

**Statement**

**of**

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**Before the**

**House Committee on Homeland Security's  
Subcommittee on Cybersecurity, Infrastructure Protection and  
Security Technologies**

**Concerning**

**Unlocking the SAFETY Act's Potential to  
Promote Technology and Combat Terrorism**

**May 26, 2011**

Chairman Lungren, Ranking Member Clarke, and Members of the Committee:

Thank you for the opportunity to testify and for holding these hearings today on the Department of Homeland Security's implementation of the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (the "SAFETY Act"). My name is Scott Boylan, and I am Vice President and General Counsel at Morpho Detection Inc. ("MDI"), a subsidiary of the Safran Group. MDI has more than 560 U.S.-based employees and factories in California and Massachusetts. We are a leading supplier of explosives and narcotics detection technology globally and support government, military, transportation, first responder, critical infrastructure and other high-risk organizations. We integrate computed tomography (CT), Raman Spectroscopy, trace (ITMS™ technology), X-ray and X-ray Diffraction (XRD) technologies into solutions that deliver detection results quickly with a high degree of accuracy, while ensuring efficient security operations.

MDI and our predecessor companies have a rich legacy in homeland security. After the Lockerbie tragedy, we were the first company to develop and deploy computed tomography-based explosives detection systems in partnership with the Federal Aviation Administration. Today, our technology is used throughout the United States to protect American citizens and infrastructure from terrorist attacks. The Transportation Security Administration relies upon MDI's technology to screen over a million bags each day for explosives. The State Department uses our technology to protect embassies and consulates around the world. The Department of the Interior protects national treasures, such as the Statue of Liberty, using our equipment. The Department of Defense protects military facilities and personnel with MDI equipment as a key part of their threat detection arsenal. We are proud of our work in developing innovative technologies to protect people and infrastructure around the world.

MDI's core mission is to develop and provide anti-terrorism technologies. The protections that the SAFETY Act affords are integral to our business plan and investment decisions. We were one of the first companies to apply for SAFETY Act coverage and value our on-going partnership with the Department of Homeland Security. Today, I would like to discuss the value of SAFETY Act protections in encouraging development of new and innovative anti-terrorism products, discuss recent trends in SAFETY Act operations, and provide recommendations as we approach the ten-year anniversary of passage of the SAFETY Act.

#### Value of the SAFETY Act

The SAFETY Act legislation and implementing regulations provide incentives for the development and deployment of anti-terrorism technologies by creating a system of "risk" and "litigation management." The purpose of the Act is to ensure that the threat of liability does not deter potential manufacturers or sellers of antiterrorism technologies from developing, deploying, and commercializing technologies that could save lives and protect the American people. As such, the SAFETY Act is a critical tool in expanding the creation, proliferation and use of anti-terrorism technologies.

In light of the potential liability MDI faces in developing and deploying anti-terrorism technology, MDI highly values the risk management and litigation management provisions of the SAFETY Act. We are not alone in this view. Investment decisions involve an evaluation of risk -- SAFETY Act protections limit and define risk allowing investors to have confidence in their decisions. The transfer of SAFETY Act coverage, for example, was a pre-condition to closing when our company was sold by GE to Safran in 2009. This only serves to illustrate how important this coverage is to investment decisions.

### Recent Trends in Implementation

The Department of Homeland Security's implementation of the SAFETY Act must be assessed with a view to the purpose of the legislation. To encourage technological innovation and to facilitate the fielding of technologies that support our nation's homeland security efforts, Congress established a set of liability protections for technology providers so companies could develop and provide anti-terrorism technologies without the threat of crippling lawsuits. Congress deserves credit for recognizing the need for the SAFETY Act, and the legislation's risk management, and liability protection provisions are at least as important today as when the Act was originally promulgated. In fact, there is increased awareness of the importance of technology in tackling our staggering homeland security mission, including defending our land and sea borders; protecting key resources and critical infrastructure—including cyber resources; preventing chemical, biological, radiological, and nuclear (“CBRN”) attacks; and improving preparedness and emergency response capabilities. Unfortunately, DHS' recent SAFETY Act implementation efforts have raised serious concern about the Department's commitment to the program as well as questions as to whether the Department is administering the program in a manner consistent with Congressional intent and the Act's statutory and regulatory mandates.

MDI's recent experience and communications with the Science & Technology Directorate concerning certain MDI SAFETY Act applications illustrate that the SAFETY Act application process is neither consistent nor “user friendly.” Moreover, the manner in which the SAFETY Act is being implemented today is discouraging applicants from continuing to support the program – at the expense of the laudable objectives of the SAFETY Act. There is growing concern, not only at MDI but also among colleagues across industry who are engaged in developing and providing homeland security technologies, that efforts to implement the SAFETY Act have been compromised by an apparent lack of understanding or commitment to the goals that led to the promulgation of the SAFETY Act. For instance, there is particular concern regarding the sharp decline in the number of technologies receiving SAFETY Act coverage generally, and SAFETY Act Certification in particular. It is also clear that the SAFETY Act application process has become more protracted and burdensome.

Our experience with the administration of the SAFETY Act by the Science & Technology Directorate over the past year has been particularly frustrating. Renewal of SAFETY Act Certification for our key product line of explosive detection technology for checked luggage was delayed beyond the regulatory required time limits.<sup>1</sup> New product models in the same product line were only given SAFETY Act Designation, not Certification, for “lack of operational test data” in spite of the fact that all of these products had been extensively tested and their performance certified by the Transportation Security Laboratory (“TSL”)<sup>2</sup> before being purchased and deployed by TSA. One of these new models had been operationally deployed and had scanned millions of bags that had been loaded upon commercial aircraft. The delay in Certification renewal forced us to consider whether we would deploy more machines without SAFETY Act coverage.

Other MDI technology that has been SAFETY Act Certified for years was recently denied Certification renewal along with a new model developed for the critical infrastructure protection market. This technology is mature and is used every day to detect and deter threats at very sensitive facilities where federal regulations require that explosive detection technology be deployed. It provides some of the best explosive detection capability available – but it has been denied SAFETY Act coverage. This scenario has injected an element of arbitrariness that we have not previously experienced.

While the SAFETY Act and its implementing regulations set forth criteria to be considered in evaluating whether a technology should receive SAFETY Act Designation, the Under Secretary for Science & Technology is directed to exercise discretion in evaluating these factors and “to give greater weight to some factors over others.” Further, the SAFETY Act regulations state in particular that “the Under Secretary is not required to reject an application that fails to meet one or more of the criteria” and that the “Under Secretary may conclude, after considering all of the relevant criteria and any other relevant factors, that a particular Technology merits Designation as a Qualified Anti- Terrorism Technology even if one or more particular criteria are not satisfied.” Recent decisions on SAFETY Act applications suggest a misunderstanding of the evaluation process to be performed in determining whether to issue a SAFETY Act Designation for a particular technology as well as the relative weighing of the factors to be considered. The fact that DHS has denied SAFETY Act renewals based upon a purported lack of operational and testing data is clearly contrary to the Act’s intent to encourage the development and deployment of new anti-terrorism technologies.

MDI is in the business of providing technologies that protect the American people. To date, MDI has looked to the SAFETY Act to provide important liability coverage for its

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<sup>1</sup> MDI’s SAFETY Act Certification renewal application filed in October 2010 was finally approved on February 17, 2011.

<sup>2</sup> The TSL is also part of the DHS Science & Technology Directorate.

anti-terrorism technologies. Should the SAFETY Act's risk management and litigation management provisions not be afforded to MDI's technologies, the company would be compelled to reevaluate whether and to what extent it should continue to deploy the technology that today is on the front lines of our homeland security efforts. The decision not to renew existing SAFETY Act approvals certainly does not incent MDI to provide anti-terrorism technologies and seems incongruous with the fact that SAFETY Act coverage is now being denied for the very technology that was integral to the TSA's effort to protect the traveling public and continues to deter terrorism in other contexts.

## Recommendations

SAFETY Act protection is critical to ensuring that technology tools are available today for homeland security and even more critical to driving the next generation of anti-terrorism technologies. In the current economic climate, companies are forced to make difficult investment decisions. Homeland security sales can be unpredictable from year-to-year and are typically event-driven. Some smaller companies with innovative ideas may not have the backing or resources to weather this volatile marketplace and may face significant barriers to entry. This, in addition to uncertainty about potential liability, could force some companies to make a difficult decision – to exit homeland security technology development. With an ever-more-sophisticated adversary, our homeland security frontline deserves the best technology available and continued investment in the tools they need to deter, detect, and thwart the next attack. Strong implementation and execution of the SAFETY Act is an important aspect in supporting security technology innovation.

We have a few recommendations for the Committee's consideration:

- Streamline SAFETY Act Certification by recognizing formal test certification by the DHS TSL or by other DHS component agencies. DHS has invested in establishing test certification processes throughout the Department. In addition, the Department of Defense has a well-established test and evaluation process that should also be recognized by DHS in SAFETY Act Certification. The SAFETY Act office should recognize successful completion of one of these DHS or DoD certification processes and expedite approval of applications for these companies. Implementation of this recommendation would eliminate duplicative processes and reduce Government costs associated with the SAFETY Act Certification processes.
- Provide greater transparency in the SAFETY Act review process. The SAFETY Act office should provide processing time metrics on its website ([www.safetyact.gov](http://www.safetyact.gov)) and should be required to notify the Committee in the event that processing times exceed those defined in the SAFETY Act Final Rule.
- Provide administrative remedies for denial of SAFETY Act Certification. This measure would provide redress for companies who have been denied certification.

- The intent of Congress in establishing the SAFETY Act – to enable and encourage U.S. companies to develop and provide vital anti-terrorism technologies to help prevent or respond to terrorist attacks without the threat of enterprise crippling potential liability – is clear, and the importance of the SAFETY Act in facilitating industry’s support of our nation’s overall homeland security mission has only grown. The Department of Homeland Security must recommit to vigorous implementation of the SAFETY Act, and the Department’s leadership must prioritize efforts to reverse the negative trend of reductions in the total number of SAFETY Act applications and approvals. Implementation of the SAFETY Act should be better aligned with the Federal acquisition process, including eliminating redundancies in and expediting technical evaluation of SAFETY Act applications relating to products and services procured by DHS and other Federal government entities.

Thank you for your attention to these issues. I am happy to answer any questions you might have.