

TRANSPORTATION SECURITY ADMINISTRATION



14th Annual Aviation Symposium The SAFETY Act 2.0: Not Just for What You Think

Francine Kerner
TSA's Office of Chief Counsel



February 2020

What Is the Purpose of the SAFETY Act?



- In the aftermath of the 9/11 attacks, the private sector was reluctant to deploy security technologies and services in civilian settings due to liability risks.
- In 2002, Congress enacted the Support Anti-terrorism by Fostering Effective Technologies Act or the SAFETY Act as part of the Homeland Security Act of 2002.
- The purpose of the SAFETY Act is to ensure that the threat of liability does not deter potential manufacturers or sellers of effective anti-terrorism technologies from developing and commercializing technologies that could save lives. It achieves this purpose by creating a system of risk and litigation management.

What Technologies Does the Safety Act Cover?



- The SAFETY Act applies to a broad range of technologies, including products, services, and software, or combinations thereof—as long as the Office of SAFETY Act Implementation within the Science and Technology Directorate determines that a technology should be designated as a Qualified Anti-Terrorism Technology or “QATT.”
- The Office of SAFETY Act Implementation may give a SAFETY Act award to a system containing many component technologies (including products and services) or may award specific component technologies individually.
- Further, a Qualified Anti-Terrorism Technology need not be newly developed—it may have already been employed (*e.g.* “prior United States government use”) or may be a new application of an existing technology. It may also be technology in a prototype stage.

How Is Technology Evaluated?



In evaluating whether to designate technology as Qualified Anti-Terrorism Technology, DHS utilizes the following criteria:

- Prior US Government use or demonstrated substantial utility and effectiveness
- Availability for immediate deployment in public and private settings
- Extraordinarily large potential liability risk exposure to the Seller
- Likelihood the technology will not be deployed absent protection
- Magnitude of risk to the public if such technology is not deployed
- Assessed capability to substantially reduce risks of harm
- Effective in facilitating defense against acts of terrorism, by preventing, defeating or responding to such acts
 - *See SAFETY Act Application Kit online for more details.*

What Are the Types of Awards?



There are three types of awards under the SAFETY Act (from least to most protective):



Developmental Test and Evaluation Designation (DTE)

“Needs more proof, but potential exists”



Full Designation

“Proven effectiveness, with confidence of repeatability”



Certification

“Consistently proven effectiveness, with high confidence of enduring effectiveness”

Each award gives the QATT Seller benefits such as an insurance liability cap, determined by DHS, and various risk and litigation management protections.

Risk and Litigation Management Protections



- Exclusive jurisdiction in Federal court for suits against QATT Sellers.
- Liability is limited to amount of liability insurance coverage specified for each QATT (determined by DHS).
 - Sellers cannot be required to obtain any more liability insurance than is reasonably available “at prices and terms that will not unreasonably distort the sales price.”
- Joint and several liability prohibited—Sellers only liable for percentage of noneconomic damages that is proportionate to their responsibility.
- Complete bar on punitive damages and prejudgment interest.
- Plaintiff’s recovery is reduced by amount of collateral source compensation, *i.e.*, plaintiff’s eligibility or receipt of insurance or government benefits.
- Rebuttable presumption that Sellers are entitled to the “government contractor defense.”

Application Materials and Process



- **First Steps:**
 - Register online with Office of SAFETY Act Implementation (OSAI) as a potential QATT Seller
 - Determine whether seeking DTE, Designation, or Certification Award
 - Request a Pre-Application Consultation
 - Apply for selected award(s)

- Application will require answering questions such as the following:
 - What is the technology?
 - What is the technology intended to do?
 - What sort of terrorist attack could be countered by the technology, and how?
 - What is the estimated scope of damage that the technology could prevent?
 - Why should the technology qualify for a SAFETY Act award?

- **No Cost for Consultation or Application**—however, must buy designated insurance coverage within 30 days of award.

Insurance Liability Determination



- DHS will determine the amounts and types of liability insurance that the Seller will be required to obtain and maintain, based on criteria such as the following:
 - What current insurance coverage would be available to satisfy third party claims against the technology, resulting from an act of terrorism?
 - If unable to obtain appropriate insurance, what attempts have been made?
 - Would available insurance distort the sales price of the technology?
 - What liability insurance did the Seller have prior to application?
 - What is the amount of liability insurance typical of Sellers of comparable technologies?

- Scope of Coverage
 - Claims for liability arising from an Act of Terrorism can only be brought against Seller, and “... may not be brought against the buyers, the buyers’ contractors, downstream users of the QATT, the Seller’s suppliers or contractors, or any other person or entity...”

Preamble; Exclusive Federal Jurisdiction and Scope of Insurance Coverage; Regulations Implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, 71 Fed. Reg. 33150 (June 8, 2006).
 - The Act does not limit liability for harms caused by qualified anti-terrorism technologies when no Act of Terrorism has occurred. An event must be deemed an Act of Terrorism by the Secretary of DHS in order for the protections to be invoked.

What is the Government Contractor Defense?



- In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the U.S. Supreme Court established the government contractor defense. In *Boyle*, a pilot was unable to escape a crashed helicopter because of a federal design specification, which was in violation of state law; plaintiff sued the manufacturer under several state tort liability claims.
- The Court reasoned that it made little sense to exclude Government contractors from liability protections where contractors performed work on behalf of the Government, as the Government would have had immunity if it had done the work itself.
- Further, withholding immunity from government contractors would negatively affect Government contracting and discretionary powers, as liability concerns would cause contractors to either decline Government specifications, or to raise prices.

How is the SAFETY Act's Government Contractor Defense Different?



- By statute, a Certification awardee may claim the defense in litigation even if they are not a government contractor.
- The defense provides broad immunity against liability claims such as design defects or failure to warn.
- The defense can only be rebutted by clear and convincing evidence that the Seller acted fraudulently or with willful misconduct (*i.e.*, knowing and deliberate intent to deceive DHS), in submitting information to DHS during course of SAFETY Act Application process.
- DHS, working under the authority of the SAFETY Act, makes eligibility determinations; no judicial determination required.

Recap: Types of SAFETY Act Awards & Benefits



Developmental Test & Evaluation Designation

"Needs more proof, but potential exists"

- Insurance Liability Cap
 - but only for identified test event(s)
 - Shorter duration (up to three years)
- Exclusive Action in Federal Court
- Limitations on Litigation Damages / Plaintiff's Recovery



Full Designation

"Proven effectiveness, with confidence of repeatability"

- Insurance Liability Cap
- Exclusive Action in Federal Court
- Limitations on Litigation Damages / Plaintiff's Recovery
- Five-year term



Certification

"Consistently proven effectiveness, with high confidence of enduring effectiveness"

- Government Contractor Defense
- Placed on SAFETY Act's Approved Product List for Homeland Security
- All Designation benefits
- Five-year term

Obligations Post-SAFETY Act Award



- Notification to DHS if QATT is “significantly modified.”
 - Applies when non-routine changes made take QATT out of the scope of the awarded Designation or Certification.
 - Not required for post-sale changes by purchaser unless Seller has expressly agreed to such changes.
 - DHS will assess whether the QATT is outside the scope of the Seller’s award and take appropriate action.
 - *However*, no designation or certification will retroactively or automatically terminate.
 - Awards will continue in full force and effect during review, unless the DHS Secretary takes discretionary action.

- Maintain required insurance.

- An award may be terminated if a Seller:
 - Fails to provide any of the insurance certifications required.
 - Provides a false certification.

Case Law: MGM Resorts



- On October 1, 2017, a mass shooting attack occurred at the Route 91 Harvest Festival in Las Vegas, Nevada. 58 people died and 500 others were injured.
- The shooter attacked the festival from his hotel room in the Mandalay Bay resort.
- MGM Resorts International owned both the festival property and the hotel.
- Victims of the shooting sued MGM on two theories:
 - Liability for the hotel's security protocols and procedures, insofar as the shooter was able to stockpile weapons in his hotel room.
 - Liability for, among other things, the festival's security, evacuation protocols and procedures, hiring and training of security personnel, and quality of emergency response on October 1, 2017.

Case Law: MGM Resorts



- The security company employed for the Route 91 Harvest Festival, Contemporary Services Corporation (“CSC”), carried a SAFETY Act Certification and Designation.
- MGM attempted to centralize multiple lawsuits arising from the Route 91 shooting into one federal action and to invoke the SAFETY Act government contractor defense, arguing that its security vendor’s SAFETY Act certification/designation immunized MGM from liability.
- The U.S. Judicial Panel on Multidistrict Litigation denied MGM’s motion to centralize litigation, and did not address the merits of the SAFETY Act defense invoked.
- Thereafter, MGM reached a settlement agreement with the victims, agreeing to pay up to \$800 million in total.

What SAFETY Act awards involve TSA?



- **MorphoTrust USA Inc.** — providing Enhanced Credential Authentication Technology, a suite of products that automatically verifies multiple security features on identification documents, to further enhance the security of the screening process.
- **Global K9 Protection Group** — providing Certified Cargo Security Facility – Canine (CCSF-K9) services, providing TSA-regulated entities option to screen air cargo for unauthorized explosives and other destructive substances through use of Certified Third-Party Canine-Cargo teams.
- **Midnite Express** — providing Certified Cargo Screening Facilities (CCSF).
- **Aegis Defense Services** — through the Screening Partnership Program (SPP), providing trained and certified personnel who conduct passenger, airport employee, and baggage screening in accordance with TSA guidelines and standard operating procedures.
- **Smiths Detection U.S. Holdings, SAFRAN, Morpho Detection** — providing Integrated Logistics Support services, establishing, implementing, and maintaining programs sustaining Government-certified Explosives Detection Systems and other technologies deployed by TSA.
- **IBM Corp.** — providing Risk Assessment Platform (“RAP”), a system of integrated hardware, software, and services incorporated into an operating framework that can provide authentication and risk assessment information to TSA.

What SAFETY Act awards involve TSA?



- **Southwest Airlines** — providing Southwest Aircraft Operator Standard Security Program (AOSSP), which is the development and implementation of a TSA-approved AOSSP, inclusive of physical and electronic security measures, tools, and procedures. Does not include security screening of passengers, accessible property, or checked baggage.
- **Boeing** — providing aviation security services for Boeing commercial aircraft deliveries. Includes: personnel screening and training; passenger and cargo screening process, equipment, materials, software and data.
- **Boeing** — providing Risk Management Analysis Process, supporting TSA’s assessment of commercial aviation vulnerabilities and security risks.
- **Global Elite Group** — providing aviation security services, including aircraft access control, ramp security, aircraft search, catering inspection and security, airport security services, employee screening, and security services for private air charter aircraft operators operating under a TSA Private Charter Standard Security Program (DTE).
- **Alclear** — providing CLEAR technology, voluntary, biometrically secured identification and access system for use as part of TSA’s Registered Traveler program and other similar programs.

More SAFETY Act Awards can be found online at www.safetyact.gov, under “Approved Technologies.”

TRANSPORTATION SECURITY ADMINISTRATION



14th Annual Aviation Symposium Update: Actions Mitigating Spread of Novel Coronavirus

**Francine Kerner
TSA's Office of Chief Counsel**



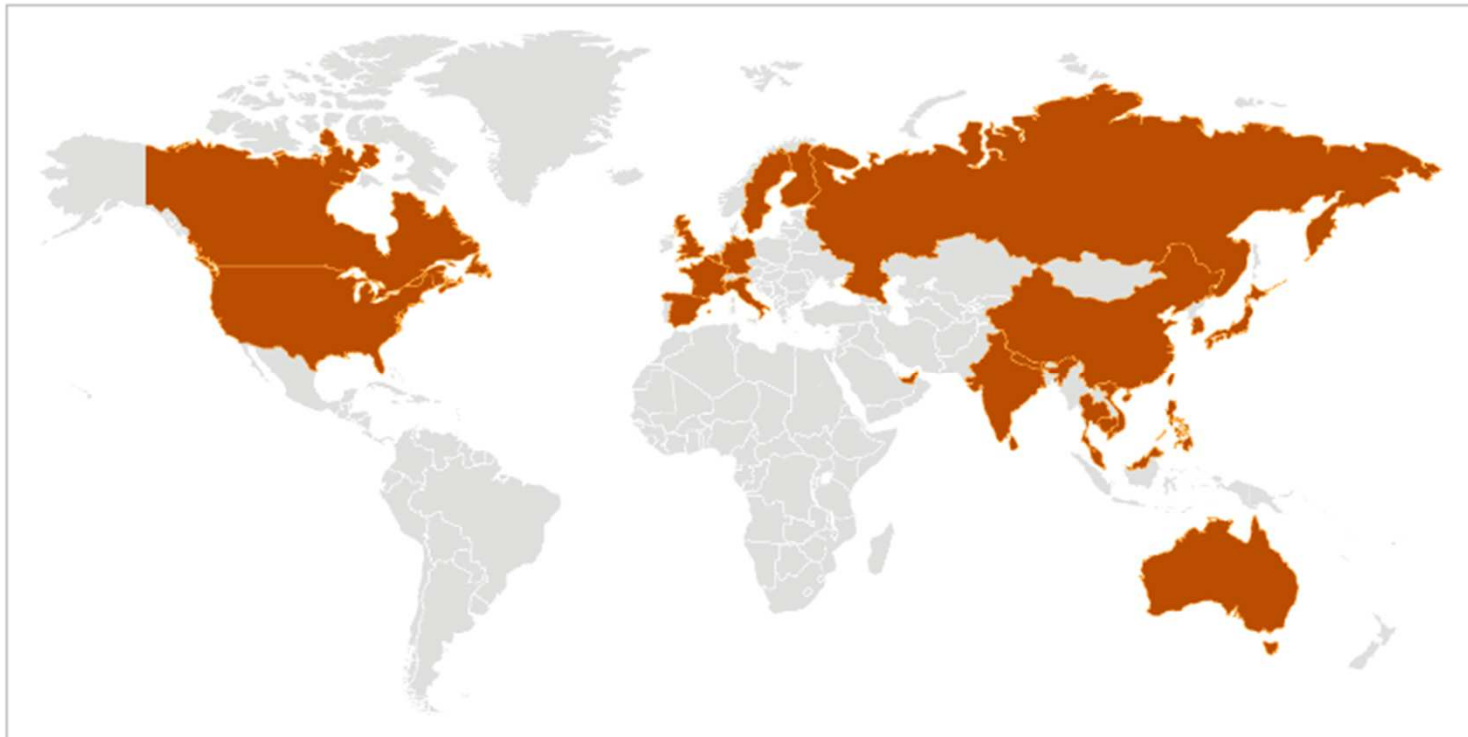
February 2020



What is the Novel Coronavirus (n-CoV)?

- Coronaviruses are a large family of viruses that are common in many different species of animals, including camels, cattle, cats, and bats. Rarely, animal coronaviruses can infect people and then spread between people such as with Middle East Respiratory Syndrome (MERS) and Severe Acute Respiratory Syndrome (SARS).
- The novel coronavirus is a type of virus causing viral pneumonia. Symptoms include cough, fever, shortness of breath, and in rare cases, severe respiratory problems, kidney failure, or death.
- Still many unknowns, such as how contagious it may be.
- Diagnosis may be difficult with only a physical exam, because symptoms resemble the flu or a bad cold. Laboratory tests can confirm a diagnosis.
- Can be passed from person to person.
- Currently no specific treatment.

Spread of the Novel Coronavirus



*Confirmed 2019-nCoV Cases Globally, as of January 31, 2020.
(28 locations)*

Source: <https://www.cdc.gov/coronavirus/2019-ncov/locations-confirmed-cases.html#map>



What is the Novel Coronavirus (n-CoV)?

- First detected in Wuhan City, Hubei Province, the People's Republic of China (PRC).
- The World Health Organization has declared the outbreak of 2019-nCoV a Public Health Emergency of International Concern.
- The Federal Aviation Administration (FAA) and Centers for Disease Control (CDC) have issued Interim Health Guidance for Air Carriers and Crews, available online.



Presidential Proclamation

- “Restrict and suspend entry into the United States, as immigrants or non-immigrants, of all aliens who were physically present within the People’s Republic of China ... during the 14-day period preceding their entry or attempted entry into the United States.”
- Effective February 2, 2020.
- The Secretary of Health and Human Services will recommend, at least every 15 days after February 2, whether the President continue, modify, or terminate the proclamation.



Presidential Proclamation

- Medical Screening and Quarantine
 - “The Secretary of Homeland Security shall take all necessary and appropriate steps to regulate the travel of persons and aircraft to the United States to facilitate the orderly medical screening, and where appropriate, quarantine of persons who enter the United States and may have been exposed to the virus.”
 - “Such steps may include directing air carriers to restrict and regulate the boarding of such passengers on flights to the United States.”

- 11 exceptions for certain aliens, including those who:
 - Are lawful permanent residents;
 - Have a specified familial or legal relationship to a lawful permanent resident;
 - Are traveling to the U.S. as air or sea crew, under 18 U.S.C. 1101(a)(15)(C) or (D).

Actions Mitigating Spread of Novel Coronavirus



Federal Register Notice

- On January 31, 2020, the Secretary of DHS issued a decision directing all flights to the U.S. carrying persons who recently traveled from, or were otherwise present in the PRC, to arrive at one of the U.S. airports where the U.S. Government is focusing public health resources. This implemented the January 31 Presidential Proclamation.
- The Federal Register Notice expands the list for a total of 11 designated airports. (JFK, ORD, SFO, SEA, HNL, LAX, ATL, IAD, EWR, DFW, DTW)
- Published by CBP and TSA on February 4, 2020. Currently in effect.

Actions Mitigating Spread of Novel Coronavirus



— TSA Issued Security Directive/Emergency Amendment —

- In accordance with the Presidential Proclamation, requires aircraft operators and foreign air carriers to:
 - Restrict alien persons from boarding a flight to the United States if the individual has been present in the PRC within the preceding 14 days of the date of his/her entry or attempted entry into the United States.
 - Question each passenger to determine whether the individual has been present in the PRC in the preceding 14 days.
- Individuals who have been in the PRC who are permitted to board a flight to the United States will be flown to one of 11 U.S. airports.
- Effective starting February 2, 2020; Currently active.

Actions Mitigating Spread of Novel Coronavirus



— Centers for Disease Control (CDC) Actions —

- Conducting, with CBP, enhanced entry screening of passengers who have been in the PRC within the past 14 days at 11 designated U.S. airports. CBP officials will also refer symptomatic travelers to CDC staff for evaluation at all 20 U.S. port of entry quarantine stations.
 - Up to 14 days of mandatory quarantine for U.S. citizens who have been in Hubei province within 14 days of their return.
 - Proactive entry health screening and up to 14 days of self-quarantine with health monitoring for U.S. citizens who have been in other areas of mainland China within 14 days of their return.
- Developed a real time test to diagnose 2019-nCoV; currently, testing for this virus must take place at CDC, but in the coming days and weeks, CDC will share these tests with domestic and international partners.
- Activated its Emergency Operations Center to better provide ongoing support.
- Issued Level 3 Travel Health Notice, recommending that travelers avoid all nonessential travel to all of the People's Republic of China.
- Working with the World Health Organization, as well as state and local public health partners. Has deployed multidisciplinary teams to Washington, Illinois, California, and Arizona to assist health departments.
- Published Health Alert Notice Advisory and clinical care guidance for health care providers and state and local health departments.