

technologies, a summary of such standards may be published, along with a link to the appropriate site for the applicant to obtain or purchase the required or suggested standard. In preparing applications for SAFETY Act protections, however, applicants are encouraged not to limit themselves to standards previously promulgated or recognized by the Department, but rather to consider and reference any consensus technical standards that they believe to be applicable to technology.

Several standards development organizations suggested that voluntary consensus standards themselves be designated as qualified anti-terrorism technologies under the SAFETY Act. Although the Department believes it is unlikely that standards themselves will qualify for a Designation because it is unlikely that a standard will fall within the definition of "qualified anti-terrorism technology" in the Act, the Department will fully evaluate all applications for SAFETY Act protections received from Sellers of standards.

Scope of Required Insurance Coverage

Thirteen comments expressed concerns or confusion regarding the scope of required insurance coverage. Some commenters expressed uncertainty regarding the definition of the term "Seller," the issue of who may be a defendant in the Federal cause of action prescribed in the SAFETY Act, and the nature of protection from liability afforded to entities other than the "Seller" in the manufacturing and distribution chains of the technology. In response, the Department has revised the definition of "Seller" in Section 25.9 of the interim rule in order to clarify that the "Seller" is the actual recipient of the Designation for a qualified anti-terrorism technology. The Department has also revised Section 25.4(a) of the interim rule to clarify that only the Seller is required to obtain the required liability insurance coverage.

Concern was expressed regarding the availability of insurance covering all of the parties specified in Section 864(a)(3) of the SAFETY Act and the corresponding provision in the interim rule (§ 25.4(c)). First, under the interpretation of Section 863 of the Act expressed by the Department in the preamble of the interim rule, (1) there is one exclusive Federal cause of action for claims relating to the deployment of a qualified anti-terrorism technology with respect to an act of terrorism, and (2) such cause of action may be brought only against the Seller, and only for injuries proximately caused by the Seller. Therefore, although other

persons and entities must be covered by the required insurance coverage, the actuarial analyses of the insurance industry should focus mainly, if not exclusively, on the Seller's potential liability, which should facilitate the issuance of insurance policies. Moreover, in this context, the provisions of Section 864(a)(2) of the Act and the corresponding provision of the interim rule (§ 25.4(b)), which limit the required insurance to no more than the maximum amount 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 (which the Department intends to interpret with regard to the effect of the insurance requirement on the price of the technology and ultimately on the demand for and deployment of the technology for anti-terrorism purposes), should be emphasized. It should also be noted that the Department has revised Section 25.4(a) of the interim rule to provide specifically for the possibility of self-insurance if the Under Secretary determines that insurance in appropriate amounts or of appropriate types is not available for a particular technology from third-party insurance carriers.

Term, Expiration, and Termination of Designation

Twenty-four comments were made suggesting that SAFETY Act Designations either should not expire or should have a longer duration (10–20 years) than provided for in the proposed rule (five to eight years). In response, the Department notes that qualification for a SAFETY Act Designation depends on a combination of the ability of the technology to be effective in a specific threat environment, the nature and cost of available insurance, and other factors, all of which are subject to rapid and unpredictable change. At the same time, the Department is very cognizant of the need for a guaranteed period of protection for successful SAFETY Act applicants in order to achieve the main goal of the Act, which is to facilitate the commercialization of needed anti-terrorism technologies. The Department believes that mandatory reconsideration of Designations after five to eight years provides a fair balancing of public and private interests.

Several comments suggested that SAFETY Act protections should have retroactive effect. There are two different senses of retroactivity that must be addressed. The first sense relates to the deployment of a technology. The Department believes that it would be inappropriate to apply

SAFETY Act protections retroactively to deployments of a qualified anti-terrorism technology that occurred prior to the effective date of the Designation issued for such technology. The reasons are (1) there is no explicit authority to issue retroactive protections under the SAFETY Act, (2) a Designation with such retroactive effect would be potentially unlawful if it extinguishes an already accrued cause of action, (3) retroactive designation is not necessary to achieve, and does not further, the goals of the Act, and (4) there is no equitable method for determining the retroactivity of particular Designations. The Department believes that SAFETY Act protections should apply only to deployments of a qualified anti-terrorism technology that occur on or after the effective date of the Designation issued for such technology.

The second sense of retroactivity relates to the date of the sale of the qualified anti-terrorism technology by the Seller. The Department recognizes that, in some cases, technologies that qualify for SAFETY Act protections will have been sold by the Seller prior to the effective date of such protections. The Department believes that the date on which a technology was sold by a Seller, per se, is not necessarily relevant to the applicability of SAFETY Act protections to a deployment of the technology in defense against, response to, or recovery from an act of terrorism, provided that the technology is within the scope of a Designation and was originally sold by the Seller to which the Designation is issued. In other words, it might be appropriate for SAFETY Act protections to be applicable to any deployment of a qualified anti-terrorism technology that occurs on or after the effective date of the Designation issued for such technology even if such technology was originally sold by the Seller before the effective date of such Designation. The Department believes that any other interpretation would lead to anomalous and inequitable results. Therefore, provisions have been added to Sections 25.3(f), 25.4(f), 25.6(b), and 25.7(g) of the interim rule to clarify this issue, and in particular to require the Under Secretary to specify in each Designation and Certification the earliest date of the sale of the technology to which the protections will apply.

The Department notes that many qualified anti-terrorism technologies might be designed for continuous "deployment" (e.g., sensors). The fact that a qualified anti-terrorism technology was sold and "deployed" prior to the effective date of an applicable Designation or Certification, or is, in a sense, continuously