

E2080 (November 13, 2001) (statement of Rep. Arney) ("[Companies] will have a government contractor defense as is commonplace in *existing law*."') (emphasis added).

Procedurally, the presumption of applicability of the government contractor defense is conferred by the Secretary's "approval" of a qualified anti-terrorism technology specifically for the purposes of the government contractor defense. This approval is a separate act from the Secretary's "designation" of a qualified anti-terrorism technology. Importantly, the Seller may submit applications for both designation as a qualified anti-terrorism technology and approval for purposes of the government contractor defense at the same time, and the Secretary may review and act upon both applications simultaneously. The distinction between the Secretary's two actions is important, however, because the approval process for the government contractor defense includes a level of review that is not required for the designation of a qualified anti-terrorism technology. Specifically, the Act provides that during the process of approval for the government contractor defense the Secretary will conduct a "comprehensive review of the design of such technology and determine whether it will perform as intended, conforms to the Seller's specifications, and is safe for use as intended." Section 863(d)(2). The Department believes that certain Sellers will be able to obtain the protections that come with designation as a qualified anti-terrorism technology even if they have not satisfied the requirements for the government contractor defense. Similarly, even if the applicability of the government contractor defense were rebutted under the test set forth in Section 863(d)(1) of the Act, the technology may still retain the designation and protections as a qualified anti-terrorism technology. Fraud or willful misconduct in the submission of information to the Department in connection with an application under the Act may result not only in rebuttal of the presumed application of the government contractor defense, but may also prompt the Department to refer the matter to the Department of Justice for pursuit of criminal or civil penalties.

The Department invites comment regarding the government contractor defense.

#### *Specific Issues Regarding the Act and This Interim Rule*

**1. Definition of Anti-Terrorism Technologies.** The Department recognizes that the universe of

technologies that can be deployed against terrorism includes far more than physical products. Rather, the defense of the homeland will require deployment of a broad range of technologies that includes services, software, and other forms of intellectual property. Thus, consistent with Section 865 of the Act, Section 25.3(a) of the interim rule defines qualified anti-terrorism technologies very broadly to include "any qualifying product, equipment, service (including support services), device, or technology (including information technology)" that the Secretary, as an exercise of discretion and judgment, determines to merit designation under the statutory criteria.

**2. Development of New Technologies.** The Act's success depends not only upon encouraging Sellers to provide existing anti-terrorism technologies, but also upon encouraging Sellers to develop new and innovative technologies to respond to the ever-changing threats to the American people. The interim rule is thus designed to allow the Department to assist would-be Sellers during the invention, design, and manufacturing phases in two important respects. First, Section 25.3(h) of the proposal makes clear that the Department, within its discretion and where feasible, may provide feedback to inventors and manufacturers regarding whether proposed or developing anti-terrorism technologies might meet the qualification factors under the Act. The Department has developed a pre-application submission process in order to facilitate the procurement of such feedback. To be sure, the Department cannot provide advance designation, as some of the factors for the Secretary's consideration cannot be addressed in advance. The Department may, however, provide feedback regarding other factors, with the goal of giving potential Sellers some understanding of whether it might be advantageous to proceed with further development of the technology. Departmental feedback at the design, prototyping, or testing stage of development, to the extent feasible, may provide manufacturers with added incentive to commence and/or complete production of cutting-edge anti-terrorism technology that otherwise might not be produced or deployed in the absence of the risk and litigation management protections in the Act. The Department will perform these consultations with potential Sellers in a manner consistent with the protection of intellectual property and trade secrets, as discussed below.

Second, Section 25.3(g) of the interim rule recognizes that Federal, state, and local government agencies will often be the purchasers of anti-terrorism technologies. The Department recognizes that terms on which Sellers are able to provide anti-terrorism technologies to government agencies may vary depending on whether the technologies receive SAFETY Act coverage or not. The interim rule thus provides that the Department may coordinate SAFETY Act reviews with government agency procurements. The Department also intends to review SAFETY Act applications relating to technologies that are the subject of government agency procurements on an expedited basis.

The Department requests public comments regarding the best way for the Department to provide feedback to potential Sellers regarding SAFETY Act coverage and the best way for the Department to coordinate SAFETY Act review with agency procurements.

**3. Protection of Intellectual Property and Trade Secrets.** The Department believes that successful implementation of the Act requires that applicants' intellectual property interests and trade secrets remain protected in the application process and beyond. Toward that end, the Department will create an application and review process in which the Department maintains the confidentiality of an applicant's proprietary information. The Department notes that laws mandating disclosure of information submitted to the government generally contain exclusions or exceptions for such information. The Freedom of Information Act, for instance, provides specific exceptions for proprietary information submitted to Federal agencies.

**4. Evaluation of Scientific Studies; Consultation with Scientific and Technical Experts.** Section 862(b)(6) of the Act provides that, as one of many factors in determining whether to designate a particular technology under the Act, the Secretary shall consider evaluation of all scientific studies "that can be feasibly conducted" in order to assess the capability of the technology to substantially reduce the risks of harm. An important part of this provision is that it contemplates review only of such studies as can "feasibly" be conducted. The Department believes that the need to protect the American public by facilitating the manufacture and marketing of anti-terrorism technologies might render it infeasible to defer a designation decision until after every conceivable scientific study is completed. In many cases, existing