

information (whether based on scientific studies, experience with the technology or a related technology, or other factors) might enable the Secretary to perform an appropriate assessment of the capability of the technology to reduce risks of harm. In other cases, even where less information is available about the capability of a technology to reduce risks of harm, the public interest in making the technology available as soon as practicable may render it infeasible to await the conduct of further scientific studies on that issue. In considering whether or to what extent it is feasible to defer a designation decision until additional scientific studies can be conducted, the Department will bring to bear its expertise concerning the protection of the American homeland and will consider the urgency of the need for the technology and other relevant factors and circumstances.

5. *“Exclusive Federal Jurisdiction” and “Scope” of Insurance Coverage under Section 864(a)(3).* The Act creates an exclusive Federal cause of action “for any claim for loss of property, personal injury, or death arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller.” Section 863(a)(2); *see also* section 863(a)(1). This exclusive “Federal cause of action shall be brought only for claims for injuries that are proximately caused by sellers that provide qualified anti-terrorism technology.” Section 863(a)(1). The best reading of Section 863(a), and the reading the Department hereby adopts, is that (1) only one Federal cause of action exists for loss of property, personal injury, or death when a claim relates to the deployment (performance or non-performance) of the Seller’s qualified anti-terrorism technology in defense against, response to, or recovery from an act of terrorism, and (2) such cause of action may be brought *only against the Seller*.

The exclusive Federal nature of this cause of action is evidenced in large part by the exclusive jurisdiction provision in Section 863(a)(2). That subsection states: “Such appropriate district court of the United States shall have original and exclusive jurisdiction over all actions for any claim for loss of property, personal injury, or death arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the Seller.” *Id.* Any presumption of

concurrent causes of action (between State and Federal law) is overcome by two basic points. First, Congress would not have created in this Act a Federal cause of action to complement State law causes of action. Not only is the substantive law for decision in the Federal action derived from State law (and thus would be surplusage), but in creating the Act Congress plainly intended to limit rather than increase the liability exposure of Sellers. Second, the granting of exclusive jurisdiction to the Federal district courts provides further evidence that Congress wanted an exclusive Federal cause of action. Indeed, a Federal district court (in the absence of diversity) does not have jurisdiction over state law claims, and the statute makes no mention of diversity claims anywhere in the Act.

Further, it is clear that the Seller is the only appropriate defendant in this exclusive Federal cause of action. First and foremost, the Act unequivocally states that a “cause of action shall be brought only for claims for injuries that are *proximately caused by sellers* that provide qualified anti-terrorism technology.” Section 863(a)(1) (emphasis added). Second, if the Seller of the qualified anti-terrorism technology at issue was not the only defendant, would-be plaintiffs could, in an effort to circumvent the statute, bring claims (arising out of or relating to the performance or non-performance of the Seller’s qualified anti-terrorism technology) against arguably less culpable persons or entities, including but not limited to contractors, subcontractors, suppliers, vendors, and customers of the Seller of the technology. Because the claims in the cause of action would be predicated on the performance or non-performance of the Seller’s qualified anti-terrorism technology, those persons or entities, in turn, would file a third-party action against the Seller. In such situations, the claims against non-Sellers thus “may result in loss to the Seller” under section 863(a)(2). The Department believes Congress did not intend through the Act to increase rather than decrease the amount of litigation arising out of or related to the deployment of qualified anti-terrorism technology. Rather, Congress balanced the need to provide recovery to plaintiffs against the need to ensure adequate deployment of anti-terrorism technologies by creating a cause of action that provides a certain level of recovery against Sellers, while at the same time protecting others in the supply chain.

The scope of Federal preemption of state laws is highly relevant to the Department’s implementation of the

Act, as the Department will have to determine the amount of insurance that Sellers must obtain. Accordingly, the Department seeks comment on that matter.

6. *Amount of Insurance.* The Act requires that Sellers obtain liability insurance “of such types and in such amounts” certified by the Secretary “to satisfy otherwise compensable third-party claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed.” Section 864(a)(1). However, the Act makes clear that Sellers are *not* required to obtain liability insurance beyond “the maximum amount of liability insurance 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.” Section 864(a)(2).

As explained above, the Department eschews any “one-size-fits-all” approach to the insurance coverage requirement. Instead, the Department construes the Act as contemplating the examination of several factors. Section 25.4(b) of the interim rule therefore sets forth a nonexclusive list of several factors that the Department may consider. These include the amount of insurance the Seller has previously maintained; the amount of insurance maintained by the Seller for other technologies or for the Seller’s business as a whole; the amount of insurance typically maintained by sellers of comparable technologies; data and history regarding mass casualty losses; information regarding the amount of liability insurance offered on the world market; the particular technology at issue and its intended use; and the point at which the cost of coverage would “unreasonably distort” the price of the technology.

In the course of determining the amount of insurance required under the Act for a particular technology, the Department may consult with the Seller, the Seller’s insurer, and others. While the decision regarding the amount of insurance required will generally be specific to each Seller or each technology, the Department recognizes that the incentive-based purposes of the Act may be furthered if the Department provides information to potential Sellers regarding the types and amounts of insurance that they will likely be required to obtain. Thus the Secretary may, where appropriate, give guidance to potential Sellers regarding the type and amounts of insurance that may be sufficient under the Act for particular