2022 SBIR/STTR Extension Act of 2022 Guidebook

November 14, 2022

In September of 2022 Congress passed a 3-year reauthorization of the SBIR/STTR programs, extending them to September 30, 2025, titled "SBIR/STTR Extension Act of 2022". Included in the legislation were several programmatic changes to the law that will directly affect some SBIR firms, and that all firms should familiarize themselves with. These changes primarily involve increased reporting requirements related to research security and protecting SBIR research from theft or illegal transfer by foreign companies, and higher transition and commercialization benchmarks for experienced firms (ie firms that have won >50 Phase Is over a 5-year period or >50 Phase IIs over a 10-year period).

The purpose of this guidebook is to provide early guidance and explanation for these changes, and to help firms understand which of these changes apply to them and what they need to do to come into compliance. The Small Business Administration and the agencies will issue guidance on these changes in the future, and SBTC will update the guidebook accordingly when official guidance is released.

Below are links to the 2022 SBIR Extension bill, the section-by-section summary, and the section of US code that applies to SBIR and STTR:

S. 4900 SBIR/STTR Extension Act of 2022:
https://sbtc.org/wp-content/uploads/2022/09/BILLS-117s4900es.pdf

Section-by-section summary of S. 4900:
https://sbtc.org/wp-content/uploads/2022/09/SBIR-STTR-Section-by-Section-Senate-Summary.pdf

15 USC 638 (SBIR Law):
http://uscode.house.gov/view.xhtml?req=(title:15%20section:638%20edition:prelim)

Although there are 11 sections in S. 4900, we will confine ourselves to the sections that require compliance and understanding on the part of the SBIR firm. These are:

- **Section 4, "Foreign Risk Management" (pg 2-3)**
- **Section 5, "Agency Recovery Authority and Ongoing Reporting" (pg 4)**
- **Section 8, "Increased Minimum Performance Standards for Experienced Firms". (pg 5-16)**

Sec. 4 Foreign Risk Management

1.0 Purpose

The intent of this section is for the Government to identify firms that may be subject to foreign influence, with a specific focus on several countries of concern as determined by the Secretary of State.

Based on required disclosures by the small business, an agency is permitted to ask for copies of financial or contractual agreements that the small business has or had with an enterprise owned or controlled by a foreign state or entity going back 5 years before the submission of a proposal. A consequence of the required disclosures is that the agency may deny awarding a contract to the small business.

Specifically, the law requires:

1. Each agency to establish a due diligence program that is capable of assessing the risks introduced by a small business due to foreign influence or control;
2. The disclosure by each small business seeking federal funding of any foreign influence in the company due to ownership or contractual obligations;
3. Further disclosures by a small business as requested based on an agency's initial risk assessment; and
4. Denial of an award to the small business if, after following the policies and procedures established by its due diligence program, the agency makes a finding of unacceptable foreign influence in the small business.

2.0 Agency Responsibility: Due Diligence and Risk Assessment

The law requires that each agency establish a due diligence program to asses security risks introduced by small business that seek federal funding.

Generally, the purpose of the due diligence program is to establish policies and procedures for assessing the risk introduced by each company that submits a proposal in response to a SBIR/STTR solicitation. In assessing the risk, the agency may use data provided by the company, as well as 'open source' information and tools that may be available to discover information that may not have been disclosed by the company, whether intentionally or unintentionally.

While this doesn't directly affect small businesses, the implementation of this program could affect some small businesses. For example, an agency may choose to investigate/research companies that were previously funded under the SBIR/STTR program. This data can be used to "filter" companies that submit proposals in the future.

The law requires the agency to submit an annual report to various congressional committees. The first report is due by December 31, 2022, and every December 31 thereafter. The GAO is required to submit an annual report, starting in FY 23, detailing the due diligence programs that have been implemented by the various agencies.

3.0 Small Business Responsibility: Disclosure

The law requires that a small business concern (SBC) disclose certain information as it relates to foreign influence. Specifically, an agency is required to ask the following questions:

A. Are any of the owners and covered individuals of the SBC a party to any foreign talent recruitment program?
B. Is the SBC or a subsidiary of the SBC a party to a joint venture that is based in, funded by, or has a foreign affiliation with any foreign country of concern?
C. Does the SBC have any current or pending contractual or financial obligations, or other agreement, or joint-venture-like arrangements with an enterprise owned by a foreign state or entity?
D. Is the SBC owned fully or in part in a foreign country of concern?
E. Are there any general partners or individuals in a leadership role of an entity that has provided venture capital or institutional investment funds to the SBC that have foreign affiliation with any foreign country? If so, what is the percentage of VC or institutional investment by such a partner?
F. Does the SBC have any technology licensing or intellectual property sales during the 5-year period preceding submission of this proposal, to a foreign country of concern?
G. Does the SBC have any related foreign business entity, offshore entity, or entity outside the US?

If the answer to any of the above questions is 'yes', and the SBC is being considered for an award, then the agency may ask for additional information, including the percentage ownership of a venture capital investment in the company, and copies of any contractual or financial agreements, among other items.

While an agency may ask for additional information up front, during the proposal submission process, it would be simpler to require any additional information only if the small business is being considered for an award. Otherwise, an agency will expend a lot of time and effort evaluating the risk associated with each company that answers yes to any of the above questions, even when the company may not even be a contender for an award.

A SMALL BUSINESS CONCERN SHOULD MAKE COMPLETE DISCLOSURES OF ALL REQUIRED INFORMATION. WHEN IN DOUBT, THE SBC SHOULD DISCLOSE.

4.0 Basis for Denial

An agency may deny an award to a small business if it determines that the small business is subject to foreign influence of one type or another and:

- Those foreign relationships interfere with the activities to be funded; or
- Create duplication of activities supported by the agency; or
- Present a potential conflict of interest; or
- The relationships weren't appropriately disclosed; or
- Violate the law or agency policies; or
- Pose a national security risk.

Note that a finding of any foreign influence, coupled with any one of the above can be a cause for denial. However, some of the above conditions are not properly defined. The due diligence program will need to define these conditions. For example, what constitutes a duplication of activity? How is interference defined? Etc.

5.0 Frequently Asked Questions

❖ **What is a "covered individual?"**

Any individual who:

a. Contributes in a substantive, meaningful way to the scientific development or execution of a research and development project proposed to be carried out with a research and development award from a Federal research agency; and
b. is designated as a covered individual by the Federal research agency concerned.

❖ **What is "foreign affiliation?"**

Any funded or unfunded academic, professional, or institutional appointment or position with a foreign government or government-owned entity, whether full-time, part-time, or voluntary (including adjunct, visiting, or honorary) can be considered to be a foreign affiliation.

❖ **What is a "foreign country of concern?"**

The People's Republic of China, the Democratic People's Republic of Korea, the Russian Federation, the Islamic Republic of Iran, and any other country determined to be a country of concern by the Secretary of State.

❖ **What is a "malign foreign talent recruitment program?[1]"**

The legal definition of such a program is relatively complex. However, if an individual is receiving some (any) form of compensation—which doesn't have to be cash—including even an honorific title, from a foreign country or an entity based in, funded by, or affiliated with a foreign country, in exchange for some service that is deemed to be against the interests of the United States, the agency may consider it to be a recruitment program. It is a very broad net.

6.0 Potential Problems for a Small Business Concern

- The primary issue here is that there is no defined appeal process in the event that a small business is denied an award due to foreign influence. Hence, the due diligence program needs to include a mechanism for an appeal. Otherwise, the SBC will need to initiate other legal proceedings, including but not limited to a protest.
- The phrase 'other agreement' is undefined and can interpreted extremely broad. For example, will a Letter of Intent (LOI) be considered? How about a Purchase Order with a foreign suppler? Agencies should limit the scope of this phrase to the type of agreement that is associated with the application of some form of control or influence over the small business.
- In addition, there is no guidance on how an agency can define a 'covered individual'. For example, it is not clear if the definition includes individuals contributing to a project as subcontractors or as consultants. Until further guidance, small businesses should be cautious and may need to have their subcontractors and consultants answer the same set of questions that it must answer.
- While the law focuses on the small business and its foreign associations, there is no discussion about the STTR program and foreign association related to the research institution.
- A small business that has an STTR award may need to apply a number of firewalls between itself and the research institute that it has partnered with. For example, does the small business need to investigate the associates of any university professor or even student that is working on the project?

[1] The legal definition is found under Section (4) of the following: https://www.law.cornell.edu/uscode/text/42/19237#4

Sec. 5. Agency Recovery Authority and Ongoing Reporting

1.0 Purpose

This section gives an agency the authority to "claw back" funds expended under an award after the agency determines that the small business poses a risk to national security.

2.0 Agency Responsibility

An agency is responsible for recovering all amounts paid to a small business under an SBIR/STTR award if the agency determines that:

- The small business made a material misstatement, or
- There is a change in the small business ownership, structure, or substantive change in circumstances,

and either one of those events pose a risk to national security.

3.0 Small Business Responsibility: Disclosure

The small business is required to regularly report:

- Any changes to its disclosures under Section 4 of the Act;
- Any past material misstatements that may have an impact on national security; and
- Any changes within the company that may pose a national security risk.

4.0 Frequently Asked Questions

- **What events must a small business report?**

A small business is required to report any changes to the company ownership, structure, investments, or circumstances that an agency could potentially view as a national security risk. It must also report any misstatements related to foreign influence within the company or national security, and if any of its answers to questions asked under Section 4 of the Act have changed.

5.0 Potential Problems for a Small Business Concern

- The law does not define which events in the change of a company structure pose a risk national security.
- The law does not define what can be determined to be a "material" misstatement.
- The law implies that even an *unintentional* misstatement can be the basis of a claw-back decision by an agency. This needs to be clarified, and only statements made knowingly or willfully should be permitted to be used as the basis to recover funds from a small business.
- In addition, once a company reports that it has made a past misstatement that could be "material," that event alone is a basis for clawing-back award funds. There is no amnesty for correcting a past mistake.

Sec. 8 Increased Minimum Performance Standards for Experienced Firms

15 USC 638 (qq)(3) (SBIR Law):
http://uscode.house.gov/view.xhtml?req=(title:15%20section:638%20edition:prelim)

SBA Performance Benchmarks Requirements:
https://www.sbir.gov/performance-benchmarks

There are two new subsections that have been added to the SBIR law relating to Phase I to II transition rate and Commercialization rate. These provisions apply only to some of the largest SBIR winners, and require these firms to show transition and commercialization rates above a certain level.

NOTE: The New standards included in the law do not replace the current performance benchmarks, but are in addition to them. The old performance benchmarks remain in place. To read more about these performance benchmarks, follow the link to the SBA's explainer:

https://www.sbir.gov/performance-benchmarks

I. FAQs: What The New Law Says

A) Progress to Phase II Minimum Performance Standards

1. Which firms does this section apply to?

- Firms that have won more than 50 SBIR & STTR Phase I awards during the five fiscal years preceding the most recent year. This rolling 5 year period is referred to as the "covered period" under this subsection
- For example, for FY2023, a firm would have to have won more than 50 SBIR & STTR Phase I awards from FY2017-FY2021.
- Firms that have won 50 or fewer Phase Is during the covered period will be exempt from these standards

2. For Firms that meet this threshold, what is the new standard they must meet?

- The new provision states that the Phase I to II performance standard for firms meeting the 50 Phase I award number threshold is twice as high as firms that are below
- The law does not specify a specific number for the Phase I to II standard, but rather allows the SBA to set the number
- SBA has previously established a base Progress to Phase II standard of 25%, or 1 Phase II for every 4 Phase Is during the covered period.
- Note "covered period" is offset a year for Phase IIs, so for example SBA will compare FY17-21 Phase Is to FY18-22 Phase IIs
- Therefore the law requires firms that meet the increased standard to show a transition rate that is 50%, or 2 Phase IIs for every 4 Phase I during the covered period.

3. What is the penalty for failing to meet the increased minimum standards?

- Firms that do not show a 50% Phase I to II transition rate are prohibited from winning more than 20 Phase I and Direct to Phase II awards at each agency beginning on when the determination is made.
- For example, in FY2023, if it is shown that from FY2017-FY2021 Company A won 54 Phase I awards, and won 24 Phase II awards, its transition rate would be calculated at 44.4%, below the required 50% threshold. This company would then be restricted from winning more than 20 Phase Is at each Federal Agency in FY2023.
- The restriction would continue to apply each additional year until either the firm raised its transition rate above 50%, or won fewer than the 50 Phase Is over the 5 year rolling period threshold.

B) ***Progress to Phase III Minimum Performance Standards***

1. Which firms does this section apply to?

- Firms that have won more than 50 SBIR & STTR Phase II awards during the ten fiscal years preceding the two most recent fiscal years. This 10 year rolling period is referred to as the "covered period" under this subsection
- For example, for FY2023, a firm would have to have won more than 50 SBIR & STTR Phase II awards from FY2011-FY2020.
- Firms that have won 50 or fewer Phase IIs during the covered period will be exempt from these standards

2. For Firms that meet this threshold, what is the new standard they must meet?

- There are two tiers of standards that apply to firms that meet the above threshold
- Tier 1: Firms that have won more than 50 SBIR & STTR Phase II awards over the covered period
    - Must receive an average of $250,000 of aggregate sales and investments per Phase II award received during covered period
- Tier 2: Firms that won more than 100 SBIR & STTR Phase II awards during the covered period
    - Must receive an average of $450,000 of aggregate sales and investments per Phase II award received during covered period

3. What is the penalty for failing to meet the increased minimum standards?

- Firms that do not meet their respective required minimum standard are prohibited from winning more than 20 Phase I and Direct to Phase II awards at each agency beginning on when the determination is made.
- For example, in FY2023, Company B from FY2011-FY2020 won 103 Phase II awards, and had a combined aggregate of sales and investment during that period of $31 million derived from Phase II awards. That averages to $300,971 per Phase II, higher than Tier 1 threshold, but lower than Tier 2.
- Since the company won more than 100 Phase II awards during the covered period, this company would then be restricted from winning more than 20 Phase Is at each Federal Agency in FY2023.

4. What documentation is required to support a firm's commercialization claims?

- The law only requires firms to submit documentation of all "covered sales" to SBA to support its commercialization standards
- The term "Covered sale" is defined narrowly in the law to mean a sale by a small business that:
    - Is attributable to an SBIR or STTR award
    - For which no amount of payment was made using Federal Funds
    - Which the firm uses to meet a minimum commercialization standard (Tier 1 or Tier 2)
    - Was received during the 5 fiscal years immediately preceding the fiscal year which the firm uses the sale to meet the standard
- It should be noted that the term "covered sale" in the law **only applies to the (iii) Documentation subsection**, and nowhere else.
- Nowhere in the law does it preclude firms from using sales and investment not included in the "covered sale" definition to meet the Commercialization minimum performance standards, that definition only includes sales for which a firm is **required to provide documentation to** support its commercialization claim.
- The definition of "covered sale" does not include federally funded sales because these sales a recorded in federal databases, and therefore in theory easy to find and verify without a firm providing documentation.
- The law also **does not preclude a firm** from providing more documentation than is required to support its commercialization claims. There is concern that some of the federal databases are not complete or accurate. When in doubt, we encourage firms to provide more documentation than is required, including documentation of federal sales.

❖ Other Notes/Changes to the law

- These new standards will come into effect on April 1, 2023
- Patents will not be applicable for firms required to meet increased Phase III performance standards. Patents may still be used by firms to meet the original Commercialization benchmark requirements laid out by SBA.
- A federal agency may apply for a waiver to the above minimum standards for a specific topic if the topic is deemed critical to national security, or to an agency's mission
- Waivers are not granted to specific companies, however
- The Increased Minimum Standards provisions will terminate on September 30, 2025

II. Further Discussion of Progress to Phase II Minimum Performance Standard

The SBIR reauthorization legislation now includes an updated performance metric based on the transition rate from Phase I to Phase II for multi-award Phase I winners. However, it is unclear in the language of the bill exactly how the Government intends to measure a company's performance against this metric. This subsection will examine a set of questions about how that measure is to be interpreted.

Summary of the Phase I->II Performance Metric

"This new Phase I to Phase II transition standard applies to firms that have won more than 50 Phase I awards during the five fiscal years preceding the most recent year. These firms must double their transition rate. The current minimum standard applies to firms with more than 20 Phase I awards and requires a minimum transition rate of 1 Phase II award per 4 Phase I awards. Firms with more than 50 awards, as detailed above, will now be required to meet an average of at least 2 Phase II awards per 4 Phase I awards." (Section-by-section Senate Summary)

Interpretation of this language is required on three major points:

1. How will the timing of the "covered window" be defined?
2. How will Phase I and Phase II awards be counted in the "covered window"?
3. Will Phase II awards of all types be included in the calculation?

How will the timing of the "covered window" be defined?

The covered window for the metric calculation is defined as the preceding five fiscal years minus the last fiscal year. Assuming implementation of the new legislation occurs in GFY 2023, then the covered window is presumably GFY 2017-2021 (dropping 2022 as the preceding fiscal year).

We see two possible ways to apply the metric counts to Phase I and Phase II awards within the covered window:

1. By original Phase I solicitation date
2. By actual award dates of Phase I and Phase II contracts and grants

How does the Government intend to define the five years in the covered window?

Discussion

Awards from "traditional" SBIR/STTR solicitation topics tend to unfold over 18-24 months at minimum, as shown below. In practice, this timeline can extend to 36 months for many topics.

Given this timeline, if the Government were to count Phase II awards based on the original Phase I solicitation date, then a company is at very high risk of losing not just one year of counted Phase II awards (which is addressed by not including the most recent fiscal year), but two to three years of Phase II awards in the metric.

However, if the Government counted all Phase I and Phase II awards by contract/grant award date (rather than original solicitation date) within the covered window regardless of when the original solicitation was published, then the company has a better chance at being measured against a more complete rolling window of Phase I to Phase II transition performance.

The importance of this distinction is highlighted by a recent GAO study into SBIR delivered to Congress in October 2022. The study, "SMALL BUSINESS RESEARCH PROGRAMS: Reporting on Award Timeliness Could Be Enhanced" (GAO-23-105591), showed that government-wide, the mean number of days it took an agency to issue an award from the solicitation closing date was 182 days. This means that if the government were to use solicitation date instead of award date, it would effectively shorten the covered window by half a year, due to no fault of the small business. There is also a lot of variation amongst agencies, with some agencies showing an award lag of over 250 days.

How will Phase I and Phase II awards be counted in the covered window?

The legislation provides no details in how the Phase I to Phase II transition rate is to be calculated temporally in the covered window. We could imagine two possible approaches:

A. On a per-topic basis: For each "traditional Phase I topic", track the award of any Phase II contracts against that topic.
B. On an aggregate basis: Count all Phase I awards to a company in the covered period (ie FY17-21), and then all Phase II awards in the covered period +1 (ie FY18-22). This is the approach that SBA uses currently

Which of these approaches does the Government intend to pursue?

Discussion

If the Government pursues Approach A above, we see three potential issues:

1. The accounting against the metric is more burdensome for agencies, in that they must track down to the topic level.
2. This approach would essentially shorten the "covered window" since Phase I awards in the latter years of the window do not have the time to convert to Phase II awards and be counted, which penalizes companies. We realize that the covered window not including the last fiscal year is likely intended to address this concern, but this definition would still cut off at least one year of conversion activity from the metric and possibly more based on discussion above.
3. The metric would not incorporate the Government's flexibility in using Direct to Phase II topics or some "open topic" contracts that do not always include a Phase I topic to be tracked. This would limit the Government's flexibility and penalize companies for using these more flexible contracting instruments.

If, however, the Government applies Approach B above, we see the following:

1. This seems a less burdensome approach since the Government is simply counting Phase I contracts awarded directly in the covered period and comparing with Phase II awards in the covered period + 1 year, and, we believe, is consistent with current SBA practices.

Will Phase II awards of all types be included in the calculation?

In recent years, the US Government has expanded the contracting options within the SBIR/STTR program to include a number of options:

1. Direct to Phase II awards: If a technology is deemed to have met the feasibility demonstration objective of a typical Phase I contract, then some agencies may contract a Phase II award directly, essentially skipping over the Phase I contract to speed technical maturation under a Phase II budget for delivery to the agency.
2. "Second" Phase II awards: Some agencies are choosing to invest in technology development and maturation beyond a starting Phase II award when the effort required to fully develop and deliver the capability requires additional investment. Second Phase II contracts even to a different agency should be included.
3. "Open topics" that can follow multiple award paths which do not always include typical Phase I contracts. Sometimes a Phase I goes directly to a non-SBIR funded contract or directly to a Phase III non-government contract. How to treat these contracts is unclear. SBC should list them.

SBA has historically counted additional Phase II contracts, but not direct to Phase II awards in this calculation. However, if Direct to Phase II derives from, extends, or completes effort made under a Phase II, then it could be argued that it should count as a Phase II in this calculation.

Discussion

These newer award types and contracting vehicles provide the US Government with highly valued flexibility—both delivering technology to their user bases faster and augmenting the investment profile in technologies that require it to achieve higher levels of technology readiness for transition. These instruments have been exceedingly valuable across the SBIR/STTR programs. We believe that current SBA practice is to include such award types in the calculation of the transition metric.

If these new award types are not included in the calculation of the Phase I to Phase II transition rate because they are not always directly derived from a Phase I topic, then companies will be disincentivized to participate in these more flexible contract vehicles for fear they will compromise the company's ability to achieve the target metric—that is, they will be inclined to use their limited business development budgets against traditional Phase I proposals that can lead to traditional Phase II conversions that will be counted in their favor in the metric. That could lead to these highly valued, more flexible contracting approaches not being leveraged in the Government's interest.

III. Further Discussion of Progress to Phase III Minimum Performance Standards

"Phase III" Defined in the law, Policy Directive, and SBA

While the SBIR/STTR Extension Act of 2022 increases the minimum standards of commercialization per Phase II that experienced firms are required to meet, it does not mandate a change in how that commercialization is calculated, with one exception: patents are specifically excluded as a metric for meeting the Progress to Phase III standards. In addition, in the section-by-section summary of the bill drafted by Congress explaining intent, it is stated that the purpose of this section is to "codify current practice".

Therefore, aside from patents, we expect SBA to continue to use the same calculations and definitions for Phase III, commercialization, and sales and additional investment as they have previously used. Below are excerpts from the law, policy directive, and SBA defining and clarifying Phase III and commercialization

- **"Phase III" is defined in the SBIR law under 15 USC 638[2] (e)(4)(C):**

> (C) where appropriate, a third phase for work that derives from, extends, or completes effort made under prior funding agreements under the SBIR program—
>
> i. in which commercial applications of SBIR-funded research or research and development are funded by non-Federal sources of capital or, for products or services intended for use by the Federal Government, by follow-on non-SBIR Federal funding awards; or
>
> ii. for which awards from non-SBIR Federal funding sources are used for the continuation of research or research and development that has been competitively selected using peer review or merit-based selection procedures;

- **The SBA's 2019 SBIR Policy Directive[3] also includes a definition for Phase III work, starting on page 76:**

> (4) Phase III work may be for products, production, services, R/R&D, or any such combination.
>
> (5) There is no limit on the number, duration, type, or dollar value of Phase III awards made to a business concern. There is no limit on the time that may elapse between a Phase I or Phase II award and Phase III award, or between a Phase III award and any subsequent Phase III award. A Federal Agency may enter into a Phase III SBIR/STTR agreement at any time with a Phase II Awardee. Similarly, a Federal Agency may enter into a Phase III SBIR/STTR agreement at any time with a Phase I Awardee. A subcontract to a Federally-funded prime contract may be a Phase III award.

- **In its "Guide for Completing the Commercialization Report"[4], SBA further explain what constitutes "sales", "investment", and "3rd party revenue:**

> **"Sales"** includes cash revenue from the sale of new products or non-R&D services embodying the specific technology developed under this Phase II project.
>
> • Count only such revenue accruing to your firm and not to other entities. If your firm sold or licensed the technological know-how developed under Phase II to another entity, enter the cash revenue accruing to the other entity from its sale of new products or non-R&D services embodying the Phase II technology in the "3rd Party Revenue" field, not with your firm's sales figures.
>
> • If the new product/service embodying the Phase II technology is a component of a larger product/service (e.g., an improved coating on an existing optical lens

[2] http://uscode.house.gov/view.xhtml?req=(title:15%20section:638%20edition:prelim)

[3] https://www.sbir.gov/sites/default/files/SBIR-STTR_Policy_Directive_2019.pdf

[4] https://www.sbir.gov/sites/default/files/Guide_for_completing_commercialization_Report_SBIR_Gov_09_15_20.pdf

product), count only the sales attributable to the component rather than the larger product/service.

"3rd Party Revenue" (if known):

Includes cash revenues received by an entity other than your firm from the sale of new products or non-R&D services derived from the specific technology developed under this Phase II project, for example through a license agreement or spin-off. Only count the portion of 3rd Party Revenues that accounts for the SBIR/STTR technology's share of the total product or service. Example: If a new coating for helicopter blades developed under a SBIR/STTR Phase II project is used by a 3rd Party Manufacturer, count only the 3rd Party revenues attributed to the blade coating, not the entire helicopter.

"Additional Investment"

includes investment by any source other than the federal SBIR/STTR programs (Phase I or Phase II) in activities that further the development and/or commercialization of the specific technology developed under the Phase II project. Examples of such activities include:

- Additional R&D on the Phase II technology
- Manufacturing/production start-up
- Purchase of plant and equipment for manufacturing/production
- Protection of intellectual property
- Obtaining certifications
- Marketing start-up and marketing; and
- Training of workforce to manufacture or sell new products embodying the Phase II technology

These may be activities funded and conducted by your firm or by other entities.

FAQs of "Covered Sale" in the SBIR/STTR Extension Act of 2022

One of the most confusing parts of the new law is the definition of "covered sale" in the Documentation subsection of the Progress to Phase III section (15 USC 638 (qq)(3)(B)(iii)(II)). This section will answer some common questions firms might have about this provision

1. **Since the definition of "covered sale" exclude sales for which "the payment was or is made using Federal funds", does this mean government sales aren't or shouldn't be included in Phase III/Commercialization calculations?**
   - No. This definition of "covered sale" only applies to the "Documentation" subsection of the law and nowhere else. Government sales are included in Phase III/Commercialization calculations, but firms are not required to provide documentation to prove or support these sales.

2. **Why does the definition of "covered sale" exclude sales using Federal Funds?**
   - The language in the reauthorization excludes sales involving Federal Funds because the assumption from Congress was that these sales are verifiable in separate and available federal databases, thereby easing the documentation burden on the SBC.

- However, to reduce confusion, maintain data integrity, and minimize errors, we recommend that the SBC voluntarily report sales involving Federal Funds, as is current practice.

3. **Does the law prohibit an SBC from submitting documentation supporting government or other federally funded sales?**
    - No, the law makes it clear that firms are not required to submit this documentation, but there is nothing in the law prohibiting firms from voluntarily doing so.
    - The Government database of Phase III SBIR contracts is relatively new and often incomplete. It only includes a contract that the contracting officer has made a determination that the contract is a Phase III and decided to report it as such. In many cases, especially when SBIR data rights are at issue, the contract is not included in the Phase III data.
    - For this reason, we recommend that the SBC should check the SBIR Phase III listings for the company and report any Phase III contracts regardless of if they are or are not included in the database.
    - A SBC should supplement its commercialization report with information and documentation that it believes should be included with an explanation of why the data should be included.

4. **What is the "covered period" for reporting "covered sales"?**
    - The SBC is required to have on hand documentation of these sales for potential audit for at least 5 years.
    - The total reporting period is for the 10 years preceding the 2 most recent government fiscal years. Because many product life cycles extend well beyond 12 years, we recommend reporting total yearly sales for both the 12 year look-back and for the lifetime of the "covered sales". There is no explicit requirement to document "covered sales" beyond the previous 5 government fiscal years.

5. **Can "covered sales" include sales by a 3rd party under license from the SBC or spin-offs from the SBC that use the foundational SBIR technology to grow a separate business?**
    - The legislation does not address the third-party revenue from licensed products or spin-offs, this will likely be left up to interpretation by SBA. Historically these sales have been counted by the SBA toward the commercialization benchmarks, and there is nothing in the law that should prompt SBA to change how they calculate a firm's commercialization returns.
    - We recommend that both direct royalty payments to the SBC, revenue from licensed product sales by a 3rd party, and revenues at spin-offs attributable to SBIR technologies be reported to SBA as part of your company's commercialization metrics. If the SBC cannot obtain exact number for an entry, it should include the best estimate and explain how the number was derived. We believe that this has been the practice at SBA. The National Academy of Sciences and the TechLink Economic Impacts studies have used this practice in their 20 studies of the SBIR.

6. **Can a firm's subcontract to a Federally funded prime contractor be included?**
    - Yes, the SBA Policy Directive makes it clear that such subcontracts are Phase III and should be covered.