

POINT PAPER

AMSEL-LG-B

10 March 2004

SUBJECT: The Support Anti-Terrorism By Fostering Effective Technologies Act (hereinafter "SAFETY ACT") of 2002

PURPOSE: To Provide Information Regarding the SAFETY ACT

FACTS:

1. The SAFETY ACT is set forth in the Homeland Security Act of 2002, 107 Pub. L. 296, Title VIII, Subtitle G, § 861 et seq. (November 25, 2002) and is codified at 6 U.S.C. § 441 et seq. (2004). Under the Act, the Secretary of the Department of Homeland Security (DHS) (hereinafter "the Secretary") may designate qualified anti-terrorism technology ("QATT") "that qualif[ies] for protection under [a] system of risk management..." 6 U.S.C. § 441 (2004). A QATT is defined as "any product, equipment, service (including support services), device, or technology (including information technology) designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, that is designated as such by the Secretary." 6 U.S.C. § 444.

2. The criteria used by the Secretary in designating a QATT, "shall include, but [are] not limited to, the following:

- (1) Prior United States Government use or demonstrated substantial utility and effectiveness.
- (2) Availability of the technology for immediate deployment in public and private settings.
- (3) Existence of extraordinarily large or extraordinarily unquantifiable potential third party liability risk exposure to the Seller or other provider of such anti-terrorism technology.
- (4) Substantial likelihood that such anti-terrorism technology will not be deployed unless protections under the system of risk management provided under this subtitle [6 USC § 441 et seq.] are extended.
- (5) Magnitude of risk exposure to the public if such anti-terrorism technology is not deployed.
- (6) Evaluation of all scientific studies that can be feasibly conducted in order to assess the capability of the technology to substantially reduce risks of harm.

(7) Anti-terrorism technology that would be effective in facilitating the defense against acts of terrorism, including technologies that prevent, defeat or respond to such acts.” 6 U.S.C. § 441.

In addition to the above-referenced criteria, the Secretary may issue regulations in connection with the SAFETY ACT and has previously published such regulations for comment. 68 Fed. Reg. 41420 (July 11, 2003). Additionally, DHS has published the Interim Rule implementing the SAFETY ACT and has requested comments on that Interim Rule. *See* 68 Fed. Reg. 59684 (October 16, 2003); 69 Fed. Reg. 7978 (February 20, 2004).

3. Once the Secretary has designated a QATT, it qualifies to become part of a litigation management system. Specifically, if a claim arises “from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against or response or recovery [from an act of terrorism]” there shall be a Federal cause of action. 6 U.S.C. § 442 (2004). If such a cause of action arises, then *inter alia*:

- The United States District Court has exclusive jurisdiction for “all actions for any claim for loss of property, personal injury, or death arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller.” 6 U.S.C. § 442;
- Punitive damages are disallowed for such an action;
- Noneconomic damages are restricted to “an amount directly proportional to the percentage of responsibility of such defendant for the harm to the plaintiff, and no plaintiff may recover noneconomic damages unless the plaintiff suffered physical harm.” 6 U.S.C. § 442; and
- Any amounts recovered by a plaintiff “shall be reduced by the amount of collateral source compensation, if any, that the plaintiff has received or is entitled to receive as a result of such acts of terrorism that result or may result in loss to the Seller.” 6 U.S.C. § 442.
- Liability for all terrorism claims where a QATT has been deployed, “shall not be in an amount greater than the limits of liability insurance coverage required to be maintained by the seller under this section.” 6 U.S.C. § 443.

4. To further qualify for this system of risk management, any seller of QATT must obtain specific amounts of liability insurance. 6 U.S.C. § 443. The amount of liability insurance coverage to be obtained does not have to be “more than the maximum amount of liability insurance reasonably available from private sources on the world market at prices and terms that will not unreasonably distort the sales price of Seller’s anti-

terrorism technologies.” 6 U.S.C. § 443. Additionally, the seller must “enter into a reciprocal waiver of claims with its contractors, subcontractors, suppliers, vendors and customers, and contractors and subcontractors of the customers.” 6 U.S.C. § 443.

5. Additionally, the SAFETY ACT provides a statutory basis for the Government Contractor Defense doctrine. The Government Contractor Defense is an affirmative defense that provides a Contractor with immunity from liability for injury or harm if the Contractor can establish such a defense. In order to qualify for this defense, the Secretary shall do a “comprehensive review” of the anti-terrorism technology’s design, determine whether it conforms to the seller’s specifications and whether it is safe for its intended use. 6 U.S.C. § 442. The SAFETY ACT allows this doctrine to apply to sales of anti-terrorism technology to both the Federal Government and non-Federal Government customers. 6 U.S.C. § 442. The Act provides that:

[s]hould a product liability or other lawsuit be filed for claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies approved by the Secretary, as provided in paragraphs (2) and (3) of this subsection, have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller, there shall be a rebuttable presumption that the government contractor defense applies in such lawsuit.” 6 U.S.C. § 442.

Moreover, the SAFETY ACT provides the Secretary with exclusive responsibility for reviewing and approving anti-terrorism technology. If a Contractor receives this approval, it may then assert this defense. Specifically:

(2) ...The Secretary will be exclusively responsible for the review and approval of anti-terrorism technology for purposes of establishing a government contractor defense in any product liability lawsuit for claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies approved by the Secretary, as provided in this paragraph and paragraph (3), have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller. Upon the Seller's submission to the Secretary for approval of anti-terrorism technology, the Secretary will conduct a comprehensive review of the design of such technology and determine whether it will perform as intended, conforms to the Seller's specifications, and is safe for use as intended. The Seller will conduct safety and hazard analyses on such technology and will supply the Secretary with all such information.

(3) Certificate. For anti-terrorism technology reviewed and approved by the Secretary, the Secretary will issue a certificate of conformance to the Seller and place the anti-terrorism technology on an Approved Product List for Homeland Security. 6 U.S.C. § 442.

6. POC for this subject is Lea Duerinck, DSN 992-3188.