

protections would exist to prevent unauthorized disclosure.

The Department will not ask applicants to violate court ordered confidentiality agreements, but will expect that every reasonable effort will be made to extract relevant non-protected information or to provide equivalent information—e.g., from industry aggregate data or summaries, etc.

Multiple Sellers

Questions were posed regarding whether it will be possible for joint ventures or other multi-party arrangements to receive SAFETY Act protections, and who will be responsible for obtaining insurance for such a multi-Seller Designation. A joint venture may take many forms. A joint venture that takes the form of a recognized business association with legal personality will be treated as a single Seller, and will be required to obtain insurance coverage itself.

As specified in the proposed rule, SAFETY Act protections may be issued to multiple Sellers (e.g., a situation in which the owner of a technology and one or more of its licensees are to be covered by a single Designation). In that situation, the parties' respective obligations to obtain insurance will be specified in the Designation.

Discussion of Interim Rule

As part of the Homeland Security Act of 2002, Public Law 107–296, Congress enacted several liability protections for providers of anti-terrorism technologies. The SAFETY Act provides incentives for the development and deployment of anti-terrorism technologies by creating a system of “risk management” and a system of “litigation management.” The purpose of the Act is to ensure that the threat of liability does not deter potential manufacturers or Sellers of anti-terrorism technologies from developing and commercializing technologies that could save lives. The Act thus creates certain liability limitations for “claims arising out of, relating to, or resulting from an act of terrorism” where qualified anti-terrorism technologies have been deployed. The Act does not limit liability for harms caused by anti-terrorism technologies when no act of terrorism has occurred.

Together, the risk and litigation management provisions provide the following protections:

- Exclusive jurisdiction in Federal court for suits against the Sellers of “qualified anti-terrorism technologies” (§ 863(a)(2));

- A limitation on the liability of Sellers of qualified anti-terrorism technologies to an amount of liability insurance coverage specified for each individual technology, provided that Sellers will not be required to obtain any more liability insurance coverage than is reasonably available “at prices and terms that will not unreasonably distort the sales price” of the technology (Section 864(a)(2));

- A prohibition on joint and several liability for noneconomic damages, so that Sellers can only be liable for that percentage of noneconomic damages proportionate to their responsibility for the harm (§ 863(b)(2));

- A complete bar on punitive damages and prejudgment interest (§ 863(b)(1));

- A reduction of plaintiffs' recovery by amounts that plaintiffs received from “collateral sources,” such as insurance benefits or other government benefits (§ 863(c)); and

- A rebuttable presumption that the Seller is entitled to the “government contractor defense” (§ 863(d)).

The Act provides that these liability protections are conferred by two separate actions by the Secretary. The Secretary's designation of a technology as a “qualified anti-terrorism technology” confers all of the liability protections *except* the rebuttable presumption in favor of the government contractor defense. The presumption in favor of the government contractor defense requires an additional “approval” by the Secretary under Section 863(d) of the Act. In many cases, however, the designation and the approval can be conferred simultaneously.

Analysis

This preamble to the interim rule first addresses the two major aspects of the Act—the designation of qualified anti-terrorism technologies and the approval of technologies for purposes of the government contractor defense. Following that discussion, the preamble addresses specific issues regarding the interim rule and the Department's interpretation of the Act.

Designation of Qualified Anti-Terrorism Technologies

As noted above, the designation of a technology as a qualified anti-terrorism technology confers all of the liability protections provided in the Act, except for the presumption in favor of the government contractor defense. The Act gives the Secretary broad discretion in determining whether to designate a particular technology as a “qualified anti-terrorism technology,” although the

Act sets forth the following criteria that must be considered to the extent that they are applicable to the technology:

- (1) Prior United States Government use or demonstrated substantial utility and effectiveness;
- (2) availability of the technology for immediate deployment;
- (3) the potential liability of the Seller;
- (4) the likelihood that the technology will not be deployed unless the SAFETY Act protections are conferred;
- (5) the risk to the public if the technology is not deployed;
- (6) evaluation of scientific studies; and
- (7) the effectiveness of the technology in defending against acts of terrorism.

These criteria are not exclusive—the Secretary may consider other factors that he deems appropriate. The Secretary has discretion to give greater weight to some factors over others, and the relative weighting of the various criteria may vary based upon the particular technology at issue and the threats that the technology is designed to address. The Secretary may, in his discretion, determine that failure to meet a particular criterion justifies denial of an application under the SAFETY Act. However, the Secretary is not required to reject an application that fails to meet one or more of the criteria. Rather the Secretary, after considering all of the relevant criteria, may conclude that a particular technology merits designation as a “qualified anti-terrorism technology” even if a particular criterion is not satisfied. The Secretary's considerations will also vary with the constantly evolving threats and conditions that give rise to the need for the technologies. The interim rule provides for designation as a qualified anti-terrorism technology for five to eight years.

The SAFETY Act applies to a very broad range of technologies, including products, services, software, and other forms of intellectual property, as long as the Secretary, as an exercise of discretion and judgment, determines that a technology merits designation under the statutory criteria. Further, as the statutory criteria suggest, a “qualified anti-terrorism technology” is not necessarily required to be newly developed—it may have already been employed (e.g. “prior United States government use”) or may be a new application of an existing technology.

The Act also provides that, before designating a “qualified anti-terrorism technology,” the Secretary will examine the amount of liability insurance the Seller of the technology proposes to maintain for coverage of the technology at issue. Under § 864(a), the Secretary must certify that the coverage level is appropriate “to satisfy otherwise