

The Lender's Advisor

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How Safe is your Borrower?

Suppose you made a loan to a government contractor who manufactures or sells a product or service that is used to detect, defend against, prevent, or respond to acts of terrorism. If that product or service should allegedly fail in some respect in connection with a terrorist attack, it is highly likely that the victims of the terrorist attack or their relatives would sue your customer for millions of dollars under well-established theories of tort liability—as was the case after the 1993 and 2001 terrorist attacks on the World Trade Center.

As the lender to that government contractor, your concern for the continued well-being of your customer would be both real and significant. If you had been prudent in your underwriting and closing of the loan to that government contractor, you would have required proof of liability insurance as a condition precedent to making the loan, and your loan documents would likely contain an ongoing obligation on the part of that government contractor to maintain adequate liability insurance throughout the term of the loan. However, odds are that the amount of liability insurance coverage would be insufficient to satisfy all of the victims' claims, and the government contractor would

be pushed into bankruptcy. How, then, can you minimize your risk?

The SAFETY Act, which is formally known as The Support Anti-Terrorism By Fostering Effective Technologies Act of 2002, may be your answer. The SAFETY Act was implemented to respond to the legitimate concerns of government contractors arising from the risk of being exposed to nearly limitless legal liability in the event of an act of terrorism.

Under the SAFETY Act, the owner or seller of “anti-terror technology”—which can be either a product or a service—may apply for and receive significant liability protections from the Department of Homeland Security (DHS). If a product or service receives SAFETY Act “Certification,” then the company that provided the product or service is entitled to seek an immediate dismissal of claims for

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compensation arising out of a terrorist attack. Companies could also receive a “Designation” under the SAFETY Act, which entitles them to a range of liability protections, one of which would limit the tort liability to the amount of insurance required to be maintained by the company, as determined by DHS.

There are many ways that you, as a lender, can obtain the benefits of the SAFETY Act, either directly or indirectly. When underwriting loans to a customer whose product or service could be implicated in an act of terrorism, it might be prudent to require that customer to provide reasonably satisfactory evidence that it has applied for and obtained SAFETY Act protections from DHS as a condition precedent to obtaining the loan.

If you wish that you had known about the benefits of the SAFETY Act sooner, do not fret. The SAFETY Act can be applied retroactively (meaning that its protections can apply to products or services deployed before the application for SAFETY Act protections was filed). So, feel free to request, pursuant to the “Further Assurances” clause in your loan documents, that your existing customers seek SAFETY Act protections for products or services already on the market, in an effort to minimize SAFETY Act risks associated with loans already outstanding.

It really should not take much convincing on your part to have your customer apply for and obtain SAFETY Act Designations and/or Certifications because it is in your customer’s best interest to do so. Aside from the direct benefits afforded by the SAFETY Act, it will

indirectly benefit your customer by giving your customer a leg up on its competition. Under the SAFETY Act, purchasers of an approved technology or service also are immune from any claims arising from the use of that product or service, thereby making your customer’s product or service more attractive than a comparable product or service sold outside the ambit of the SAFETY Act. In fact, many purchasers of security products and services (including banks and lending institutions) are now demanding that their vendors hold SAFETY Act protections, either at a Designation or Certification level, before they procure items from them. And why shouldn’t they? The SAFETY Act offers valuable liability protections that cannot be replicated by any other law or contractual provision.

Dickstein Shapiro counsels companies in the preparation, filing, and managing of SAFETY Act applications, utilizing its unique level of experience working with clients on SAFETY Act-related issues. In fact, nearly one out of every four SAFETY Act applications that, to date, have been filed with DHS, have been handled by Dickstein Shapiro—making it one of the leading law firms on SAFETY Act matters. Dickstein Shapiro’s Homeland Security Practice is headed by Brian Finch, who has testified before the House Homeland Security Committee on the implementation of the SAFETY Act, and has led a task force that drafted a white paper on the implementation of the SAFETY Act while serving as the Senior Advisor for Science & Technology Policy for the Homeland Security and Defense Business Council.

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