

Guide to SBIR/STTR Program Eligibility

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U.S. Small Business Administration

This document is published by the U.S. Small Business Administration as the official compliance guide for small entities, as required by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). SBREFA requires that agencies publish compliance guides for all rules with a significant small business impact. These guides must explain in plain language how the firms can comply with the regulations.

SBIR/STTR size and ownership regulations were revised on December 27, 2012, effective January 28, 2013. This guide incorporates and explains these changes.

This guide has no legal effect and does not create any legal rights. Compliance with the procedures described in this guide does not establish compliance with the rule or establish a presumption or inference of compliance. The legal requirements that apply are governed by SBA's SBIR/STTR size regulations, which control if there is any inconsistency between the rule and the information in this guide.

Guide to SBIR/STTR Program Eligibility

1. OVERVIEW

The SBIR and STTR programs are designed to support small, independent, US firms. To ensure that only these types of firms receive program funds, all awardees are required to certify at the time of award that the awardee firm meets the size, ownership, and control requirements of the programs. These requirements are stated in the [Size Regulations \[PDF\]](#), SBIR and STTR Policy Directives (pdf available at www.sbir.gov), and the periodic solicitations for proposals issued by the participating agencies (available under *Solicitations* tab at www.SBIR.gov).

This guide is intended to help small businesses (1) understand the programs' eligibility requirements, (2) determine if they will be eligible at the time of award, and (3) accurately complete the necessary certification. This guide explains the *ownership and control requirements* and provides illustrative examples. It also explains the 500 employee *size limit* and how a firm's *affiliates* are determined when measuring its size. The guide does not address other certifications required in the program application and award process such as those concerning the *performance of work requirements*. Guidance on these other certifications is provided in the program Policy Directives and agency solicitations.

2. REGISTER YOUR COMPANY

Who must register?

- All applicants to the SBIR or STTR programs must register on the [SBIR/STTR Company Registry](#). This includes all small businesses that are *majority-owned by multiple venture operating companies, hedge funds or private equity firms*, and are applying for an award from an agency using Section 5107 authority.
- The Company Registry is a new element of the SBIR/STTR data system and application process. Once you have registered, your company will be given an SBIR/STTR ID number that you will use when applying to any SBIR/STTR agency solicitation. SBA expects this to facilitate application and reduce the need for multiple data entry.
- After registering, you will print out the completed registration form and attach to every solicitation.

When must I register my company?

- You must register prior to submitting an application.

3. CERTIFY THAT YOUR COMPANY MEETS THE REQUIREMENTS

When must I certify regarding my firm's eligibility?

At the time of award. All awardees must sign a certification form at the time of award stating that the firm meets the program eligibility requirements. This will be after you are notified of the award and before you receive the award. Agency solicitations and the SBIR/STTR Policy Directives contain the required certification form.

- With the application. Some agencies may require a certification at the time of application or offer stating that the applicant *intends to meet* all program size, ownership, and other eligibility requirements at the time of award.
- All small businesses that are *majority-owned by multiple venture operating companies, hedge funds or private equity firms*, and are applying for an award from an agency using Section 5107 authority, must complete the certification prior to submitting an application. The certification is then included with the application or submission.

Other times during the award. Some agencies may require you to recertify your firm’s continued eligibility at other points in the award life-cycle. Agencies will require a recertification if the awardee has been merged or acquired by another business, or if the award exceeds five years.

How do I certify regarding my firm’s eligibility?

- Each *agency solicitation* contains a copy of the required certification form and provides information about how the form must be completed and where it must be submitted.
- Program certification forms are set forth in Appendix I to the SBIR and STTR Policy Directives. Click [here](#) for a copy of the certification form that must be completed at the time of award.
- Be sure to read each statement in the certification form carefully and have an officer of the business sign and date the form.

4. DETERMINE IF YOUR FIRM IS ELIGIBLE

What is the purpose and intent of the eligibility regulations? SBIR/STTR program eligibility requirements are in place to ensure that the funds go only to small, independent US businesses. The regulations include restrictions about (1) the type of firm, (2) its ownership structure, and (3) the firm’s size in terms of the number of employees. The purpose of the requirement regarding ***type of firm*** is to target the awards to firms with an economic interest in developing the idea or research into a commercial application. The purpose of the ***ownership*** requirement is to limit the program to independent firms controlled by US citizens or permanent resident aliens as a way of maximizing the likelihood that the funding will stimulate innovative activity within the US economy. The purpose of the ***size*** restriction (number of employees of the firm and its affiliates) is to limit program funding to small business concerns which have a unique capacity for innovation and are more likely to be constrained by lack of access to such funding.

The requirements are presented here under the headings: Type of Firm, Ownership & Control, and Size.

TYPE OF FIRM

- An SBIR/STTR small business awardee must be a business concern – it must be organized as a ***for-profit concern*** and meet all of the other requirements for a “business concern” in 13 C.F.R. § 121.105. Non-profit entities are not eligible (except as research institutions under the STTR Program).
- If an awardee is a ***joint venture***, each party to the joint venture must be a concern that satisfies all program eligibility requirements.

OWNERSHIP & CONTROL

The ownership requirement: A majority (more than 50%) of your firms' equity (e.g., stock) must be directly owned and controlled by one of the following:

- 1) One or more individuals who are citizens or permanent resident aliens of the US,
- 2) Other for-profit small business concerns (each of which is directly owned and controlled by individuals who are citizens or permanent resident aliens of the US).
- 3) A combination of (1) and (2) above.
- 4) Multiple venture capital operating companies, hedge funds, private equity firms, or any combination of these, so long as no one such firm owns or controls more than 50% of the equity. **Note: This option is allowed only for SBIR awards from agencies that are using the authority provided in § 5107 of the SBIR/STTR Reauthorization Act (*majority-VC-owned authority*), 15 U.S.C. § 638(dd)(1).**

*The venture capital operating company, hedge fund or private equity firm must have a place of business located in the United States and be created or organized in the United States, or under the law of the United States or of any State.

Note: If an *Employee Stock Ownership Plan* owns all or part of the concern, each stock trustee and plan member is considered an owner. If a *trust* owns all or part of the concern, each trustee and trust beneficiary is considered an owner.

Your company's eligible ownership majority. The ownership requirement above states that at least a majority of your firm's equity must be held by certain types of eligible entities (individuals and/or other firms). Therefore, when determining and certifying your firm's eligibility, you must be able to identify an ownership majority (of individuals and/or entities) that is made up of eligible individuals and/or other firms.

Owned by individuals. Each individual you include as part of the eligible ownership majority of your company, must be either a citizen or permanent resident alien of the US. The term "individual" refers only to actual people—it does not refer to companies or other legal entities of any sort. "Permanent resident alien" refers to an alien admitted to the United States as a lawful permanent resident by the U.S. Citizenship and Immigration Services. If a size determination is conducted of your firm, you may be asked to show proof of this ownership.

Owned by other business concerns. If you include other business concerns as part of the eligible ownership majority of your firm, you should verify that each such concern is more than 50% owned and controlled by individuals who are US citizens or permanent resident aliens.

How is ownership determined? *Ownership* refers to direct ownership of stock or equity of the small business. When determining a small business' ownership, control and affiliation for the SBIR/STTR programs, SBA reviews equity ownership on a fully diluted basis. This means that SBA considers the total number of shares or equity that would be outstanding if all possible sources of conversion were exercised, including, but not limited to: outstanding common stock or equity, outstanding preferred stock (on a converted-to-common basis) or equity, outstanding warrants (on an as-exercised-and-converted-to-common basis), outstanding options and options reserved for future grants, and any other convertible securities on an as-converted-to-common basis.

- Example: A company has 50,000 shares. The company has also authorized a new issuance of 10,000 shares in stock options. The total number of shares on a fully diluted basis is 60,000.
- Example: The three owners of the company each hold 100 shares. The three owners each also have 100 shares of stock warrants. The total number of shares on a fully diluted basis is 600.
- Example: Individual A has issued 60 shares of Series A Preferred stock (convertible 1 to 1 to common), 30 shares of common stock and has granted options to buy up to 10 shares to various employees. The total number of shares on a fully diluted basis is 100 (60+30+10 shares exercised pursuant to options).

Where must control lie? The purpose of the ownership requirement is to ensure that the awardee firm is controlled directly by individuals who are US citizens or permanent resident aliens or by businesses that are majority-owned by US citizens or permanent resident aliens. Therefore, actual control of the firm must reside within the eligible ownership majority and may not reside outside of that ownership block. One of the following must describe the control of your firm – the company must be more than 50% controlled by:

- One US citizen or permanent resident alien
- More than one US citizen or permanent resident alien
- One other small business that is directly owned and controlled by US citizens or permanent resident aliens
- More than one other small business each of which are directly owned and controlled by US citizens or permanent resident aliens
- Any combination of the above.

May an awardee firm be owned by *venture capital operating companies, hedge funds, or private equity firms*?

Yes, but only under the following circumstances:

- An awardee may be majority owned by one or more other concerns (including a VC, hedge fund or private equity firm) that qualify as a small business that is majority owned and controlled by individuals who are citizens or resident aliens of the US.
- Any firm may own 50 percent or less of an awardee so long as it does not have the power to control the awardee.
- For awards issued under §5107 (*majority VC ownership*) authority (see [agencies using this authority](#)), an awardee may be majority owned and controlled by multiple VC, hedge fund or private equity firms, so long as no one such firm owns a majority of the awardee equity.

Note: If any firm with an ownership stake in the awardee qualifies as an affiliate (see below) of the awardee, then its employees must be counted in assessing whether awardee meets the size limit.

Majority VC ownership authority: 15 U.S.C. § 638(dd)(1) (also §5107 of the SBIR/STTR Reauthorization Act) gives SBIR agencies the option to use a portion of their SBIR funds to make awards to small businesses that are majority-owned by multiple venture capital operation companies (VCOC), hedge funds or private equity firms. If an agency elects to use this authority, it will secure the authority through the SBA and note this in its solicitations. [Agencies currently using the majority VC ownership authority](#).

How are VCOCs, hedge funds, and private equity firms defined?

VCOC has the meaning provided in: 13 CFR 121.103(b)(5)

VCOC means:

- (i) Venture capital operating companies, as defined in the U.S. Department of Labor regulations found at 29 C.F.R. §2510.3-101(d);
- (ii) Investment companies registered under the Investment Company Act of 1940, as amended (1940 Act) (15 U.S.C. 80a-1, *et seq.*); and
- (iii) Investment companies, as defined under the 1940 Act, which are not registered under the 1940 Act because they are beneficially owned by less than 100 persons, if the company's sales literature or organizational documents indicate that its principal purpose is investment in securities rather than the operation of commercial enterprises.

Hedge fund and ***private equity firm*** have the meanings given in section 13(h)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. § 1851(h)(2)). That statute states that the terms “hedge fund” and “private equity fund” mean an issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*), but for section 3(c)(1) or 3(c)(7) of that Act, or such similar funds as the appropriate Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission may determine.

US location. For the purposes of the SBIR/STTR programs, a VCOC, hedge fund and private equity firm must have a place of business located in the United States and be created or organized in the United States, or under the law of the United States or of any State.

Table 1 shows several examples of eligible and ineligible ownership structures to illustrate the requirements. Each example is discussed below.

TABLE 1. ILLUSTRATIVE EXAMPLES OF SBIR/STTR OWNERSHIP OPTIONS

OWNERSHIP SHARES (% of stock)						
Circles identify the majority ownership block that meets the eligibility criteria						
Ex.	Individual(s) ^a	SB1 ^b	SB2 ^b	VC1 ^c	VC2 ^c	Other: e.g., large co., univ, non-profit
Standard program (agencies not using Sec. 5107 authority)						
1	60	30				10
2	20	20	20	20		20
3		40	20	20		20
4	40			60		
5	20			40	30	10
For those agencies using Sec. 5107 authority						
6				50	50	
7		49		31	20	
8	10			60	30	
9	30	10	10	20	20	10

^a Individual(s) who are citizens of or permanent resident aliens in the US.

^b A small business (other than the awardee) that is directly owned and controlled by one or more individuals who are citizens or permanent resident aliens of the US.

^c Firms specified in Sec. 5107, specifically: a venture capital operating company (VCOC), hedge fund, or private equity firm.

Explanation of examples in Table 1:

Example 1: The firm is eligible because it is more than 50% owned by one or more individuals who are US citizens or permanent resident aliens.

Example 2: The firm is eligible because it is more than 50% owned by a combination of *citizens of or permanent resident aliens in the US* and other small businesses owned by *citizens of or permanent resident aliens in the US*.

Example 3: The firm is eligible because it is more than 50% owned by a combination of other small businesses owned by *citizens of or permanent resident aliens in the US*.

Example 4: The firm is not eligible because it is not majority owned by *citizens of or permanent resident aliens in the US* or other small businesses owned by *citizens of or permanent resident aliens in the US*. Like example 9, this firm would also not be eligible for an award from an agency using section 5107 authority.

- Example 5: The firm is not eligible because it is not majority owned by *citizens of or permanent resident aliens in the US or other small businesses owned by citizens of or permanent resident aliens in the US* and the agency does not use section 5107 authority. However, this firm would be eligible for an award from an agency using section 5107 authority.
- Example 6: The firm is eligible for agencies using section 5107 authority because a majority of the stock is owned by multiple VCOCs, hedge funds, or private equity firms and none owns more than 50%.
- Example 7: The firm is eligible for agencies using section 5107 authority because, while the other small business “SB1” has the largest share, the firm is more than 50% owned by more than one VCOC, hedge fund, or private equity firm and none has more than 50% ownership.
- Example 8: The firm is not eligible for the regular program. It is also not eligible for agencies using section 5107 authority because, although it is more than 50% owned by VCOCs, hedge funds, or private equity firms, one of these firms owns more than 50%.
- Example 9: The firm is not eligible for the regular program because it is not majority owned by *citizens of or permanent resident aliens in the US or other small businesses owned by citizens of or permanent resident aliens in the US*, and it is not eligible for agencies using section 5107 authority because it is not majority owned by multiple VCOCs, hedge funds, or private equity firms.

SIZE

The size requirement: An SBIR/STTR awardee, together with its *affiliates*, must not have more than 500 employees.

Is size determined by revenue for SBIR/STTR? No, for SBIR/STTR, size is determined only by the number of employees. There are no revenue limits.

What is the definition of an employee? For the SBIR/STTR programs, an *employee* includes all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee organization or leasing concern. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern. Volunteers (i.e., individuals who receive no compensation, including no in-kind compensation, for work performed) are not considered employees. See 13 C.F.R. § 121.106(a).

How do you calculate the number of employees?

SBA uses the following approach to determining the size of a concern (see 13 C.F.R. § 121.106(b)):

- (1) The *average number of employees* is used (including employees all domestic and foreign affiliates) based upon the number of employees for each of the pay periods for the preceding completed 12 calendar months.
 - The average number of employees of the business concern is added to the average number of employees of each of its affiliates.

- If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the employees counted in determining size status include the employees of the acquired or acquiring concern. This aggregation applies for the entire period of measurement, not just the period after the affiliation arose.
- Employees of a former affiliate are not counted if affiliation ceased before the date used for determining size. This exclusion of employees of a former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased.

(2) *Part-time and temporary employees* are counted the same as full-time employees.

(3) If a concern has not been in business for 12 months, the average number of employees is used for each of the pay periods during which it has been in business.

What is an affiliate? Concerns and entities are *affiliates* of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the *power to control* exists. When making a size determination, SBA looks at many factors and circumstances that determine where the power to control lies, and this is used to determine a firm's affiliates. In the size regulations (13 C.F.R. § 121.702), SBA identifies nine bases for finding affiliation between an awardee and other entities.

Bases for finding affiliation:

(1) Ownership.

- A concern is an affiliate of an individual, concern, or entity that owns or has the power to control more than 50% of the concern's voting equity.
- However, SBA may find a concern an affiliate of an individual, concern, or entity that owns or has the power to control 50% or less of voting equity based upon the totality of circumstances.
- SBA notes that there is less of a likelihood of finding affiliation with a minority shareholder holding less than 40% of the equity.
- If no individual, concern, or entity is found to control, SBA will deem the Board of Directors to be in control of the concern.

(2) Options, convertible securities, agreements to merge. In determining size, SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a *present effect* on the power to control a concern. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised; with the following exceptions:

- (i) **Agreements** to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered "agreements in principle" and are therefore not given present effect.
- (ii) **Options**, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, or unenforceable under state

or Federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be extremely remote, are not given present effect.

(iii) An individual, concern or other entity that controls one or more other concerns cannot use options, convertible securities, or agreements to appear to terminate such control before actually doing so. SBA will not give present effect to individuals', concerns' or other entities' **ability to divest** all or part of their ownership interest in order to avoid a finding of affiliation.

(3) Common management. Affiliation arises where the CEO or President of a concern (or other officers, managing members, or partners who control the *management* of the concern) also controls the *management* of one or more other concerns. Affiliation also arises where a single individual, concern, or entity that controls the *board of directors* of one concern also controls the *board of directors or management* of one or more other concerns.

(4) Identity of interest. SBA may find affiliation among two or more individuals, concerns or other entities with an identity of interest. An individual, concern or entity may rebut a determination of identity of interest with evidence showing that the interests deemed to be one are in fact separate.

(i) SBA may presume an identity of interest between family members with identical or substantially identical business or economic interests (e.g., where the family members operate concerns in the same or similar industry and in the same geographic area).

(ii) SBA may presume an identity of interest based upon economic dependence if the SBIR/STTR awardee relies upon another concern or entity for 70% or more of its receipts.

(iii) An SBIR or STTR awardee is *not affiliated* with a portfolio company of a venture capital operating company, hedge fund, or private equity firm, *solely on the basis of one or more shared investors*, though affiliation may be found for other reasons.

(5) Newly organized concern. Affiliation may arise where former or current officers, directors, principal stockholders, managing members, general partners, or key employees of one concern *organize a new concern* in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, general partners, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise.

(i) A concern will be considered “new” for the purpose of this rule if it has been actively operating continuously for less than one year.

(ii) A “key employee” is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns.

(6) Joint ventures. Concerns submitting an application as a joint venture are affiliated with each other with regard to the application. SBA will apply the joint venture affiliation exception at § 121.103(h)(3)(iii) for two firms approved to be a mentor and protégé under SBA’s 8(a) program.

- (7) Ostensible subcontractor. A concern and its ostensible subcontractor are treated as joint ventures, and therefore affiliates, for size determination purposes. An *ostensible subcontractor* is a subcontractor or subgrantee that performs *primary and vital requirements* of a funding agreement (i.e., requirements associated with the principal purpose of the funding agreement), or a subcontractor or subgrantee upon which the concern is *unusually reliant*. All aspects of the relationship between the concern and subcontractor are considered, including, but not limited to, the terms of the proposal (such as management, technical responsibilities, and the percentage of subcontracted work) and agreements between the concern and subcontractor or subgrantee (such as bonding assistance or the teaming agreement).
- (8) License agreements. SBA will consider whether there is a license agreement concerning a product or trademark which is critical to operation of the licensee. The license agreement will not cause the licensor to be affiliated with the licensee if the licensee has the right to profit from its efforts and bears the risk of loss.
- (9) Totality of the circumstances. In determining whether affiliation exists, SBA may consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.

Exception for portfolio companies. If a venture capital operating company, hedge fund, or private equity firm that is determined to be affiliated with an awardee is a minority investor in the awardee, the awardee is not affiliated with a portfolio company of the venture capital operating company, hedge fund, or private equity firm, unless:

- (i) The venture capital operating company, hedge fund, or private equity firm owns a majority of the stock of the portfolio company; or
- (ii) The venture capital operating company, hedge fund, or private equity firms holds a majority of the seats of the board of directors of the portfolio company.

Table 2. Summary of Bases for Affiliation for SBIR/STTR Program Eligibility

<i>Category</i>	<i>When affiliation may be found</i>
Ownership	<ul style="list-style-type: none"> ▶ An individual, concern, or entity owns or has the power to control more than 50% of voting equity. Note that SBA is less likely to find affiliation when this ownership is less than 40%.
Options, convertible securities, agreements to merge (given <i>present effect</i>)	<ul style="list-style-type: none"> ▶ If an individual or entity has control with the exercise of options and/or convertible securities and agreements to merge. ▶ Agreements that are open or merely continue negotiations about a possible merger are not given present effect.
Common management	<ul style="list-style-type: none"> ▶ Officers, managing members, partners who control the management of the concern also control the management of another concern. ▶ Individuals or entities that control the board of directors of the concern also control the board or management of another concern.
Identity of interest	<ul style="list-style-type: none"> ▶ SBA may <i>presume</i> identity of interest among two or more persons/entities, and therefore affiliation, such as:

	<p>(a) Between , family members with identical or substantially identical business or economic interests.</p> <p>(b) If a firm relies on another firm for 70% or more of its receipts.</p> <p>▶ An awardee firm is <i>not affiliated</i> with a portfolio company of a venture capital operating company, hedge fund, or private equity firm, <i>solely on the basis of</i> one or more shared investors.</p>
Newly organized concern	<p>▶ The firm's officers, directors, principal stockholders, managing members, general partners, or key employees <i>organize another concern</i> in the same or related industry or field, and serve in such capacity for the new concern and the one furnishes the other with contracts, or other assistance. This applies only to firms that have actively operated continuously for less than one year.</p>
Joint ventures	<p>▶ Firms apply for award as a joint venture -- all parties to the joint venture are affiliated.</p>
Ostensible subcontractor	<p>▶ The firm is a subcontractor or subgrantee</p> <p>(a) that performs primary and vital requirements of a funding agreement or</p> <p>(b) upon which the concern is unusually reliant.</p>
License agreements	<p>▶ There is a license agreement concerning a product or trademark that is critical to the operation of the licensee, except if the licensee has the right to profit from its efforts with regard to the agreement and bears the risk of loss.</p>
Totality of the circumstances	<p>▶ Based upon the totality of circumstances, SBA determines that affiliation exists.</p>

When does SBA determine the size of an SBIR/STTR awardee? An SBA size office may make a determination of an applicant or awardee firm if the size is protested. When making a size determination, an SBA regional office will identify other individuals or entities it finds to be affiliated with the firm. The employees of these affiliates will be counted when determining the firm's size.

[Eligibility Checklist](#)

Appendix 1: Text from Size Regulation 121.702

PDF

For the reasons stated in the preamble, SBA amends 13 CFR part 121 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for 13 CFR part 121 is revised to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 638, 662, and 694a(9).

2. Amend § 121.103 as follows:

a. Add a new paragraph (a)(7); and

b. Add a new paragraph (b)(8).

§ 121.103 How does SBA determine affiliation?

(a) * * *

(7) For SBA's Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs, the bases for affiliation are set forth in § 121.702.

* * * * *

(b) * * *

(8) These exceptions to affiliation and any others set forth in § 121.702 apply for purposes of SBA's SBIR and STTR programs.

* * * * *

3. Amend § 121.201 by revising paragraph (b) of footnote 11 at the end of the table "Small Business Size Standards by NAICS Industry," to read as follows:

§ 121.201 What size standards has SBA identified by North American Industry Classification System codes?

* * * * *

Small Business Size Standards by NAICS Industry

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Footnotes

* * * * *

11. * * *

(a) * * *

(b) For purposes of the Small Business Innovation Research (SBIR) and the Small Business Technology Transfer (STTR) Programs only, a different definition has been established by law. See §121.702 of these regulations.

* * * * *

4. Revise the undesignated center heading immediately preceding § 121.701 to read as follows:

Size and Eligibility Requirements for the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Programs

5. Amend § 121.701 as follows:

a. Revise the section heading;

b. Revise paragraphs (a) and (b); and

c. Remove paragraph (c).

§ 121.701 What SBIR and STTR programs are subject to size and eligibility determinations and what definitions are important?

(a) These sections apply to SBA's SBIR and STTR programs, 15 U.S.C. § 638.

(b) Definitions.

(1) Funding agreement officer means a contracting officer, a grants officer, or a cooperative agreement officer.

(2) Funding agreement means any contract, grant or cooperative agreement entered into between any Federal agency and any small business for the purposes of the SBIR or STTR program.

(3) Hedge fund has the meaning given that term in section 13(h)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. § 1851(h)(2)). The hedge fund must have a place of business located in the United States and be created or organized in the United States, or under the law of the United States or of any State.

(4) Portfolio company means any company that is owned in whole or part by a venture capital operating company, hedge fund, or private equity firm.

(5) Private equity firm has the meaning given the term “private equity fund” in section 13(h)(2) of the Bank Holding Company Act of 1956 (12 U.S.C. § 1851(h)(2)). The private equity firm must have a place of business located in the United States and be created or organized in the United States, or under the law of the United States or of any State.

(6) Venture capital operating company means an entity described in clause (i), (v), or (vi) of § 121.103(b)(5). The venture capital operating company must have a place of business located in the United States and be created or organized in the United States, or under the law of the United States or of any State.

6. Revise § 121.702 to read as follows:

§ 121.702 What size and eligibility standards are applicable to the SBIR and STTR programs?

To be eligible for award of funding agreements in SBA's SBIR and STTR programs, a business concern must meet the requirements below at the time of award of an SBIR or STTR Phase I or Phase II funding agreement:

(a) Ownership and control for the SBIR program.

(1) An SBIR awardee must:

(i) Be a concern which is more than 50% directly owned and controlled by one or more individuals (who are citizens or permanent resident aliens of the United States), other business concerns (each of which is more than 50% directly owned and controlled by individuals who are citizens or permanent resident aliens of the United States), or any combination of these;

(ii) Be a concern which is more than 50% owned by multiple venture capital operating companies, hedge funds, private equity firms, or any combination of these (for agencies electing to use the authority in 15 U.S.C. § 638(dd)(1)); or

(iii) Be a joint venture in which each entity to the joint venture must meet the requirements set forth in paragraph (a)(1)(i) or (a)(1)(ii) of this section. A joint venture that includes one or more concerns that meet the requirements of (a)(1)(ii) must comply with § 121.705(b) concerning registration and proposal requirements.

(2) No single venture capital operating company, hedge fund, or private equity firm may own more than 50% of the concern.

(3) If an Employee Stock Ownership Plan owns all or part of the concern, each stock trustee and plan member is considered an owner.

(4) If a trust owns all or part of the concern, each trustee and trust beneficiary is considered an owner.

(b) Ownership and control for the STTR program.

(1) An STTR awardee must:

(i) Be a concern which is more than 50% directly owned and controlled by one or more individuals (who are citizens or permanent resident aliens of the United States), other business concerns (each of which is more than 50% directly owned and controlled by individuals who are citizens or permanent resident aliens of the United States), or any combination of these; or

(ii) Be a joint venture in which each entity to the joint venture must meet the requirements set forth in paragraph (b)(1)(i) of this section.

(2) If an Employee Stock Ownership Plan owns all or part of the concern, each stock trustee and plan member is considered an owner.

(3) If a trust owns all or part of the concern, each trustee and trust beneficiary is considered an owner.

(c) Size and affiliation. An SBIR or STTR awardee, together with its affiliates, must not have more than 500 employees. Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. For the purposes of the SBIR and STTR programs, the following bases of affiliation apply:

(1) Affiliation based on ownership. For determining affiliation based on equity ownership, a concern is an affiliate of an individual, concern, or entity that owns or has the power to control more than 50 percent of the concern's voting equity. However, SBA may find a concern an affiliate of an individual, concern, or entity that owns or has the power to control 40% or more of the voting equity based upon the totality of circumstances. If no individual, concern, or entity is found to control, SBA will deem the Board of Directors to be in control of the concern.

(2) Affiliation arising under stock options, convertible securities, and agreements to merge. In determining size, SBA considers stock options, convertible securities, and agreements to merge (including agreements in principle) to have a present effect on the power to control a concern. SBA treats such options, convertible securities, and agreements as though the rights granted have been exercised.

(i) Agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered "agreements in principle" and are thus not given present effect.

(ii) Options, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, or unenforceable under state or Federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be extremely remote, are not given present effect.

(iii) An individual, concern or other entity that controls one or more other concerns cannot use options, convertible securities, or agreements to appear to terminate such control before actually doing so. SBA will not give present effect to individuals', concerns' or other entities' ability to divest all or part of their ownership interest in order to avoid a finding of affiliation.

(3) Affiliation based on common management. Affiliation arises where the CEO or President of a concern (or other officers, managing members, or partners who control the management of the concern) also controls the management of one or more other concerns. Affiliation also arises where a single individual, concern, or entity that controls the board of directors of one concern also controls the board of directors or management of one or more other concerns.

(4) Affiliation based on identity of interest. Affiliation may arise among two or more persons (including any individual, concern or other entity) with an identity of interest. An individual, concern or entity may rebut a determination of identity of interest with evidence showing that the interests deemed to be one are in fact separate.

(i) SBA may presume an identity of interest between family members with identical or substantially identical business or economic interests (such as where the family members operate concerns in the same or similar industry in the same geographic area).

(ii) SBA may presume an identity of interest based upon economic dependence if the SBIR/STTR awardee relies upon another concern or entity for 70% or more of its receipts.

(iii) An SBIR or STTR awardee is not affiliated with a portfolio company of a venture capital operating company, hedge fund, or private equity firm, solely on the basis of one or more shared investors, though affiliation may be found for other reasons.

(5) Affiliation based on the newly organized concern rule. Affiliation may arise where former or current officers, directors, principal stockholders, managing members, general partners, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, general partners, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns. A "key employee" is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern. A concern will be considered "new" for the purpose of this rule if it has been actively operating continuously for less than one year.

(6) Affiliation based on joint ventures. Concerns submitting an application as a joint venture are affiliated with each other with regard to the application. SBA will apply the joint venture affiliation exception at § 121.103(h)(3)(iii) for two firms approved to be a mentor and protégé under SBA's 8(a) program.

(7) Affiliation based on the ostensible subcontractor rule. A concern and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor or subgrantee that performs primary and vital requirements of a funding agreement (*i.e.*, those requirements associated with the principal purpose of the funding agreement), or a subcontractor or subgrantee upon which the concern is unusually reliant. All aspects of the relationship between the concern and subcontractor are considered, including, but not limited to, the terms of the proposal (such as management, technical responsibilities, and the percentage of subcontracted work) and agreements between the concern and subcontractor or subgrantee (such as bonding assistance or the teaming agreement). To determine whether a subcontractor performs primary and vital requirements of a funding agreement, SBA will consider whether the concern's proposal complies with the performance requirements of the SBIR or STTR program.

(8) Affiliation based on license agreements. SBA will consider whether there is a license agreement concerning a product or trademark which is critical to operation of the licensee. The license agreement will not cause the licensor to be affiliated with the licensee if the licensee has the right to profit from its efforts and bears the risk of loss. Affiliation may arise, however, through other means, such as common ownership or common management.

(9) Exception to affiliation for portfolio companies. If a venture capital operating company, hedge fund, or private equity firm that is determined to be affiliated with an awardee is a minority investor in the awardee, the awardee is not affiliated with a portfolio company of the venture capital operating company, hedge fund, or private equity firm, unless:

(i) The venture capital operating company, hedge fund, or private equity firm owns a majority of the portfolio company; or

(ii) The venture capital operating company, hedge fund, or private equity firms holds a majority of the seats of the board of directors of the portfolio company.

(10) Totality of the Circumstances. In determining whether affiliation exists, SBA may consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.

(d) Calculating Ownership and Control. SBA will review the small business' equity ownership on a fully diluted basis for purposes of determining ownership, control and affiliation in the SBIR and STTR programs. This means that SBA will consider the total number of shares or equity that would be outstanding if all possible sources of conversion were exercised, including, but not limited to: outstanding common stock or equity, outstanding preferred stock (on a converted to common basis) or equity, outstanding warrants (on an as exercised and converted to common basis), outstanding options and options reserved for future grants, and any other convertible securities on an as converted to common basis.

7. Revise § 121.704 to read as follows:

§ 121.704 When does SBA determine the size and eligibility status of a business concern?

(a) The size and eligibility status of a concern for the purpose of a funding agreement award under the SBIR and STTR programs is determined at the time of award for both Phase I and Phase II SBIR and STTR awards, or on the date of the request for a size determination, if an award is pending.

(b) A concern that qualified as a small business at the time it receives an SBIR or STTR funding agreement is considered a small business throughout the life of that specific funding agreement. Where a concern grows to be other than small, the funding agreement agency may exercise the options on the award that is a contract, grant or cooperative agreement or issue a continuation on a grant or cooperative agreement and still count the award as an award to a small business under the SBIR or STTR program. However, the following exceptions apply:

(1) In the case of a merger or acquisition, the awardee must, within 30 days of the transaction becoming final (or the approved funding agreement novation if a novation is required), recertify its small business size status to the funding agreement agency or inform the funding agreement agency that it is other than small. If the awardee is other than small, the agency can no longer fund the options or issue a continuation pursuant to the funding agreement, from that point forward, with SBIR or STTR funds. Funding agreement notations for reasons other than a merger or acquisition do not necessarily require re-certification. The funding agreement agency and the awardee

must immediately revise all applicable Federal contract and grant databases to reflect the new size status from that point forward.

(2) For the purposes of SBIR and STTR funding agreements with durations of more than five years, a funding agreement officer must request that a business concern re-certify its small business size status no more than 120 days prior to the end of the fifth year of the funding agreement, and no more than 120 days prior to exercising any option or issuing any continuation. If the awardee certifies that it is other than small, the funding agreement agency can no longer fund the options or issue a continuation pursuant to the funding agreement with SBIR or STTR funds. The funding agreement agency and the awardee must immediately revise all applicable Federal contract and grant databases to reflect the new size status from that point forward.

(c) Re-certification does not change the terms and conditions of the funding agreement. The requirements in effect at the time of award remain in effect throughout the life of the funding agreement.

(d) A request for a size re-certification shall include the size standard in effect at the time of re-certification.

8. Revise § 121.705 to read as follows:

§ 121.705 Must a business concern self-certify its size and eligibility status?

(a) A business concern must self-certify that it meets the eligibility requirements set forth in § 121.702 of this title for a Phase I or Phase II SBIR or STTR funding agreement.

(b) A business concern that is more than 50% owned by multiple venture capital operating companies, hedge funds, or private equity firms and a joint venture where one or more parties to the joint venture is more than 50% owned by multiple venture capital operating companies, hedge funds, or private equity firms must be registered with SBA as of the date it submits its initial proposal (or other formal response) to a Phase I or Phase II SBIR announcement or solicitation. The concern must indicate in any SBIR proposal or application that it is registered with SBA as majority-owned by multiple venture capital operating companies, hedge funds, or private equity firms.

(c) A small business concern that did not meet the requirements of paragraph (b) at the time of its SBIR proposal or application must notify the funding agreement officer if, on the date of award, the concern is more than 50% owned by multiple venture capital operating companies, hedge funds, or private equity firms.

(i) The concern is still eligible to receive the award if it becomes majority-owned by multiple venture capital operating companies, hedge funds, or private equity firms after the time it submitted its initial proposal (or other formal response) to a Phase I or Phase II SBIR announcement or solicitation if the agency makes the award on or after the date that is 9 months from the end of the period for submitting applications under the SBIR solicitation.

(ii) This small business, known as a covered small business concern, would have to certify that it meets the requirements of the SBIR program set forth in §§121.702(a)(1)(ii) or 121.702(a)(1)(iii), and 121.702(a)(2) and 121.702(c) at the time of award of the funding agreement.

(d) A funding agreement officer may accept a concern's self-certification as true for the particular funding agreement involved in the absence of a written protest or other credible information which would cause the funding agreement officer or SBA to question the size or eligibility of the concern.

(e) Procedures for protesting an awardee's self-certification are set forth in §§121.1001 through 121.1009. In adjudicating a protest, SBA may address both the size status and eligibility of the SBIR or STTR awardee.

9. Amend § 121.1001 by revising paragraph (a)(4) as follows:

§ 121.1001 Who may initiate a size protest or request a formal size determination?

(a) * * *

(4) For SBA's Small Business Innovation Research (SBIR) program and Small Business Technology Transfer (STTR) program, the following entities may protest:

(i) An offeror or applicant for that solicitation;

(ii) The funding agreement officer; and

(iii) The responsible SBA Government Contracting Area Director; the Director, Office of Government Contracting; or the Associate Administrator, Investment Division.

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10. Amend § 121.1004 by revising paragraph (b) as follows:

§ 121.1004 What time limits apply to size protests?

* * * * *

(b) Protests by contracting officers, funding agreement officers or SBA. The time limitations in paragraph (a) of this section do not apply to contracting officers, funding agreement officers or SBA, and they may file protests before or after awards, except to the extent set forth in paragraph (e) of this section, including for purposes of the SBIR and STTR programs. Notwithstanding paragraph (e), for purposes of the SBIR and STTR programs the funding agreement officer or SBA may file a protest in anticipation of an award.

* * * * *

11. Amend § 121.1008 by revising paragraph (a) to read as follows:

§ 121.1008 What occurs after SBA receives a size protest or request for a formal size determination?

(a) When SBA receives a size protest, the SBA Area Director for Government Contracting, or designee, will notify the contracting officer, the protested concern, and the protestor that the protest has been received. If the protest pertains to a requirement involving SBA's HUBZone program, the Area Director will also notify the D/HUB of the protest. If the protest pertains to a requirement set aside for WOSBs or EDWOSBs, the Area Director will also notify SBA's Director for Government Contracting of the protest. If the protest pertains to a requirement involving SBA's SBIR or STTR programs, the Area Director will also notify the Associate Administrator, Investment Division. If the protest involves the size status of an SDB concern (see part 124, subpart B of this chapter) the Area Director will notify SBA's Associate Administrator for Business Development. If the protest pertains to a requirement that has been reserved for competition among eligible 8(a) BD program participants, the Area Director will notify the SBA district office servicing the 8(a) concern whose size status has been protested. SBA will provide a copy of the protest to the protested concern together with SBA Form 355, Application for Small Business Size Determination, by certified mail, return receipt requested, or by any overnight delivery service that provides proof of receipt. SBA will ask the protested concern to complete the form and respond to the allegations in the protest.

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