

insurance coverage at different liability limitation levels.

Regarding potential unavailability of insurance for certain technologies, the Department notes that the granting of a Designation may render a previously uninsurable technology insurable through reduction of liability exposure. Where necessary to address unavailability of insurance, however, Designations may be granted that permit the insurance requirement to be satisfied by self-insurance up to a specified limit of liability. A new Section 25.4(f) and other provisions have been inserted in the interim rule to address this issue, as well as the continuing applicability of SAFETY Act protections after the expiration or termination of a Designation (which had been addressed in the proposed rule only in the preamble).

#### *Clarification of Government Contractor Defense (GCD)*

The precise nature and consequences of the GCD as applied by the Act were considered by 14 commenters to be unclear in the proposed rule. In particular, the interaction between the scope of the judicially derived GCD and the scope of the presumption defined in the Act was believed to be unclear.

As defined in the Act, the rebuttable presumption of the applicability of the GCD is accorded to any Seller who (1) has received Certification as described in Section 863(d), and (2) is the defendant in the Federal cause of action arising in Section 863(a). Pursuant to Section 863(d)(1), the presumption may only be overcome by evidence showing that the Seller acted fraudulently or with willful misconduct in submitting information during the SAFETY Act application process.

The view of the Department is that the GCD protections afforded by the SAFETY Act to recipients of Certifications are similar to those affirmed by the courts in *Boyle v. United Technologies* and its progeny as of the date of the enactment of the SAFETY Act. In applying those protections, the Department believes that Congress intended that, for purposes of applying the GCD, courts presume that all of the legal and factual requirements for establishment of the GCD by a government contractor are met by the existence of an applicable SAFETY Act Certification.

The Department has added a new paragraph to Section 25.6 of the interim rule that corresponds to Section 863(d)(1) of the Act. Such new paragraph makes it clear that the presumption of the GCD will continue to apply in perpetuity to all

deployments of technologies that receive a Certification, provided that the sale of the technology was consummated by the Seller prior to the expiration or termination of the applicable Certification.

#### *Relationship of the SAFETY Act and Indemnification Under Public Law 85-804*

Thirteen comments related to the relationship between SAFETY Act protections and indemnification under Public Law 85-804. The Department believes, however, that the language contained in part 8 of the "Special Issues" section of the preamble of the interim rule adequately explains such relationship, and makes it clear that eligibility for a SAFETY Act Designation does not preclude the granting of indemnification under Public Law 85-804.

#### *Detailed Specification of the Seller, Technology, and Scope of a Designation*

Twenty comments focused on the detailed specification of the Seller, technology, and scope of a Designation. Commenters suggested that there are advantages to the public, to industry, and to the application evaluation process in designating entire classes of technology, rather than designating each Seller of a technology individually.

The Department seeks to balance the need for rapid deployment of anti-terrorism technologies with the need for careful evaluation of each technology and the need to avoid uncertainty in the marketplace concerning which specific product or service deployments are protected by Designation. In general, Designations will be restricted in scope to a particular Seller, a specific product or service, and delineated types of deployment or application. This approach addresses the comment that it is beneficial to the public to be able to learn precisely which Sellers and which of their products/services have been designated, and for what scope of deployment. At some in the near future, as relevant standards are adopted and the body of "substantially equivalent" technologies increases, the Department will revisit the advisability of awarding broader Designations ("Block Designations") to classes of technology.

#### *Definition of "Act of Terrorism"*

Ten comments indicated a belief that the definition of "act of terrorism" in Section 865(2) of the Act (and in Section 25.9 of the interim rule) is ambiguous. One suggested that the definition coincide with other federal definitions of "terrorism," such as the definition in 22 U.S.C. 2656f(d)(2). The Department

notes that the definition of "act of terrorism" was prescribed by Congress in the SAFETY Act. The Department believes that the definition in the Act provides an appropriate degree of flexibility in the evolving threat environment, including the use of the broad term "harm." Regarding the comment concerning whether acts that occur on foreign territory are covered by the definition, the Department's view is that the term "act of terrorism," as defined, potentially encompasses acts that occur outside the territory of the United States. The basis for that view is that there is no geographic requirement in the definition; rather, an act that occurs anywhere may be covered if it causes harm to a person, property, or an entity in the United States. The statutory definition of "act of terrorism" has been added to Section 25.9 of the interim rule.

#### *Determinations Not Subject to Review or Appeal*

Five commenters observed that the SAFETY Act Designation and Certification processes are complex and that many apparently subjective assessments will be made during the evaluation process. They were concerned that the Secretary's decision is final, without recourse or appeal. Some commenters suggested that the Administrative Procedures Act (APA) requires a formal review as part of the process.

The Department is aware of the complexity of the review process and has made numerous allowances for exchange of information and concerns between evaluators and applicants at multiple points during the process, in order to clarify uncertainties and to give the applicant an opportunity to provide supplemental information and address issues. The Department believes that this interactive process provides sufficient recourse to applicants. The SAFETY Act is a discretionary authority accorded by Congress to the Secretary of Homeland Security in order to facilitate the commercialization and deployment of needed anti-terrorism technologies. The exercise of that authority with respect to a particular technology requires that many discretionary judgments be made regarding the applicability and application of the SAFETY Act criteria to the technology and the weighting of the criteria in each case. It would be inappropriate to provide for what would amount to the second-guessing of the Secretary's discretionary judgment by empowering another entity to substitute its own discretionary judgment for that of the Secretary.