

PART 25—REGULATIONS TO SUPPORT ANTI-TERRORISM BY FOSTERING EFFECTIVE TECHNOLOGIES

Sec.

- 25.1 Purpose.
- 25.2 Definitions.
- 25.3 Delegation.
- 25.4 Designation of qualified anti-terrorism technologies.
- 25.5 Obligations of seller.
- 25.6 Procedures for designation of qualified anti-terrorism technologies.
- 25.7 Litigation management.
- 25.8 Government contractor Defense.
- 25.9 Procedures for certification of approved products for Homeland Security.
- 25.10 Confidentiality and protection of intellectual property.

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§ 25.1 Purpose.

This part implements the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, sections 441-444 of title 6, United States Code (the “SAFETY Act” or “the Act”).

§ 25.2 Definitions.

Act of Terrorism—The term “Act of Terrorism” means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary:

- (1) Is unlawful;
- (2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States; and
- (3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Certification—The term “Certification” means (unless the context requires otherwise) the certification

issued pursuant to section 25.9 that a Qualified Anti-Terrorism Technology for which a Designation has been issued will perform as intended, conforms to the Seller’s specifications, and is safe for use as intended.

Contractor—The term “contractor” means any person, firm, or other entity with whom or with which a Seller has a contract or contractual arrangement relating to the manufacture, sale, use, or operation of anti-terrorism Technology for which a Designation is issued (regardless of whether such contract is entered into before or after the issuance of such Designation), including, without limitation, an independent laboratory or other entity engaged in testing or verifying the safety, utility, performance, or effectiveness of such Technology, or the conformity of such Technology to the Seller’s specifications.

Designation—The term “Designation” means the designation of a Qualified Anti-Terrorism Technology under the SAFETY Act issued by the Under Secretary under authority delegated to the Under Secretary by the Secretary of Homeland Security.

Loss—The term “loss” means death, bodily injury, or loss of or damage to property, including business interruption loss (which is a component of loss of or damage to property).

Noneconomic damages—The term “noneconomic damages” means damages for losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium, hedonic damages, injury to reputation, and any other nonpecuniary losses.

Office of SAFETY Act Implementation—The term “Office of SAFETY Act Implementation” or “OSAI” means the office within the Department of Homeland Security’s Directorate of Science and Technology that assists with the implementation of the SAFETY Act. The responsibilities of the Office of SAFETY Act Implementation may include, without limitation, preparing the SAFETY Act Application Kit, receiving and facilitating the evaluation of applications, managing the SAFETY Act Web site and otherwise providing

the public with information regarding the SAFETY Act and the application process.

Physical harm—The term “physical harm” as used in the Act and this part means any physical injury to the body, including an injury that caused, either temporarily or permanently, partial or total physical disability, incapacity or disfigurement. In no event shall physical harm include mental pain, anguish, or suffering, or fear of injury.

Qualified Anti-Terrorism Technology or QATT—The term “Qualified Anti-Terrorism Technology” or “QATT” means any Technology (including information technology) designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a Designation has been issued pursuant to this part.

SAFETY Act or Act—The term “SAFETY Act” or “Act” means the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, sections 441–444 of title 6, United States Code.

SAFETY Act Application Kit —The term “SAFETY Act Application Kit” means the Application Kit containing the instructions and forms necessary to apply for Designation or Certification. The SAFETY Act Application Kit shall be published at <http://www.safetyact.gov> or made available in hard copy upon written request to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528.

SAFETY Act Confidential Information—Any and all information and data voluntarily submitted to the Department under this part (including Applications, Pre-Applications, other forms, supporting documents and other materials relating to any of the foregoing, and responses to requests for additional information), including, but not limited to, inventions, devices, Technology, know-how, designs, copy-righted information, trade secrets, confidential business information, analyses, test and evaluation results, manuals, videotapes, contracts, letters, facsimile transmissions, electronic mail and other correspondence, finan-

cial information and projections, actuarial calculations, liability estimates, insurance quotations, and business and marketing plans. Notwithstanding the foregoing, “SAFETY Act Confidential Information” shall not include any information or data that is in the public domain or becomes part of the public domain by any means other than the violation of this section.

Secretary—The term “Secretary” means the Secretary of Homeland Security as established by section 102 of the Homeland Security Act of 2002.

Seller—The term “Seller” means any person, firm, or other entity that sells or otherwise provides Qualified Anti-Terrorism Technology to any customer(s) and to whom or to which (as appropriate) a Designation and/or Certification has been issued under this part (unless the context requires otherwise).

Technology—The term “Technology” means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a Technology under this part.

Under Secretary—The term “Under Secretary” means the Under Secretary for Science and Technology of the Department of Homeland Security.

§ 25.3 Delegation.

All of the Secretary’s responsibilities, powers, and functions under the SAFETY Act, except the authority to declare that an act is an Act of Terrorism for purposes of section 865(2) of the SAFETY Act, may be exercised by the Under Secretary for Science and Technology of the Department of Homeland Security or the Under Secretary’s designees.

§ 25.4 Designation of qualified anti-terrorism technologies.

(a) *General.* The Under Secretary may Designate as a Qualified Anti-Terrorism Technology for purposes of the

protections under the system of litigation and risk management set forth in sections 441–444 of Title 6, United States Code, any qualifying Technology designed, developed, modified, provided or procured for the specific purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause.

(b) *Criteria to be Considered.* (1) In determining whether to issue the Designation under paragraph (a) of this section, the Under Secretary may exercise discretion and judgment in considering the following criteria and evaluating the Technology:

(i) Prior United States Government use or demonstrated substantial utility and effectiveness.

(ii) Availability of the Technology for immediate deployment in public and private settings.

(iii) Existence of extraordinarily large or extraordinarily unquantifiable potential third party liability risk exposure to the Seller or other provider of such anti-terrorism Technology.

(iv) Substantial likelihood that such anti-terrorism Technology will not be deployed unless protections under the system of risk management provided under sections 441–444 of title 6, United States Code, are extended.

(v) Magnitude of risk exposure to the public if such anti-terrorism Technology is not deployed.

(vi) Evaluation of all scientific studies that can be feasibly conducted in order to assess the capability of the Technology to substantially reduce risks of harm.

(vii) Anti-terrorism Technology that would be effective in facilitating the defense against acts of terrorism, including Technologies that prevent, defeat or respond to such acts.

(viii) A determination made by Federal, State, or local officials, that the Technology is appropriate for the purpose of preventing, detecting, identifying or deterring acts of terrorism or limiting the harm such acts might otherwise cause.

(ix) Any other factor that the Under Secretary may consider to be relevant to the determination or to the homeland security of the United States.

(2) The Under Secretary has discretion to give greater weight to some factors over others, and the relative weighting of the various criteria may vary depending upon the particular Technology at issue and the threats that the Technology is designed to address. The Under Secretary may, in his discretion, determine that failure to meet a particular criterion justifies denial of an application under the SAFETY Act. However, the Under Secretary is not required to reject an application that fails to meet one or more of the criteria. The Under Secretary may conclude, after considering all of the relevant criteria and any other relevant factors, that a particular Technology merits Designation as a Qualified Anti-Terrorism Technology even if one or more particular criteria are not satisfied. The Under Secretary's considerations will take into account evolving threats and conditions that give rise to the need for the anti-terrorism Technologies.

(c) *Use of Standards.* From time to time, the Under Secretary may develop, issue, revise, adopt, and recommend technical standards for various categories or components of anti-terrorism Technologies (“Adopted Standards”). In the case of Adopted Standards that are developed by the Department or that the Department has the right or license to reproduce, the Department will make such standards available to the public consistent with necessary protection of sensitive homeland security information. In the case of Adopted Standards that the Department does not have the right or license to reproduce, the Directorate of Science and Technology will publish a list and summaries of such standards and may publish information regarding the sources for obtaining copies of such standards. Compliance with any Adopted Standard or other technical standards that are applicable to a particular anti-terrorism Technology may be considered in determining whether a Technology will be Designated pursuant to paragraph (a) of this section. Depending on whether an Adopted Standard otherwise meets the criteria set forth in section 862 of the Homeland Security Act; 6 U.S.C. 441, the Adopted Standard itself may be deemed a Technology

that may be Designated as a Qualified Anti-Terrorism Technology.

(d) *Consideration of Substantial Equivalence.* In considering the criteria in paragraph (b) of this section, or evaluating whether a particular anti-terrorism Technology complies with any Adopted Standard referenced in paragraph (c) of this section, the Under Secretary may consider evidence that the Technology is substantially equivalent to other Technologies (“Predicate Technologies”) that previously have been Designated as Qualified Anti-Terrorism Technologies under the SAFETY Act. A Technology may be deemed to be substantially equivalent to a Predicate Technology if:

(1) It has the same intended use as the Predicate Technology; and

(2) It has the same or substantially similar performance or technological characteristics as the Predicate Technology.

(e) *Pre-Application Consultations.* To the extent that he deems it to be appropriate, the Under Secretary may consult with prospective and current SAFETY Act applicants regarding their particular anti-terrorism Technologies. Prospective applicants may request such consultations through the Office of SAFETY Act Implementation. The confidentiality provisions in § 25.10 shall be applicable to such consultations.

(f) *Developmental Testing & Evaluation (DT&E) Designations.* With respect to any Technology that is being developed, tested, evaluated, modified or is otherwise being prepared for deployment for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, the Under Secretary may Designate such Technology as a Qualified Anti-Terrorism Technology and make such Technology eligible for the protections under the system of litigation and risk management set forth in sections 441–444 of title 6, United States Code. A Designation made pursuant to this paragraph shall be referred to as a “DT&E Designation,” and shall confer all of the rights, privileges and obligations that accompany Designations made pursuant to paragraph (a) of this section except as modified by the terms of this

paragraph or the terms of the particular DT&E Designation. The intent of this paragraph is to make eligible for SAFETY Act protections qualifying Technologies that are undergoing testing and evaluation and that may need to be deployed in the field either for developmental testing and evaluation purposes or on an emergency basis, including during a period of heightened risk. DT&E Designations shall describe the subject Technology (in such detail as the Under Secretary deems to be appropriate); identify the Seller of the subject Technology; be limited to the period of time set forth in the applicable DT&E Designation, which in no instance shall exceed a reasonable period for testing or evaluating the Technology (presumptively not longer than 36 months); be terminable by the Under Secretary at any time upon notice to the Seller; be subject to the limitations on the use or deployment of the QATT set forth in the DT&E Designation; and be subject to such other limitations as established by the Under Secretary. The protections associated with a DT&E Designation shall apply only during the period specified in the applicable DT&E Designation. Consent of the Seller of a QATT Designated pursuant to this paragraph will be a condition precedent to the establishment of any deployment or use condition and any other obligation established by the Under Secretary pursuant to this paragraph. Those seeking a DT&E Designation for a QATT pursuant to this paragraph (f) shall follow the procedures for DT&E Designations set forth in the SAFETY Act Application Kit.

§ 25.5 Obligations of seller.

(a) *Liability Insurance Required.* The Seller shall obtain liability insurance of such types and in such amounts as shall be required in the applicable Designation, which shall be the amounts and types certified by the Under 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 in defense against, response to, or recovery from, such act. The Under Secretary may request at any time

that the Seller of a Qualified Anti-Terrorism Technology submit any information that would:

(1) Assist in determining the amount of liability insurance required; or

(2) Show that the Seller or any other provider of Qualified Anti-Terrorism Technology otherwise has met all of the requirements of this section.

(b) *Amount of Liability Insurance.* (1) The Under Secretary may determine the appropriate amounts and types of liability insurance that the Seller will be required to obtain and maintain based on criteria he may establish to satisfy compensable third-party claims arising from, relating to or resulting from an Act of Terrorism. In determining the amount of liability insurance required, the Under Secretary may consider any factor, including, but not limited to, the following:

(i) The particular Technology at issue;

(ii) The amount of liability insurance the Seller maintained prior to application;

(iii) The amount of liability insurance maintained by the Seller for other Technologies or for the Seller's business as a whole;

(iv) The amount of liability insurance typically maintained by Sellers of comparable Technologies;

(v) Information regarding the amount of liability insurance offered on the world market;

(vi) Data and history regarding mass casualty losses;

(vii) The intended use of the Technology; and

(viii) The possible effects of the cost of insurance on the price of the product, and the possible consequences thereof for development, production, or deployment of the Technology.

(2) In determining the appropriate amounts and types of insurance that a particular Seller is obligated to carry, the Under Secretary may not require any type of insurance or any amount of insurance that is not available on the world market, and may not require any type or amount of insurance that would unreasonably distort the sales price of the Seller's anti-terrorism Technology

(c) *Scope of Coverage.* (1) Liability insurance required to be obtained pursuant

to this section shall, in addition to the Seller, protect the following, to the extent of their potential liability for involvement in the manufacture, qualification, sale, use, or operation of Qualified Anti-Terrorism Technologies deployed in defense against, response to, or recovery from, an Act of Terrorism:

(i) Contractors, subcontractors, suppliers, vendors and customers of the Seller.

(ii) Contractors, subcontractors, suppliers, and vendors of the customer.

(2) Notwithstanding the foregoing, in appropriate instances the Under Secretary will specify in a particular Designation that, consistent with the Department's interpretation of the SAFETY Act, an action for the recovery of damages proximately caused by a Qualified Anti-Terrorism Technology that arises out of, relates to, or results from an Act of Terrorism may properly be brought only against the Seller and, accordingly, the liability insurance required to be obtained pursuant to this section shall be required to protect only the Seller.

(d) *Third Party Claims.* To the extent available pursuant to the SAFETY Act, liability insurance required to be obtained pursuant to this section shall provide coverage against third party claims arising out of, relating to, or resulting from an Act of Terrorism when the applicable Qualified Anti-Terrorism Technologies have been deployed in defense against, response to, or recovery from such act.

(e) *Reciprocal Waiver of Claims.* The Seller shall enter into a reciprocal waiver of claims with its contractors, subcontractors, suppliers, vendors, and customers, and contractors and subcontractors of the customers, involved in the manufacture, sale, use, or operation of Qualified Anti-Terrorism Technologies, under which each party to the waiver agrees to be responsible for losses, including business interruption losses, that it sustains, or for losses sustained by its own employees resulting from an activity resulting from an Act of Terrorism when Qualified Anti-Terrorism Technologies have been deployed in defense against, response to, or recovery from such act.

Notwithstanding the foregoing, provided that the Seller has used diligent efforts in good faith to obtain all required reciprocal waivers, obtaining such waivers shall not be a condition precedent or subsequent for, nor shall the failure to obtain one or more of such waivers adversely affect, the issuance, validity, effectiveness, duration, or applicability of a Designation or a Certification. Nothing in this paragraph (e) shall be interpreted to render the failure to obtain one or more of such waivers a condition precedent or subsequent for the issuance, validity, effectiveness, duration, or applicability of a Designation or a Certification.

(f) *Information to be Submitted by the Seller.* As part of any application for a Designation, the Seller shall provide all information that may be requested by the Under Secretary or his designee, regarding a Seller's liability insurance coverage applicable to third-party claims arising out of, relating to, or resulting from an Act of Terrorism when the Seller's Qualified Anti-Terrorism Technology has been deployed in defense against, response to, or recovery from such act, including:

- (1) Names of insurance companies, policy numbers, and expiration dates;
- (2) A description of the types and nature of such insurance (including the extent to which the Seller is self-insured or intends to self-insure);
- (3) Dollar limits per occurrence and annually of such insurance, including any applicable sublimits;
- (4) Deductibles or self-insured retentions, if any, that are applicable;
- (5) Any relevant exclusions from coverage under such policies or other factors that would affect the amount of insurance proceeds that would be available to satisfy third party claims arising out of, relating to, or resulting from an Act of Terrorism;
- (6) The price for such insurance, if available, and the per-unit amount or percentage of such price directly related to liability coverage for the Seller's Qualified Anti-Terrorism Technology deployed in defense against, or response to, or recovery from an Act of Terrorism;
- (7) Where applicable, whether the liability insurance, in addition to the

Seller, protects contractors, subcontractors, suppliers, vendors and customers of the Seller and contractors, subcontractors, suppliers, vendors and customers of the customer to the extent of their potential liability for involvement in the manufacture, qualification, sale, use or operation of Qualified Anti-terrorism Technologies deployed in defense against, response to, or recovery from an Act of Terrorism; and

(8) Any limitations on such liability insurance.

(g) *Under Secretary's Certification.* For each Qualified Anti-Terrorism Technology, the Under Secretary shall certify the amount of liability insurance the Seller is required to carry pursuant to section 443(a) of title 6, United States Code, and paragraphs (a), (b), and (c) of this section. The Under Secretary shall include the insurance certification under this section as a part of the applicable Designation. The insurance certification may specify a period of time for which such insurance certification will apply. The Seller of a Qualified Anti-Terrorism Technology may at any time petition the Under Secretary for a revision of the insurance certification under this section, and the Under Secretary may revise such insurance certification in response to such a petition. The Under Secretary may at any time request information from the Seller regarding the insurance carried by the Seller or the amount of insurance available to the Seller.

(h) *Seller's Continuing Obligations.* Within 30 days after the Under Secretary's insurance certification required by paragraph (g) of this section, the Seller shall certify to the Under Secretary in writing that the Seller has obtained the required insurance. Within 30 days of each anniversary of the issuance of a Designation or at any other time as he may determine, the Under Secretary may require, by written notice to the Seller, that the Seller certify to the Under Secretary in writing that the Seller has maintained the required insurance. The Under Secretary may terminate a Designation if the Seller fails to provide any of the insurance certifications required by this

paragraph (h) or provides a false certification.

§ 25.6 Procedures for designation of qualified anti-terrorism technologies.

(a) *Application Procedure.* Any person, firm or other entity seeking a Designation shall submit an application to the Under Secretary or such other official as may be named from time to time by the Under Secretary. Such applications shall be submitted according to the procedures set forth in and using the appropriate forms contained in the SAFETY Act Application Kit prescribed by the Under Secretary, which shall be made available at <http://www.safetyact.gov> and by mail upon written request to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528. The burden is on the applicant to make timely submission of all relevant data requested in the SAFETY Act Application Kit to substantiate an application for Designation. An applicant may withdraw a submitted application at any time and for any reason by making a written request for withdrawal with the Department. Withdrawal of a SAFETY Act application shall have no prejudicial effect on any other application.

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

- (1) The application is complete and will be reviewed and evaluated, or
- (2) That the application is incomplete, in which case the missing or incomplete parts will be specified.

(c) *Review Process.* (1) The Under Secretary or his designee will review each complete application and any included supporting materials. In performing this function, the Under Secretary or his designee may but is not required to:

- (i) Request additional information from the Seller;
- (ii) Meet with representatives of the Seller;
- (iii) Consult with, and rely upon the expertise of, any other Federal or non-Federal entity;

(iv) Perform studies or analyses of the subject Technology or the insurance market for such Technology; and

(v) Seek information from insurers regarding the availability of insurance for such Technology.

(2) For Technologies with which a Federal, State, or local government agency already has substantial experience or data (through the procurement process or through prior use or review), the review may rely in part upon such prior experience and, thus, may be expedited. The Under Secretary may consider any scientific studies, testing, field studies, or other experience with the Technology that he deems appropriate and that are available or can be feasibly conducted or obtained, including test results produced by an independent laboratory or other entity engaged to test or verify the safety, utility, performance, in order to assess the effectiveness of the Technology or the capability of the Technology to substantially reduce risks of harm. Such studies may, in the Under Secretary's discretion, include, without limitation:

- (i) Public source studies;
- (ii) Classified and otherwise confidential studies;
- (iii) Studies, tests, or other performance records or data provided by or available to the producer of the specific Technology; and
- (iv) Proprietary studies that are available to the Under Secretary.

(3) In considering whether or the extent to which it is feasible to defer a decision on a Designation until additional scientific studies can be conducted on a particular Technology, the Under Secretary will bring to bear his expertise concerning the protection of the security of the United States and will consider the urgency of the need for the Technology.

(d) *Action by the Under Secretary.* Within 90 days of notification to the Seller that an application for a Designation is complete in accordance with paragraph (b)(1) of this section, the Under Secretary shall take one of the following actions:

- (1) Approve the application and issue an appropriate Designation to the applicant for the Technology, which shall include the insurance certification required by § 25.5(h) of this part;

§ 25.6

6 CFR Ch. I (1–1–25 Edition)

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

(3) Deny the application, and notify the applicant in writing of such decision. The Under Secretary may extend the 90-day time period for up to 45 days upon notice to the Seller. 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) *Content of Designation.* (1) A Designation shall:

(i) Describe the Qualified Anti-Terrorism Technology (in such detail as the Under Secretary deems to be appropriate);

(ii) Identify the Seller(s) of the Qualified Anti-Terrorism Technology;

(iii) Specify the earliest date of sale of the Qualified Anti-Terrorism Technology to which the Designation shall apply (which shall be determined by the Under Secretary in his discretion, and may be prior to, but shall not be later than, the effective date of the Designation);

(iv) Set forth the insurance certification required by § 25.5(g); and

(v) To the extent practicable, include such standards, specifications, requirements, performance criteria, limitations, or other information as the Department in its sole and unreviewable discretion may deem appropriate.

(2) The Designation may, but need not, specify other entities that are required to be covered by the liability insurance required to be purchased by the Seller. The failure to specify a covered person, firm, or other entity in a Designation will not preclude the application or applicability of the Act's protections to that person, firm, or other entity.

(f) *Term of Designation; Renewal.* A Designation shall be valid and effective for a term of five to eight years (as determined by the Under Secretary) commencing on the date of issuance, and the protections conferred by the Designation shall continue in full force and effect indefinitely to all sales of Qualified Anti-Terrorism Technologies

covered by the Designation. At any time within two years prior to the expiration of the term of the Designation, the Seller may apply for renewal of the Designation. The Under Secretary shall make the application form for renewal available at <http://www.safetyact.gov> and by mail upon request sent to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528.

(g) *Government Procurements—(1) Overview.* The Under Secretary may coordinate the review of a Technology for SAFETY Act purposes in connection with a Federal, State, or local government agency procurement of an anti-terrorism Technology in any manner he deems appropriate consistent with the Act and other applicable law. A determination by the Under Secretary to issue a Designation, or not to issue a Designation for a particular Technology as a QATT is not a determination that the Technology meets, or fails to meet, the requirements of any solicitation issued by any Federal government customer or non-Federal government customer. Determinations by the Under Secretary with respect to whether to issue a Designation for Technologies submitted for his review shall be based on the factors identified in § 25.4(b).

(2) *Procedure.* Any Federal, State, or local government agency that engages in or is planning to engage in the procurement of a Technology that potentially qualifies as a Qualified Anti-terrorism Technology, through the use of a solicitation of proposals or otherwise, may request that the Under Secretary issue a notice stating that the Technology to be procured either affirmatively or presumptively satisfies the technical criteria necessary to be deemed a Qualified Anti-Terrorism Technology (a "Pre-Qualification Designation Notice"). The Pre-Qualification Designation Notice will provide that the vendor(s) chosen to provide the Technology (the "Selected Vendor(s)"), upon submitting an application for SAFETY Act Designation will: Receive expedited review of their application for Designation; either affirmatively or presumptively (as the case may be) be deemed to have satisfied

the technical criteria for SAFETY Act Designation with respect to the Technology identified in the Pre-Qualification Designation Notice; and be authorized to submit a streamlined application as set forth in the Pre-Qualification Designation Notice. In instances in which the subject procurement involves Technology with respect to which a Block Designation or Block Certification has been issued, the Department may determine that the vendor providing such Technology will affirmatively receive Designation or Certification with respect to such Technology, provided the vendor satisfy each other applicable requirement for Designation or Certification. Government agencies seeking a Pre-Qualification Designation Notice shall submit a written request using the “Procurement Pre-Qualification Request” form prescribed by the Under Secretary and made available at <http://www.safetyact.gov> and by mail upon request sent to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528.

(3) *Actions.* Within 60 days after the receipt of a complete Procurement Pre-Qualification Request, the Under Secretary shall take one of the following actions:

(i) Approve the Procurement Pre-Qualification Request and issue an appropriate Pre-Qualification Designation Notice to the requesting agency that it may include in the government contract or in the solicitation materials, as appropriate; or

(ii) Notify the requesting agency in writing that the relevant procurement is potentially eligible for a Pre-Qualification Designation Notice, but that additional information is needed before a decision may be reached; or

(iii) Deny the Procurement Pre-Qualification Request and notify the requesting agency in writing of such decision, including the reasons for such denial.

(4) *Contents of Notice.* A Pre-Qualification Designation Notice shall contain, at a minimum, the following:

(i) A detailed description of and detailed specifications for the Technology to which the Pre-Qualification Designation Notice applies, which may

incorporate by reference all or part of the procurement solicitation documents issued or to be issued by the requesting agency;

(ii) A statement that the Technology to which the Pre-Qualification Designation Notice applies satisfies the technical criteria to be deemed a Qualified Anti-Terrorism Technology and that the Selected Vendor(s) may presumptively or will qualify for the issuance of a Designation for such Technology upon compliance with the terms and conditions set forth in such Pre-Qualification Designation Notice and the approval of the streamlined application;

(iii) A list of the portions of the application referenced in § 25.6(a) that the Selected Vendor(s) must complete and submit to the Department in order to obtain Designation and the appropriate period of time for such submission;

(iv) The period of time within which the Under Secretary will take action upon such submission;

(v) The date of expiration of such Pre-Qualification Designation Notice; and

(vi) Any other terms or conditions that the Under Secretary deems to be appropriate in his discretion.

(5) *Review of Completed Applications.* The application for Designation from the Selected Vendor(s) shall be considered, processed, and acted upon in accordance with the procedures set forth in § 25.6 (which shall be deemed to be modified by the terms and conditions set forth in the applicable Pre-Qualification Designation Notice). However, the review and evaluation of the Technology to be procured from the Selected Vendor(s), in relation to the criteria set forth in § 25.4(b), shall ordinarily consist of a validation that that the Technology complies with the detailed description of and detailed specifications for the Technology set forth in the applicable Pre-Qualification Designation Notice.

(h) *Block Designations.* (1) From time to time, the Under Secretary, in response to an application submitted pursuant to § 25.6(a) or upon his own initiative, may issue a Designation that is applicable to any person, firm,

or other entity that is a qualified Seller of the QATT described in such Designation (a “Block Designation”). A Block Designation will be issued only for Technology that relies on established performance standards or defined technical characteristics. All Block Designations shall be published by the Department within ten days after the issuance thereof 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. Any person, firm, or other entity that desires to qualify as a Seller of a QATT that has received a Block Designation shall complete only such portions of the application referenced in § 25.6(a) as are specified in such Block Designation and shall submit an application to the Department in accordance with § 25.6(a) and the terms of the Block Designation. Applicants seeking to be qualified Sellers of a QATT pursuant to a Block Designation will receive expedited review of their applications and shall not be required to provide information with respect to the technical merits of the QATT that has received Block Designation. Within 60 days (or such other period of time as may be specified in the applicable Block Designation) after the receipt by the Department of a complete application, the Under Secretary shall take one of the following actions:

(i) Approve the application and notify the applicant in writing of such approval, which notification shall include the certification required by § 25.5(g); or

(ii) Deny the application, and notify the applicant in writing of such decision, including the reasons for such denial.

(2) If the application is approved, commencing on the date of such approval the applicant shall be deemed to be a Seller under the applicable Block Designation for all purposes under the SAFETY Act, this part, and such Block Designation. A Block Designation shall be valid and effective for a term of five to eight years (as determined by the Under Secretary in his discretion) commencing on the date of issuance, and

may be renewed or extended by the Under Secretary at his own initiative or in response to an application for renewal submitted by a qualified Seller under such Block Designation in accordance with § 25.6(h). Except as otherwise specifically provided in this paragraph, a Block Designation shall be deemed to be a Designation for all purposes under the SAFETY Act and this part.

(i) *Other Bases for Expedited Review of Applications.* The Under Secretary may identify other categories or types of Technologies for which expedited processing may be granted. For example, the Under Secretary may conduct expedited processing for applications addressing a particular threat or for particular types of anti-terrorism Technologies. The Under Secretary shall notify the public of any such opportunities for expedited processing by publishing such notice in the FEDERAL REGISTER.

(j) *Transfer of Designation.* Except as may be restricted by the terms and conditions of a Designation, any Designation may be transferred and assigned to any other person, firm, or other entity to which the Seller transfers and assigns all right, title, and interest in and to the Technology covered by the Designation, including the intellectual property rights therein (or, if the Seller is a licensee of the Technology, to any person, firm, or other entity to which such Seller transfers all of its right, title, and interest in and to the applicable license agreement). Such transfer and assignment of a Designation will not be effective unless and until the Under Secretary is notified in writing of the transfer using the “Application for Transfer of Designation” form issued by the Under Secretary (the Under Secretary shall make this application form available at <http://www.safetyact.gov> and by mail by written request sent to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528). Upon the effectiveness of such transfer and assignment, the transferee will be deemed to be a Seller in the place and stead of the transferor with respect to the applicable Technology for all purposes under the SAFETY Act, this

part, and the transferred Designation. The transferred Designation will continue to apply to the transferor with respect to all transactions and occurrences that occurred through the time at which the transfer and assignment of the Designation became effective, as specified in the applicable Application for Transfer of Designation.

(k) *Application of Designation to Licensees.* Except as may be restricted by the terms and conditions of a Designation, any Designation shall apply to any other person, firm, or other entity to which the Seller licenses (exclusively or nonexclusively) the right to manufacture, use, or sell the Technology, in the same manner and to the same extent that such Designation applies to the Seller, effective as of the date of commencement of the license, provided that the Seller notifies the Under Secretary of such license by submitting, within 30 days after such date of commencement, a “Notice of License of Qualified Anti-terrorism Technology” form issued by the Under Secretary. The Under Secretary shall make this form available at <http://www.safetyact.gov> and by mail upon request sent to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528. Such notification shall not be required for any licensee listed as a Seller on the applicable Designation.

(l) *Significant Modification of Qualified Anti-terrorism Technologies.* (1) The Department recognizes that Qualified Anti-Terrorism Technologies may routinely undergo changes or modifications in their manufacturing, materials, installation, implementation, operating processes, component assembly, or in other respects from time to time. When a Seller makes routine changes or modifications to a Qualified Anti-Terrorism Technology, such that the QATT remains within the scope of the description set forth in the applicable Designation or Certification, the Seller shall not be required to provide notice under this subsection, and the changes or modifications shall not adversely affect the force or effect of the Seller’s QATT Designation or Certification.

(2) A Seller shall promptly notify the Department and provide details of any change or modification to a QATT that causes the QATT no longer to be within the scope of the Designation or Certification by submitting to the Department a completed “Notice of Modification to Qualified Anti-Terrorism Technology” form issued by the Under Secretary (a “Modification Notice”). A Seller is not required to notify the Department of any change or modification of a particular Qualified Anti-Terrorism Technology that is made post-sale by a purchaser unless the Seller has consented expressly to the modification. The Under Secretary shall make an appropriate form available at <http://www.safetyact.gov> and by mail upon request sent to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528. The Department will promptly acknowledge receipt of a Modification Notice by providing the relevant Seller with written notice to that effect. Within 60 days of the receipt of a Modification Notice, the Under Secretary may, in his sole and unreviewable discretion:

(i) Inform the submitting Seller that the QATT as changed or modified is consistent with, and is not outside the scope of, the Seller’s Designation or Certification;

(ii) Issue to the Seller a modified Designation or Certification incorporating some or all of the notified changes or modifications;

(iii) Seek further information regarding the changes or modifications and temporarily suspend the 60-day period of review;

(iv) Inform the submitting Seller that the changes or modifications might cause the QATT as changed or modified to be outside the scope of the Seller’s Designation or Certification, and require further review and consideration by the Department;

(v) Inform the submitting Seller that the QATT as changed or modified is outside the scope of the subject Seller’s Designation or Certification, and require that the QATT be brought back into conformance with the Seller’s Designation or Certification; or

(vi) If the Seller fails to bring the subject QATT into conformance in accordance with the Under Secretary's direction pursuant to paragraph (1)(2)(v) of this section, issue a public notice stating that the QATT as changed or modified is outside the scope of the submitting Seller's Designation or Certification and, consequently, that such Designation or Certification is not applicable to the QATT as changed or modified. If the Under Secretary does not take one or more of such actions within the 60-day period following the Department's receipt of a Seller's Modification Notice, the changes or modifications identified in the Modification Notice will be deemed to be approved by the Under Secretary and the QATT, as changed or modified, will be conclusively established to be within the scope of the description of the QATT in the Seller's Designation or Certification.

(3) Notwithstanding anything to the contrary herein, a Seller's original QATT Designation or Certification will continue in full force and effect in accordance with its terms unless modified, suspended, or terminated by the Under Secretary in his discretion, including during the pendency of the review of the Seller's Modification Notice. In no event will any SAFETY Act Designation or Certification terminate automatically or retroactively under this section. A Seller is not required to notify the Under Secretary of any change or modification that is made post-sale by a purchaser or end-user of the QATT without the Seller's consent, but the Under Secretary may, in appropriate circumstances, require an end-user to provide periodic reports on modifications or permit inspections or audits.

§ 25.7 Litigation management.

(a) Liability for all claims against a Seller arising out of, relating to, or resulting from an Act of Terrorism when such Seller's Qualified Anti-Terrorism Technology has been deployed in defense against, response to, or recovery from such act and such claims result or may result in loss to the Seller shall not be in an amount greater than the limits of liability insurance coverage required to be maintained by the Seller

under this section or as specified in the applicable Designation.

(b) In addition, in any action for damages brought under section 442 of Title 6, United States Code:

(1) No punitive damages intended to punish or deter, exemplary damages, or other damages not intended to compensate a plaintiff for actual losses may be awarded, nor shall any party be liable for interest prior to the judgment;

(2) Noneconomic damages may be awarded against a defendant only in an amount directly proportional to the percentage of responsibility of such defendant for the harm to the plaintiff, and no plaintiff may recover noneconomic damages unless the plaintiff suffered physical harm; and

(3) Any recovery by a plaintiff shall be reduced by the amount of collateral source compensation, if any, that the plaintiff has received or is entitled to receive as a result of such Acts of Terrorism that result or may result in loss to the Seller.

(c) Without prejudice to the authority of the Under Secretary to terminate a Designation pursuant to paragraph (h) of § 25.6, the liability limitations and reductions set forth in this 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 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 Under Secretary has also approved an application for a Designation for the same Technology in accordance with § 25.4.

(f) *Content and term of certification; renewal.* (1) A Certification shall:

(i) Describe the Qualified Anti-Terrorism Technology (in such detail as the Under Secretary deems to be appropriate);

(ii) Identify the Seller(s) of the Qualified Anti-Terrorism Technology;

(iii) Specify the earliest date of sale of the Qualified Anti-Terrorism Technology to which the Certification shall apply (which shall be determined by the Under Secretary in his discretion, and may be prior to, but shall not be later than, the effective date of the Certification); and

(iv) To the extent practicable, include such standards, specifications, requirements, performance criteria, limitations, or other information as the Department in its sole and unreviewable discretion may deem appropriate.

(2) A Certification shall be valid and effective for the same period of time for which the related Designation is issued, and shall terminate upon the termination of such related Designation. The Seller may apply for renewal of the Certification in connection with an application for renewal of the related Designation. An application for renewal must be made using the "Application for Certification of an Approved Product for Homeland Security" form issued by the Under Secretary.

(g) *Application of Certification to licensees.* A Certification shall apply to any other person, firm, or other entity to which the applicable Seller licenses (exclusively or nonexclusively) the right to manufacture, use, or and sell the Technology, in the same manner and to the same extent that such Certification applies to the Seller, effective as of the date of commencement of the license, provided that the Seller notifies the Under Secretary of such license by submitting, within 30 days after such date of commencement, a "Notice of License of Approved Anti-terrorism Technology" form issued by the Under Secretary. The Under Secretary shall make this form available at <http://www.safetyact.gov> and by mail upon request sent to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528. Such notification shall not be required for any licensee listed as a Seller on the applicable Certification.

(h) *Transfer of Certification.* In the event of any permitted transfer and assignment of a Designation, any related Certification for the same anti-terrorism Technology shall automatically be deemed to be transferred and assigned to the same transferee to which such Designation is transferred and assigned. The transferred Certification will continue to apply to the transferor with respect to all transactions and occurrences that occurred through the time at which such transfer and assignment of the Certification became effective.

(i) *Issuance of Certificate; Approved Product List.* For anti-terrorism Technology reviewed and approved by the Under Secretary and for which a Cer-

tification is issued, the Under Secretary shall issue a certificate of conformance to the Seller and place the anti-terrorism Technology on an Approved Product List for Homeland Security, which shall be published by the Department.

(j) *Block Certifications.* (1) From time to time, the Under Secretary, in response to an application submitted pursuant to § 25.9(a) or at his own initiative, may issue a Certification that is applicable to any person, firm or other entity that is a qualified Seller of the Approved Product for Homeland Security described in such Certification (a "Block Certification"). All Block Certifications shall be published by the Department within ten days after the issuance thereof 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. Any person, firm, or other entity that desires to qualify as a Seller of an Approved Product for Homeland Security under a Block Certification shall complete only such portions of the application referenced in § 25.9(a) as are specified in such Block Certification and shall submit such application to the Department in accordance with § 9(a). Applicants seeking to be qualified Sellers of an Approved Product for Homeland Security pursuant to a Block Certification will receive expedited review of their applications and shall not be required to provide information with respect to the technical merits of the Approved Product for Homeland Security that has received Block Certification. Within 60 days (or such other period of time as may be specified in the applicable Block Certification) after the receipt by the Department of a complete application, the Under Secretary shall take one of the following actions:

(i) Approve the application and notify the applicant in writing of such approval; or

(ii) Deny the application, and notify the applicant in writing of such decision, including the reasons for such denial.

§ 25.10

(2) If the application is approved, commencing on the date of such approval, the applicant shall be deemed to be a Seller under the applicable Block Certification for all purposes under the SAFETY Act, this part, and such Block Certification. A Block Certification shall be valid and effective for the same period of time for which the related Block Designation is issued. A Block Certification may be renewed by the Under Secretary at his own initiative or in response to an application for renewal submitted by a qualified Seller under such Block Certification in accordance with § 25.9(g). Except as otherwise specifically provided in this paragraph, a Block Certification shall be deemed to be a Certification for all purposes under the SAFETY Act and this part.

§ 25.10 Confidentiality and protection of Intellectual Property.

(a) *General.* The Secretary, in consultation with the Office of Management and Budget and appropriate Federal law enforcement and intelligence officials, and in a manner consistent with existing protections for sensitive or classified information, shall establish confidentiality procedures for safeguarding, maintenance and use of information submitted to the Department under this part. Such protocols shall, among other things, ensure that the Department will utilize all appropriate exemptions from the Freedom of Information Act.

(b) *Non-disclosure.* Except as otherwise required by applicable law or regulation or a final order of a court of competent jurisdiction, or as expressly authorized in writing by the Under Secretary, no person, firm, or other entity may:

(1) Disclose SAFETY Act Confidential Information (as defined above) to any person, firm, or other entity, or

(2) Use any SAFETY Act Confidential Information for his, her, or its own benefit or for the benefit of any other person, firm, or other entity, unless the applicant has consented to the release of such SAFETY Act Confidential Information.

(c) *Legends.* Any person, firm, or other entity that submits data or information to the Department under

6 CFR Ch. I (1–1–25 Edition)

this part may place a legend on such data or information indicating that the submission constitutes SAFETY Act Confidential Information. The absence of such a legend shall not prevent any data or information submitted to the Department under this part from constituting or being considered by the Department to constitute SAFETY Act Confidential Information.

PART 27—CHEMICAL FACILITY ANTI-TERRORISM STANDARDS

Subpart A—General

- Sec.
- 27.100 Purpose.
- 27.105 Definitions.
- 27.110 Applicability.
- 27.115 Implementation.
- 27.120 Designation of a Coordinating Official; consultations and technical assistance.
- 27.125 Severability.

Subpart B—Chemical Facility Security Program

- 27.200 Information regarding security risk for a chemical facility.
- 27.203 Calculating the screening threshold quantity by security issue.
- 27.204 Minimum concentration by security issue.
- 27.205 Determination that a chemical facility “presents a high level of security risk.”
- 27.210 Submissions schedule.
- 27.215 Security vulnerability assessments.
- 27.220 Tiering.
- 27.225 Site security plans.
- 27.230 Risk-based performance standards.
- 27.235 Alternative security program.
- 27.240 Review and approval of security vulnerability assessments.
- 27.245 Review and approval of site security plans.
- 27.250 Inspections and audits.
- 27.255 Recordkeeping requirements.

Subpart C—Orders and Adjudications

- 27.300 Orders.
- 27.305 Neutral adjudications.
- 27.310 Commencement of adjudication proceedings.
- 27.315 Presiding officers for proceedings.
- 27.320 Prohibition on ex parte communications during proceedings.
- 27.325 Burden of proof.
- 27.330 Summary decision procedures.
- 27.335 Hearing procedures.
- 27.340 Completion of adjudication proceedings.