

## Specific Issues Regarding the Act and This Rule

1. *Definition of Anti-Terrorism Technologies.* The Department recognizes that the universe of technologies that can be deployed against terrorism includes far more than physical products. Rather, the defense of the homeland will require deployment of a broad range of technologies that includes services, software, and other forms of intellectual property. Thus, consistent with Section 865 of the Act, Section 25.3(a) of the proposed rule defines qualified anti-terrorism technologies very broadly to include “any qualifying product, equipment, service (including support services), device, or technology (including information technology)” that the Secretary, as an exercise of discretion and judgment, determines to merit designation under the statutory criteria.

2. *Development of New Technologies.* The Act’s success depends not only upon encouraging Sellers to provide existing anti-terrorism technologies, but also upon encouraging Sellers to develop new and innovative technologies to respond to the ever-changing threats to the American people. The proposed rule is thus designed to allow the Department to assist would-be Sellers during the invention, design, and manufacturing phases in two important respects. First, Section 25.3(h) of the proposal makes clear that the Department, within its discretion and where feasible, may provide feedback to manufacturers regarding whether proposed or developing anti-terrorism technologies might meet the qualification factors under the Act. To be sure, the Department cannot provide advance designation, as some of the factors for the Secretary’s consideration cannot be addressed in advance. The Department may, however, provide feedback regarding other factors, with the goal of giving potential Sellers some understanding of whether it might be advantageous to proceed with further development of the technology. Departmental feedback at the design, prototyping, or testing stage of development, to the extent feasible, may provide manufacturers with added incentive to commence and/or complete production of cutting-edge anti-terrorism technology that otherwise might not be produced or deployed in the absence of the risk and litigation management protections in the Act. The Department will perform these consultations with potential Sellers in a manner consistent with the protection

of intellectual property and trade secrets, as discussed below.

Second, Section 25.3(g) of the proposal recognizes that Federal agencies will often be the purchasers of anti-terrorism technologies. The Department recognizes that terms on which Sellers are able to provide anti-terrorism technologies to Federal agencies may vary depending on whether the technologies receive SAFETY Act coverage or not. The proposal thus provides that the Department may coordinate SAFETY Act reviews with agency procurements. The Department also intends to review SAFETY Act applications relating to technologies that are the subject of agency procurements on an expedited basis.

The Department requests public comments regarding the best way for the Department to provide feedback to potential Sellers regarding SAFETY Act coverage and the best way for the Department to coordinate SAFETY Act review with agency procurements.

3. *Protection of Intellectual Property and Trade Secrets.* The Department believes that successful implementation of the Act requires that applicants’ intellectual property interests and trade secrets remain protected in the application process and beyond. Toward that end, the Department will create an application and review process in which the Department maintains the confidentiality of an applicant’s proprietary information. The Department notes that laws mandating disclosure of information submitted to the government generally contain exclusions or exceptions for such information. The Freedom of Information Act, for instance, provides specific exceptions for proprietary information submitted to Federal agencies. The Department seeks further input on this issue.

4. *Evaluation of Scientific Studies; Consultation with Scientific and Technical Experts.* Section 862(b)(6) of the Act provides that, as one of many factors in determining whether to designate a particular technology under the Act, the Secretary shall consider evaluation of all scientific studies “that can be feasibly conducted” in order to assess the capability of the technology to substantially reduce the risks of harm. An important part of this provision is that it contemplates review only of such studies as can “feasibly” be conducted. The Department believes that the need to protect the American public by facilitating the manufacture and marketing of anti-terrorism technologies might render it infeasible to defer a designation decision until

after every conceivable scientific study is completed. In many cases, existing information (whether based on scientific studies, experience with the technology or a related technology, or other factors) might enable the Secretary to perform an appropriate assessment of the capability of the technology to reduce risks of harm. In other cases, even where less information is available about the capability of a technology to reduce risks of harm, the public interest in making the technology available as soon as practicable may render it infeasible to await the conduct of further scientific studies on that issue. In considering whether or to what extent it is feasible to defer a designation decision until additional scientific studies can be conducted, the Department will bring to bear its expertise concerning the protection of the American homeland and will consider the urgency of the need for the technology and other relevant factors and circumstances. The Department invites comment on how the Department should determine what scientific studies “can be feasibly conducted.”

5. *“Exclusive Federal Jurisdiction” and “Scope” of Insurance Coverage under § 864(a)(3).* The Act creates an exclusive Federal cause of action “for any claim for loss of property, personal injury, or death 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.” § 863(a)(2); *see also* § 863(a)(1). This exclusive “Federal cause of action shall be brought only for claims for injuries that are proximately caused by sellers that provide qualified anti-terrorism technology.” § 863(a)(1). The best reading of § 863(a), and the reading the Department is inclined to adopt, is that (1) only one Federal cause of action exists for loss of property, personal injury, or death when a claim relates to performance or non-performance of the Seller’s qualified and deployed anti-terrorism technology, and (2) such cause of action may be brought *only against the Seller*.

The exclusive Federal nature of this cause of action is evidenced in large part by the exclusive jurisdiction provision in § 863(a)(2). That subsection states: “Such appropriate district court of the United States shall have original and exclusive jurisdiction over all actions for any claim for loss of property, personal injury, or death arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been