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DEPARTMENT OF HOMELAND SECURITY

SAFETY ACT OF 2002

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Introduction. Following the horrific terrorist attacks of September 11, a number of lawsuits were filed against airports, airplane manufacturers, security companies, and government entities like the Port Authority of New York/New Jersey. A Federal judge has permitted those lawsuits to proceed, saying that the use of an airplane as a suicide weapon was potentially foreseeable. As a result, the potential liability costs for all providers and users of anti-terror products and services have become virtually unlimited.

The Federal government, recognizing that such massive liability would crush the research, development, sale and use of anti-terror technologies, passed the SAFETY Act as part of the Homeland Security Act of 2002. In short, the SAFETY Act essentially eliminates liability that could arise out of a terrorist attack for sellers whose anti-terror products or services have been reviewed and approved by DHS.

Continuing its outstanding tradition of providing the best services possible, Michael Stapleton Associates (“MSA”) proudly announces that it has received liability protections from the Department of Homeland Security (“DHS”). MSA has been granted coverage under a new federal law known as the “Support Anti-Terrorism By Fostering Effective Technology Act” (the “SAFETY Act”). As explained below, the tort protections that accompany SAFETY Act coverage will result in dramatically lower liability risks for MSA *and* its customers should a future act of terrorism occur.

Background.

SmartTech provides conventional explosive and weapons detection coupled with remote access to a highly skilled bomb technician on demand through MSA. The system includes Device Recognition, Alerts, Training, Image Archiving, and Maintenance and related technical manuals. MSA bomb technicians review images through the SmartTech system and provide feedback to the customer. Each of MSA’s bomb technicians shall have graduated from the Federal Bureau of Investigation’s Hazardous Device School as a Certified Bomb Technician.

MSA’s Explosive Detection Teams include certified and trained explosive detecting canines and their human handlers. The Explosive Detection Teams are utilized to detect and counter conventional explosives and conventional weapons. Each of MSA’s explosive detecting canines shall have been trained and certified in accordance with the Training Standards for Explosive Detecting Canines established by the North American Police Work Dog Association.

Summary of SAFETY Act

The SAFETY Act was designed to encourage companies to bring Anti-terrorism technologies to market by providing sweeping liability limitations, and in certain cases, complete immunity for all third-party claims brought against Sellers and Buyers of anti-terrorism technologies for damages resulting from terrorist acts. This protection applies for qualified anti-terrorism technologies that are sold to the federal government and state governments, and even to purely commercial sales. **The liability limiting protections apply not only to the Seller of the technology but also to every entity that purchases that technology from the Seller.**

Summary of SAFETY Act

The safety act creates certain liability limitations for all claims arising out of, relating to or arising from an act of terrorism where “qualified anti-terrorism technologies” are in use. The SAFETY Act provides the following six protections:

- Exclusive federal court jurisdiction for suits against Sellers and Buyers of “qualified anti-terrorism technologies;”
- A limitation on Sellers’ liability of qualified anti-terrorism technologies to an amount of liability insurance coverage specified for each individual technology, provided that the Sellers will not be required to obtain any more liability insurance coverage than is reasonably available “at prices and terms that will not unreasonably distort the sales price” of the technology;
- Elimination of joint and several liability for non-economic damages, so that Sellers and Buyers may only be liable for that percentage of non-economic damages proportionate to their responsibility for the harm;
- A complete bar on punitive damages and prejudgment interest for Sellers and Buyers;
- A reduction of plaintiffs’ recovery by amounts that plaintiffs received from “collateral sources,” such as insurance benefits or other government benefits; and
- A rebuttable presumption that the Seller and Buyer are entitled to the “government contractor defense.”

Definition: Act of Terrorism

- Is unlawful;
- Causes harm to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States; and

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- Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

The rule makes clear that there are two sets of SAFETY Act protections, conferred upon Sellers and Buyers by two separate actions by the DHS Secretary.

- All the protections except the rebuttable presumption of the application of the government contractor defense, apply to those technologies “designated” by the secretary as “qualified anti-terrorism technologies.” **MSA received designation for SmartTech® and Explosive Detection Canines on June 18, 2004**
- The rebuttable presumption of the application of the government contractor defense is an additional protection that applies only to those qualified anti terrorism technologies that are the subject of an additional “certification” by the secretary under section 863(d) of the SAFETY Act. **MSA received certification for SmartTech® and Explosive Detection Canines on June 18, 2004**

Thus, a technology may be “designated” as a qualified anti-terrorism technology and provide the Seller and Buyer of that technology with a the first five of the protections outlined above, but not gain the protection offered by the rebuttable presumption of the government contractor defense – an additional certification by the secretary is required for that additional and very significant protection. The converse is not true; a technology may not be “certified” for application of the government contractor defense unless it is also “designated” as a qualified anti-terrorism technology.

Qualified Anti-Terrorism Technology”

The SAFETY Act applies to “technologies,” not just products. It applies to services (including support services), software, information technology and all other technologies 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.”

The SAFETY Act provides seven criteria that the Secretary must consider, to the extent applicable, in ruling on an application for “designation” as a qualified anti-terrorism technology; (1) prior federal government use or demonstrated substantial utility and effectiveness; (2) availability of the technology for immediate deployment; (3) the potential liability of the Seller; (4) the likelihood that the technology will not be deployed unless the SAFETY Act protections are conferred; (5) the risk to the public if the technology is not deployed; (6) evaluation of scientific studies; and (7) the effectiveness of the technology in defending against acts of terrorism.

Insurance

Before the Secretary may designate a technology as a qualified anti-terrorism technology, he must examine the amount of liability insurance the Seller intends to maintain for coverage of the technology and certify that the coverage level is appropriate to satisfy otherwise compensable third-party claims that may be caused by an act of terrorism when qualified anti-terrorism technologies have been implemented. The SAFETY Act also provides that Sellers are not required to obtain

insurance in excess of the maximum amount reasonably available that would not unreasonably distort the sales price of the anti-terrorism technology.

Government Contractor Defense

While the protections available for qualified anti-terrorism technologies significantly limit the liability of a seller and Buyer of qualified anti-terrorism technologies, the additional protection available under the SAFETY act of the rebuttable presumption of the government contractor defense provides total immunity to both the Sellers of qualified anti-terrorism technologies and their customers.

The presumption of the government contractor defense applies to all “certified” qualified anti-terrorism technologies for all claims brought in any kind of lawsuit “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.” While the government contractor defense is a judicially created doctrine requiring the Seller to prove essential elements in order to qualify for the defense, the SAFETY Act supplants the case law so that once the Secretary “Certifies” the application for this additional protection the government contractor defense applies.

Significantly, the statutory government contractor defense available under the SAFETY Act provides immunity not only against all claims that might be brought by third parties relating to the sales to the government, it also applies to purely private transactions. Thus, once the Secretary “certifies” a qualified anti-terrorism technology for this additional protection, the Seller and Buyer are immune from Liability relating to sales of that technology in the commercial sector.

Moreover, under the case law, the government contractor defense is available only if the contractor manufactured the product in question in accordance with reasonably precise federal government specifications. Under the SAFETY Act, that is not the case. In reviewing an application, the Secretary will perform a “compressive review of the design of such a technology and determine weather it will perform as intended, conforms to the seller’s specifications, and is safe for use as intended.” The act also provides that the Seller will “conduct safety and hazard analyses and supply such information to the Secretary.

Thus, unlike the judicially created government contractor defense, the statutory government contractor defense will protect Sellers and Buyers of technology in the commercial marketplace and will allow qualified anti-terrorism technologies to be approved for such treatment eve if a federal specification is not involved.

The rule clearly adopts the broad protections provided by the case law to the SAFETY Act version of the government contractor defense. The rule recognizes that the scope of the defense is very broad, and expressly states that sellers and Buyers of “certified” qualified anti-terrorism technologies cannot be held liable under the SAFETY act for design defects or failure to war claims) unless the presumption is rebutted by evidence that the seller acted fraudulently with willful misconduct in submitting information to the Secretary in connection with its application).

Conclusion

The SAFETY Act is perhaps the most significant piece of tort reform legislation ever enacted. For qualified anti-terrorism technologies, liability is capped at the insurance levels required by the Secretary and other limitations on damages and the types

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of causes of action also apply. The additional protection provided by the rebuttable presumption of the statutory government contractor defense provides total immunity to the sellers and buyers of qualified anti-terrorism technologies that are “Certified” for this additional protection.

Make no mistake about the significance of this law. Because the SAFETY Act protects Sellers and Buyers of qualified anti-terrorism technologies, and every entity that purchases such technologies from that seller, the SAFETY Act “designation” and the additional “certification” relating to the government contractor defense, may soon become the security equivalent of the Good Housekeeping Seal of Approval.

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Press Release

For Immediate Release
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DEPARTMENT OF HOMELAND SECURITY ANNOUNCES FIRST DESIGNATIONS AND CERTIFICATIONS UNDER THE SAFETY ACT

The Department of Homeland Security announced today the issuance of Designations and Certifications for four anti-terrorism technologies under the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act). This is the first announcement in an ongoing process of review, analysis, and designation and certification of anti-terrorism technologies by the Department of Homeland Security.

“We at the Department of Homeland Security are thrilled to grant Designation and Certification for these technologies as effective tools in the fight against terrorism,” said Dr. Charles E. McQueary, Under Secretary for Science and Technology at the Department of Homeland Security. “This announcement illustrates that this legislation, and the process to implement it, are working to support businesses that develop technologies to protect the American people. We appreciate and encourage the innovative contributions of the private sector in providing new tools and new technologies that will help protect our homeland, and now it is time to let the marketplace work.”

The technologies are representative of the tools that private businesses, both large and small, from across America are developing to fight terrorism. The four anti-terrorism technologies for which Designation and Certification were announced today are:

Lockheed Martin Corporation Risk Assessment Platform: Lockheed Martin’s automated, threat-based Risk Assessment Platform is an integrated computer system that provides near real-time, event-driven terrorism threat analysis, allowing the focus of resources on the most imminent threats and greatest risks. The platform enables effective, responsible sharing of information between

private industry and the government through continuous independent auditing of compliance with policies governing access, use, and distribution of information.

Michael Stapleton Associates SmartTech System and Explosion Detection

Services: The SmartTech System is a two-way high-speed video/audio system designed to allow off-site bomb technicians to support clients in x-ray screening of items for explosives and hazardous materials through real-time viewing of images of suspicious items and then providing immediate guidance on identification and correct operational procedures. The real-time system eliminates disruptions to businesses, and through the use of additional resources including explosive detection canines, training programs, and radiation detection equipment, vastly increases the level of security provided to employees.

Northrop Grumman Biohazard Detection System (BDS): The Biohazard Detection System was developed by a Northrop Grumman Corporation-led team, and has been selected by the U.S. Postal Service to rapidly analyze environmental samples and detect potential biological threats as postal service, mail-sorting facilities nationwide. The BDS detects trace levels of DNA from anthrax spores and other biological agents as mail is processed on high-speed sorting equipment.

Teledyne Brown Engineering, Inc. WaterSabre™ : WaterSabre™ is a remotely operated, ultra-high pressure water jet cutting system designed to investigate and aid in the neutralization of explosive devices by providing a rapid means of gaining access to the interiors of devices and, when necessary, to aid in the neutralization of explosive devices. The system works by discharging a high-powered water stream that can cut through various containers, thus enabling technicians to gain access to a container or potential explosive device without the risk of injury.

The Office of SAFETY Act Implementation, which opened in October of 2003, has received 91 Pre-applications and 19 Full Applications for SAFETY Act Designation and Certification. The application itself is currently undergoing revision as the Department considers feedback from applicants, businesses, and industry groups in order to make the process as user-friendly as possible. In addition, DHS has been considering comments on the Interim Rule, as it was signed by Secretary Tom Ridge on October 10, 2003, as the Department prepares to issue its Final Rule to OMB in the near future.

The SAFETY Act is intended to facilitate the development and deployment of anti-terrorism technologies by creating systems of risk management and litigation management. Specifically, the SAFETY Act creates certain liability limitations for “claims arising out of, relating to, or resulting from an act of terrorism” where qualified anti-terrorism technologies have been deployed. Because there are many technologies important to the fight against terrorism, the SAFETY Act grants Designation and Certification for effective technologies that will prevent, detect, identify, or deter acts of terrorism, or mitigate the harm that such acts might otherwise cause, and that satisfy additional statutory criteria.

