

SAFETY Act protections are not required to market any technology, and therefore the absence of a grant of protection under the SAFETY Act will not prevent any person or entity from doing business. The Department also notes that a SAFETY Act Designation is not a "license required by law" within the meaning of Section 558(c) of the APA, and thus is not covered by the APA.

Allowability of Insurance Costs

Four comments questioned whether the cost of maintaining the insurance required by a SAFETY Act Designation is an "allowable cost" under Federal contracting practices. The Department notes that each Federal procurement and contracting arrangement is unique to the Federal agency involved. When an applicant has questions regarding allowability for a specific case involving Federal procurements, the applicant should consult with the procuring agency and, if appropriate, with the applicant's legal counsel.

Burden of Proof With Regard to Evaluation Criteria

Three commenters asked, in essence, if the applicant bears the responsibility for demonstrating the applicability of each of the seven evaluation criteria. In particular, it was asked whether the applicant must establish the existence of an extraordinarily large or unquantifiable potential risk exposure (criterion 3), or the magnitude of risk exposure to the public if applicant's technology were not deployed (criterion 5). It was also asked whether applicants will bear the cost of scientific studies (criterion 6).

An application for a Designation or a Certification is a positive assertion on the applicant's part that the technology in question deserves special protections under the law in order to promote a public good. It is the applicant's responsibility to make a persuasive and defensible case. This will involve, at a minimum, submitting evidence that the technology satisfies the criteria in Section 862(b) of the SAFETY Act and the corresponding provision of the interim rule (§ 25.3(b)). To that end, an application that contains the most complete suite of supporting information regarding concrete evidence of proven or potential effectiveness will be more persuasive than an application that relies solely on the applicant's personal effectiveness estimates and *a priori* threat and liability assessments. Any evaluations needed to address the criteria will be the financial responsibility of the applicant.

Relationship of Designation and Certification Processes

Three comments addressed the linkage of the Designation and Certification processes. The Department believes that it is appropriate for these two aspects of the Act to remain closely aligned, and that the SAFETY Act indeed requires the issuance of a Designation for a technology to be a prerequisite (but not sufficient in itself) for issuance of a Certification. The same high standard of review will be applied to evaluations for Designations and Certifications, and a substantial amount of the information that is needed to evaluate applications for Designations is also integral to the Certification process (although there is additional information required to support the evaluation for a Certification). The Designation and the Certification are two separate protections with separate (but overlapping) criteria, and therefore they require two discrete application processes. The Department notes again, however, that applications for both protections may be considered in parallel, and that both protections may be granted simultaneously.

Multi-use Technologies and "Specific Purpose"

Four commenters noted that the proposed rule stated that a technology must be "designed, developed, modified, or procured for the specific purpose of preventing, detecting, identifying or deterring acts of terrorism * * *." They stated that the word "specific," as used in this context, seems overly restrictive. They believe that this narrow reading could exclude from designation any product originally developed for another use.

The "specific purpose" clause was prescribed by Congress in Section 865(1) of the Act, and the Department does not have the authority to change that definition. The Department believes, however, that Congress did not intend for "specific purpose" to mean "exclusive purpose." An applicant need only show that one specific purpose of the subject technology is to prevent, detect, identify, or deter acts of terrorism or limit the harm such acts might otherwise cause; it is irrelevant for purposes of the definition of "qualified anti-terrorism technology" that a technology might have other purposes or uses. Applications for SAFETY Act protections, and their component parts, should, of course, focus on the specific purpose(s) of the technology for which the applicant is seeking protection.

Expedited Reviews

Thirteen comments expressed a desire for the Department to provide expedited reviews for specific technologies based on various criteria. The approach of the Department will be to prioritize and expedite SAFETY Act applications in order to ensure that the highest risk vulnerabilities to the highest consequence threats are addressed first. In general, the Department will expedite reviews of SAFETY Act applications as its resources allow.

Reciprocal Waivers

Several comments stated that reciprocal waivers of the type described in the Act (reciprocal waivers of claims by the specified parties for losses sustained by them or their employees arising from an act of terrorism with respect to which a qualified anti-terrorism technology is deployed) are not standard practice in most industries, and that some customers, vendors, and suppliers may be unwilling to enter into such reciprocal agreements. The Department will not withhold or revoke a Designation based on the failure to obtain one or more required reciprocal waivers, provided that the Seller shows that it made diligent efforts in good faith to obtain such waivers.

The Department's view is that such waivers are not an absolute condition (precedent or subsequent) for the issuance, validity, effectiveness, duration, or applicability of a Designation, because (1) obtaining such waivers often will be beyond the control of SAFETY Act applicants, (2) requiring all of such waivers as such a condition would thwart the intent of Congress in enacting the SAFETY Act by rendering the benefits of the SAFETY Act inapplicable in many otherwise appropriate situations, and (3) the consequences of failing to obtain the waivers are not specified in the Act. Section 25.4(e) of the interim rule has been revised accordingly.

Mass Casualty Data

Four comments expressed concern over the use of mass casualty data. In particular, the proposed rule stated that the Secretary's inquiry concerning an application "may involve * * * data and history regarding mass casualty losses." It was noted that, in the case of past mass tort settlements, such data may exist but be confidential. Questions were asked regarding whether providing such data (where it exists) would be mandatory for a Designation or a Certification, even when restricted by prior court-ordered confidentiality agreements, and whether special