

technologies or categories of technologies.

The Department also recognizes that the amount of insurance available at prices that will not unreasonably distort the price of the anti-terrorism technology may vary over time. Thus, the interim rule is written to give the Department flexibility to address fluctuating insurance prices by providing that, during the term of the designation, the Seller may request reconsideration of the insurance certification due to changed circumstances or other reasons.

The interim rule provides that the Seller shall certify on an annual basis that the Seller has maintained the insurance required by the Under Secretary's certification. It further provides that the Under Secretary may terminate the designation as a qualified anti-terrorism technology if the Seller fails to provide the certification or provides a false certification. Termination of the designation would mean that the Seller would not be able to sell the technology as a qualified anti-terrorism technology after the date of the termination. The Seller's failure to maintain the insurance also may adversely affect the Seller's ability to obtain a renewal of the designation for the technology, and may even adversely affect the Seller's ability to obtain future designations of "qualified anti-terrorism technologies." Finally, a false certification may result in criminal or other penalties under existing laws.

The liability protections of the Act will continue to apply to technologies sold while the SAFETY Act designation was effective, regardless of whether the seller maintains the required insurance. This is necessary because the SAFETY Act protects not only the Seller, but also others in the manufacturing and distribution chains. For example, a buyer who purchases the technology while the SAFETY Act designation is still in effect should not be punished for the Seller's failure to maintain the insurance. The Seller, however, will face potential uninsured liability, because the Seller's liability limit will remain at the certified insurance level. This is because subsection (c) of Section 864 makes clear that the Seller's liability is capped at the amount of insurance "required" to be maintained under Section 864, rather than the amount of coverage actually obtained. The limitation of liability thus relates entirely to the amount of insurance required and makes no reference to whether such insurance is, in fact, maintained by the Seller.

The Department, as part of each certification, will specify the Seller or

Sellers of the anti-terrorism technology for purposes of SAFETY Act coverage. The Department may, but need not, specify in the certification the others who are covered by the liability insurance required to be purchased by the Seller.

7. *Use of Standards.* Section 25.3(c) of the interim rule provides that the Under Secretary may issue technical standards for categories of anti-terrorism technologies, and that the Under Secretary may consider compliance with any such applicable standards in determining whether to grant a designation under the Act.

8. *Relationship of the SAFETY Act to Indemnification under Public Law 85-804.* The Department recognizes that Congress intended that the SAFETY Act's liability protections would substantially reduce the need for the United States to provide indemnification under Public Law 85-804 to Sellers of anti-terrorism technologies. Where applicable, the strong liability protections of the SAFETY Act should, in most circumstances, make it unnecessary to provide indemnification to Sellers. The Department recognizes, however, that there might be, in some limited circumstances, technologies or services with respect to which both SAFETY Act coverage and indemnification might be warranted. *See* 148 Cong. Rec. E2080 (statement by Rep. Arme) (November 13, 2002) (stating that in some situations the SAFETY Act protections will "complement other government risk-sharing measures that some contractors can use such as Public Law 85-804").

In recognition of this close relationship between the SAFETY Act and indemnification authority, in Section 73 of Executive Order 13286 of February 28, 2003, the President recently amended the existing Executive Order on indemnification—Executive Order 10789 of November 14, 1958, as amended. The amendment granted the Department of Homeland Security authority to indemnify under Public Law 85-804. At the same time, it requires that *all* agencies—not just the Department of Homeland Security—follow certain procedures to ensure that the potential applicability of the SAFETY Act is considered before any indemnification is granted for an anti-terrorism technology. Specifically, the amendment provides that Federal agencies cannot provide indemnification "with respect to any matter that has been, or could be, designated by the Secretary of Homeland Security as a qualified anti-terrorism technology" unless the Secretary of Homeland Security has

advised whether SAFETY Act coverage would be appropriate and the Director of the Office of Management and Budget has approved the exercise of indemnification authority. The amendment includes an exception for the Department of Defense where the Secretary of Defense has determined that indemnification is "necessary for the timely and effective conduct of United States military or intelligence activities."

Application of Various Laws and Executive Orders to This Interim Rulemaking

Executive Order 12866—Regulatory Planning and Review

The Department has examined the economic implications of this interim rule as required by Executive Order 12866. Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 12866 classifies a rule as significant if it meets any one of a number of specified conditions, including: having an annual effect on the economy of \$100 million, adversely affecting a sector of the economy in a material way, adversely affecting competition, or adversely affecting jobs. A regulation is also considered a significant regulatory action if it raises novel legal or policy issues.

The Department did not receive any comments on our economic analysis.

The Department concludes that this interim rule is a significant regulatory action under the Executive Order because it will have a positive, material effect on public safety under Section 3(f)(1), and it raises novel legal and policy issues under Section 3(f)(4). The Department concludes, however, that this interim rule does not meet the significance threshold of \$100 million effect on the economy in any one year under Section 3(f)(1), due to the relatively low estimated burden of applying for this technology program, the unknown number of certifications and designations that the Department will dispense, and the unknown probability of a terrorist attack that would have to occur in order for the protections put in place in this interim rule to have a large impact on the public.