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DHS Breaks New Ground With Issuance of SAFETY Act Certifications for Advanced Cybersecurity Defense Systems

By Brian E. Finch and Aimee P. Ghosh

FireEye's MVX and DTI Technologies become the first cybersecurity products to earn certification as "Qualified Anti-Terrorism Technologies."

The Department of Homeland Security (DHS) crossed an important barrier in late April when it announced that it had granted a Certificate of SAFETY Act Certification to cybersecurity products deployed by FireEye Inc.: the Multi-Vector Virtual Execution™ (MVX™) engine and Dynamic Threat Intelligence™ (DTI™) cloud platform.

By granting Certification awards to both of those products, DHS permanently dispelled any notion that the liability protections offered through the SAFETY Act—or the Support Anti-Terrorism By Fostering Effective Technologies Act of 2002—somehow excluded cybersecurity products and/or services or that the protections did not apply when the triggering attack was a cyber-event as opposed to a "conventional" physical attack such as an active shooter or improvised explosive device event.

By way of background, Congress passed the SAFETY Act in 2002 after learning that the threat of tort litigation was inhibiting the development and continued deployment of security products. To counter those worries, Congress incentivized the deployment of effective and reliable security products and services through a carefully crafted liability management program administered by DHS rather than relying on the unpredictable mechanism of common law tort litigation.

In the 12-plus years since the enactment of the SAFETY Act, the vast majority of the over 700 SAFETY Act awards have related to physical security products and systems. Examples of such awards include:

- Explosive detecting canines
- Millimeter wave detection systems
- Emergency planning policies and procedures for iconic real estate locations
- Skin decontamination lotions for use after exposure to dangerous chemical agents
- Commercial facility security guard services.

Over that same time frame, a few awards have been granted to software products as well as to some cybersecurity- related products and services, but not once has DHS and its Office of SAFETY Act Implementation granted its highest level of protection, a Certification, to a product designed purely for cybersecurity purposes.

With the awards granted to FireEye's MVX engine and DTI cloud platform, that barrier has been broken. By granting those Certification awards and placing two cybersecurity products on its Approved Products List for Homeland Security, DHS has sent the unmistakable message that it considers some cybersecurity products mature enough to earn the highest level of liability protections possible under the SAFETY Act.

Indeed, remembering the intent of the SAFETY Act—to encourage the widespread deployment of useful and effective security technologies and services—DHS has taken a wise step by selecting two very well-known technologies as the first products to earn SAFETY Act Certification. Those products in fact have been deployed for years in high threat environments and demonstrated time and again their value in protecting against advanced cyber threats.

What Does this Mean for Other Cybersecurity Vendors and Customers?

The practical effect of FireEye's SAFETY Act Certifications is that it validates the utility of that liability management program and answers key questions as to its potential value as a differentiator when making acquisition decisions.

First, questions have lingered for some time as to whether SAFETY Act Certification would actually apply to cybersecurity products. Many have been openly skeptical as whether it would, given lingering beliefs that the program was designed only for anti-terrorism products and services in the most traditional sense.

With the granting of the FireEye Certification awards, there is no longer any question that cybersecurity products and services are just as eligible as any other item for SAFETY Act protections.

This is not to say that it will be easy for companies to obtain these protections. FireEye's technologies certainly represent "best in class" products, and so it will not necessarily follow that hundreds of cybersecurity awards will be granted in the immediate future. Still, other companies are aware that they, too, can obtain these awards if they can withstand the rigorous review process utilized by DHS when examining a SAFETY Act application.

And that leads to the second point, which is that there will undoubtedly be greater interest if not demand from cybersecurity customers for products and services with SAFETY Act protections. By virtue of these awards, it is now clear that the only reason a cybersecurity company has for not holding SAFETY Act protections is a decision on their part to not pursue the process, rather than a DHS policy or legal position.

In turn, cybersecurity customers should be pressing their vendors to at least apply for SAFETY Act protections as their receipt indicates 1) that a thorough review of the product has been conducted and 2) that otherwise unavailable liability protections can now be obtained. This could well turn into a self-perpetuating loop, where vendors pursue SAFETY Act protections to obtain a competitive advantage or at least operate on a level playing field, while customers demand that vendors hold SAFETY Act protections to obtain the flow-down liability protections and also demonstrate that they made "reasonable" choices in selecting cybersecurity technologies.

Pillsbury's SAFETY Act Assistance Offerings

Pillsbury's Cybersecurity and Global Security practices both stand ready to assist cybersecurity vendors and customers with respect to SAFETY Act counseling. Pillsbury attorneys have helped over manage well over 100 successful SAFETY Act applications. Most relevant, Pillsbury served as FireEye's SAFETY Act counsel for its MVX and DTI cloud platform Certification application.

As FireEye's general counsel, Alexa King, noted, "Pillsbury's team, led by Brian Finch and Aimee Ghosh, provided us with invaluable assistance in navigating the extremely rigorous SAFETY Act drafting and review process." King added that "Their intimate knowledge of the SAFETY Act as well as their reputation as two of the nation's best cybersecurity lawyers helped make this process as smooth as possible."

Pillsbury and FireEye plan on holding a series of webcasts and discussions to further explore the impact of the SAFETY Act award, and look forward to a robust discussion on this game-changing event.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Brian E. Finch (bio)
Washington, DC
+1.202.663.8062
brian.finch@pillsburylaw.com

Aimee P. Ghosh (bio)
Washington, DC
+1.202.663.9231
aimee.ghosh@pillsburylaw.com

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