

Additional Guidance to Sellers of Certified Qualified Anti-Terrorism Technology Regarding the Scope of the Government Contractor Defense Available Under the SAFETY Act.

In the Preamble to the Regulations Implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (Final Rule)<sup>1</sup>, the Department of Homeland Security (Department) stated that it intended to publish additional guidance regarding (1) its interpretation of the government contractor defense, as it applies to the Support Anti-terrorism by Fostering Effective Technologies Act (SAFETY Act) and (2) the Supreme Court's *Boyle*<sup>2</sup> line of cases which set forth the government contractor defense, as it existed on November 25, 2002 - the date of enactment of the SAFETY Act.<sup>3</sup>

This Guidance will (1) summarize the relevant background regarding the SAFETY Act's incorporation of the government contractor defense set forth in *Boyle*, (2) delineate the attendant protections afforded by the government contractor defense as set forth in the SAFETY Act and the Final Rule, and (3) explain how a Seller of a Certified Qualified Anti-terrorism Technology (QATT), who is sued as a result of an alleged failure of the QATT, may invoke the government contractor defense.

Background

The SAFETY Act codifies a rebuttable presumption that the government contractor defense may be asserted in defense against lawsuits arising from an Act of Terrorism<sup>4</sup> when Certified QATTs have been deployed.<sup>5</sup> The Final Rule further explains that the government contractor defense is an affirmative defense that immunizes Sellers, whose products have been Certified under the SAFETY Act by the Secretary for Homeland Security or her designee, from liability against product liability claims or other lawsuits.<sup>6</sup>

The legislative history of the SAFETY Act shows that Congress sought to encourage the development of anti-terrorism technologies by providing a government contractor defense based on the judicially-created defense to avoid "saddl[ing] manufacturers with unreasonable exposure to unlimited lawsuits."<sup>7</sup> At the Homeland Security Act of 2002, Hearing on H.R. 5005 Before the Senate, Senator Hatch stated that Congress "must provide some stability to the legal process" to ensure resources continue to be deployed for homeland defense.<sup>8</sup>

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<sup>1</sup> Codified at 6 CFR Part 25.

<sup>2</sup> *Boyle v. United Tech. Corp.*, 487 U.S. 500, 512 (1988).

<sup>3</sup> 71 FR 33150, Jun. 8, 2006.

<sup>4</sup> 6 U.S.C. 444(2) (2002).

<sup>5</sup> 6 U.S.C. 442(d)(1)(3).

<sup>6</sup> 71 FR 33149.

<sup>7</sup> *Homeland Security Act of 2002: Hearing on H.R. 5005 Before the Senate* (HAS Hearing), 107<sup>th</sup> Cong., S11367 (2002) (statement of Sen. Hatch).

<sup>8</sup> *Homeland Security Act of 2002: Hearing on H.R. 5005 Before the Senate* (HAS Hearing), 107<sup>th</sup> Cong., S11368 (2002) (statement of Sen. Hatch).

Congress sought to disallow future judicial developments of the defense to be incorporated into the SAFETY Act, as these developments would cause uncertainty for Sellers of Certified QATTs.<sup>9</sup> The purpose of applying this static government contractor defense, rather than a common law defense that continues to develop in the courts, is to provide Sellers a degree of assurance and certainty regarding the extent of, and manner in which, the defense may apply during litigation.<sup>10</sup>

### The Boyle Ruling as Applied to the SAFETY Act

Originally, prior to being enacted as part of the SAFETY Act, the government contractor defense was judicially-created to limit contractors' liability as a result of work they conducted pursuant to contracts with the Federal government.<sup>11</sup> In *Boyle*, the Supreme Court held that federal law precludes recovery against the contractor under state tort law when the contractor has manufactured the product in accordance with specifications approved by the Federal government.<sup>12</sup> Between 1988, when *Boyle* was published, and 2002, when the SAFETY Act was codified, the Supreme Court affirmed this specific holding of *Boyle* in the case of *Hercules Inc. v. United States*.<sup>13</sup> During this time frame, the Supreme Court also affirmed *Boyle's* broader discussion of federal preemption of state law in five cases.<sup>14</sup>

The Final Rule explains that the express statutory framework set forth in Section 442 of the SAFETY Act supplants the judicially-developed government contractor defense elements/criteria for purposes of lawsuits related to the deployment of a Certified QATT.<sup>15</sup> The SAFETY Act and the Final Rule delineate the scope of the defense to broadly apply to any product liability or other lawsuit that is filed for claims arising out of, relating to, or resulting from an Act of Terrorism when Certified QATTs have been deployed.<sup>16</sup> Additionally, for purposes of the SAFETY Act, the government contractor defense is available not only to Sellers who contract with the government, but also to those who sell to the private sector or to state and local governments.<sup>17</sup>

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<sup>9</sup> 71 FR 33150.

<sup>10</sup> See, e.g., HSA Hearing, 107<sup>th</sup> Cong., E2079-2080 (2001) (statement of Rep. Arme) (“[Companies] will have a government contractor defense as is commonplace in *existing law*.”) (emphasis added); HSA Hearing, 107<sup>th</sup> Cong., S11368 (2002) (statement of Sen. Hatch).

<sup>11</sup> *Boyle v. United Tech. Corp.*, 487 U.S. 500, 504-5.

<sup>12</sup> *Boyle*, 487 U.S. at 512-14.

<sup>13</sup> 516 U.S. 417, 421-22 (1996).

<sup>14</sup> *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001); *Atherton v. F.D.I.C.*, 519 U.S. 213, 225-26 (1997); *O'Melveny & Meyers v. F.D.I.C.*, 512 U.S. 79, 87-88 (1994); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991).

<sup>15</sup> 71 FR 33147, 33149; 6 CFR 25.8.

<sup>16</sup> 6 U.S.C. 442(d)(1); 6 CFR 25.8(b); 71 FR 33166.

<sup>17</sup> 6 U.S.C. 441(d)(1), 444(6); 71 FR 33149.

In *Boyle*, the Supreme Court recognized the government contractor defense in lawsuits for injury or death due to a contractor's defective products.<sup>18</sup> The Supreme Court established three requirements that a contractor must meet to successfully assert the government contractor defense (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States of dangers in the use of the equipment that were known to the supplier but not to the United States.<sup>19</sup>

Under the SAFETY Act, a QATT's specifications are not government-created, but are government-approved after thorough review by the Department of Homeland Security, thereby effectively incorporating the first *Boyle* element.<sup>20</sup> A Seller's showing of (1) a valid Certification and (2) the absence of any material change to the QATT or approval of a material change by DHS<sup>21</sup> is sufficient to satisfy the second element of the *Boyle* test – conformity with government-approved specifications.<sup>22</sup> Finally, *Boyle*'s third element – that the Seller warns the government about the dangers that accompany the use of the QATT, as known by the Seller – is satisfied by the requisite disclosures in the application process for Certification and any subsequent notices of modification or renewal.<sup>23</sup> Accordingly, as stated in the Final Rule, Certification of the QATT is the only evidence necessary to establish that the Seller is entitled to a presumption of dismissal from suit.<sup>24</sup>

#### Invoking the Government Contractor Defense

Certification of the QATT establishes that the Seller is entitled to a presumption of dismissal from suit. However, Certification of a QATT does not automatically entitle a Seller to dismissal from suit. A Seller whose QATT is Certified under the SAFETY Act can satisfy the burden of presenting the affirmative government contractor defense by asserting: (1) the Secretary has determined that the act, incident, or event upon which the plaintiff's claim rests is an Act of Terrorism, as defined in section 444(2) of the SAFETY Act; (2) a valid Certification providing protections for the specific QATT that is the subject of the plaintiff's claims<sup>25</sup>; and (3) a deployment of the specific QATT during the Term of Certification.<sup>26</sup>

The plaintiff may then rebut the presumption that the government contractor defense applies by presenting clear and convincing evidence of fraud or willful misconduct in the

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<sup>18</sup> *Boyle*, 487 U.S. at 512.

<sup>19</sup> *Boyle*, 487 U.S. at 512.

<sup>20</sup> 6 CFR 25.5, 25.7-25.9.

<sup>21</sup> Sellers are required to notify the Department and provide details of any change or modification to a QATT that causes the QATT to no longer be within the scope of the Certification.

<sup>22</sup> 6 CFR 25.6(l), 25.8-25.9.

<sup>23</sup> 6 CFR 25.6(l), 25.8-25.9.

<sup>24</sup> 6 CFR 25.8(c).

<sup>25</sup> An assertion that a Certification is valid may include discussions about any material changes that were made to the QATT and whether the Department approved that change during a Notice of Modification process.

<sup>26</sup> 6 USC 441(d)(1)-(3); 71 FR at 33,156; 6 CFR 25.8-25.9.

Seller's representations to the Department.<sup>27</sup> The plaintiff must establish that there was a knowing and deliberate intent to deceive the government for the plaintiff to prove fraud or willful misconduct.<sup>28</sup>

If the Seller successfully invokes the SAFETY Act government contractor defense and the plaintiff fails to rebut the presumption that the government contractor defense applies, the Seller shall be entitled to summary judgment for all claims arising out of, relating to, or resulting from an Act of Terrorism implicating a Certified QATT.<sup>29</sup>

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<sup>27</sup> 6 U.S.C. 441(d)(1), (2).

<sup>28</sup> 6 CFR 25.8.

<sup>29</sup> 6 CFR 25.8.