

The Department, as part of each certification, will specify the Seller or Sellers of the anti-terrorism technology for purposes of SAFETY Act coverage. The Department may, but need not, specify in the certification the others who are covered by the liability insurance required to be purchased by the Seller.

The Department invites comment regarding the appropriate interpretation of “prices and terms that will not unreasonably distort sales prices,” the factors that the Department should consider in determining the appropriate amount of insurance, and the relevance of any other provisions of law, such as the Terrorism Risk Insurance Act of 2002 (“TRIA”).

7. *Use of Standards.* Section 25.3(c) of the proposed rule provides that the Under Secretary may issue safety and effectiveness standards for categories of anti-terrorism technologies, and that the Under Secretary may consider compliance with any such applicable standards in determining whether to grant a designation under the Act. The Department seeks comment on how the Department can best develop standards and implement the SAFETY Act provisions to provide the appropriate market and industry incentives for the development and deployment of anti-terrorism technologies.

8. *Relationship of the SAFETY Act to Indemnification under Public Law 85–804.* The Department recognizes that Congress intended that the SAFETY Act’s liability protections would substantially reduce the need for the United States to provide indemnification under Public Law 85–804 to Sellers of anti-terrorism technologies. The strong liability protections of the SAFETY Act should, in most circumstances, make it unnecessary to provide indemnification to Sellers. The Department recognizes, however, that there might be, in some limited circumstances, technologies or services with respect to which both SAFETY Act coverage and indemnification might be warranted. See 148 Cong. Rec. E2080 (statement by Rep. Arney) (November 13, 2002) (stating that in some situations the SAFETY Act protections will “complement other government risk-sharing measures that some contractors can use such as Public Law 85–804”).

In recognition of this close relationship between the SAFETY Act and indemnification authority, in Section 73 of Executive Order 13286 of February 28, 2003, the President recently amended the existing Executive Order on indemnification—Executive Order 10789 of November 14, 1958, as

amended. The amendment granted the Department of Homeland Security authority to indemnify under Public Law 85–804. At the same time, it requires that *all* agencies—not just the Department of Homeland Security—follow certain procedures to ensure that the potential applicability of the SAFETY Act is considered before any indemnification is granted for an anti-terrorism technology. Specifically, the amendment provides that federal agencies cannot provide indemnification “with respect to any matter that has been, or could be, designated by the Secretary of Homeland Security as a qualified anti-terrorism technology” unless the Secretary of Homeland Security has advised whether SAFETY Act coverage would be appropriate and the Director of the Office of Management and Budget has approved the exercise of indemnification authority. The amendment includes an exception for the Department of Defense where the Secretary of Defense has determined that indemnification is “necessary for the timely and effective conduct of United States military or intelligence activities.”

Application of Various Laws and Executive Orders to This Rulemaking

Executive Order 12866—Regulatory Planning and Review

The Department has examined the economic implications of this proposed rule as required by Executive Order 12866. Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 12866 classifies a rule as significant if it meets any one of a number of specified conditions, including: Having an annual effect on the economy of \$100 million, adversely affecting a sector of the economy in a material way, adversely affecting competition, or adversely affecting jobs. A regulation is also considered a significant regulatory action if it raises novel legal or policy issues.

The Department concludes that this proposed rule is a significant regulatory action under the Executive Order because it will have a positive, material effect on public safety under Section 3(f)(1), and it raises novel legal and policy issues under Section 3(f)(4). The Department tentatively concludes, however, that this proposed rule does

not meet the significance threshold of \$100 million effect on the economy in any one year under Section 3(f)(1), due to the relatively low estimated burden of applying for this technology program, the unknown number of certifications and designations that the Department will dispense, and the unknown probability of a terrorist attack that would have to occur in order for the protections put in place in this proposed rule to have a large impact on the public. The Department requests comments regarding this determination, and invites commenters to submit any relevant data that will assist the agency in estimating the impact of this rule.

Need for the Regulation and Market Failure

This regulation implements the SAFETY Act and is intended to implement the provisions set forth in that Act. The Department believes the current development of anti-terrorism technologies has been slowed due to the potential liability risks associated with their development and eventual deployment. In a fully functioning insurance market, technology developers would be able to insure themselves against excessive liability risk; however, the terrorism risk insurance market appears to be in disequilibrium. The attacks of September 11 fundamentally changed the landscape of terrorism insurance. Congress, in the findings of TRIA, concluded that temporary financial assistance in the insurance market is needed to “allow for a transitional period for the private markets to stabilize, resume pricing of such insurance, and build capacity to absorb any future losses.” TRIA § 101(b)(2). This rulemaking addresses a similar concern, to the extent that potential technology developers are unable to efficiently insure against large losses due to an ongoing reassessment of terrorism issues in insurance markets.

Even after a temporary insurance market adjustment, purely private terrorism risk insurance markets may exhibit negative externalities. Because the risk pool of any single insurer may not be large enough to efficiently spread and therefore insure against the risk of damages from a terrorist attack, and because the potential for excessive liability may render any terrorism insurance prohibitively expensive, society may suffer from less than optimal technological protection against terrorist attacks. The measures set forth in this proposed rule are designed to meet this goal; they will provide certain liability protection from lawsuits and consequently will increase the