

of any future application by the Seller for renewal of the applicable designation, and perhaps in any other application by the Seller.

The Department solicits comment on the designation of qualified anti-terrorism technologies, including whether the five to eight year period is an appropriate length of time for such a designation.

Government Contractor Defense

The Act creates a rebuttable presumption that the government contractor defense applies to qualified anti-terrorism technologies “approved by the Secretary” in accordance with certain criteria specified in § 863(d)(2). The government contractor defense is an affirmative defense that immunizes Sellers from liability for certain claims brought under § 863(a) of the Act. *See* § 863(d)(1). The presumption of this defense applies to all “approved” qualified anti-terrorism technologies for claims brought in a “product liability or other lawsuit” and “arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies . . . have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller.” *Id.* While the government contractor defense is a judicially-created doctrine, Section 863’s express terms supplant many of the requirements in the case law for application of the defense.

First, and most obviously, the Act expressly provides that the government contractor defense is available not only to government contractors, but also to those who sell to state and local governments and the private sector. *See* § 863(d)(1) (“This presumption of the government contractor defense shall apply regardless of whether the claim against the Seller arises from a sale of the product to Federal Government or non-Federal Government customers.”).

Second, Sellers of qualified anti-terrorism technologies need not design their technologies to federal government specifications in order to obtain the government contractor defense under the SAFETY Act. Instead, the Act sets forth criteria for the Department’s “approval” of technologies. Specifically, the Act provides that during the process of approval for the government contractor defense the Secretary will conduct a “comprehensive review of the design of such technology and determine whether it will perform as intended, conforms to the Seller’s specifications, and is safe for use as intended.” § 863(d)(2). The Act also provides that the Seller will “conduct safety and hazard analyses” and supply

such information to the Secretary. *Id.* This express statutory framework thus governs in lieu of the requirements developed in case law for the application of the government contractor defense.

Third, the Act expressly states the limited circumstances in which the applicability of the defense can be rebutted. The Act provides expressly that the presumption can be overcome only by evidence showing that the Seller acted fraudulently or with willful misconduct in submitting information to the Secretary during the course of the Secretary’s consideration of such technology. *See* § 863(d)(1) (“This presumption shall only be overcome by evidence showing that the Seller acted fraudulently or with willful misconduct in submitting information to the Secretary during the course of the Secretary’s consideration of such technology under this subsection.”).

The applicability of the government contractor defense to particular technologies is thus governed by these express provisions of the Act, rather than by the judicially-developed criteria for applicability of the government contractor defense outside the context of the SAFETY Act.

While the Act does not expressly delineate the scope of the defense (*i.e.*, the types of claims that the defense bars), the Act and the legislative history make clear that the scope is broad. For example, it is clear that any Seller of an “approved” technology cannot be held liable under the Act for design defects or failure to warn claims, unless the presumption of the defense is rebutted by evidence that the Seller acted fraudulently or with willful misconduct in submitting information to the Secretary during the course of the Secretary’s consideration of such technology.

The government contractor defense under *Boyle* and its progeny bars a broad range of claims. The Supreme Court in *Boyle* concluded that “state law which holds Government contractors liable for design defects” can present a significant conflict with federal policy (including the discretionary function exception to the Federal Tort Claims Act) and therefore “must be displaced.” *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988). The Department believes that Congress incorporated the Supreme Court’s *Boyle* line of cases as it existed on the date of enactment of the SAFETY Act, rather than incorporating future developments of the government contractor defense in the courts. Indeed, it is hard to imagine that Congress would have intended a statute designed to provide certainty

and protection to Sellers of anti-terrorism technologies to be subject to future developments of a judicially-created doctrine. In fact, there is evidence that Congress rejected such a construction. *See, e.g.*, 148 Cong. Rec. E2080 (November 13, 2001) (statement of Rep. Arney) (“[Companies] will have a government contractor defense as is commonplace in existing law.”) (emphasis added).

Procedurally, the presumption of applicability of the government contractor defense is conferred by the Secretary’s “approval” of a qualified anti-terrorism technology specifically for the purposes of the government contractor defense. This approval is a separate act from the Secretary’s “designation” of a qualified anti-terrorism technology. Importantly, the Seller may submit applications for both designation as a qualified anti-terrorism technology and approval for purposes of the government contractor defense at the same time, and the Secretary may review and act upon both applications simultaneously. The distinction between the Secretary’s two actions is important, however, because the approval process for the government contractor defense includes a level of review that is not required for the designation of a qualified anti-terrorism technology. Specifically, the Act provides that during the process of approval for the government contractor defense the Secretary will conduct a “comprehensive review of the design of such technology and determine whether it will perform as intended, conforms to the Seller’s specifications, and is safe for use as intended.” § 863(d)(2). The Department believes that certain Sellers will be able to obtain the protections that come with designation as a qualified anti-terrorism technology even if they have not satisfied the requirements for the government contractor defense. Similarly, even if the applicability of the government contractor defense were rebutted under the test set forth in Section 863(d)(1) of the Act, the technology may still retain the designation and protections as a qualified anti-terrorism technology. Fraud or willful misconduct in the submission of information to the Department in connection with an application under the Act may result not only in rebuttal of the presumed application of the government contractor defense, but may also prompt the Department to refer the matter to the Department of Justice for pursuit of criminal or civil penalties.

The Department invites comment regarding the government contractor defense.