

**§ 166.15 [Amended]**

■ 2. Section 166.15 is amended as follows:

- a. In paragraph (a), by adding, in alphabetical order, the word "Kentucky,".
- b. In paragraph (b), by removing the word "Kentucky,".
- c. In paragraph (d), by removing the word "Kentucky,".

Done in Washington, DC, this 29th day of November, 2004.

**Elizabeth E. Gaston,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 04-26613 Filed 12-2-04; 8:45 am]

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**SMALL BUSINESS ADMINISTRATION****13 CFR Part 121**

**RIN 3245-AE76**

**Small Business Size Regulations;  
Small Business Innovation Research  
Program**

**AGENCY:** Small Business Administration (SBA).

**ACTION:** Final rule.

**SUMMARY:** The U.S. Small Business Administration (SBA or Agency) is revising its small business size regulations regarding ownership and control of Small Business Innovation Research (SBIR) Program awardees. The final rule provides that an SBIR awardee must meet the following requirements: It must be a for-profit business concern that is at least 51% owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States (as the regulations currently require); or it must be a for-profit business concern that is at least 51% owned and controlled by another for-profit business concern that is at least 51% owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States. This rule does not change the size standard requiring that an SBIR awardee, together with its affiliates, have no more than 500 employees. Because SBA received a large number of comments concerning ownership of SBIR Program participants by Venture Capital Companies, SBA will issue an Advanced Notice of Proposed Rulemaking seeking additional information this issue.

**DATES:** This rule is effective January 3, 2005.

**FOR FURTHER INFORMATION CONTACT:** Carl Jordan, Office of Size Standards, at (202)

205-6618, or Edsel Brown, Assistant Administrator for Technology, at (202) 205-6540. You may also e-mail questions to [sizestandards@SBA.gov](mailto:sizestandards@SBA.gov).

**SUPPLEMENTARY INFORMATION:****Introduction**

On June 4, 2003, the SBA published in the **Federal Register** (68 FR 33412) a proposed rule to modify the eligibility requirements for the SBIR Program. The proposed rule provided that small business concerns (SBCs), which are 100% owned and controlled by another concern, could receive SBIR awards so long as the concern that owned and controlled the awardee was at least 51% owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States. In addition, the SBIR awardee, including its affiliates (the parent company and any other affiliates), would have to meet the 500-employee size standard.

The SBA sought comments on its proposed rule together with alternatives that it considered. Below is a summary and discussion of the comments the SBA received, as well as a summary of the final rule.

**Summary of Comments**

The SBA received 164 comments on the proposed rule. Although the majority of the comments supported a change to the eligibility requirements for the SBIR Program, many of them recommended additional changes. The significant issues raised by the comments included: (1) Less than 100% ownership and control by one other concern; (2) majority ownership and control by large businesses; (3) ownership and control by more than one concern; (4) foreign ownership and control; (5) majority ownership and control by venture capital companies (VCCs); (6) ownership by Small Business Investment Companies (SBICs), employee stock option plans (ESOPs) and trusts; (7) joint ventures (JVs) in relation to the proposed rule; and (8) the 500-employee size standard.

**Ownership by Other Concerns or Entities and Foreign Ownership**

The SBA received several comments recommending a rule that would allow less than 100% ownership and control of an SBIR participant by another concern. Some of these comments stated that the level of ownership or control is not material to the overall success of the SBIR Program. Others contended that allowing less than 100% ownership or control is consistent with the Small Business Innovation Development Act (SBIDA) of 1982 (which can be found at

<http://thomas.loc.gov/bss/d097/d097laws.html>) and its legislative history, and in fact furthers the SBIDA's intent. One commenter added that requiring 100% ownership would stifle investment from others.

Several commenters recommended a regulation that would allow an SBIR awardee to be owned and controlled by two or more other business concerns, which in turn are at least 51% owned and controlled by U.S. citizens or permanent resident aliens. Four commenters supported the idea of multiple corporate owners because it would permit one concern to "spin off" another, and then add one or more other corporate investors in the "spin off." Other commenters recommended variations of the proposed rule, including: Allowing indirect ownership by U.S. citizens or permanent resident aliens, defining the term individuals to include U.S. corporations, and providing for a net worth test for the parent company.

Three commenters argued that allowing foreign ownership and control would be consistent with Federal procurement regulations. One commenter stated that it needed to go overseas to raise funds through the London Stock Exchange. Several commenters believed that rather than have a U.S. citizen or permanent resident alien ownership requirement, SBA should require the SBIR participant to have a base of operations in the United States, incorporate in the United States, employ U.S. citizens and/or pay taxes to the United States.

One commenter recommended allowing nonprofits to own and control more than 49% of the SBIR participant, but require the non-profit to license its technology exclusively to the start-up so that the non-profit cannot use the program to its advantage. Several commenters supported ownership and control of an SBIR participant by SBICs. One commenter stated that it believed the statutes and rules governing SBICs, as well as the SBA's regulatory authority over them, could provide adequate safeguards against abuse of the SBIR program by such larger businesses. One commenter did not support allowing more than 49% ownership by an SBIC. Other commenters supported ownership and control by trusts for estate/tax planning purposes and by Employee Stock Ownership Plans (ESOPs) for investment and employee incentive purposes.

Conversely, 50 commenters expressed concern that permitting another business concern to own an SBIR Program participant could permit large companies to participate in the SBIR

Program via a subsidiary. These commenters opposed the rule change and argued that business concerns owned by other business concerns have more money than most SBIR participants, which may have only 10 to 50 employees. In those instances, these smaller SBIR participants will be competing against larger participants (which, together with the parent company, meet the 500-employee size standard). These commenters did not believe this met the purpose and intent of SBIDA. Although several commenters supported allowing more than one business concern to own and control an SBIR awardee, many also likewise believed that the SBA must ensure that only true SBCs receive the SBIR award and directly benefit from the program.

SBA thoroughly reviewed each of the comments received and believes that allowing one business concern to own or control at least 51% of an SBIR participant, which is in turn at least 51% owned and controlled by U.S. citizens or permanent resident aliens, provides SBIR participants with the flexibility they need to leverage money and bring in other funding sources (such as SBICs) and yet remain small. Pursuant to the final rule, ownership of an SBIR awardee is limited to one of the two following ways: (1) The awardee must be at least 51% owned and controlled by citizens of, or permanent resident aliens in, the United States; or, (2) it must be at least 51% owned and controlled by one for-profit business concern that itself is at least 51% owned and controlled by citizens of, or permanent resident aliens in, the United States. With respect to the first eligibility criterion, if the SBIR awardee is at least 51% owned and controlled by citizens of, or permanent resident aliens in, the United States, other concerns (or entities such as non-profits) may participate in its ownership and control, but only so long as these concerns together do not own any more than 49% of the SBIR concern and do not control the concern as a result of their ownership interest. With respect to the second eligibility criterion, one for-profit business concern must have 51% or more ownership and control of an eligible SBIR awardee (if the awardee is not at least 51% owned and controlled by citizens of, or permanent resident aliens in, the United States). Other concerns (and entities such as non-profits) may have an ownership interest in the SBIR participant, but they are limited to 49%, individually or together.

The SBA believes that requiring that the business concern with the controlling interest be at least 51% owned and controlled by U.S. citizens

or permanent resident aliens (note that SBA does not consider entities to be individuals or citizens or permanent resident aliens) supports the intent and purpose of SBIDA that the research and development (R&D) advances resulting from this program remain in this country and benefit the United States. Specifically, SBIDA was enacted because "the rate of productivity increase in the United States ha[d] been well below that of all the leading industrial nations, most notably Japan and Germany. While this relative decline in American productivity [wa]s due to many factors, a major one [wa]s certainly the slowdown in our technological innovation." S. Rep. No. 194, 97th Cong., 1st Sess. 1 (1982). House Report No. 349, Part I, further stated that Federal support for R&D was concentrated in big businesses, laboratories, universities, and non-profit organizations. It was believed that this concentration of private R&D in a few large entities was contrary to the national interest and that small science and technology-based enterprises, thought of as the most innovative sector of the American economy, was excluded from effective participation. H.R. Rep. No. 349, 97th Cong., 1st Sess., pt. 1, at 9 (1981). The purpose of SBIDA was, and still is, to encourage small business participation in R&D to stimulate the American economy.

Because the purpose of the SBIR program is to increase the rate of productivity in the United States by increasing technological innovations, especially those innovations of SBCs here in the United States, the SBA believes that the legislative history of and purpose of SBIDA does not support more than 49% ownership by foreign investors or nonprofit institutions. The SBA notes that this rule does not preclude foreign or nonprofit investment; it merely limits the amount of investment. The SBA also notes that this regulation does not create the anomalous situation where an SBIR participant concern is owned and controlled by U.S. citizens or permanent resident aliens or a business concern that is owned and controlled by U.S. citizens or permanent resident aliens, but has a place of business overseas. The regulations, set forth at 13 CFR 121.105, specifically define the term "concern" or "business concern" to mean one that is organized for profit, with 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. Therefore, in addition to meeting the 51% ownership and control requirements, the SBIR participant must meet this definition of "concern" or "business concern." The SBA notes that this is not a change in policy; all business concerns eligible for the SBA assistance as a small business concern must meet this definition.

In addition, the SBA does not believe that allowing ownership by other concerns would allow large businesses to participate in the SBIR program. For purposes of the SBIR Program, an SBIR awardee, together with its affiliates, must be "small" for purposes of the program, and a concern, together with its affiliates, is deemed to be small only when it has no more than 500 employees. The SBA's Small Business Size Regulations set forth in 13 CFR 121.103 define affiliation with another business concern. According to § 121.103, concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both. The SBA considers factors such as common ownership, common management and identity of interest (often found in members of the same family) to indicate affiliation. Although control exists when a party or parties has more than 50% ownership, it may also exist with considerably less than 50% ownership.

As a result of these affiliation rules, employees of businesses that have ownership interests in or control of an SBIR awardee may be counted toward the size of the SBIR awardee. Where one firm is a subsidiary of another, the parent and subsidiary are affiliates for size purposes and their employees would be aggregated in determining whether the subsidiary qualified as a small business. Thus, these rules would prevent "large" businesses from participating in the SBIR Program via a subsidiary.

Further, the SBA notes that under the former rules, a business concern could still own an SBIR participant, but was limited to 49% ownership. The new rule provides more flexibility in the ownership and control of an SBIR participant while still ensuring that only SBCs (those with not more than 500 employees, including affiliates) participate in the Program.

The SBA responded by letter or email to those commenters opposed to allowing businesses to own an SBIR awardee to clarify what it believed was a misunderstanding of the SBA's affiliation regulations and how those regulations apply to all of the SBA's programs, including the SBIR Program. In response, 15 of the 50 commenters

withdrew their opposition to the proposed rule and two stated that they remained opposed to the proposed rule.

Finally, the SBA would like to clarify that ESOPs can own SBIR awardees and the Agency has specifically addressed this issue in the final regulation to avoid any confusion. SBA has also amended the final rule to address the issue of ownership by trusts. The SBA understands that trusts are oftentimes established for tax reasons, where, as at least one commenter explained, an owner may establish a family trust for the benefit of her children. The commenter believed that such situations should be addressed in the regulations and the SBA agrees. For purposes of an ESOP, SBA will treat the plan members and trustees as owners. For purposes of a trust, SBA will treat the trustee and beneficiaries as owners of the SBIR awardee.

#### Ownership by VCCs

The SBA received 60 comments specifically addressing whether VCCs should own and control 51% or more of an SBIR awardee. Several commenters argued that VCCs should be allowed to own and control 51% or more of an SBIR awardee because small innovative business concerns, especially those in the biotechnology field, need this capital investment. In addition, because many of these VCCs have institutional investors, these commenters did not believe that there should be a U.S. citizen ownership and control test for such VCC-backed business concerns. As a result, some commenters recommended disregarding VCC ownership altogether when determining the 51% or more ownership and control requirement or suggested that the SBA deem U.S. investment companies to be individuals and U.S. citizens for purposes of this rule. In addition, some argued that the SBA should modify its affiliation provision to disregard affiliation with such VCCs.

Meanwhile, 20 commenters opposed allowing concerns majority owned and controlled by VCCs to be eligible for the SBIR Program. These commenters believe that such concerns do not need further funding—such as Government funding through an SBIR award—because they already receive help from the VCC. In addition, these commenters expressed concern about the impact on existing SBCs in seeking R&D support if concerns that are majority owned and controlled by VCCs were allowed to obtain SBIR funding awards.

The SBA notes that this final rule makes no distinction between a VCC and other for-profit entities. This rule allows a VCC to own and control an

SBIR awardee, as long as the VCC is itself at least 51% owned and controlled by U.S. citizens and permanent resident aliens and the SBIR awardee, together with its affiliates, meets the 500-employee size standard. However, the specific nature of the relationship between a VCC or other investment vehicle, which is in turn more than 50% owned by institutional investors, with an SBIR participant is a broader policy question than SBA sought to address with the proposed rule. When VCCs have control of a firm in which they invest, they are considered affiliated with that firm under current rules (§ 121.103, “What is affiliation?”), just as any other business entity would be if it had ownership or control. Business concerns owned and controlled by VCCs with institutional investors would be affiliated with those VCCs and institutional investors and, thus, may not meet the SBIR Program’s 500-employee size standard. The SBA stated in the proposed rule that it was not changing the rule that a concern, together with its affiliates, must meet the 500 employee small business size standard.

Because of the large number of comments SBA received on the issue of affiliation for VCCs, the SBA believes that it warrants further consideration. SBA will issue an Advance Notice of Proposed Rulemaking seeking additional information on this issue. This action ensures that the small business community is aware of SBA’s consideration of a significant change to the eligibility criteria for the SBIR Program and that it has an opportunity to provide information to assist SBA with the evaluation of the issue.

#### The Effects of the Rule on Joint Ventures (JVs)

Two commenters questioned whether this rule would comply with existing provisions on JVs as set forth in the SBA’s SBIR Policy Directive and whether JVs must have a separate Employer Identification Number (EIN). First, the SBA notes that this final rule does not effect the eligibility of JVs for SBIR awards as set forth in the SBA’s SBIR Policy Directive, 67 FR 60072 (Sept. 24, 2002), which was promulgated pursuant to notice and comment rulemaking. SBA notes that in addition to amending the SBIR Policy Directive on this issue, it proposed an amendment to 13 CFR 121.702(a) in 67 FR 70339 (Nov. 22, 2002) to address JVs in the SBIR Program. SBA received no comments on that proposal, which was identical to the rule set forth in the SBIR Policy Directive. As a result, the SBA is amending the regulation to address this

issue. The final regulation, like the Policy Directive, states that joint ventures are eligible for an SBIR award if each entity that is part of the venture meets the SBIR ownership and control requirements.

Second, and with respect to the EIN number, this issue was addressed in the preamble to the final SBIR Policy Directive. For purposes of the SBIR Program, a JV is an association of concerns with interests in any degree or proportion by way of a contract, express or implied, consorting to engage in and carry out a specific business venture for joint profit, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. Further, for purposes of the SBIR Program, a JV is viewed as a business entity in determining power to control its management. Therefore, a JV can have its own EIN, but it is not required to have one, so long as the purpose of the JV is to engage in and carry out a specific business venture.

#### The 500-Employee Size Standard

A few commenters recommended that the SBA amend the SBIR program size standard from 500 employees to 250 or even 50 employees. One commenter maintained that companies with more than 250 employees generate \$15 million to \$20 million annually while another commenter believed that companies with 500 employees generate \$50 million in sales. Both commenters argued that these companies should pursue standard government grants and contracts, leaving SBIR funds for smaller companies. One commenter maintained that the value of the SBIR Program is greatest for the smallest entities, such as those with less than 50 employees, who cannot fund innovations from their own profits.

The proposed rule specifically stated that the SBA was not amending the size standard for the SBIR Program and therefore the SBA did not propose any alternate size standards. If the SBA determines that it is necessary to amend the size standard for the SBIR Program, it will do so through a separate rulemaking action, which includes proposing a standard for public comment.

#### Time of Eligibility

The SBA received one comment on its proposal to revise the first sentence of § 121.702 by changing “To be eligible to compete for award \* \* \*” to read “To be eligible for award \* \* \*.” With this change, an SBIR awardee would not need to meet the eligibility requirements

when it submits its proposal. Rather, the awardee would need to be eligible at the time of the award. According to the commenter, this change would allow large businesses to use resources to apply for SBIR funding and then establish a small business for purposes of the award.

The SBA disagrees with this comment. First, the SBA has been issuing size determinations for SBIR participants at the time of award for several years and is not aware of any instances where a large business has become "small" for purposes of an SBIR award. The SBA believes that, generally, this process proposed by the commenter would be too time and money consuming.

Second, the reason for the departure from the time of self-certification with the proposal submission requirement applicable to other programs is the concern that potential SBIR entrepreneurs often are working at large concerns or non-profit institutions (*e.g.*, universities) at the time of their initial proposal and, thus, would be precluded from the SBIR Program by a "time of offer" rule. These offerors typically leave their position with the affiliated entity upon approval of their proposal and prior to award. Therefore, the SBA is promulgating the final rule as proposed.

### The SBA's Decision

In sum, this final rule adopts a modification to the SBA's proposed rule. Although the SBA had proposed to allow another concern to own an SBIR awardee, the proposal required 100% ownership and control. Based on comments received and discussed above, the SBA believes that its proposal was unnecessarily limiting. Therefore, without modifying the size standard requiring that an SBIR awardee, together with its affiliates, have no more than 500 employees, the SBA is revising § 121.702 to allow an SBIR funding awardee to be either:

(1) A for-profit business concern, as defined in § 121.105, that is at least 51% owned and controlled by one or more individuals who are citizens of the United States, or permanent resident aliens in the United States; or,

(2) A for-profit business concern, as defined in § 121.105, that is at least 51% owned and controlled by another for-profit business concern, as defined in § 121.105, that is itself at least 51% owned and controlled by individuals who are citizens of, or permanent resident aliens in, the United States.

This final rule also adopts the SBA's proposal to revise the first sentence of § 121.702 by changing "To be eligible to

compete for award \* \* \*" to read "To be eligible for award \* \* \*." With this change, an SBIR awardee does not need to meet the eligibility requirements when it submits its proposal. Rather, the awardee must be eligible at the time of the award.

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

The Office of Management and Budget (OMB) has determined that this rule is a significant regulatory action for purposes of Executive Order 12866. Small business size standards determine what businesses are eligible for Federal small business programs. This rule does not effect small business size standards, but may effect the number of awards to different small businesses under the SBIR Program. This is not a major rule, however, under the Congressional Review Act, 5 U.S.C. 800. For purposes of Executive Order 12988, the SBA has determined that this rule has been drafted, to the extent practicable, in accordance with the standards set forth in that order. For purposes of Executive Order 13132, the SBA has determined that this rule does not have any federalism implications warranting the preparation of a Federalism Assessment. For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, the SBA has determined that this rule does not impose new reporting or recordkeeping requirements, other than those now required of the SBA and Federal agencies that request R&D proposals under the SBIR Program. The SBA's Final Regulatory Impact Analysis follows.

### Regulatory Impact Analysis

#### 1. Need for This Regulatory Action

The SBA's experience over the last several years led it to believe that it should reconsider its policy on eligibility for SBIR awardees. The SBA believes that the former regulation was unnecessarily restrictive. The revised rule now allows small businesses owned and controlled by no more than one other for-profit business concern to participate in the SBIR Program. The SBA believes this regulation will increase the number of SBCs eligible for the SBIR Program and therefore increase the number and quality of technological innovations by SBCs. As a result, this rule, despite the fact it broadens the eligibility requirements for SBIR awardees, is still consistent with SBIDA and its legislative history.

The mission of SBA is to aid and assist small businesses through a variety of financial, procurement, business development and advocacy programs. To effectively assist intended beneficiaries of these programs, the SBA must establish distinct definitions of what it means to be a small business and define what small businesses are eligible for various Federal Government programs. The Small Business Act (15 U.S.C. 632(a)) delegates broad responsibility for establishing small business definitions to the SBA Administrator.

This rule is consistent with the SBA's statutory mandate to assist small business. This action will promote the Administrator's objectives to help individual small businesses succeed through fair and equitable access to capital and credit. Reviewing and modifying the SBA's Small Business Size Regulations, when appropriate, ensures that intended beneficiaries have access to small business programs designed to assist them.

#### 2. Potential Benefits and Costs of This Regulation

Small R&D concerns that will become eligible for SBIR Program awards are the primary beneficiaries of this rule. Specifically, benefits will flow to concerns that were ineligible for SBIR awards solely because they were owned and controlled by other concerns, rather than natural persons. In addition, companies owned and controlled by SBIR participants, which were previously ineligible to participate in the SBIR Program, are now eligible.

In the proposed rule, the SBA could not predict with confidence the distributional impact of the rule. The SBA believed that there would be about 50 to 100 concerns that might benefit, based on information that, in the past, agencies have not awarded approximately 50 to 100 SBIR proposals as a result of the former ownership restrictions. Although the SBA specifically requested comments on this issue, commenters did not offer estimates, but generally agreed with the SBA's estimates.

In fiscal year 2002, there were approximately 5,000 SBIR awards that received approximately \$1.5 billion in funding. Therefore, if 100 newly eligible firms win SBIR awards, the SBA estimates that approximately \$30 million could be awarded annually to newly eligible concerns as a result of this rule.

Federal Government agencies with SBIR Programs also benefit from this rule because it enables them to tap the resources of more small innovative

firms, facilitating the conversion of federally funded research results into commercially viable products and services. In keeping with Congress' intent, the rule further helps Federal agencies to meet their mandate to assist SBCs.

The Federal Government will incur no additional costs as a result of this final rule. By slightly expanding the pool of eligible concerns, the rule makes an already competitive program even more competitive, which can increase the quality of the projects funded. The rule will have no impact on the number of awards given or on the amount of funds available for the program.

The SBA estimated in the proposed rule that there would be relatively few distributional effects if it adopted the rule. In the past, agencies have not awarded approximately 50 to 100 SBIR proposals as a result of the former ownership restrictions. The agencies did not issue an award to either small businesses or other than small businesses. Again, as stated above, the SBA could not accurately determine how many concerns might become eligible for these awards because there are no data to support an estimate of the distributional effects, but the SBA believed it could be no more than 100 awards made to newly eligible concerns. Commenters did not dispute this estimate, and one stated its assumption that the SBA's estimate of newly eligible concerns was correct.

#### **Final Regulatory Flexibility Analysis**

Under the Regulatory Flexibility Act, the SBA has determined that this rule may have a significant economic effect on a substantial number of small entities. The SBA estimates that an additional 50 to 100 small concerns could become eligible for the SBIR Program and obtain approximately \$30 million in funding agreements. Immediately below, the SBA sets forth a Final Regulatory Flexibility Analysis of this rule providing the following: (1) The need for and objective of the rule; (2) a description and estimate of the number of small concerns to which the rule will apply; (3) projected reporting, recordkeeping, and other compliance requirements of the rule; (4) relevant Federal rules that may duplicate, overlap or conflict with the rule; and (5) alternatives to allow the Agency to accomplish its regulatory objectives while minimizing the impact on small entities.

##### *(1) Need and Objective of the Rule*

The SBA believes that several SBCs were precluded from participating in the SBIR Program under the prior rule,

solely because of their ownership structure. Participating SBIR agencies have not awarded 50 to 100 SBIR proposals annually because there were no meritorious and feasible proposals from qualified concerns. In those cases, the SBA believes the SBCs were qualified except for the fact that they did not meet the ownership criteria.

One purpose of the SBIR Program is to increase the share of the Federal R&D budget awarded to SBCs. In addition, according to SBIDA's legislative history, SBCs have difficulty competing with not-for-profit entities. Allowing concerns that are at least 51% owned and controlled by a single for-profit business concern that is itself at least 51% owned and controlled by one or more individuals who are citizens of, or permanent resident aliens in, the United States is consistent with the objectives of the SBIR Program.

##### *(2) Description and Estimate of the Number of Small Entities to Which the Rule Applies*

The SBA could not precisely determine how many concerns would become eligible as a result of the proposed rule, if adopted, because it had no data on how many wholly owned subsidiaries there are in the United States. In fiscal year 2002, there were about 5,000 annual SBIR awards for approximately \$1.5 billion, less than 2% of which are multiple awards. The SBA believes that between 50 to 100 concerns will become eligible under this rule, as discussed above.

The SBA believes that the additional eligible concerns will not have a significant impact on existing small concerns. While there are approximately 5,000 annual SBIR awards, over 98% are awarded to concerns that receive no other awards during the year. That is, there are approximately 4,900 awards in any given year to approximately 4,900 different concerns. The SBA estimates that, on average, three concerns compete for any given award. Therefore, there are about 15,000 concerns seeking SBIR awards. The SBA does not believe that an additional 100 competitors, about 0.7%, adds significant competition for SBIR awards.

The SBA recognizes that newly eligible firms might be viewed as competition for other small businesses competing for SBIR awards. However, newly eligible firms under this rule must, like other participants, meet the 500-employee size standard. This rule does not increase the population of eligible firms by allowing other than small business to participate; it only adds SBCs with different ownership structures. Therefore, newly eligible

concerns competing for SBIR awards do not have the benefits that generally accrue to larger concerns. While there will be a small increase in the number of concerns competing, the newly eligible firms will not be more competitive due to their size.

Participating agencies have no limit to the number and amount of awards they may make in a given fiscal year. The agencies have goals and objectives, but they are not limited to those levels. This rule opens up opportunities for more small R&D concerns to participate in the SBIR Program.

##### *(3) Projected Reporting or Recordkeeping, or Other Compliance Requirements of This Rule*

This rule does not impose any additional reporting, recordkeeping or other compliance requirements on small entities for the SBA's programs. It also does not create additional costs on a business to determine whether or not it qualifies as a small business. A business need only examine existing business information to determine its eligibility, such as its Federal tax returns. In addition, this rule does not impose any new information collection requirements from the SBA, which would require approval by OMB under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501-3520.

##### *(4) Relevant Federal Rules That May Duplicate, Overlap or Conflict With the Rule*

The SBA's Small Business Size Regulations may in some instances overlap other Federal rules that use the SBA's small business size standards to define a small business. However, this rule is limited to a single program and does not conflict with other regulatory requirements, or any small business program, other than the SBIR Program's Policy Directive, which the SBA will amend to comply with this rule.

##### *(5) Alternatives To Allow the Agency To Accomplish Its Regulatory Objectives While Minimizing the Impact on Small Entities*

In its proposed rule, the SBA proposed only to extend eligibility to concerns that were owned 100% by another concern. The SBA also indicated that it had considered an alternative that would permit concerns less than wholly owned or controlled by other concerns, or owned or controlled by more than one other concern, to be eligible for SBIR awards. Based on comments received to the proposed rule, the SBA adopted the alternative that would allow an SBIR participant to be less than 100% owned and

controlled by another concern. However, the rule states that the business concern with at least 51% ownership and control of the SBIR awardee must be at least 51% owned and controlled by citizens or permanent resident aliens in the United States. The SBA believes that this regulation provides flexibility with respect to investments while ensuring that small R&D concerns obtain SBIR awards.

#### List of Subjects in 13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Grant programs—business, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

■ For the reasons set forth in the Preamble, the SBA is amending 13 CFR part 121 as follows:

#### PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for Part 121 continues to read as follows:

**Authority:** 15 U.S.C. 632(a), 634(b)(6), 636(b), 637(a), 644(c), and 662(5); and Sec. 304, Pub. L. 103–403, 108 Stat. 4175, 4188, Pub. L. 106–24, 113 Stat. 39.

■ 2. Revise § 121.702 to read as follows:

#### § 121.702 What size standards are applicable to the SBIR program?

To be eligible for award of funding agreements in the SBA's Small Business Innovation Research (SBIR) program, a business concern must meet the requirements of paragraphs (a) and (b) below:

(a) *Ownership and control.*

(1) An SBIR awardee must (i) be a concern which is at least 51% owned and controlled by one or more individuals who are citizens of the United States, or permanent resident aliens in the United States; or

(ii) Be a concern which is at least 51% owned and controlled by another business concern that is itself at least 51% owned and controlled by individuals who are citizens of, or permanent resident aliens in the United States; or

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

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

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

(b) *Size.* An SBIR awardee, together with its affiliates, not have more than 500 employees.

Dated: November 29, 2004.

**Hector V. Barreto,**

*Administrator.*

[FR Doc. 04–26608 Filed 12–2–04; 8:45 am]

**BILLING CODE 8025–01–U**

#### DEPARTMENT OF TRANSPORTATION

##### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA–2004–19325; Airspace Docket No. 04–ACE–54]

#### Modification of Class E Airspace; Dodge City, KS

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Direct final rule; confirmation of effective date.

**SUMMARY:** This document confirms the effective date of the direct final rule which revises Class E airspace at Dodge City, KS.

**EFFECTIVE DATE:** 0901 UTC, January 20, 2005.

**FOR FURTHER INFORMATION CONTACT:** Kathy Randolph, Air Traffic Division, Airspace Branch, ACE–520C, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2525.

**SUPPLEMENTARY INFORMATION:** The FAA published this direct final rule with a request for comments in the **Federal Register** on October 19, 2004 (69 FR 61439) and subsequently published corrections to the direct final rule on October 29, 2004 (69 FR 63032) and November 22, 2004 (69 FR 67811). The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on January 20, 2005. No adverse comments were received, and thus this notice confirms that this direct final rule will become effective on that date.

Issued in Kansas City, MO on November 23, 2004.

**Elizabeth S. Wallis,**

*Acting Area Director, Western Flight Services Operations.*

[FR Doc. 04–26670 Filed 12–2–04; 8:45 am]

**BILLING CODE 4910–13–M**

#### DEPARTMENT OF HOMELAND SECURITY

##### Federal Emergency Management Agency

#### 44 CFR Part 65

[Docket No. FEMA–P–7638]

#### Changes in Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Interim rule.

**SUMMARY:** This interim rule lists communities where modification of the Base (1% annual-chance) Flood Elevations (BFEs) is appropriate because of new scientific or technical data. New flood insurance premium rates will be calculated from the modified BFEs for new buildings and their contents.

**DATES:** These modified BFEs are currently in effect on the dates listed in the table below and revise the Flood Insurance Rate Map(s) in effect prior to this determination for the listed communities.

From the date of the second publication of these changes in a newspaper of local circulation, any person has ninety (90) days in which to request through the community that the Mitigation Division Director of the Emergency Preparedness and Response Directorate reconsider the changes. The modified BFEs may be changed during the 90-day period.

**ADDRESSES:** The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** Doug Bellomo, P.E., Hazard Identification Section, Emergency Preparedness and Response Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2903.

**SUPPLEMENTARY INFORMATION:** The modified BFEs are not listed for each community in this interim rule. However, the address of the Chief