

deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller.” *Id.* Any presumption of concurrent causes of action (between State and Federal law) is overcome by two basic points. First, Congress would not have created in this Act a Federal cause of action to complement State law causes of action. Not only is the substantive law for decision in the Federal action derived from State law (and thus would be surplusage), but in creating the Act Congress plainly intended to limit rather than increase the liability exposure of Sellers. Second, the granting of exclusive jurisdiction to the Federal district courts provides further evidence that Congress wanted an exclusive Federal cause of action. Indeed, a Federal district court (in the absence of diversity) does not have jurisdiction over state law claims, and the statute makes no mention of diversity claims anywhere in the Act.

Further, it is clear that the Seller is the only appropriate defendant in this exclusive Federal cause of action. First and foremost, the Act unequivocally states that a “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) (emphasis added). Second, if the Seller of the qualified anti-terrorism technology at issue was not the only defendant, would-be plaintiffs could, in an effort to circumvent the statute, bring claims (arising out of or relating to the performance or non-performance of the Seller’s qualified anti-terrorism technology) against arguably less culpable persons or entities, including but not limited to contractors, subcontractors, suppliers, vendors, and customers of the Seller of the technology. Because the claims in the cause of action would be predicated on the performance or non-performance of the Seller’s qualified anti-terrorism technology, those persons or entities, in turn, would file a third-party action against the Seller. In such situations, the claims against non-Sellers thus “may result in loss to the Seller” under § 863(a)(2). The Department believes Congress did not intend through the Act to increase rather than decrease the amount of litigation arising out of or related to the deployment of qualified anti-terrorism technology. Rather, Congress balanced the need to provide recovery to plaintiffs against the need to ensure adequate deployment of anti-terrorism technologies by creating a cause of action that provides a certain level of recovery against Sellers, while

at the same time protecting others in the supply chain.

The scope of federal preemption of state laws is highly relevant to the Department’s implementation of the Act, as the Department will have to determine the amount of insurance that Sellers must obtain. Accordingly, the Department seeks comment on that matter.

6. *Amount of Insurance.* The Act requires that Sellers obtain liability insurance “of such types and in such amounts” certified by the Secretary “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). However, the Act makes clear that Sellers are *not* required to obtain liability insurance beyond “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).

As explained above, the Department eschews any “one-size-fits-all” approach to the insurance coverage requirement. Instead, the Department construes the Act as contemplating the examination of several factors. Section 25.4(b) of the proposed rule therefore sets forth a nonexclusive list of several factors that the Department may consider. These include 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; information regarding the amount of liability insurance offered on the world market; the particular technology at issue and its intended use; and the point at which the cost of coverage would “unreasonably distort” the price of the technology.

In the course of determining the amount of insurance required under the Act for a particular technology, the Department may consult with the Seller, the Seller’s insurer, and others. While the decision regarding the amount of insurance required will generally be specific to each Seller or each technology, the Department recognizes that the incentive-based purposes of the Act may be furthered if the Department provides information to potential Sellers regarding the types and amounts of insurance that they will likely be required to obtain. Thus the Secretary may, where appropriate, give guidance

to potential Sellers regarding the type and amounts of insurance that may be sufficient under the Act for particular technologies or categories of technologies.

The Department also recognizes that the amount of insurance available at prices that will not unreasonably distort the price of the anti-terrorism technology may vary over time. Thus, the proposed rule is written to give the Department flexibility to address fluctuating insurance prices by providing that, during the term of the designation, the Seller may request reconsideration of the insurance certification due to changed circumstances or other reasons.

The Proposed Rule provides that the Seller shall certify on an annual basis that the Seller has maintained the insurance required by the Under Secretary’s certification. It further provides that the Under Secretary may terminate the designation as a qualified anti-terrorism technology if the Seller fails to provide the certification or provides a false certification. Termination of the designation would mean that the Seller would not be able to sell the technology as a qualified anti-terrorism technology after the date of the termination. The Seller’s failure to maintain the insurance also may adversely affect the Seller’s ability to obtain a renewal of the designation for the technology, and may even adversely affect the Seller’s ability to obtain future designations of “qualified anti-terrorism technologies.” Finally, a false certification may result in criminal or other penalties under existing laws.

The liability protections of the Act will continue to apply to technologies sold while the SAFETY Act designation was effective, regardless of whether the seller maintains the required insurance. This is necessary because the SAFETY Act protects not only the Seller, but also others in the supply chain. For example, a buyer who purchases the technology while the SAFETY Act designation is still in effect should not be punished for the Seller’s failure to maintain the insurance. The Seller, however, will face potential uninsured liability, because the Seller’s liability limit will remain at the certified insurance level. This is because subsection (c) of Section 864 makes clear that the Seller’s liability is capped at the amount of insurance “required” to be maintained under Section 864, rather than the amount of coverage actually obtained. The limitation of liability thus relates entirely to the amount of insurance required and makes no reference to whether such insurance is, in fact, maintained by the Seller.