seeking Designation or Certification as the risk of cyberterrorism grows.

## Litigation and Liability Mitigation

Jurisdictionally, claims related to a QATT must be brought in federal court under a specific federal cause of action and may only be brought against the seller of that offering, not against its users.

The SAFETY Act also places significant limits on potential liability:

- Overall liability is capped at a pre-determined amount of insurance held by the seller.
- Liability is offset by any recovery from collateral sources.
- Punitive and exemplary damages are disallowed.
- Defendants are not jointly and severally liable.
- Noneconomic damages are only available for plaintiffs who suffered physical harm.

For Designated products and services, these protections apply for a five-to-eight-year term with renewals available prior to expiration. Under a “Developmental Testing and Evaluation Designation,” technologies that “require additional ... testing and evaluation...” may also benefit from these protections during a limited test period.

A Certified technology receives all the benefits of a Designated technology with the additional protection of being allowed to assert the Government Contractor Defense, which preempts and provides a complete defense against a plaintiff’s products-liability claims.

## Procurement Differentiator

Beyond legal protections, SAFETY Act coverage also offers strategic advantages in procurement. SAFETY Act awards act as a differentiator in public and private acquisitions. In the public sphere, both Designated and Certified technologies are placed on the SAFETY Act’s “Approved Products” list for DHS and FAR subpart 50.2 mandates for certain procurements that government agencies “shall consider SAFETY Act issues as early in the acquisition cycle as possible,” while FAR 7.105 requires certain agency acquisition plans to address SAFETY Act considerations. In the private sphere, potential users are likely to favor technologies which extend the SAFETY Act’s liability umbrella to them.

## Evaluation Criteria

In awarding Designation or Certification, the DHS evaluates the products and services on non-exhaustive criteria including utility and effectiveness, their availability for immediate deployment and the extent of liability exposure.

## Who Should Consider SAFETY Act Coverage?

Given the range of technologies, methods, services and procedures eligible for an award, any vendor or user of such technologies and services who is looking to operate in the anti-terror space or who deems themselves potentially susceptible to terrorist attacks could benefit from SAFETY Act coverage as a risk mitigation strategy.

Entities that develop, provide or utilize anti-terrorism technologies should conduct a thorough review of their offerings to determine eligibility under the SAFETY Act. If, during this review, potential candidates for Designation or Certification are identified, Haynes Boone's Government Contracts team stands ready to assist.

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<sup>1</sup> United States Department of Homeland Security, Science and Technology Office awards QATT applicants either "Developmental Testing and Evaluation Designation", "Designated" or "Certified" status under the SAFETY Act. Designated status is a prerequisite for Certified status. See 52.250-3 SAFETY Act Block Designation/ Certification (FEB 2009); 6 U.S.C. 441

<sup>2</sup> 6 C.F.R. § 25.2