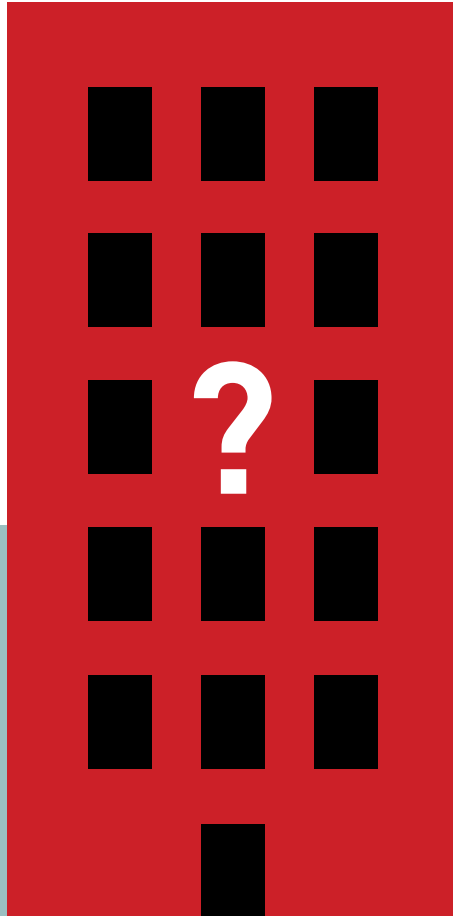


ENHANCED PROTECTION



Andrew J. Weiner
Partner
Pillsbury

Brian E. Finch
Partner
Pillsbury

Aimee P. Ghosh
Partner
Pillsbury

Samantha Sharma
Senior Associate
Pillsbury

Sarah Hartman
Law Clerk
Pillsbury

The SAFETY Act program offers real estate investors liability protections and other benefits—and building or portfolio owners of sufficient size and purpose may find it worthwhile to consider making a SAFETY Act application.

The risk of terrorist attacks faced by owners and operators of real property, and the consequent devastating impact to their properties and operations, has not materially diminished since the 9/11 attacks on the World Trade Center, even though twenty years have passed since the tragedy.

This risk is especially pronounced for owners and operators of properties that are of a size, location, or character that makes them a more likely target, potentially putting large numbers of employees, staff and visitors at risk. The US Department of Homeland Security (DHS) administers a program that enables owners and operators to manage this risk and hedge against resulting liabilities. Notably, DHS highlights that owners of stadiums, theme parks, and high-profile commercial buildings in major US cities have participated in this program.

This article provides a high-level introduction to the liability protections offered under this program, created by the Support Anti-Terrorism by Fostering Effective Technologies Act (SAFETY Act), enacted by Congress in 2002.

SAFETY ACT OVERVIEW

The SAFETY Act offers providers of security products, services, and security programs designed to deter acts of terrorism—including internally deployed security programs at large commercial properties—the opportunity to apply for, and secure, significant liability protections.

US courts have categorized the threat of a terrorist attack as “reasonably foreseeable,” and officers and directors have been held to owe a duty of oversight in that regard. This exposes property owners (and their direct or indirect owners, management, and employees) to material (and potentially overwhelming) liability for property damages and injury to, or death of, individuals caused by third-party actors on or around their assets. Not all of this risk is insurable, and the cost of available insurance is substantial.

The SAFETY Act, by its terms, can be invoked upon the occurrence of an “Act of Terrorism,” which is an event determined by the DHS Secretary as one that: (i) is unlawful, (ii) causes harm to individuals, entities, or property in the US, and (iii) “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.”

DHS has confirmed that “Acts of Terrorism” may include cyber attacks, which (in a real estate context) might be particularly relevant to the hospitality industry and data centers.

Companies can apply for SAFETY Act protections for individual products and for integrated security systems serving a building or complex. Examples include: (i) multi-layered security systems for major venues; (ii) design, integration, monitoring, and maintenance of perimeter security and anti-intrusion systems; (iii) physical security services at commercial facilities; (iv) evacuation planning tools, and the other similar systems. Companies can also seek protections for holistic security programs, inclusive of policies, procedures, personnel, and the deployment of security systems.

Companies that deploy security programs (including to protect their properties and operations) may apply for liability protections which come in two levels: Designation and Certification. The applicant must present a detailed description of the protections for review by DHS-designated experts, with the desired result that they are “Designated” or “Certified” by DHS. These designations or certifications are typically valid for a period of five years and are required to be renewed for each subsequent term.

Designation

If a “Designation” is obtained, the awardee is entitled to the following protections against liability to third parties for an applicable Act of Terrorism:

- Generally, the “seller” of an approved product, service, or program may be sued—not the downstream users. Plaintiffs are barred from suing directors, officers, equity holders, and others individually for liability with respect to the Designated items.
- A cap is placed on the aggregate damages payable by the awardee to third party victims relating to the Act of Terrorism. This is an annual aggregate cap negotiated with DHS and generally expected to be consistent with the awardee’s relevant terrorism insurance. The required amount of insurance is defined based on a multi-factor analysis prescribed by DHS. Once the cap is reached in the year in question, the awardee is not liable for any further damages where the SAFETY Act defense may be used. Recovery may be reduced by amounts collected from collateral sources. Once insurance levels are approved, they must be maintained by the awardee.
- No joint and several liability for non-economic damages.
- All claims must be brought in Federal court and pre-judgment interest and punitive damages are barred.

Certification

Due to the increased scrutiny required for a “Certification” award, if such an award is obtained, then—in addition to the benefits of Designation—the awardee is also entitled to have all claims brought against it arising from the Act of Terrorism and related to the products or services described in the SAFETY Act Certification dismissed, unless the plaintiff can show fraud or misconduct of the awardee in applying for SAFETY Act protection.

SAFETY Act applicants have noted that merely going through the application process has resulted in a stronger, more consistent security program.

OTHER POTENTIAL DIRECT BENEFITS

The process of applying for protection under the SAFETY Act requires the applicant to intensively review, and defend to DHS experts, its security program. This process may have practical benefits in improvements of that program, and—for a property owner—provide exposure to products or systems that have been vetted by DHS.

The existence of a SAFETY Act defense may inform and moderate the strategy of plaintiffs or potential plaintiffs. If a SAFETY Act defense is upheld, litigation costs to settle may be reduced, given the brackets placed on who can be sued and what award can be made.

Anecdotally, awardees may experience lower insurance premiums based on the existence of the SAFETY Act award.

As suggested above, users of SAFETY Act-approved products and services are entitled to liability protections. In other words, in the event of a declared Act of Terrorism involving the deployment of a SAFETY Act-awarded product or service, litigation stemming from the deployment may only be brought against the “Seller,” and not the end user. As such, property owners and operators can derive SAFETY Act benefits simply by procuring SAFETY Act Designated and/or Certified products and services.

POTENTIAL COLLATERAL BENEFITS OF CONSIDERING A SAFETY ACT APPLICATION

SAFETY Act applicants have noted that merely going through the application process has resulted in a stronger, more consistent security program. That is because preparing a successful SAFETY Act application requires carefully reviewing many security programs and policies, which generally lead to improvements in, as well as useful clarifications to, those items. It may also disclose deficiencies in existing security programs.

A SAFETY Act application process may lead to greater awareness of the various security responsibilities executives have with respect to security matters. A key component of any SAFETY Act review is setting forth clear roles and responsibilities both inside and outside an organization. That leads to a greater understanding of who has responsibility for a security matter inside an applicant’s company, as well as clearly defining the responsibilities of outside security vendors.

Even if the liability protections of the SAFETY Act are not triggered, the existence of the award can still be highly valuable in any situation where an awardee’s security program is called into question. The fact that a company’s security program successfully navigated the SAFETY Act application process allows it to argue that the program has already been deemed effective and reasonable. Mere incorporation of vetted products or procedures may support a defense against liabilities for an Act of Terrorism, particularly punitive damages.

LIMITATIONS AND OPEN ISSUES

On its face, the SAFETY Act is potentially a valuable risk management tool for property owners and operators. In evaluating whether to consider engaging with DHS in the SAFETY Act process, additional factors should be considered:

SAFETY Act applications must satisfy a rigorous set of hurdles, extensive document production and review by and interrogatories of the experts selected by DHS. Certifications and Designations are not lightly provided and are by no means certain to be granted. And while there is no filing fee for submitting an application for SAFETY Act protections to DHS, developing the application, as well as responding to inquiries from DHS about the application during the review process can include a material (but not unreasonably high) investment of personnel resources.

There is also some uncertainty as to what events the DHS Secretary will be willing to classify as Acts of Terrorism, and that classification is a condition precedent to the availability of SAFETY Act benefits for that particular event. While the definition of the phrase seems broad and is not expressly limited to acts of foreign terrorist organizations

or persons acting in furtherance of political or religious goals, it remains uncertain how this determination process will proceed and, in particular, whether and to what extent acts of violence will be deemed “Acts of Terrorism.” The scope of the DHS Secretary’s discretion is by no means clear in such regard.

The provisions of the SAFETY Act have not, to our knowledge, been tested in court. Speaking more broadly, there is a general lack of judicial guidance for most questions relating to the application of SAFETY Act protections. On the other hand, there is at least one instance where a SAFETY Act award may have produced a felicitous settlement by a company that has been granted SAFETY Act protections, even where an Act of Terrorism had not yet been certified.

A Designation or Certification is not all-inclusive. SAFETY Act awards extend only to a specific scope of protection (e.g., a set of policies and processes). Therefore, liability may exist for matters outside of the Designation or Certification. It is also important to note that a Designation is terminable by DHS if the awardee fails to provide requisite insurance certifications or provides a false certificate.

ACTIVATING THE SAFETY ACT

The SAFETY Act program has attracted the attention and efforts of prominent members of the real estate community, who have sought to obtain the liability protections and other benefits that it offers. An owner of a building, facility or portfolio of sufficient size and purpose may find it worthwhile to consider making a SAFETY Act application for its properties or operations.

ABOUT THE AUTHORS

Andrew Weiner is a real estate partner at Pillsbury Winthrop Shaw Pittman LLP, practicing in New York City since 1976. His practice is national and global, with a concentration in New York. He represents domestic and foreign clients in equity, debt and leasing transactions, including joint ventures, distressed real estate, and the hospitality and REIT sectors. He is a fellow of the American College of Real Estate Lawyers. Andy graduated from Yale College and Harvard Law School. He served at the NYC Department of City Planning, the Urban Land Institute and the Ralph Nader Congress Project and as Chair of the Real Property Law Committee of Lex Mundi.

Brian Finch is a partner in the Washington, DC office of Pillsbury Winthrop Shaw Pittman LLP. Brian co-chairs the Firm’s Cybersecurity and Homeland Security Practices, with a particular focus on providing proactive liability mitigation advice to clients. His clients include the Durst Organization, Brookfield Office Properties, a number of critical infrastructure companies, defense and cybersecurity contractors, as well as a number of professional sports teams. Brian is a leading authority on the SAFETY Act, a federal statute that can provide liability protection to companies following a terrorist or cyber-attack. Brian regularly speaks and writes on security issues, including for the Wall Street Journal, Politico, The Hill, and other publications. He also is the author of a book on the cybersecurity obligations of lawyers.

Aimee Ghosh is a government, law, and strategies parties at Pillsbury Winthrop Shaw Pittman LLP, based in Washington, DC. Aimee’s practice focuses on the intersection of business and government, providing strategic counsel on government affairs strategy, regulatory obligations, state and federal legislation, and rulemaking to help clients maximize business opportunities and mitigate risk. Aimee is a recognized authority on security strategy, counseling clients on global security, cybersecurity, crisis management, business continuity, and related regulatory obligations. Her clients include leading providers of physical and cybersecurity services and organizations with unique security needs. For more than 10 years, Aimee has helped companies, including real estate owners and operators, successfully secure liability protections under the SAFETY Act.

Samantha Sharma is a senior associate at Pillsbury Winthrop Shaw Pittman LLP, practicing in all areas of real estate law since 2015. Her experience includes drafting and negotiation of complex commercial agreements, such as lease agreements for the leasing of office, research, industrial, retail and restaurant space; term sheets, purchase agreements, management agreements and joint venture agreements for the acquisition, disposition or development of office, alternative energy, industrial, multifamily residential and mixed-use properties; and loan documents for the origination, acquisition and syndication of commercial real estate loans. Samantha’s experience also includes advising corporate, finance and energy clients on all aspects of real estate.

Sarah Hartman is a student at Fordham University School of Law. She is a staff member of the *Fordham Urban Law Journal* and is a member of the Dispute Resolution Society and ABA Negotiation Competition Team. She will be joining Pillsbury Winthrop Shaw Pittman LLP as a law clerk in the fall of 2025.