clothes washers adopted pursuant to these provisions appear under Title 10 of the Code of Federal Regulations (CFR) part 430, subpart B, appendices F (''Uniform Test Method for Measuring the Energy Consumption of Room Air Conditioners''), C (''Uniform Test Method for Measuring the Energy Consumption of Dishwashers''), and J1 (''Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-Automatic Clothes Washers''). DOE also recently published a new test procedure for residential clothes washers (Appendix J2—''Uniform Test Method for Measuring the Energy Consumption of Automatic and Semi-Automatic Clothes Washers''), the use of which is not required until compliance with any amended standards is required. These procedures establish the currently permitted means for determining energy efficiency and annual energy consumption of these products.

DOE has received inquiries regarding the appropriate interpretation of various provisions of the current DOE test procedures. DOE has issued guidance documents on certain aspects of testing room air conditioners, residential dishwashers, and residential clothes washers. See *http://www1.eere.energy.gov/guidance/default.aspx?pid=2&spid=1* for additional information.

The Department is holding this public meeting and webinar to gather information regarding the current practices of manufacturer-run and private testing facilities. The Department seeks to understand how interested parties have interpreted test procedures provisions that they believe to be ambiguous absent DOE guidance. DOE plans to issue guidance, as needed and appropriate, to provide better consistency in the application of the test procedures and better clarity regarding how DOE conducts testing.

Discussion at the public meeting should focus on current test procedures (Appendices C, F, J1 and J2). Furthermore, while DOE seeks the views of all interested parties, this public meeting is not an appropriate forum for consensus building. The Department will take the information provided in the course of the public meeting into consideration when drafting DOE interpretive guidance.

In 2011, DOE launched a new Web site dedicated to DOE guidance: *http://www1.eere.energy.gov/guidance/default.aspx?pid=2&spid=1*. All test procedure guidance is now published through a public process. DOE publishes guidance in draft form on the guidance Web site. DOE accepts public comment on the draft guidance. After considering comments, DOE may take one of three courses: Publishing final guidance, publishing revised draft guidance, or withdrawing the guidance. If the Department publishes revised draft guidance, interested parties have another opportunity to provide comments.

DOE will conduct the public meeting in an informal, conference style. There shall be no discussion of proprietary information, costs or prices, market shares, or other commercial matters regulated by U.S. antitrust laws. A court reporter will record the meeting, after which a transcript will be placed on the DOE Web site and made available for purchase from the court reporter.

Anyone who wishes to participate in the public meeting, receive meeting materials, or be added to the DOE mailing list to receive future notices and information about room air conditioners, residential dishwashers, or residential clothes washers should contact Ms. Brenda Edwards at (202) 586–2945.

Dated: Issued in Washington, DC, on May 9, 2012.

Kathleen B. Hogan,

Deputy Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 2012–11732 Filed 5–14–12; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

13 CFR Part 121

RIN 3245–AG46

Small Business Size Regulations, Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program

AGENCY: Small Business Administration.

ACTION: Proposed rule.

SUMMARY: The U.S. Small Business Administration (SBA) proposes to amend its regulations governing size and eligibility for the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Programs. This proposed rule would implement provisions of the National Defense Authorization Act for Fiscal Year 2012. The proposed rule addresses ownership, control and affiliation for participants in the SBIR and STTR Programs. This includes participants that are majority owned by multiple venture capital operating companies, private equity firms or hedge funds.

DATES: You must submit your comments on or before July 16, 2012.

ADDRESSES: You may submit comments, identified by RIN: 3245–AG46, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail, Hand Delivery/Courier:* Carl Jordan, Office of Size Standards, or Edsel Brown, Assistant Director, Office of Technology, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

SBA will post all comments to this proposed rule on *www.regulations.gov*. If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.regulations.gov,* you must submit such information to Carl Jordan or Edsel Brown, or send an email to *sizestandards@sba.gov*. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review your information and determine whether it will make the information public.

FOR FURTHER INFORMATION CONTACT: Carl Jordan, Office of Size Standards, at (202) 205–6618, or Edsel Brown, Assistant Director, Office of Technology, at (202) 401–6365. You may also email questions to *sizestandards@SBA.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On July 22, 1982, Congress enacted and the President signed into law the Small Business Innovation Development Act of 1982, Public Law 97–219 (codified at 15 U.S.C. 638), which established the Small Business Innovation Research (SBIR) Program. The statutory purpose of the SBIR Program is to stimulate technological innovation by strengthening the role of innovative small business concerns in Federally-funded research and research and development (R/R&D).

In 1992, Congress enacted the Small Business Technology Transfer Act of 1992 (STTR Act), Public Law 102–564 (codified at 15 U.S.C. 638). The STTR Act initially established the Small Business Technology Transfer (STTR) program as a pilot program that requires Federal agencies with extramural budgets for R/R&D in excess of $1 billion per fiscal year to enter into funding agreements with small business concerns that engage in a collaborative relationship with a research institution. The purpose of the STTR program is to stimulate a partnership of ideas and technologies between innovative small business concerns and research institutions. Congress amended the Small Business Act (Act) in 2001 and

changed the status of the STTR program from a pilot program to a permanent one.

On December 31, 2011, the President signed into law the National Defense Authorization Act for Fiscal Year 2012 (Defense Reauthorization Act), Public Law 112–81. Section 5001, Division E of the Defense Reauthorization Act contains the SBIR/STTR Reauthorization Act of 2011 (SBIR/STTR Reauthorization Act), which extends both the SBIR and STTR programs through September 30, 2017, increases the percentage of each participating agency's extramural budget allocated for the programs, and increases the SBIR and STTR Phase I and Phase II award levels. In addition to the above, the SBIR/STTR Reauthorization Act contains several provisions relating to businesses majority-owned by venture capital operating companies (VCOCs), hedge funds or private equity firms. Specifically, the SBIR/STTR Reauthorization Act provides that businesses majority-owned by VCOCs, hedge funds or private equity firms may participate in the SBIR Program, under certain conditions.

At the present time, SBA's size regulations, which address ownership and affiliation of SBIR participants, do not permit business concerns majority-owned by multiple venture operating companies, hedge funds or private equity firms to participate in the program. Consequently, the SBIR/STTR Reauthorization Act requires that SBA issue a proposed rule, within 120 days of enactment of the Act, amending 13 CFR 121.103 (relating to determinations of affiliation applicable to the SBIR Program) and 13 CFR 121.702 (relating to ownership and control and size for the SBIR Program) to address ownership, control, and affiliation for businesses that are owned in majority part by VCOCs, private equity firms or hedge funds. According to the statute, the regulations must also address domestic ownership of program participants.

As a result of the abbreviated time frame set forth in the SBIR/STTR Reauthorization Act by which SBA must issue a proposed rule, the Agency was unable to conduct public outreach prior to drafting and issuing this proposed rule. However, in addition to soliciting public comments on the proposed rule, SBA plans to conduct public outreach sessions following publication of the rule, such as town hall meetings and webinars, to gather additional input on these statutory provisions and SBA's proposed implementation. SBA will release more information about these public sessions later. The information will be available at *www.SBIR.gov* and *www.sba.gov*.

II. Proposed Amendments

SBA is proposing to amend its regulations to address affiliation, ownership, and control of participants in the SBIR and STTR programs. Because these issues affect various parts of SBA's size regulations, SBA must propose amendments to several sections. In drafting these regulations, the SBA took into consideration recent Executive Orders issued by the President, including Executive Order 13563, issued on January 18, 2011. Executive Order 13563 explains that when drafting regulations, agencies must consider approaches that reduce burdens, maximize benefits and maintain flexibility; promote coordination, simplification, and harmonization; identify and assess available alternatives; and consider the costs of the regulations on the public.

SBA believes this proposed rule simplifies and streamlines the current ownership and affiliation criteria for the SBIR and STTR programs, while also ensuring that only domestic small businesses receive the benefits of these programs. Specifically, SBA's proposed rules provide a clear set of guidelines for small businesses to understand and a bright-line test by which small businesses can easily determine whether they meet the ownership, size and affiliation requirements of the programs.

When drafting the regulations, SBA considered the fact that the statutory provisions relating to majority ownership by VCOCs, hedge funds or private equity firms specifically apply to the SBIR Program. However, § 5104 of the SBIR/STTR Reauthorization Act permits a small business concern that received a Phase I award under the SBIR or STTR program to receive a Phase II award in either the SBIR or STTR program. Therefore, an SBIR Phase I awardee may be able to receive an STTR Phase II award. If that is the case, the eligibility rules of both programs should be the same and consistent. As a result, SBA's proposed amendments apply to both the SBIR and STTR programs.

The proposed amendments are set forth in a section-by-section analysis below. In each section, SBA has requested comments on specific issues. However, SBA welcomes comments on all issues arising from this proposed rule, including whether there are additional ways to simplify the current requirements, maximize benefits and increase flexibility for small businesses.

A. Section 121.701—Definitions and Programs Subject to Size Determinations

SBA is proposing to amend § 121.701, which states that the SBIR Programs of the agencies are subject to SBA's size determinations, to make it clear that the regulations apply to both the SBIR and STTR programs. In addition, SBA has added definitions applicable to the programs and set forth in statute to this section.

Section 5107(c)(3)(A) of the SBIR/STTR Reauthorization Act states that SBA's regulations addressing the participation of applicants majority-owned by multiple VCOCs, hedge funds, or private equity firms in the SBIR Program should address whether the applicant is owned by domestic business concerns. SBA therefore has proposed to define the term ''domestic business concern.'' In defining the term, SBA looked first at its regulations, which define the term ''business concern or concern.'' A ''business concern or concern'' eligible for SBA's programs is one that is for profit, has a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor. SBA proposes that a domestic business concern meet this definition.

However, SBA has proposed additional criteria that a ''domestic business concern'' must meet. SBA has proposed that for purposes of the SBIR and STTR programs, the domestic business concern must also be created or organized in the United States, or under the law of the United States or of any State. SBA believes that this proposed definition not only meets statutory requirements set forth in the Act but is straightforward and easy to understand.

When drafting the proposed definition of domestic business concern, SBA reviewed other regulations, such as those implementing the Buy American Act and Berry Amendment, to determine whether they define the term. We note that the Department of Defense Federal Acquisition Regulations Supplement (DFARS) defines the term ''domestic concern'' to mean a concern incorporated in the United States (including a subsidiary that is incorporated in the United States, even if the parent corporation is a foreign concern) or an unincorporated concern having its principal place of business in the United States. *See* 48 CFR 225.003. SBA did not propose this definition for the SBIR and STTR programs because

we do not believe it is sufficiently restrictive—the DFARs definition does not appear to require an incorporated concern to have a place of business in the United States.

In addition, SBA also considered whether it should include a requirement that to be considered a domestic business concern, more than 50% of the business must either directly or indirectly be owned by U.S. citizens, permanent resident aliens, or domestic corporations, partnerships or limited liability companies (LLCs). SBA did not propose this requirement in the definition of domestic business concern because we believe it adds an extra burden on the small business and an added complexity that is not necessary.

The definition proposed for the term ''domestic business concern'' has generally been utilized for SBA's programs for many years, and has ensured that domestic small business concerns receive the benefits of SBA's programs. However, SBA welcomes comments on whether the proposed definition of domestic business concern should include additional criteria to ensure that the business is truly a domestic concern. SBA also welcomes comments on whether it should adopt the more simplified definition of domestic concern used in the DFARS, which is discussed above.

In addition, the SBIR/STTR Reauthorization Act defines the terms VCOC, hedge fund and private equity firm. SBA has proposed incorporating those statutory definitions into the regulations.

SBA has also proposed to define the term ''portfolio company'' because the SBIR/STTR Reauthorization Act uses that term when referring to VCOCs, hedge funds and private equity firms, but does not define it. SBA is proposing to define the term ''portfolio company'' to mean any company owned by the VCOC, hedge fund or private equity fund. SBA reviewed the U.S. Department of Labor's definition for venture capital investment set forth in 29 CFR 2510.3–101(d)(3)(i), which defines the term as an investment in an operating company as to which the investor has or obtains management rights. However, SBA believes that the definition it has proposed is a simpler and easier definition to understand.

SBA welcomes comments on these proposed amendments.

B. Section 121.702—Ownership and Control

SBA is proposing to amend 13 CFR 121.702 to address many of the amendments to the Small Business Act set forth in the SBIR/STTR Reauthorization Act of 2011. Specifically, SBA is proposing amendments to address ownership and control of SBIR and STTR participants.

The SBIR/STTR Reauthorization Act specifically permits, in certain instances, SBIR and STTR applicants that are majority-owned by multiple VCOCs, hedge funds or private equity firms to participate in the SBIR Program. Therefore, SBA has proposed amending its regulations to address this new statutory requirement.

In addition, when drafting the proposed rule, SBA reviewed its current regulations regarding eligibility for the programs. The current regulations state that an SBIR awardee must be a business concern that is at least 51% owned and controlled by U.S. citizens or permanent resident aliens or at least 51% owned and controlled by another business that is at least 51% owned and controlled by U.S. citizens or permanent resident aliens. SBA considered retaining this ownership and eligibility criterion since it clearly ensures that there is domestic ownership and control of SBIR and STTR participants. However, SBA believes this eligibility criterion may be too restrictive and fails to provide sufficient flexibility to small businesses when creating their ownership structure.

As a result, SBA has proposed that an SBIR and STTR applicant must be:

- More than 50% owned and controlled by U.S. citizens, permanent resident aliens, or domestic business concerns (the proposed definition of domestic business concern is explained above); or
- Majority-owned by multiple domestic VCOCs, hedge funds or private equity firms.

As set forth in the SBIR/STTR Reauthorization Act, no one domestic business concern that is a VCOC, hedge fund or private equity firm may own more than 50% of the SBIR or STTR participant. Further, if the SBIR or STTR participant is majority-owned by multiple VCOCs, hedge funds or private equity firms, then it would trigger certain statutory requirements.

The SBIR/STTR Reauthorization Act also requires SBA to consider whether an applicant should be a domestic entity itself as well as a direct or indirect subsidiary of a domestic entity. In other words, this statutory provision requires SBA to consider that while an applicant could be organized and located in the United States and therefore be domestic, it might be necessary to ensure that the applicant is also owned by U.S. citizens or domestic companies.

SBA believes that the ownership requirements proposed in this rule—that the SBIR and STTR participant must be more than 50% owned by U.S. citizens, permanent resident aliens or domestic business concerns—addresses the statutory recommendation concerning domestic-owned applicants. SBA also believes that its proposed definition of domestic business concern, discussed in the section above, addresses these statutory recommendations.

In sum, when determining eligibility for the program, the proposed rule would require the applicant to consider the following (in addition to the requirements relating to size and affiliation, etc.):

1. Is the concern more than 50% owned by a single domestic business concern that is a VCOC, hedge fund or private equity firm? If yes, then it is not eligible for the SBIR or STTR program.

Example: SBIR Applicant is owned 80% by VCOC A, 10% by VCOC B and 10% by an individual. SBIR Applicant would *not* meet the ownership requirement.

2. Is the concern more than 50% owned by one or more U.S. citizens, permanent resident aliens, or domestic business concerns? If yes, then it may be eligible for the SBIR or STTR program, unless it answered yes to Question No. 1.

Example 1: SBIR Applicant is owned 40% by U.S citizens, 30% by domestic corporations, and 30% by a non-domestic corporation. The SBIR applicant would be more than 50% owned by U.S. citizens and domestic business concerns. SBIR Applicant meets the ownership criteria for the program.

Example 2: STTR Applicant is owned 49% by a domestic VCOC, 2% by an individual who is a U.S. citizen and 49% by a non-domestic corporation. STTR Applicant would be more than 50% owned by U.S. citizens and a domestic business concern that is a VCOC. The domestic business concern that is a VCOC does not own more than 50% of the applicant. STTR Applicant meets the ownership criteria for the program.

3. Is the concern more than 50% owned by multiple domestic business concerns that are VCOCs, hedge funds, or private equity firms? If yes, then it may be eligible for the SBIR or STTR program unless answered yes to Question No. 1.

SBA believes that this proposed rule satisfies the requirements for ownership set forth in statute and, at the same time, provides a straight-forward and simplified method for determining eligibility. It also provides small business with the flexibility needed in structuring their business and obtaining capital and will ensure that innovation in the United States continues to grow and flourish.

However, SBA understands that there may be alternatives to the proposal and

seeks comments, including the following: (1) Whether the eligibility criteria meets the statutory purpose of the programs with respect to domestic ownership of the applicant; (2) whether the eligibility criteria meets the statutory purpose of the programs with respect to ownership by other-than-small businesses; and (3) whether the proposed rule should address other issues besides the above with respect to ownership.

Moreover, § 5107(c)(3)(B) of SBIR/STTR Reauthorization Act requires that under the already existing authority for SBA to establish size standards, 15 U.S.C. 632(a), SBA shall establish size standards for applicants that are majority-owned by VCOCs, hedge funds or private equity firms. The current size standard for SBIR and STTR applicants is 500 employees. This means that an applicant, including its affiliates, cannot have more than 500 individual employees on a full-time, part-time or other basis, and includes employees obtained from a temporary employee agency, professional employer organization and leasing concern. SBA uses the average number of the business concern's employees based upon the number of employees for each of the pay periods for the preceding completed 12 calendar months (*see* 13 CFR 121.106(b)(1)).

SBA has reviewed the 500-employee size standard and is not proposing any changes. The 500 employee size standard is the current size standard for all R&D North American Industry Classification System (NAICS) codes, including SBIR and STTR. For example, both NAICS 541711, Research and Development in Biotechnology, and NAICS 541712, Research and Development in the Physical, Engineering and Life Sciences (except Biotechnology) have 500 employee size standards.

SBA welcomes comments on these proposed amendments to the ownership and control regulations in § 121.701.

C. Section 121.702—Affiliation

SBA's regulations, at § 121.103, address the principles of affiliation. Generally, affiliation exists when one business controls or has the power to control another or when a third party (or parties) controls or has the power to control both businesses. Control may arise through ownership, management, or other relationships or interactions between the parties. Affiliation is an important issue when determining size because SBA counts the receipts, employees, or other measure of the business, and includes those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit (13 CFR 121.103(a)(6)).

SBA's affiliation rules generally apply to all Federal programs for which a business must qualify as small, including SBA's Government Contracting or Business Development programs, small business loan programs and grant programs. Therefore, for purposes of the SBIR and STTR programs, an applicant for a Phase I and Phase II award must meet the 500 employee size standard, taking into consideration the employees of the applicant and all of the applicant's affiliates.

Section 5107(c)(3)(D) of the SBIR/STTR Reauthorization Act sets forth an outline for affiliation with respect to those applicants that are majority owned by VCOCs, hedge funds, or private equity firms, as well as any other business that the VCOC, hedge fund, or private equity firm has financed. After reviewing these statutory provisions, the purpose of the amendments to the SBIR and STTR programs, the purpose of the SBIR and STTR programs, and the overall goal of simplification and maximization of benefits for small businesses, SBA has proposed certain amendments to the current affiliation rules, solely with respect to these programs. As a result, SBA has proposed to address size and affiliation for the SBIR and STTR programs in § 121.702, and not in § 121.103, to avoid any confusion.

SBA believes that, in general, the principles of affiliation set forth in § 121.103 apply to the SBIR and STTR program. However, SBA believes that certain affiliation principles—such as those concerning minority stock holdings—are not necessarily applicable to SBIR or STTR applicants as a result of the general business structure and purpose of such business concerns. In addition, SBA sought to create a simple, bright-line test for SBIR and STTR applicants to apply when determining eligibility with respect to size and affiliation.

SBA's current principles of affiliation explain that if a business concern's stock is widely held and no single block of stock is large as compared to others, then the board of directors and President or Chief Executive Officer are deemed to control the business concern, unless they can present evidence showing otherwise. In addition, SBA's general principles of affiliation explain that if two or more persons own, control or have the power to control less than 50% of the concern's voting stock, but the blocks of stock are equal or approximately equal in size, then SBA presumes each person to control the business concern.

In this proposed rule, SBA has amended those principles solely for purposes of the SBIR and STTR program. Consequently, SBA's proposed rule explains that where an SBIR or STTR applicant's voting stock is widely held or two or more persons hold large blocks of voting stock but no one person owns more than 50% of the stock, then the board of directors controls the applicant. SBA believes that in these two instances (minority holdings are equal in size and voting stock is widely held), the investments are diffused. As a result, we believe that for purposes of the SBIR and STTR programs, control would rest with the board of directors since it is that body that is truly running the business.

SBA welcomes comments on this proposed rule as it relates to SBIR and STTR applicants where no one stockholder owns a majority of the applicant. For example, SBA welcomes comments on whether it should: (1) Retain the current affiliation rule with respect to minority stock holdings and if so, whether it should set forth a specific threshold by which it will find control and therefore affiliation (*e.g.,* if a person owns 33% or more of the company) in order to create a bright-line test for applicants; (2) find affiliation if two or three persons or businesses collectively own more than 50% of the applicant, and the same two or three persons or businesses collectively own more than 50% of any other company or entity; or (3) implement a rule setting forth both options (1) and (2) above.

SBA has also proposed to amend the current affiliation rules relating to identity of interest, for purposes of the SBIR and STTR programs only. Specifically, the proposed rule explains that SBA will presume affiliation based on an identity of interest between family members with identical or substantially identical business or economic interests.

SBA may also presume affiliation based on an identity of interest between business concerns that are economically dependent through contractual or other arrangements. For example, affiliation based on an identity of interest may arise if a business earns 70% of its revenues as a result of doing business with one other business concern. Affiliation based on an identity of interest may also arise where one business concern is dependent on loans supplied by another business, and the loans are made outside of arm's length transactions. Because it is not clear how often these types of situations arise for SBIR and STTR applicants, SBA requests comments on whether the

identity of interest rule relating to economic dependency should be retained for purposes of the SBIR and STTR programs.

We note that § 5107(c)(3)(D) of the SBIR/STTR Reauthorization Act states that SBA may not determine that a portfolio company of the VCOC, hedge fund, or private equity firm is affiliated with an SBIR or STTR applicant based solely on one or more shared investors. Therefore, SBA has proposed that it will not find affiliation for an SBIR or STTR applicant with a portfolio company solely because of shared investors.

Consequently, SBA's proposed rule explains that it may find affiliation for SBIR or STTR applicants in one or more of the following situations:

1. *Control of more than 50% of voting stock.* A person (individual, entity, or business concern) is an affiliate of the SBIR or STTR applicant if the person owns or controls, or has the power to control, more than 50% of the concern's voting stock.

Example: Individual A is the majority owner of SBIR Applicant B, Company C and Company D (54.5%, 81%, and 60%, respectively). Individual A has the power to control SBIR Applicant B, Company C and Company D. The companies are all affiliated. The number of employees of all will be aggregated in determining the size of the SBIR applicant.

2. *Control of less than 50% of voting stock.* If two or more persons (including any individual, concern or other entity) each owns, controls, or has the power to control less than 50% of an SBIR or STTR applicant's voting stock, the board of directors controls the SBIR/STTR applicant.

Example: Domestic Business Concern A owns 20%, domestic VCOC B owns 20% and domestic VCOC C owns 20% of SBIR Application, Inc. The rest of the stock is widely held. The Board of Directors of the company controls the company for affiliation purposes.

3. *Stock options, convertible securities, and agreements to merge.* SBA treats stock options, convertible securities, and agreements to merge as though the rights granted have been actually exercised. SBA gives present effect to an agreement to merge (including an agreement in principle) or to sell stock. If these rights have been granted and they confer the power to control, affiliation exists.

Example: If VCOC A holds an option to purchase a controlling interest in Company B at the time it submits an offer for the SBIR Program, the situation is treated as though VCOC A had exercised its rights and had become owner of the controlling interests in Company B when it obtained the option.

4. *Common management.* If one or more officers, managing members, general partners, or the board of directors of an SBIR or STTR applicant also controls the management of another business concern, the concerns are affiliates.

Example: The managing member of SBIR Applicant LLC is the managing member of Company B. The two concerns are affiliated based on common management.

5. *Identity of interest between individuals or businesses, including family members, except for common investments.* Individuals or firms that have identical (or substantially identical) family or economic interest may be treated as one party unless they can demonstrate otherwise. Family members or firms that are economically dependent through contractual or financial relationships, are among those treated this way.

Example 1: SBIR Applicant A performs subcontracts for Company B, and Company B accounts for 90% of SBIR Applicant A's revenues. SBA may presume there is an identity of interest as a result of the economic dependence of the SBIR applicant on Company B and find affiliation between the two.

Example 2: SBIR Applicant A is dependent on loans provided by Company B for survival. The loans were not supplied from Company B to Applicant through arm's length transactions. Instead, the loans were poorly documented and did not follow normal business practices. SBA may presume an identity of interest between Applicant A and Company B.

6. *Newly Organized Concern.* SBA may find that an SBIR or STTR applicant is affiliated with another business concern when: (1) The former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern; (2) the new concern is in the same or related industry or field of operation; (3) the persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and (4) 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. This could include SBIR ''spin-offs'' or ''spin-outs.''

7. *Joint Ventures.* Business concerns submitting offers for an SBIR or STTR award as joint venturers are affiliated with each other with regard to that award, unless an exception to affiliation applies for the joint venture.

8. *Ostensible Subcontractor.* An applicant and its subcontractor are treated as joint venturers and therefore affiliates if the ostensible subcontractor will perform primary and vital requirements of the funding agreement or the applicant is unusually reliant upon the subcontractor. To determine whether a subcontractor performs primary and vital requirements of a funding agreement, SBA will consider whether the applicant is meeting the statutorily required percentages of work for the funding agreement.

9. *License Agreements.* There must be a license agreement concerning a ''critical operation'' of the licensee. SBA will look at this license agreement to see if the licensee possesses the right to profit or bear the risk of loss.

If SBA does find affiliation based upon one of the above with a VCOC, hedge fund, or private equity firm that owns a minority interest in the SBIR or STTR applicant, then § 5107(c) of the SBIR/STTR Reauthorization Act provides that the portfolio companies of the VCOC, hedge fund, or private equity firm will not be affiliated with the SBIR or STTR applicant unless: (1) the VCOC, hedge fund, or private equity firm owns a majority of the portfolio company; or (2) the VCOC, hedge fund, or private equity firm holds a majority of the seats on the board of directors of the portfolio company. SBA's proposed regulations set forth this statutory exception to affiliation for portfolio companies.

SBA specifically requests comments on these proposals for determining affiliation, including whether the proposed rules sufficiently prevent other-than-small businesses from controlling SBIR and STTR applicants and any other issues relating to affiliation not addressed by the proposed rule.

D. Section 121.704—When SBA Determines Size and Eligibility

SBA's current regulations for the SBIR Program state that size and eligibility are determined at the time of award for both Phase I and Phase II awards. In drafting the proposed rule, SBA considered whether it should retain this current requirement or require the SBIR or STTR applicant to meet the size and eligibility requirements at the time of submission of the application, or at both time of application and award. SBA notes that for its government contracting programs, size is determined at the time of submission of an offer (which is equivalent to the time of application for the SBIR and STTR programs). SBA uses that date because it is a date certain—the small business knows when it will submit an offer and can therefore determine with some accuracy whether it will be small at that time.

SBA has proposed that for its SBIR and STTR programs it will determine size and eligibility of the concern at the time it submits an application in response to the SBIR or STTR solicitation or announcement and at the time of award. SBA believes that this would ensure that only eligible small businesses are considered for award and actually receive the award and it will help prevent fraud, waste and abuse of the program. SBA welcomes comments on the timing of size and eligibility determinations, and specifically on the requirement that SBA determine size and eligibility of a small business concern at the time it submits an application in response to the SBIR or STTR solicitation or announcement and at the time of award.

SBA welcomes comments on any impact the proposed change may have on the SBIR and STTR programs.

E. Section 121.705—Certification of size and eligibility

Section 5107 of the SBIR/STTR Reauthorization Act requires that all small business concerns that are majority-owned by multiple VCOCs, hedge funds, or private equity firms and qualified for participation must register with SBA prior to or on the date that it submits an application in response to an SBIR solicitation or announcement. In addition, the new statutory provisions require that such small businesses indicate in any SBIR proposal that they have completed this registration. SBA has proposed to amend this section of the regulations to address these new requirements.

SBA notes that, at this time, it is considering at least two options with respect to the registration requirement. SBA will need to either maintain a separate registration for purposes of the SBIR and STTR programs only, or it will amend its current Dynamic Small Business Search (DSBS) system to see whether it can use DSBS as its registry. SBA is studying the anticipated costs and timelines for completion of this registry, but welcomes comments on these and other possible options.

Section 5107 (a) of the SBIR/STTR Reauthorization Act states that certain ''covered small business concerns'' are eligible to receive SBIR awards, without regard to whether the covered small business concern meets the requirements for receiving an award under the SBIR Program at the time of award if an agency took longer than 9 months from the date applications were due to issue an award. A covered small business concern is one that was not majority-owned by a VCOC, hedge fund, or private equity firm at the time of submission of a Phase I or Phase II application (and therefore did not register), but that was majority-owned on the date of award.

The proposed regulations address covered small business concerns and explain that if a small business concern did not register as majority-owned by VCOCs, hedge funds or private equity firms at the time of application, it must notify the funding agreement officer if, on the date of award, the concern is more than 50% owned by multiple VCOCs, hedge funds, or private equity firms.

The SBA notes that the funding agency needs this information because the statute states that if the agency made its award on or after the date that is 9 months from the end of the period for submitting applications under the SBIR or STTR solicitation, that small business concern would be eligible to receive the award without regard to the fact that it is more than 50% owned by multiple VCOCs, hedge funds, or private equity firms at the time of award.

In addition to registration requirements, § 5143 of the SBIR/STTR Reauthorization Act requires each applicant that receives SBIR or STTR funding to certify that it is in compliance with the laws relating to the program. SBA's Administrator is required to develop, in consultation with the Council of Inspectors General on Integrity and Efficiency, the procedures and requirements for this certification after providing notice of and an opportunity for public comment on such procedures and requirements. SBA is therefore requesting public input on whether the current self-certification requirement set forth in § 121.705 is sufficient, *i.e.,*—that the business merely self-certify it meets the requirements of the program.

Further, as discussed above, SBA has proposed that the certification on eligibility (size and ownership) will occur at the time of submission of the offer or application and at the time of award. However, some have argued that these representations are necessary throughout the life of the SBIR or STTR award. As a result, SBA requests specific comment on whether the small business should also be required to represent its status at certain points in time after award, including at the time of final payment or final award allotment.

For example, with respect to small business status for government contracting (other than the SBIR Program), a small business represents its status at the time of offer only and size is determined at that time. The small business is permitted to grow to be other than small during the life of the contract and there is no need for it to re-represent its status on a particular contract. There are two exceptions to this general rule: (1) A small business must recertify its status if it has been acquired by or merged with another business concern; or (2) the contract is greater than five years. At those times, the small business must recertify its status and if it is no longer small, the contracting officer cannot count any options exercised or orders issued against the contract as an award to a small business. SBA requests comments on whether this policy and the procedures should be extended to the SBIR Program.

F. Section 121.1001(a)(4)—Initiating a Protest or Request for Formal Size Determination

Section 121.1001(a)(4) sets forth who may initiate a size protest or request a formal size determination. For purposes of the SBIR Program and STTR Program, the regulations state that a prospective offeror, the funding agreement officer, the responsible SBA Government Contracting Area Director or the Division Chief, Office of Innovation may file a protest. SBA has proposed amending this section to state that a current offeror and the Associate Administrator, Investment Division may file a protest. These proposed changes correspond to the proposed change for when an applicant must be eligible for an award (at the time of submission of offer or application and at time of award) and the move of SBA's Office of Innovation to its Investment Division. SBA welcomes comments on these proposed changes.

G. Section 121.1004—Time Limits That Apply to Size Protests

SBA is proposing to amend this section to address when a protest may be filed by the contracting officer/funding agreement officer or SBA with respect to an SBIR or STTR award. The current regulations state that the contracting officer or SBA may file a protest in anticipation of an award. SBA proposes to amend this regulation to state that SBA or the contracting officer/funding agreement officer may file a protest at any time, as long as it is not premature. This means that SBA will not accept a size protest until the awardee has been selected and notified of the award, which is consistent with current practice for its contracting programs. SBA welcomes comments on this proposed change.

III. Request for Comments

The SBIR/STTR Reauthorization Act has set forth specific provisions relating to affiliation, ownership and control of SBIR and STTR participants. These provisions open the door for more small businesses by providing them access to these programs. SBA has proposed amendments to its current regulations to implement these provisions (some amendments will have to be made to the policy directive, and not necessarily SBA's regulations). As such, SBA requests comments on each proposed amendment to the rule. We have noted above specific issues on which the agency would like to receive comments. However, SBA seeks comments on all aspects of this proposed rule.

Compliance With Executive Orders 12866, 12988, 13132, 13563, the Paperwork Reduction Act (44 U.S.C., Chapter 35) and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

OMB has determined that this rule is a significant regulatory action under Executive Order 12866; however this is not a major rule under the Congressional Review Act (CRA). The Regulatory Impact Analysis is set forth below.

Regulatory Impact Analysis

1. Necessity of Regulation

This regulatory action implements the SBIR/STTR Reauthorization Act. Specifically, it implements § 5107 of the SBIR/STTR Reauthorization Act of 2011, which requires SBA to issue proposed regulations to amend 13 CFR 121.103 (relating to determinations of affiliation applicable to the SBIR Program) and 13 CFR 121.702 (relating to ownership and control and size for the SBIR Program) within 120 days of passage of the Reauthorization Act.

SBA's current regulations address affiliation, ownership and control for participants in the SBIR Program. However, the regulations do not provide specific guidance for the STTR program. In addition, the regulations must be amended to address the new statutory provisions relating to majority ownership by VCOCs, hedge funds or private equity firms; otherwise, the regulations and statute would conflict. Moreover, the SBIR/STTR Reauthorization Act requires that SBA issue a proposed, and then a final or interim final rule.

2. Alternative Approaches to Proposed Rule

SBA considered numerous alternatives when drafting this regulation. SBA considered an alternative approach with respect to ownership by U.S. citizens. For example, SBA's current regulations state that to be eligible for the SBIR Program, the business must be 51% owned and controlled by U.S. citizens or permanent resident aliens, or 51% owned and controlled by another business that is 51% owned and controlled by U.S. citizens. The SBIR/STTR Reauthorization Act requires that SBA consider whether participants to the program are at least 51% owned and controlled by U.S. citizens, domestic VCOCs, hedge funds or private equity firms. SBA considered retaining its current regulation but believes the current regulation may be too restrictive. SBA's proposed regulation permits ownership and control by U.S. citizens, permanent resident aliens *and* domestic business concerns, including domestic VCOCs, hedge funds or private equity firms.

In addition, SBA considered whether the statutory provisions relating to majority ownership by VCOCs, hedge funds, or private equity firms should also apply to STTR participants and not just SBIR participants. The SBIR/STTR Reauthorization Act is not clear on this point. However, the SBIR/STTR Reauthorization Act does permit participants in the STTR program to receive SBIR awards, and vice versa. As a result, it would seem necessary to apply the same rules for the SBIR Program to the STTR program.

Other examples of alternatives considered are discussed in the preamble above (*e.g.,* affiliation, definitions).

3. What are the potential benefits and costs of this regulatory action?

One potential benefit of the rule is to increase participation in the SBIR and STTR program by providing more businesses access to these programs. SBA believes this will increase competition, which will ultimately increase the quality of proposals and spur innovation. For example, in Fiscal Year (FY) 2010, agencies awarded 6,931 SBIR and STTR Phase I and Phase II awards for a total of over $2 billion. In FY 2003, however, agencies funded 7,419 awards for a total of over $1.8 billion. If you adjust the dollar figures for inflation, it would seem that there has been a decrease in SBIR and STTR Phase I and Phase II awards and funding. Likewise, in FY 2010, agencies awarded 4,777 Phase I SBIR and STTR awards for a total of over $596 million. In FY 2003, however, agencies funded 5,561 awards for a total of over $508 million. If you adjust the dollar figures for inflation, it would seem that there has been a decrease in Phase I SBIR and STTR awards and funding. Again, SBA anticipates that increasing competition will increase the number of awards and funding, as a result of higher quality proposals submitted.

There are a few anticipated costs with this proposed rule. The statute requires SBA to maintain a registry of businesses that are majority-owned by VCOCs, hedge funds or private equity firms. SBA will need to either maintain a separate system or will amend its current DSBS system and use it as its registry. This will result in a cost to SBA. Further, as a result of the anticipated increase in proposals for the SBIR/STTR program, we believe the agencies will have a need for additional staff. In addition, we anticipate there may be an increase in size protests, which will increase SBA's size specialists' current workload.

Executive Order 13563

The SBIR/STTR Reauthorization Act of 2011 imposes a specific statutory deadline by which SBA must issue a proposed and a final regulation. Specifically, SBA is required to issue a proposed rule by April 29, 2012. Given the time needed to comply with various administrative rulemaking requirements, it was not practicable for SBA to hold public forums prior to issuing a proposed rule, as the executive order recommends, and still be able to meet the April 29th statutory deadline. However, SBA is considering holding such public forums (*e.g.,* town hall meetings, webinars) once it issues the proposed rule to afford the public an opportunity to participate in the rulemaking process as envisioned by this executive order. SBA has also provided for a 60-day comment period and has requested comments on not just the entire rule, but specific parts of the rule where SBA considered several alternatives or options for implementation. As indicated above in the **ADDRESSES** section of this rule, the public is provided with the link to the online rulemaking Web site and is encouraged to use this medium to submit comments and view the comments of others. Where applicable, the outcome of all of these efforts will be addressed when this rule is finalized.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminates ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For the purposes of Executive Order 13132, SBA has determined that this proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, SBA has determined that this proposed rule has no federalism implications warranting preparation of a federal assessment.

Paperwork Reduction Act, 44 U.S.C., Ch. 35

For purposes of the Paperwork Reduction Act (PRA), 44 U.S.C. Chapter 35, SBA has determined that this proposed rule will impose new reporting or recordkeeping requirements. Specifically, business concerns that are majority-owned by VCOCs, hedge funds or private equity firms must register their status in a database, as required by statute. However, because the detailed procedures for meeting this requirement will be outlined in the SBIR Policy Directive, and not the rule, SBA believes it would be more meaningful and less confusing for the small business community if SBA submits the information collection to OMB when the Policy Directives are submitted for review.

Regulatory Flexibility Act, 5 U.S.C., 601–612

SBA has determined that this proposed rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.* Accordingly, SBA has prepared an Initial Regulatory Flexibility Analysis (IRFA) addressing the impact of this Rule. The IRFA examines the objectives and legal basis for this proposed rule; the kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; whether there are any Federal rules that may duplicate, overlap, or conflict with this proposed rule; and whether there are any significant alternatives to this proposed rule.

1. What are the reasons for, and objectives of, this proposed rule?

This regulatory action implements several sections of the SBIR/STTR Reauthorization Act. These sections of the SBIR/STTR Reauthorization Act address affiliation, ownership and control of SBIR and STTR program participants.

The objective of the rule is to implement these statutory changes by further defining terms and expanding on the concepts set forth in the SBIR/STTR Reauthorization Act.

2. What is the legal basis for this proposed rule?

The legal basis for this rule is the National Defense Authorization Act for Fiscal Year 2012, Section 5001, Division E (cited as the SBIR/STTR Reauthorization Act of 2011 or Reauthorization Act), Public Law 112–81.

3. What is SBA's description and estimate of the number of small entities to which the rule will apply?

In FY 2009, for the SBIR Program, agencies received 22,444 Phase I proposals and 3,352 Phase II proposals. In FY 2009, for the STTR program, agencies received 2,804 Phase I proposals and 467 Phase II proposals. Some of the proposals submitted were by the same small business. However, using these numbers, SBA estimates that approximately 24,000 businesses could be impacted by this proposed rule. This includes those businesses that are currently not eligible under SBA's existing regulations and will become eligible as a result of implementation of the SBIR/STTR Reauthorization Act, if this rule is adopted as proposed.

4. What are the projected reporting, recordkeeping, Paperwork Reduction Act and other compliance requirements?

The proposed rule does provide that businesses will need to represent their size status at the time of initial offer and award. If there is a size protest, the small business will need to ensure it has business records that verify their small business status. These are the same documents that a business would keep in the normal course of its activities (stock certificates, by-laws etc.). The SBA has explained that there is a new reporting requirement for those businesses that are majority-owned by VCOCs, hedge funds or private equity firms. However, the SBA intends to address this reporting requirement and the database used for the reporting, when it amends the SBIR policy directive.

5. What relevant federal rules may duplicate, overlap, or conflict with this rule?

This proposed rule will conflict with current provisions in SBA's SBIR and STTR Policy Directives. As a result, those directives will need to be amended.

6. What significant alternatives did SBA consider that accomplish the stated objectives and minimize any significant economic impact on small entities?

SBA discussed several alternatives in the preamble as well as the Regulatory Impact Analysis.

List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Loan programs—business, Small businesses.

For the reasons stated in the preamble, SBA proposes to amend 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 Small Business Innovation Research (SBIR) and Small Business Technology Transfer (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

* * * * *

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.

(i) *Domestic business concern* means a business entity (including a venture capital operating company, hedge fund, or private equity firm) organized for profit; with a place of business located in the United States; which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor; and created or organized in the United States, or under the law of the United States or of any State.

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

(iii) *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.

(iv) *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)).

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

(vi) *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)).

(vii) *Venture capital operating company* means an entity described in clause (i), (v), or (vi) of § 121.103(b)(5).

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 submission of its initial proposal (or other formal response) to a Phase I or Phase II SBIR or STTR announcement or solicitation and at the time of award:

(a) *Ownership and control.*

(1) An SBIR or STTR applicant must:

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

(ii) Be a concern which is more than 50% owned by multiple domestic business concerns that are venture capital operating companies, hedge funds, private equity firms, or any combination of these domestic business concerns.

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

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

(4) If a trust owns all or part of the concern, SBA considers each trustee and trust beneficiary to be an owner.

(b) *Joint Ventures.* If the SBIR or STTR applicant is a joint venture, each entity to the joint venture must meet the requirements set forth in paragraph (a) of this section. A joint venture that includes one or more concerns that are majority-owned by multiple domestic business concerns that are venture capital operating companies, hedge funds, or private equity firms must comply with § 121.705(b), concerning registration and proposal requirements.

(c) *Size and affiliation.* An SBIR or STTR applicant, 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 stock ownership.* For determining affiliation based on stock ownership, a concern (including an SBIR and STTR applicant) is an affiliate of a person (including any individual, concern or other entity) that owns, or has the power to control, more than 50 percent of the concern's voting stock. If no person owns or has the power to control more than 50 percent of the concern's voting stock, 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 person 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 with an identity of interest. An individual or firm 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) An SBIR or STTR applicant 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 officers, directors, principal stockholders, managing members, 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, 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.

(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.* An applicant and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a funding agreement, or a subcontractor upon which the applicant is unusually reliant. All aspects of the relationship between the applicant 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 applicant and subcontractor (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 applicant'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 applicant is a minority investor in the applicant, the applicant 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.

7. Revise § 121.704 to read as follows:

§ 121.704 When does SBA determine the size and eligibility status of an SBIR or STTR applicant?

The size and eligibility status of a concern for the purpose of a funding agreement under the SBIR and STTR programs is determined as of the date the concern submits a written self-certification that it is small and meets the eligibility requirements of the program to the Federal agency as part of its initial proposal (or other formal response) to a Phase I or Phase II SBIR or STTR announcement or solicitation and at the time of award.

8. Revise § 121.705 to read as follows:

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

(a) In its initial proposal (or other formal response) to a Phase I or Phase II SBIR or STTR announcement or solicitation, and at the time of award, a business concern must self-certify that it currently meets the eligibility requirements set forth in § 121.702 of this title.

(b) In addition, a small business concern that 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 or STTR announcement or solicitation. The concern must indicate in any SBIR or STTR 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 was not subject to 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. If the agency made award on or after the date that is 9 months from the end of the period for submitting applications under the SBIR solicitation, the concern is eligible to receive the award without regard to whether it meets the requirements for receiving an award as a small business concern that is more than 50% owned by multiple venture capital operating companies, hedge funds, or private equity firms at the time of award, if the concern meets all other requirements for the award.

(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 by other offerors 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 offeror'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 applicant.

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;

(ii) The funding agreement officer;

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

(iv) Any other offeror or applicant for that solicitation.

* * * * *

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.

* * * * *

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

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

(a) * * * If the protest pertains to a requirement involving SBA's SBIR Program or STTR Program, the Area Director will also notify the Associate Administrator, Investment Division. * * *

* * * * *

Dated: May 4, 2012.

Karen G. Mills,

Administrator.

[FR Doc. 2012–11586 Filed 5–11–12; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. FAA–2012–0485; Notice No. 23–12–01–SC]

Special Conditions: Tamarack Aerospace Group, Cirrus Model SR22; Active Technology Load Alleviation System (ATLAS)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Tamarack Aerospace Group's modification to the Cirrus Model SR22 airplane. This airplane as modified by Tamarack will have a novel or unusual design feature(s) associated with Tamarack Aerospace Group's modification. The design change will install winglets and an Active Technology Load Alleviation System (ATLAS). The addition of the ATLAS mitigates the negative effects of the winglets by effectively aerodynamically turning off the winglet under limit gust and maneuver loads. This is accomplished by measuring the aircraft loading and moving a small aileron-like device called a Tamarack Active Control Surface (TACS). The TACS movement reduces lift at the tip of the wing, resulting in the wing center of pressure moving inboard, thus reducing bending stresses along the wing span. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Send your comments on or before June 14, 2012.

ADDRESSES: Send comments identified by docket number FAA–2012–0485 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery of Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 8 a.m., and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://regulations.gov,* including any personal information the commenter provides. Using the search function of the docket web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m., and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For sections 23.301 through 23.629 (structural requirements), contact Mr. Mike Reyer; telephone (816) 329–4131. For sections 23.672 through 23.701 (control system requirements), contact Mr. Ross Schaller; telephone (816) 329–4162. The address and facsimile for both Mr. Reyer and Mr. Schaller is: Federal Aviation Administration, Small Airplane Directorate, Aircraft Certification Service, 901 Locust, Kansas City, Missouri 64106; facsimile (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change these special conditions based on the comments we receive.

Background

On February 15, 2011, Tamarack Aerospace Group applied for a supplemental type certificate for installation of winglets and an Active Technology Load Alleviation System (ATLAS) on the Cirrus Model SR 22 (serial numbers 0002–2333, 2335–2419, and 2421–2437). The Cirrus model SR22 is a certified, single reciprocating engine, four-passenger, composite airplane.

The installation of winglets, as proposed by Tamarack, increases aerodynamic efficiency. However, the winglets by themselves also increase wing static loads and the wing fatigue stress ratio, which under limit gust and maneuver loads factors may exceed the certificated wing design limits. The addition of ATLAS mitigates the negative effects of the winglets by effectively aerodynamically turning off the winglet at elevated gust and maneuver loads factors.

The ATLAS functions as a load-relief system. This is accomplished by measuring aircraft loading via an accelerometer, and by moving a small aileron-like device called a Tamarack Active Control Surface (TACS) that reduces lift at the tip of the wing. Because the ATLAS compensates for the increased wing root bending at elevated load factors, the overall effect of this modification is that the winglet can be