OSAI Issues Guidance on Government Contractor Defense for Certified Anti-terror Technologies

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Congress enacted the **SAFETY Act** in 2002 in an effort to incentivize the development of antiterrorism technologies following the attacks of September 11, 2001. The Act affords liability protections to sellers of **Qualified Anti-Terrorism Technologies ("QATTs")** in the event of an act of terrorism where QATTs are deployed. Although the SAFETY Act's protections have not yet been tested in court, a <u>recent publication</u> from the Department of Homeland Security's Office of SAFETY Act Implementation ("OSAI") further explains and reaffirms how the Act's most significant liability protection—the government contractor defense—would operate to protect a SAFETY Act-approved company sued in court following a terrorist attack.

OSAI can award three possible levels of SAFETY Act coverage: (1) Developmental Testing and Evaluation Designation, (2) Designation, or (3) Designation and Certification ("Certification"). All three levels of protection grant QATT sellers liability protections, including liability caps at DHS-determined insurance levels and prohibitions on the recovery of punitive damages or prejudgment interest. However, only Certification grants QATT sellers the added liability protection of presumptive immunity from suit in the form of the government contractor defense.

The guidance that OSAI recently issued highlights the broad protections that the government contractor defense provides for Certified QATTs. Derived from the Supreme Court's decision in *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988), the defense originally immunized government contractors from product liability claims whenever (1) the government issued or approved reasonably precise specifications (2) to which the product conformed, and (3) the contractor informed the government about any potential dangers associated with the equipment actually known to the contractor, but not to the government. OSAI's guidance document makes clear that in passing the SAFETY Act, Congress codified *Boyle* as a static rather than common law defense in order to give Certified QATT sellers "a degree of assurance and certainty regarding the extent of, and manner in which, the defense may apply during litigation." Because the SAFETY Act Certification process necessarily requires an in-depth government review of the proposed QATT,

Boyle's elements are satisfied in this context by a showing of (1) a valid Certification, and (2) the absence of any unapproved material changes to the QATT. "Accordingly, . . . Certification of the QATT is the only evidence necessary to establish that the Seller is entitled to a presumption of dismissal from suit." OSAI re-emphasizes that this presumption can only be overcome if, during the SAFETY Act application process, the applicant acted with a "knowing and deliberate intent to deceive the government."

Thus, this recent OSAI publication re-enforces the significant protections afforded by the Act and provides useful perspective to current and prospective Certification applicants.

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