

terrorism” where qualified anti-terrorism technologies have been deployed. The Act does not limit liability for harms caused by anti-terrorism technologies when no act of terrorism has occurred.

Together, the risk and litigation management provisions provide the following protections:

- Exclusive jurisdiction in federal court for suits against the Sellers of “qualified anti-terrorism technologies” (§ 863(a)(2));
- A limitation on the liability of Sellers of qualified anti-terrorism technologies to an amount of liability insurance coverage specified for each individual technology, provided that Sellers will not be required to obtain any more liability insurance coverage than is reasonably available “at prices and terms that will not unreasonably distort the sales price” of the technology (§ 864(a)(2));
- A prohibition on joint and several liability for noneconomic damages, so that Sellers can only be liable for that percentage of noneconomic damages proportionate to their responsibility for the harm (§ 863(b)(2));
- A complete bar on punitive damages and prejudgment interest (§ 863(b)(1));
- A reduction of plaintiffs’ recovery by amounts that plaintiffs received from “collateral sources”, such as insurance benefits or other government benefits (§ 863(c)); and
- A rebuttable presumption that the Seller is entitled to the “government contractor defense” (§ 863(d)).

The Act provides that these liability protections are conferred by two separate actions by the Secretary. The Secretary’s designation of a technology as a “qualified anti-terrorism technology” confers all of the liability protections *except* the rebuttable presumption in favor of the government contractor defense. The presumption in favor of the government contractor defense requires an additional “approval” by the Secretary under § 863(d) of the Act. In many cases, however, the designation and the approval can be conferred simultaneously.

### Analysis

This preamble to the proposed rule first addresses the two major aspects of the Act—the designation of qualified anti-terrorism technologies and the approval of technologies for purposes of the government contractor defense. Following that discussion, the preamble addresses specific issues regarding the proposed rule and the Department’s interpretation of the Act.

### Designation of Qualified Anti-Terrorism Technologies

As noted above, the designation of a technology as a qualified anti-terrorism technology confers all of the liability protections provided in the Act, except for the presumption in favor of the government contractor defense. The Act gives the Secretary broad discretion in determining whether to designate a particular technology as a “qualified anti-terrorism technology,” although the Act sets forth the following criteria that must be considered to the extent that they are applicable to the technology: (1) Prior United States Government use or demonstrated substantial utility and effectiveness; (2) availability of the technology for immediate deployment; (3) the potential liability of the Seller; (4) the likelihood that the technology will not be deployed unless the SAFETY Act protections are conferred; (5) the risk to the public if the technology is not deployed; (6) evaluation of scientific studies; and (7) the effectiveness of the technology in defending against acts of terrorism. These criteria are not exclusive—the Secretary may consider other factors that he deems appropriate. The Secretary has discretion to give greater weight to some factors over others, and the relative weighting of the various criteria may vary based upon the particular technology at issue and the threats that the technology is designed to address. The Secretary may, in his discretion, determine that failure to meet a particular criterion justifies denial of an application under the SAFETY Act. However, the Secretary is not required to reject an application that fails to meet one or more of the criteria. Rather the Secretary, after considering all of the relevant criteria, may conclude that a particular technology merits designation as a “qualified anti-terrorism technology” even if a particular criterion is not satisfied. The Secretary’s considerations will also vary with the constantly evolving threats and conditions that give rise to the need for the technologies. The proposed rule provides for designation as a qualified anti-terrorism technology for five to eight years.

The SAFETY Act applies to a very broad range of technologies, including products, services, software, and other forms of intellectual property, as long as the Secretary, as an exercise of discretion and judgment, determines that a technology merits designation under the statutory criteria. Further, as the statutory criteria suggest, a “qualified anti-terrorism technology” is not necessarily required to be newly

developed—it may have already been employed (e.g. “prior United States government use”) or may be a new application of an existing technology.

The Act also provides that, before designating a “qualified anti-terrorism technology,” the Secretary will examine the amount of liability insurance the Seller of the technology proposes to maintain for coverage of the technology at issue. Under Section 864(a), the Secretary must certify that the coverage level is appropriate “to satisfy otherwise compensable third-party claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed.” § 864(a)(1). The Act further provides that “the Seller is not required to obtain liability insurance of more than the maximum amount of liability insurance reasonably available from private sources on the world market at prices and terms that will not unreasonably distort the sales price of Seller’s anti-terrorism technologies.” § 864(a)(2).

The Secretary does not intend to set a “one-size-fits-all” numerical requirement regarding required insurance coverage for all technologies. Instead, as the Act suggests, the inquiry will be specific to each application and may involve an examination of several factors, including the following: the amount of insurance the Seller has previously maintained; the amount of insurance maintained by the Seller for other technologies or for the Seller’s business as a whole; the amount of insurance typically maintained by sellers of comparable technologies; data and history regarding mass casualty losses; and the particular technology at issue. The Secretary will not require insurance beyond the point at which the cost of coverage would “unreasonably distort” the price of the technology. Once the Secretary concludes the analysis regarding the appropriate level of insurance coverage (which might include discussions with the Seller in appropriate cases), the Secretary will identify in a short certification a description of the coverage appropriate for the particular qualified anti-terrorism technology. If, during the term of the designation, the Seller would like to request reconsideration of that insurance certification due to changed circumstances or for other reasons, the Seller may do so. If the Seller fails to maintain coverage at the certified level during that time period, the liability protections of the Act will continue to apply, but the Seller’s liability limit will remain at the certified insurance level. Such failure, however, will be regarded as a negative factor in the consideration