



LIABILITY PROTECTION UNDER THE SAFETY ACT

The development of anti-terrorism technologies is of vital importance to the U.S. Department of Homeland Security (DHS) as it works to protect the United States by preparing for, preventing, and responding to terrorism. After the terror attacks on September 11, 2001, the federal government wanted the private sector to become a “force multiplier” by researching and developing much-needed anti-terrorism technologies and services. However, the federal government recognized the private sector’s very real concern over potential business-ending liability claims that could result if their technologies proximately cause real property damage or personal injury, or failed to function as designed in a terrorist attack.

Reacting to this concern, Congress passed the **Support Anti-terrorism by Fostering Effective Technologies Act of 2002** (the **SAFETY Act**), which provides legal liability protections to companies that design products or offer services that are aimed at combating terrorism. Many buyers perceive DHS’s Certification of a product or service under the SAFETY Act as a significant and positive differentiator, and having SAFETY Act approval can be an important selling point.

Levels of Protection

In order to be eligible for the protections made available by the SAFETY Act and have their product or service become a Qualified Anti-Terrorism Technology (QATT), companies must go through a multi-step evaluation process with DHS. The first step is known as the “pre-application” phase, where DHS screens out which products or services are likely to receive SAFETY Act approval, and which are not. For those deemed likely to meet the requirements of a QATT, companies then submit another round of applications in order to obtain approval.

DHS offers levels of liability protection to successful applicants to encourage companies to continue developing and deploying QATTs – Designation, Certification, and Developmental Test and Evaluation Designation (DTED). Under the SAFETY Act, the seller of a QATT is the only entity liable for real property or personal injury damages that are proximately caused by the QATT in connection with an act of terrorism. Accordingly, those in the QATT’s stream of commerce, including the end user, are shielded from liability.

DHS “DESIGNATION”

“Designation” asserts proven effectiveness of your product or service. It provides, among other benefits, a limitation on the QATT seller’s liability based on the amount of liability insurance that DHS determines the seller must maintain, a prohibition of punitive damages, and exclusive federal court jurisdiction.

DHS “CERTIFICATION”

“Certification” is the highest level of DHS approval of your product or service. In addition to receiving all the protections provided under Designation status, Certification allows a seller to assert the Government Contractor Defense, thereby potentially providing complete immunity from product liability and design defect claims. QATTs that receive Certification will also be placed on DHS’s Approved Products List for Homeland Security.

DHS “DEVELOPMENTAL TEST AND EVALUATION DESIGNATION”

In instances when DHS determines that a certain product or service does not yet qualify for Designation or Certification and instead grants the technology “Developmental Test and Evaluation Designation” status – often when more operational data is needed – the firm works with clients to help determine what needs to be done to progress the technology from DTED status to Designation and then, if appropriate, Certification. DTED status provides similar liability protection as that of a Designation or Certification status, so that the intended product or service can be tested in operational environments.

How Patton Boggs Helps

Patton Boggs assists clients at every stage of this process to help companies obtain SAFETY Act protection for their products and services by:

- Working with clients to assemble a successful application for DHS – one which contains the specific information and data the Department is looking for and excludes what it's not
- Navigating timelines and deadlines established by DHS
- Assessing not only the current state of a client's product, but also the product's past use and its potential applicability to combating terrorism in the future

The firm advises companies on the kinds of services or products that could qualify for SAFETY Act Designation and Certification, analyzing the critical criteria that will determine whether or not their technologies will be classified as QATTs. Among the most important questions Patton Boggs helps clients to answer are:

- Is it a practical and effective technology for fighting terrorism?
- To what extent (if any) does technology expose the company to liability?
- Are SAFETY Act protections necessary or desirable in order for the technology to be properly deployed?
- For Certification, can the company demonstrate that its technology does what it is supposed to do and conforms to the seller's specifications?
- If the product is in a developmental stage, is it mature enough to submit for SAFETY Act approval?
- Has the company demonstrated that the technology is safe?

After establishing that the product or service may meet the criteria for SAFETY Act protections, the firm then assists companies in completing the registration, pre-application consultation forms, and Designation and/or Certification forms. Patton Boggs can also assist clients with their oral pre-application consultation with the DHS and guides clients through the steps of composing and completing the application, and seeing to it that the relevant data and material requested by DHS is included.

The SAFETY Act provides liability protection that can help safeguard a company's central assets, cap its damages, and exclude the company from any litigation outside of federal court, all while enabling the company to offer services, design software, or create products that serve a critical purpose – to more sufficiently defend the United States against terrorist threats.

Patton Boggs offers companies full assistance on all their SAFETY Act-related needs – from assessing the eligibility of their technology and guidance through the pre-application process to the successful completion of the application itself and helping clients to achieve the Designation and/or Certification status they pursue.

For More Information on the Firm's SAFETY Act Capabilities, Please Contact:

Stephen McHale, Partner

Co-Chair of the Patton Boggs' Homeland Security, Defense, and Technology Transfer Practice Group
Washington, D.C.
202.457.6344, E-mail: smchale@pattonboggs.com

Robert Tompkins, Of Counsel

Washington, D.C.
202.457.6168, E-mail: rtompkins@pattonboggs.com

Sarah Vilms, Public Policy Advisor

Washington, D.C.
202.457.5248, E-mail: svilms@pattonboggs.com

Scott Louis Weber, Partner

New Jersey
973.848.5630, E-mail: sweber@pattonboggs.com