

MARSH RISK CONSULTING

UNDERSTANDING AND GETTING STARTED WITH THE SAFETY ACT

May 9, 2017

Today's Discussion and Speakers

- Welcome/Introductions.
- SAFETY Act Discussion:
 - Overview.
 - Protections created.
 - Examples.
 - Managing the submission.
 - Maintaining coverage.
 - What to expect in court.
- Questions and Answers.

Speakers:

*Scot Ferrell
Managing Director
Marsh Risk Consulting*

*Ray Biagini
Partner
Covington & Burling LLP*

*Scott Freling
Partner
Covington & Burling LLP*

Marsh/Covington SAFETY Act Experience

- SAFETY Act services help clients understand and reduce liability exposure related to terrorist activities at venues and sporting events.
- Roles:
 - **Covington:** Assists with your application process – filing, managing submission, and maintaining SAFETY Act award.
 - **Marsh Risk Consulting:** Assists clients with completing written documentation and manuals needed for the submission process including:
 - Risk assessments (1st and 3rd party).
 - Safety/hazards analyses.
 - Security program.
 - Emergency response plan.
 - Crisis management plan.
 - Cybersecurity network security assessments.

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OVERVIEW OF THE SAFETY ACT

The Perfect Storm Led to Enactment of the SAFETY Act in 2002

- Post-9/11 realities:
 - Because of **liability** concerns, key homeland security providers were not going to sell their anti-terror technology into the marketplace.
 - Federal courts were now finding that terrorist attacks were **foreseeable**.
 - Insurance companies **stopped** writing terror coverage.
 - **Pro-tort reform** White House and Congress.
- The SAFETY Act is **landmark legislation**, eliminating or minimizing tort liability for sellers or those that deploy anti-terror technology (ATT) approved by the US Department of Homeland Security (DHS) should suits arise in the US after an act of terrorism.

Key Definitions

Act of Terrorism: An **unlawful** act causing harm to a person, property, or entity in the US, **using or attempting to use** instrumentalities, weapons, or other methods designed or intended to cause mass destruction, injury, **or other loss** to citizens or instrumentalities of the US.

The SAFETY Act defines “**loss**” as death, injury, or property damage to third parties, **including business interruption loss.**

Anti-terror technologies (ATT): Broadly applied by DHS to cover technologies deployed in **defense against** or **response or recovery from** a terror attack. These technologies **include services** such as security training, vulnerability assessments, emergency response plans, guard services, perimeter security and access intrusion systems, etc. Such technology or services **must have a material anti-terror purpose.**

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PROTECTIONS OF THE SAFETY ACT

Certification: The Highest Form of Protection

- Presumption that the seller/deployer of ATT is **immediately dismissed** from the suit unless there is **clear and convincing** evidence that the seller/deployer **acted fraudulently** or with **willful misconduct** in submitting data to DHS during the application process.
- No punitives.
- Suit can be filed only in federal court.
- Any liability is **capped** at an agreed upon limit, usually your **terror insurance** coverage limits.



Designation

- Includes all of the benefits of Certification **except** presumption of immediate dismissal.
- It is used primarily in relation to the development, testing, and evaluation of ATT.

Coverage

These Certification and Designation protections **also apply** to a seller's/deployer's :

- Subsidiaries.
- Vendors.
- Distributors.
- Customers.
- Contributors to or utilizers of SAFETY Act-approved technologies.

Important Clarification

- DHS clarified in 2006 that the protections can apply to entities deploying **their own anti-terror services** to protect **their own facilities and assets** — crucial for sports and entertainment venues.
- Protections will apply even if the act of terror occurs **outside the US** so long as the “**harm,**” including **financial harm,** is to persons, property, or entities in the US.



Key Considerations

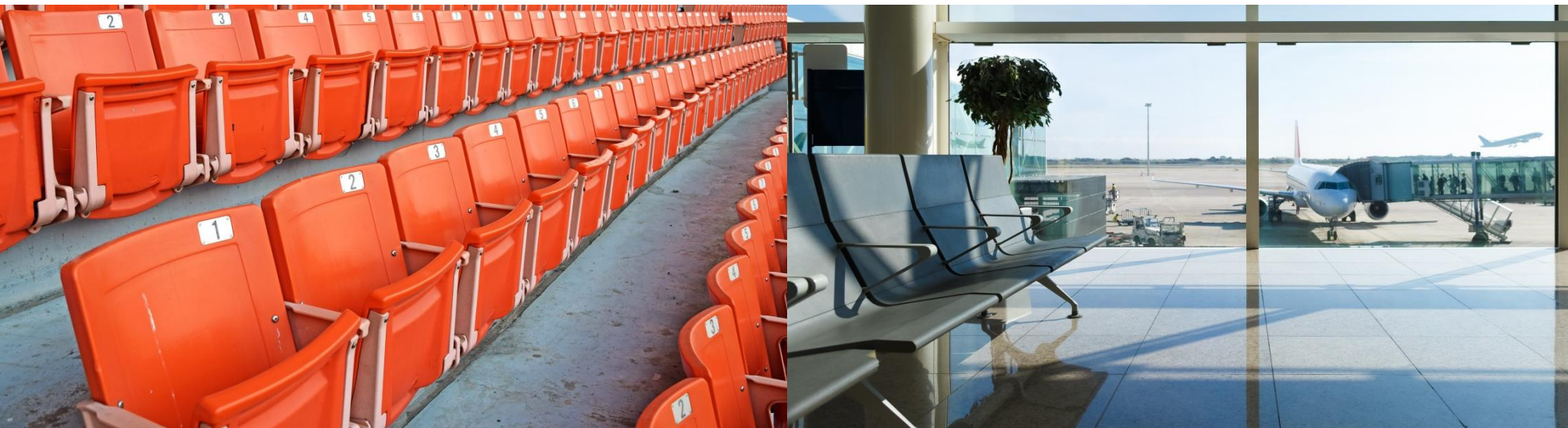
- Coverage is usually awarded for **five years** from the date of the decision. However, DHS has also awarded SAFETY Act protections to apply **retroactively** to **past deployments** of substantially equivalent ATT.
- To obtain these tort protections, it is **crucial** that you demonstrate to DHS the “**proven effectiveness**” of your ATT, e.g., through your own internal testing/quality control, third party assessments and evaluations, use of established vendor selection criteria and processes, etc.

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EXAMPLES OF SAFETY ACT AWARDS

The SAFETY Act Is Used by Many Industries

- Sports and entertainment leagues and venues.
 - Professional sports leagues for their venue security standards and compliance auditing programs.
 - Various professional sports venues for their security practices and protocols.
- Airports and other high-profile facilities.



Defining Your Coverage

SAFETY Act coverage requires **established** and **documented** security planning procedures and protocols for the following:

Security practices:

- Threat and vulnerability assessment protocols.
- Event day vs. non-event day security procedures.
- Emergency evacuation plans.
- Vendor selection.
- Hiring, vetting, and training of security personnel.
- Coordination response/recovery procedures with governmental entities.

Defining Your Coverage

Deployed physical security systems:

- Perimeter security, including guards and canines.
- Access intrusion detection systems, including CCTV, magnetometers, and metal detectors.
- Command and control centers.
- Delivery screening and public address systems.

Deployed cybersecurity systems:

- Recovery, restoration, and credentialing technologies.

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OBTAINING SAFETY ACT COVERAGE

Setting Expectations

- You must apply for it.
- You must be committed to developing the necessary responses to complete the application.
- Prudent for you to engage in a “pre-filing” consultation with DHS to preview your application and obtain important guidance.
- Each of your venues must seek separate SAFETY Act coverage.

Preparing and Submitting the Application

You must complete and submit DHS' SAFETY Act **application kit**:

- **Technical:** Emphasizes evidence of the efficacy of the ATT; readiness for deployment; existence of substantial third-party risks; safety/hazards analyses; and established anti-terror decision-making processes.
 - This is key “Go” or “No Go” decision point.
 - An ATT readiness assessment should be performed and include consideration of other similarly-situated SAFETY Act awards.
 - Based on the results of the assessment, a corrective implementation plan should be developed using external partners such as Marsh Risk Consulting or your own internal team.
 - Need to professionally **document** any gap assessments, security plan/program, and emergency response plan/manuals using latest industry protocol and practices before proceeding with the remainder of the application.

Preparing and Submitting the Application

- **Financial:** Requests (only for the ATT at issue) your **revenues or expenditures** for the past three years and a **projection of revenues or expenditures** for the current and next two years.
- **Insurance:** Requests information on your **terror insurance policies available** to satisfy third-party claims arising out of an act of terror involving the ATT at issue, including information on exclusions, limits, deductibles and self-retentions. Your terror insurance limits (or lower amounts negotiated with DHS) usually become your **SAFETY Act cap on liability**.
 - Your Marsh client executive can assist with any insurance evaluation that may be needed.

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MANAGING THE SUBMISSION

What to Expect During the Evaluation Process

- The DHS **review** and **approval** process takes about 120 days.
- DHS has **200+** experts from academia, federal government, national labs, and FFRDCs available to review applications.
- Applicant may:
 - Face possible site visits by DHS.
 - Need to address DHS Requests for Information.



Protecting Your Confidential Information

- Regarding **confidentiality**, DHS has stated that it is committed to **vigorous protection** of each applicant's SAFETY Act data.
 - Those conducting the review enter into **non-disclosure** agreements and are subject to a **conflicts-of-interest** evaluation.
- SAFETY Act data is **protected** by:
 - The **Trade Secrets Act**.
 - Exemption 1 (“**national security**”) and Exemption 4 (“**privileged or confidential information**”) of FOIA.
 - The **Critical Infrastructure Information Act** as a voluntary submission.
- Unauthorized disclosure is subject to **criminal** penalties.
- DHS agrees to **not** share data outside of DHS without **express permission** of the applicant.

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MAINTAINING SAFETY ACT COVERAGE

Post-Award Considerations

- **Insurance:** You must certify that you maintain the required types and amounts of terror insurance.
 - Continuing obligation to advise DHS of any **material change** in the type or amount of terror insurance, including reduction, termination, or cancellation.
- **Modifications of ATT:** You should follow the DHS modification process for any **material** changes to the ATT to ensure your coverage is updated and accurate.
- **Coverage renewal:** Three years into your five-year coverage period, you can begin the process to renew your SAFETY Act coverage and obtain an additional **five years of coverage**.

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WHAT TO EXPECT IN COURT

What to Expect in Court

- DHS' regulatory positions and interpretations of key aspects of the SAFETY Act will help ensure **potent** application of the Act in any court action.
- **Secretary of DHS** will determine on a case-by-case basis which terror incidents are covered under the SAFETY Act.
- **Triggering** your SAFETY Act coverage in court will depend somewhat on the allegations in the plaintiffs' complaint and the scope of your SAFETY Act coverage.
- This underscores the need to draft your application with sufficient **breadth** and **depth** so as to anticipate and defeat potential plaintiffs' tort allegations.

SUMMARY AND QUESTIONS

The background features a dark blue top section. Below it, there are three horizontal bands of varying shades of blue and teal, separated by wavy, organic lines. The bottom-most band is a bright cyan color.

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Thank You

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