

## § 25.8

section shall apply in perpetuity to all sales or deployments of a Qualified Anti-Terrorism Technology in defense against, response to, or recovery from any Act of Terrorism that occurs on or after the effective date of the Designation applicable to such Qualified Anti-Terrorism Technology, regardless of whether any liability insurance coverage required to be obtained by the Seller is actually obtained or maintained or not, provided that the sale of such Qualified Anti-Terrorism Technology was consummated by the Seller on or after the earliest date of sale of such Qualified Anti-Terrorism Technology specified in such Designation and prior to the earlier of the expiration or termination of such Designation.

(d) There shall exist only one cause of action for loss of property, personal injury, or death for performance or non-performance of the Seller's Qualified Anti-Terrorism Technology in relation to an Act of Terrorism. Such cause of action may be brought only against the Seller of the Qualified Anti-Terrorism Technology and may not be brought against the buyers, the buyers' contractors, or downstream users of the Technology, the Seller's suppliers or contractors, or any other person or entity. In addition, such cause of action must be brought in the appropriate district court of the United States.

### § 25.8 Government contractor Defense.

(a) *Criteria for Certification.* The Under Secretary may issue a Certification for a Qualified Anti-Terrorism Technology as an Approved Product for Homeland Security for purposes of establishing a rebuttable presumption of the applicability of the government contractor defense. In determining whether to issue such Certification, the Under Secretary or his designee shall 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. The Seller shall provide safety and hazard analyses and other relevant data and information regarding such Qualified Anti-Terrorism Technology to the Department in connection with an application. The Under

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Secretary or his designee may require that the Seller submit any information that the Under Secretary or his designee considers relevant to the application for approval. The Under Secretary or his designee may consult with, and rely upon the expertise of, any other governmental or non-governmental person, firm, or entity, and may consider test results produced by an independent laboratory or other person, firm, or other entity engaged by the Seller.

(b) *Extent of Liability.* Should a product liability or other lawsuit be filed for claims arising out of, relating to, or resulting from an Act of Terrorism when Qualified Anti-Terrorism Technologies Certified by the Under Secretary as provided in §§ 25.8 and 25.9 of this part 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, there shall be a rebuttable presumption that the government contractor defense applies in such lawsuit. This presumption shall only be overcome by clear and convincing evidence showing that the Seller acted fraudulently or with willful misconduct in submitting information to the Department during the course of the consideration of such Technology under this section and § 25.9 of this part. A claimant's burden to show fraud or willful misconduct in connection with a Seller's SAFETY Act application cannot be satisfied unless the claimant establishes there was a knowing and deliberate intent to deceive the Department. This presumption of the government contractor defense shall apply regardless of whether the claim against the Seller arises from a sale of the product to Federal Government or non-Federal Government customers. Such presumption shall apply in perpetuity to all deployments of a Qualified Anti-Terrorism Technology (for which a Certification has been issued by the Under Secretary as provided in this section and § 25.9 of this part) in defense against, response to, or recovery from any Act of Terrorism that occurs on or after the effective date of the Certification applicable to such Technology, provided that the sale of such Technology was consummated by the Seller on or after the earliest date

of sale of such Technology specified in such Certification (which shall be determined by the Under Secretary in his discretion, and may be prior to, but shall not be later than, such effective date) and prior to the expiration or termination of such Certification.

(c) *Establishing Applicability of the Government Contractor Defense.* The Under Secretary will be exclusively responsible for the review and approval of anti-terrorism Technology for purposes of establishing the government contractor defense in any product liability lawsuit for claims arising out of, relating to, or resulting from an Act of Terrorism when Qualified Anti-Terrorism Technologies approved by the Under Secretary, as provided in this final rule, 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. The Certification of a Technology as an Approved Product for Homeland Security shall be the only evidence necessary to establish that the Seller of the Qualified Anti-Terrorism Technology that has been issued a Certification is entitled to a presumption of dismissal from a cause of action brought against a Seller arising out of, relating to, or resulting from an Act of Terrorism when the Qualified Anti-Terrorism Technology was deployed in defense against or response to or recovery from such Act of Terrorism. This presumption of dismissal is based upon the statutory government contractor defense conferred by the SAFETY Act.

**§ 25.9 Procedures for certification of approved products for Homeland Security.**

(a) *Application Procedure.* An applicant seeking a Certification of anti-terrorism Technology as an Approved Product for Homeland Security under § 25.8 shall submit information supporting such request to the Under Secretary. The Under Secretary shall make application forms available at <http://www.safetyact.gov>, and copies may also be obtained by mail by sending a request to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528. An application for a Certification may not be

filed unless the applicant has also filed an application for a Designation for the same Technology in accordance with § 25.6(a). Such applications may be filed simultaneously and may be reviewed simultaneously by the Department.

(b) *Initial Notification.* Within 30 days after receipt of an application for a Certification, the Under Secretary or his designee shall notify the applicant in writing that:

(1) The application is complete and will be reviewed, or

(2) That the application is incomplete, in which case the missing or incomplete parts will be specified.

(c) *Review Process.* The Under Secretary or his designee will review each complete application for a Certification and any included supporting materials. In performing this function, the Under Secretary or his designee may, but is not required to:

(1) Request additional information from the Seller;

(2) Meet with representatives of the Seller;

(3) Consult with, and rely upon the expertise of, any other Federal or non-Federal entity; and

(4) Perform or seek studies or analyses of the Technology.

(d) *Action by the Under Secretary.*

(1) Within 90 days after receipt of a complete application for a Certification, the Under Secretary shall take one of the following actions:

(i) Approve the application and issue an appropriate Certification to the Seller;

(ii) Notify the Seller in writing that the Technology is potentially eligible for a Certification, but that additional specified information is needed before a decision may be reached; or

(iii) Deny the application, and notify the Seller in writing of such decision.

(2) The Under Secretary may extend the time period one time for 45 days upon notice to the Seller, and the Under Secretary is not required to provide a reason or cause for such extension. The Under Secretary's decision shall be final and not subject to review, except at the discretion of the Under Secretary.

(e) *Designation is a Pre-Condition.* The Under Secretary may approve an application for a Certification only if the