



SMALL BUSINESS ADMINISTRATION

13 CFR Part 107

Small Business Investment Companies – Energy Saving Qualified Investments

RIN: 3245-AF86

AGENCY: U.S. Small Business Administration

ACTION: Final rule.

SUMMARY: In this rule, the U.S. Small Business Administration (SBA) sets forth defined terms for “Energy Saving Qualified Investment” and “Energy Saving Activities” for the Small Business Investment Company (SBIC) Program. These definitions are established to implement a provision of the Energy Independence and Security Act of 2007 (Energy Act), which allows an SBIC making an “energy saving qualified investment” to obtain SBA leverage by issuing a deferred interest “energy saving debenture”. This rule also implements a provision of the Energy Act that provides access to additional SBA leverage for SBICs that have made Energy Saving Qualified Investments in Smaller Enterprises. This final rule includes changes based on public comments received on the proposed rule published in the Federal Register on January 11, 2011. Generally, the changes allow a broader range of potential investments to qualify as Energy Saving Qualified Investments and reduce the need for SBICs to obtain pre-financing determinations of eligibility from SBA.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background Information

The Energy Independence and Security Act of 2007, Public Law 110-140, Title XII, section 1205(a), amended section 303 of the Small Business Investment Act of 1958 (SBI Act) by authorizing SBICs licensed after September 30, 2008, to issue Energy Saving Debentures. Section 1205(b) of the Energy Act amended section 103 of the SBI Act by adding the new defined terms “energy saving debenture” and “energy saving qualified investment.” Section 1206 of the Energy Act amended section 303(b)(2) of the SBI Act to make SBICs licensed after September 30, 2008, eligible for additional leverage if they have made Energy Saving Qualified Investments. An SBIC making maximum use of this provision could have approximately 11% more leverage outstanding than would be permitted under the standard leverage eligibility formula.

On January 11, 2011, SBA published a proposed rule to implement the SBIC-related provisions of the Energy Act (76 FR 2029). SBA received eleven sets of comments on the proposed rule, primarily falling into three areas: (1) definitions; (2) procedures and timing when SBA must make a pre-financing determination of eligibility, including the details of SBA’s collaboration with the Department of Energy (DOE); and (3) impact of the Energy Saving Debenture on SBIC program costs. SBA discusses the comments in the following section-by-section analysis.

II. Section by Section Analysis

Section 107.50 – Definitions. The Energy Act provides that Energy Saving Debentures are to be issued at a discount with a five- or ten-year maturity, and require no interest payment or annual charge for the first five years. Although an SBIC can use other funds to make an Energy Saving Qualified Investment, an SBIC that issues an Energy Saving Debenture must use the proceeds only to make an Energy Saving Qualified Investment. To implement these statutory provisions, SBA proposed to add “Energy Saving Qualified Investment” and “Energy Saving Activities” as defined terms in § 107.50. SBA is finalizing both definitions with modifications.

“Energy Saving Qualified Investment”

The proposed regulatory definition of Energy Saving Qualified Investment had several key points. First, as required by statute, an Energy Saving Qualified Investment can only be made by an SBIC licensed after September 30, 2008. Second, the investment must be made in a Small Business, as defined in 13 CFR part 107. Third, the investment must be in the form of a Loan, a Debt Security (a debt instrument that includes an equity feature, such as warrants or rights to convert to equity), or an Equity Security. Fourth, the Small Business must be “primarily engaged” in business activities that reduce the use or consumption of non-renewable energy sources (“Energy Saving Activities”).

Four commenters suggested that SBA broaden the criteria under which a Small Business is presumed to be “primarily engaged” in Energy Saving Activities. In the proposed rule, the presumption applied only to a Small Business that derived at least 50% of its revenues during its most recently completed fiscal year from Energy Saving Activities. The commenters’ concern was that a Small Business would not be able to satisfy a historical revenue-based test if it was either a start-up or an established company

expanding its business to include Energy Saving Activities. While the proposed rule would have allowed SBA to make a determination of eligibility in such cases, SBA agrees that a broader presumption of eligibility would be an effective way to encourage investment and reduce administrative burden. In considering how to expand the presumption in the final rule, SBA favored a test that would be simple to apply and would focus on prospective rather than historical activity. In the final rule, SBA has retained the proposed revenue-based presumption while adding a second presumption: a Small Business is presumed to meet the “primarily engaged” test if it will utilize 100% of the proceeds of a financing to engage in Energy Saving Activities.

“Energy Saving Activities”

The proposed rule defined Energy Saving Activities largely by referencing certain criteria established by the Department of Energy and other Federal agencies to identify energy efficient products and services and renewable energy sources. As one example, the design or manufacturing of products that satisfy the criteria for use of the Energy Star trademark label would qualify as an Energy Saving Activity.

Paragraph (1) of the proposed definition provided that Energy Saving Activities would include not only manufacturing or research and development of energy-efficient final products, but also “integral product components, integral material, or related software”. One commenter asked SBA to clarify that Small Businesses producing “supply chain” components for products eligible for federal tax credits are included in the definition of Energy Saving Activities. SBA intended paragraph (1) of the proposed definition to include the activities of “supply chain” Small Businesses. SBA believes the proposed rule was sufficiently clear on this point and does not require modification.

SBA received a comment to include under the definition of Energy Saving Activities any Small Business activity that qualifies for either the Residential Energy Tax Credit or an Advanced Research Project Agency – Energy (ARPA-E) grant award. With the agreement of DOE, SBA has added paragraph (1)(v) to the Energy Saving Activities definition to include those activities, as well as any other technology commercialization activity that has qualified for a DOE Small Business Innovation Research (SBIR) or Small Business Technology Transfer (STTR) award.

SBA received, but did not adopt, a comment suggesting that paragraph (1)(iii) of the definition, which describes activities that improve “automobile” efficiency, should be broadened to include other means of transport such as trucks, buses, trains, and aircraft. This provision of the proposed rule was based upon DOE's specific expertise in energy savings activities related to passenger vehicles, whereas other transportation alternatives would fall across the purview of several Federal agencies. SBA expects that many activities aimed at achieving results similar to those described in paragraph (1)(iii) for forms of transportation other than automobiles would qualify as Energy Saving Activities under paragraph (4) of the definition.

SBA received five comments suggesting the definition of Energy Saving Activities be expanded to specifically include the biomass preprocess of pyrolysis, which is one method of biomass conversion for the ultimate production of renewable solid fuels. Based on consultation with DOE, SBA did not adopt this suggestion, as each preprocess of biomass is situational and specific and there are currently no approved standards by which to evaluate all levels of biomass preprocesses and conversion methods. With the many possible technological permutations, SBA believes that potential SBIC investments

involving pyrolysis or any type of preprocessing of biomass should be evaluated on a case-by-case basis under paragraph (4) of the definition.

SBA received one comment to expand the definition of Energy Saving Activities to include “earthquake disaster potential and pipeline safety” of both non-renewable and renewable energy sources. While SBA agrees that these are important concerns, they are outside the scope of activities contemplated by the Energy Act.

SBA received one comment to broaden the definition of Energy Saving Activities “...to include all forms of commercialization of R[esearch] &D[evelopment], including ‘licensing’ and ‘outsourcing’ as well as revenues generated by those activities.” Paragraphs (1) and (4) of the proposed definition already encompassed research and development activities; the commenter’s suggestion would also treat the receipt of licensing fees, royalties, or similar payments as an Energy Saving Activity if such payments were generated from the results of previously conducted research and development that would have qualified as Energy Saving Activities. SBA does not believe that the passive receipt of payments is appropriate for inclusion in the definition. Furthermore, if a Small Business generates revenues solely from licensing or similar activities, it would be ineligible for SBIC financing under existing § 107.720(b), which prohibits the financing of a passive business. It should be noted, however, that a Small Business that outsources the manufacturing of its products may still qualify for financing (and its activities may qualify as Energy Saving Activities) if it is actively engaged in product design or deployment.

Paragraph (1)(v) of the Energy Saving Activities definition in the proposed rule (redesignated as paragraph (1)(vi) in the final rule) included activities that meet the

standards for receiving Energy Credits as defined in Internal Revenue Code section 48, among which is a credit related to qualified fuel cell power plants. In the final rule, at the suggestion of DOE, SBA has added paragraph (1)(vii) to the Energy Saving Activities definition, to clarify that the definition includes the provision of highly efficient conversion systems for fuel cells that can use renewable or non-renewable fuel.

SBA has also made non-substantive edits to improve the clarity of paragraphs (1)(viii) and (2)(v) of the Energy Saving Activities definition. Paragraph (1)(viii) concerns manufacturing or research and development activities that improve electricity delivery efficiency by supporting one or more defined smart grid functions; paragraph (2)(v) concerns deployment of products, services or functionalities for the same purpose.

Section 107.610 – Required Certifications for Loans and Investments. SBA received two comments on the certification requirements for Energy Saving Qualified Investments in proposed § 107.610(f), in particular the requirements in paragraph (f)(2) applicable to investments for which SBA must make a pre-financing determination of eligibility. In such cases, the proposed rule would have required materials submitted to SBA to be certified as true and correct by both the Small Business and the SBIC to the best of their knowledge. The commenters pointed out that an SBIC might not be in a position to make the required certification at the date of submission because due diligence on the prospective investment would probably still be in its early stages. SBA agrees that this is a valid concern and has modified the final rule so that only the Small Business must provide a certification at the date of submission. As of the closing date of the Financing all due diligence should be completed, and at that time the SBIC would be required to

certify that, to the best of its knowledge, it has no reason to believe that the materials submitted to SBA are incorrect.

As part of its review of the certification requirements in response to the comments on the proposed rule, SBA noted that proposed paragraph (f)(1), which concerns Energy Saving Qualified Investments that do not require a pre-financing determination of eligibility by SBA, required a certification by the SBIC but not by the concern receiving the financing. Because not all information can be independently confirmed, an SBIC must rely to some degree on the integrity of the information that a concern provides. Therefore, in the final rule, § 107.610(f)(1)(iv) adds a requirement under which a concern receiving financing must certify, as true and correct to the best of its knowledge, any information it provided to an SBIC in connection with the determination that the concern was eligible to receive an Energy Saving Qualified Investment.

As discussed earlier in this preamble, SBA has revised the definition of Energy Saving Qualified Investment by adding a presumption that a Small Business will be considered “primarily engaged” in Energy Saving Activities if it intends to use all of the proceeds of a proposed financing for such activities. In connection with that revision, SBA has added post-investment requirements for documentation of the actual use of proceeds in § 107.610(f)(5). Under these provisions, the Small Business must provide the SBIC with documentation of the use of proceeds no later than six months after the closing date of the financing; if some or all of the proceeds have not yet been spent, further updates would be required at six-month intervals. SBA expects, given the substantial investment amounts typically involved, that an SBIC would monitor use of proceeds at least this frequently in the ordinary course of business. The SBIC would be

responsible for reviewing the information submitted by the Small Business and documenting that it had reasonably determined that the financing proceeds were used appropriately to fund Energy Saving Activities.

SBA has also slightly reorganized § 107.610(f) for greater clarity; in the final rule, § 107.610(f)(2) includes only the requirements for an SBIC seeking a determination from SBA that an activity in which a concern is engaged is an Energy Saving Activity. The requirements for an SBIC seeking a determination from SBA that a concern is “primarily engaged” in Energy Saving Activities appear separately in § 107.610(f)(3). The requirement for certification by the SBIC as of the closing date of the financing appears in § 107.610(f)(4).

SBA also received three comments dealing more generally with the process and timeframe for obtaining a pre-financing determination of eligibility from SBA. Commenters suggested that SBA allow SBICs to submit materials electronically and develop an expected timeline for consideration for SBA to reach a decision in consultation with DOE.

SBA has and will continue to consult with DOE technical experts on an as-needed basis when evaluating whether certain small business concerns are primarily engaged in an energy saving activity (per request of an SBIC as part of the pre-financing determination of eligibility of use for the Energy Savings Debenture program). As discussed in the “Paperwork Reduction Act” section of this preamble, SBA will electronically collect information from an SBIC through the “Financing Eligibility Statement for Usage of Energy Saving Debenture”.

Section 107.1150 – Maximum Amount of Leverage for a Section 301(c) Licensee.

New paragraph (d) implements a provision of the Energy Act that may provide additional leverage eligibility to SBICs licensed on or after October 1, 2008, that make Energy Saving Qualified Investments in Smaller Enterprises. SBA received no comments on this provision and is finalizing the section as proposed.

Other Comments. In addition to the comments received on specific provisions of the proposed rule, SBA received four comments suggesting that SBA report on various topics, including among others: Energy Saving Debenture usage, number of Small Businesses financed, resulting breakthroughs in technology, comparative studies quantifying energy savings, and performance of Small Businesses financed. While SBA is concerned about minimizing any increases in the reporting burden placed on SBICs and Small Businesses, SBA recognizes a particular need to monitor the performance of investments financed with the proceeds of Energy Saving Debentures, because of their potential impact on fees charged to all SBICs utilizing debenture leverage. SBA plans to ask SBICs to identify each financing that is an Energy Saving Qualified Investment through a certification made at the time of such financing and through quarterly and annual financial reports to SBA. SBICs will also be asked to indicate whether an Energy Saving Qualified Investment was financed with the proceeds of an Energy Saving Debenture or a standard debenture. With these identifiers, SBA will be able to track the performance of Energy Saving Qualified Investments and the SBICs that have made them. SBA expects to make the information collected available to the public in aggregated form.

Energy Saving Debenture

As discussed in the preamble to the proposed rule, section 1205(b) of the Energy Act provided for SBA leverage in the form of an “energy saving debenture”, which would be a five- or ten-year debenture issued at a discount so as to be, in effect, a “zero coupon” debenture for the first five years. SBA leverage fees would be paid as required under current § 107.1130, except for the annual charge in § 107.1130(d) which would be deferred for the first five years and thereafter be payable semi-annually along with the debenture interest. For example, an SBIC issuing a \$1,000,000 ten-year debenture with a combined interest rate and annual charge of 6% would receive roughly \$750,000 upon issuance and would make no payments of interest or annual charge for the first five years. Starting with the sixth year, the SBIC would make semi-annual payments of interest and charges on the debenture’s face amount of \$1,000,000. At maturity the SBIC would pay the \$1,000,000 face amount of the debenture.

Each SBIC licensed after September 30, 2008, that is eligible to issue debentures under current regulations would be eligible to issue an Energy Saving Debenture for the purpose of making an Energy Saving Qualified Investment. No regulatory changes are necessary to implement this new type of debenture. However, SBA did receive a number of comments concerning the Energy Saving Debenture.

SBA received two comments stating that SBA should clarify how an SBIC will be able to calculate the net proceeds it can expect to receive when it issues an Energy Saving Debenture. The same two commenters also asked whether the interest rate on an Energy Saving Debenture could change after issuance if SBA were to include the debenture in a

pool of securities offered for public or private sale, and if so whether the change might affect the funds available to the SBIC.

As discussed elsewhere in this preamble, the cash received by an SBIC issuing an Energy Saving Debenture would be the face value of the debenture discounted by the present value of the interest and annual Charge for the five-year discount period. SBA currently maintains a calculator that an SBIC can use to estimate the net proceeds of an LMI debenture, which has the same structure as the Energy Saving Debenture. The LMI calculator can be accessed through <http://www.sba.gov/content/lmi-debenture-calculator>.

SBA does not anticipate that Energy Saving Debentures will be pooled. SBICs can expect the interest rate on such debentures to remain fixed for their entire term.

SBA received two comments stating that SBICs planning to use Energy Saving Debentures must be able to understand how SBA intends to apportion availability. Beginning in fiscal year 2012, SBA expects to hold annual Energy Saving Debenture allocations on a semi-annual basis, authorizing up to half of the overall annual allocation amount in the first allocation period and the remainder in the second period. SBA will limit the maximum initial Energy Saving Debenture allocation for an individual SBIC to an amount equal to the SBIC's Regulatory Capital (i.e., one tier of leverage) in any fiscal year. If aggregate demand at one tier of leverage is greater than the amount available, SBA will scale back SBICs' leverage requests as necessary. An SBIC that received an allocation of Energy Saving Debenture leverage in the first allocation period may seek an additional allocation in the second period, subject to availability.

Finally, SBA received two comments regarding the impact of the Energy Saving Debenture on program costs; these comments are discussed in the section of this preamble concerning compliance with Executive Order 12866.

Electronic Access to Criteria for Evaluation of “Energy Saving Activities”

As discussed in the preamble to the proposed rule, SBA intends to link its Investment Division web site (www.sba.gov/inv) to other government web sites that will assist users in determining whether a company providing or developing particular products or services is engaged in Energy Saving Activities. Some sites allow users to search for a specific product by name, while others provide performance criteria or outcomes that a qualifying product or service must satisfy. The current addresses for these sites are repeated here for the convenience of the reader:

1. Energy Star:

www.energystar.gov/products

2. Federal Energy Management Program:

www1.eere.energy.gov/femp/technologies/eep_purchasingspecs.html

3. Renewable Electricity Production Tax Credit (Internal Revenue Code Section 45):

http://www.irs.gov/irb/2010-18_IRB/ar11.html

4. Energy Credit (Internal Revenue Code Section 48):

[http://frwebgate.access.gpo.gov/cgi-](http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc26.wais&start=1688508)

[bin/usc.cgi?ACTION=RETRIEVE&FILE=\\$\\$xa\\$\\$busc26.wais&start=1688508](http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc26.wais&start=1688508)

[&SIZE=98870&TYPE=PDF](http://frwebgate.access.gpo.gov/cgi-bin/usc.cgi?ACTION=RETRIEVE&FILE=$$xa$$busc26.wais&start=1688508)

5. Installation-related Federal Tax Credits for Consumer Energy Efficiency:

http://www.energystar.gov/index.cfm?c=tax_credits.tx_index

III. Justification for Immediate Effective Date

The Administrative Procedure Act (APA), 5 U.S.C. 553(d) (3), requires that “publication or service of a substantive rule shall be made not less than 30 days before its effective date, except * * * as otherwise provided by the agency for good cause found and published with the rule.”

The purpose of this provision is to provide interested and affected members of the public sufficient time to adjust their behavior before the rule takes effect. In the case of this rulemaking, however, there should be no need for any member of the public, including any SBIC, to make any changes in order to prepare for the rule taking effect. This rule implements changes to the SBIC program to encourage financings in Energy Saving Qualified Investments, which are expected to contribute to the important goal of reducing U.S. dependence on non-renewable fuels. Any further delay in making leverage available to SBICs in the form of Energy Saving Debentures will only hold back the potential benefits of investment in small business engaged in Energy Saving Activities. SBA therefore finds that there is good cause for making this rule effective immediately instead of observing the 30-day period between publication and effective date.

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)
Executive Order 12866

OMB has determined that this rule is a “significant” regulatory action under Executive Order 12866. In the proposed rule, SBA set forth its initial regulatory impact analysis, which addressed the following: Necessity of the regulation; alternative approaches to the proposed rule; and the potential benefits and costs of the regulation.

SBA received comments which addressed both alternative approaches to and potential costs of the regulation. Those comments are discussed in the final Regulatory Impact Analysis set forth below:

1. Necessity of Regulation

This regulatory action implements sections 1205 and 1206 of the Energy Independence and Security Act of 2007, Public Law 110-140. The statutory revisions provide an SBIC seeking to make an “energy saving qualified investment” with a new SBA leverage option in the form of an “energy saving debenture.”

2. Alternative Approaches to Regulation

Because the regulatory definition of Energy Saving Qualified Investment must be consistent with the statutory definition, SBA had a limited ability to consider alternatives. The statute defines “energy saving qualified investment” as an “investment in a small business concern that is primarily engaged in researching, manufacturing, developing, or providing products, goods, or services that reduce the use or consumption of non-renewable energy resources.” The SBA considered adopting this statutory definition without modification. However, SBA did not select this approach due to concerns that without some interpretation of the broad statutory language, it would be difficult to evaluate (a) whether qualifying investments would actually contribute to the energy-saving objectives of the statute and (b) what constitutes “primarily engaged”.

In considering alternatives for determining whether a qualifying investment would likely contribute to the energy-saving objectives of the statute, the SBA conferred with DOE to consider two options besides using the broad statutory definition: (1) defining a list of specific industries and (2) referencing existing standards developed for Federal

programs that promote energy efficiency. SBA did not adopt the first option to identify a list of specific industries because (1) “energy saving” efforts take place across a broad spectrum of industries; (2) the North American Industrial Classification System (NAICS) codes, typically used to identify industries, are inadequate for capturing whether a business is involved in “energy saving” across this spectrum; and (3) developing a static list does not adequately allow for either a full range of products and services or the rapid growth in this area that might further the statutory goals. Given the number of Federal programs already directed towards “energy saving” activities, SBA chose to adopt the second option in order to improve standardization across agencies, allow growth as DOE and other agencies update program standards to reflect new “energy saving” initiatives, and to address the broadest spectrum of products and services. Towards those goals, SBA recognizes that SBICs may wish to invest in Small Businesses that are manufacturing or researching products or performing services that have not been identified by existing Federal standards. Therefore, SBA will also consider other investments on a case by case basis, based on the SBIC’s ability to demonstrate energy savings associated with the Small Business’s activities.

To determine whether a concern is “primarily engaged” in Energy Saving Activities, SBA considered using either a specific quantitative standard or an evaluation based on total facts and circumstances. For simplicity, the proposed rule presumed that a business is “primarily engaged” if it derived at least 50% of revenues during its most recently completed fiscal year from Energy Saving Activities. As a result of comments received, SBA supplemented this historical test with an alternative, prospective test; in the final rule, a Small Business that will use 100% of the financing proceeds for Energy

Saving Activities will also be presumed to be “primarily engaged” in such activities. SBA believes this change will encourage SBICs to make Energy Saving Qualified Investments by reducing the associated administrative burden. As in the proposed rule, an SBIC may also ask SBA to determine whether a concern is “primarily engaged” in Energy Saving Activities based on an evaluation of various factors, including “the distribution of revenues, employees and expenditures, intellectual property rights held, and business plans presented to investors as part of a formal solicitation”.

3. Potential Benefits and Costs

As stated in the proposed rule, SBA initially estimated demand for Energy Saving Debentures at approximately 5 percent of the overall SBIC debenture program. This estimate was based on SBA’s analysis of SBICs’ usage of the “low and moderate income” (LMI) debenture, which has the same structure as the Energy Saving Debenture, and on venture capital industry data for “Cleantech” investments, which SBA believes are fairly representative of energy saving investments. SBA estimated that level of demand would result in an increase to the annual fee of 14.3 basis points versus a formulation with no Energy Saving Debentures. When calculating the SBA Fiscal Year 2012 budget, SBA found that the same level of demand would increase the annual fee for SBIC licensees by 15.5 basis points versus a formulation with no Energy Saving Debentures. This increase reflects an overall increase in the size of the SBIC program while taking into account the additional risk associated with SBIC equity investments contemplated in the usage of the Energy Saving Debenture.

SBA received two comments stating that Energy Saving Debentures should not be combined with standard debentures when calculating the annual fee charged to all

debenture users. The commenters expressed concern that all SBIC debenture issuers would be required to subsidize the higher-risk Energy Saving Debenture, including those SBICs whose access to the Energy Saving Debenture is prohibited because they were licensed before October 1, 2008.

SBA understands the commenters' concern about spreading the costs of the Energy Saving Debenture across the entire debenture program. In order to limit the impact of fee increases, SBA has decided to cap the amount of Energy Saving Debentures available in a given fiscal year at 5 percent of the overall SBIC program debenture program level for the year, even if demand proves to be higher. However, SBA does not believe it is feasible to accommodate the commenters' request to separate the Energy Saving Debenture from the standard debenture. On a stand-alone basis, the annual fee for the Energy Saving Debenture would exceed the statutory maximum of 1.38%, meaning that SBA would be unable to implement the statutory provisions of the Energy Act. SBA will review the demand for and performance of the Energy Saving Debenture on an annual basis to determine whether the modeling assumptions underlying this Regulatory Impact Analysis should be changed.

Executive Order 12988

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

Executive Order 13132

For the purposes of Executive Order 13132, SBA has determined that this final 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, for the purposes of Executive Order 13132, Federalism, SBA has determined that this final rule has no federalism implications warranting the preparation of a federalism assessment.

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

SBA has determined that this rule imposes additional reporting and recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., chapter 35. This collection of information includes three different reporting requirements: (1) information needed for SBA to determine whether a Small Business is “primarily engaged” in Energy Saving Activities, (2) information needed for SBA to determine whether a particular activity is an “Energy Saving Activity”, and (3) identification of a completed financing as an Energy Saving Qualified Investment on the Portfolio Financing Report (an existing information collection approved under OMB Control Number 3245-0078). The descriptions of respondents and the titles and purpose of the information collections are discussed below with an estimate of the annual reporting burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

A. “Primarily engaged” and “Energy Saving Activity” Determinations.

Title: Financing Eligibility Statement for Usage of Energy Saving Debentures, SBA Form 2428

Summary: The Financing Eligibility Statement for Usage of Energy Saving Debentures will be used by SBICs requesting either or both of the SBA determinations that may be requested under § 107.610(f)(2) and/or (f)(3) of the rule: (1) whether a particular activity in which a Small Business is engaged is an Energy Saving Activity, and (2) whether a Small Business is “primarily engaged” in Energy Saving Activities. The Small Business must provide supporting evidence of the Small Business’s eligibility based on the factors listed in the proposed rule. SBA received no comments specifically related to the proposed information collection. However, as a result of two comments received on the proposed certification requirement in § 107.610(f), SBA has eliminated that requirement as it would have related to the SBIC. Only the Small Business providing the information must certify that the information is true and correct.

Need and Purpose: Section 1205 of the Energy Independence and Security Act of 2007 makes SBA leverage in the form of a deferred interest “energy saving debenture” available to SBICs licensed after September 30, 2008 for the purpose of making Energy Saving Qualified Investments. This final rule identifies various criteria under which a financing can qualify as an Energy Saving Qualified Investment; however, SBA recognizes that some proposed investments will need to be individually reviewed by SBA to determine whether they fulfill the energy saving objectives of the statute. SBA will use the submitted information to make those determinations.

Description of Respondents: SBICs will submit this form to obtain a determination from SBA as to whether a proposed financing is an Energy Saving Qualified Investment.

There are approximately 294 active SBICs; only about 17% of these are debenture SBICs that were licensed after September 30, 2008, and are eligible to issue Energy Saving Debentures to make Energy Saving Qualified Investments. Based on anticipated new licensing activity, SBA is estimating the number of eligible SBICs at 60. Assuming each of these SBICs will invest in five companies per year, that 5% of all investments will be in energy-saving companies, and that one-third of those will require SBA to make a pre-financing determination of eligibility, SBA estimates five responses per year.

SBA estimates the burden of this collection of information as follows: An applicant will complete this collection once for each prospective Energy Saving Qualified Investment that requires SBA to make a pre-financing determination of eligibility. SBA estimates that the time needed to complete this collection will average 10 hours. SBA estimates that the cost to complete this collection will be approximately \$150 per hour. Total estimated burden is 50 hours per annum costing a total of \$7,500 for the year.

B. Portfolio Financing Report

Title: Portfolio Financing Report, SBA Form 1031 (OMB Control Number 3245-0078)

Summary: SBA Form 1031 is a currently approved information collection. SBA regulations (§ 107.640) require SBICs to submit a Portfolio Financing Report on SBA Form 1031 for each financing that an SBIC provides to a small business concern. The form is SBA's primary source of information for compiling statistics on the SBIC program as a provider of capital to small businesses. SBA also uses the information provided on Form 1031 to evaluate SBIC compliance with regulatory requirements. SBA has revised the form by adding one new question, which would ask the SBIC to use a pull-down menu to identify whether a completed financing was an Energy Saving Qualified Investment.

SBA's financial reporting software would automatically transfer this designation to the SBA Form 468 (SBIC Financial Statements), the source of data needed to determine eligibility for additional leverage based on Energy Saving Qualified Investments under § 107.1150(d)(2)(i). This revised form was approved by OMB on March 16, 2011.

Need and Purpose: Section 1206 of the Energy Independence and Security Act of 2007 increases the maximum amount of leverage potentially available to an SBIC licensed on or after October 1, 2008, that makes Energy Saving Qualified Investments. In this rule, § 107.1150(d) adjusts the basic leverage eligibility formula in § 107.1150(a) by subtracting from an SBIC's outstanding leverage the cost basis of Energy Saving Qualified Investments that the SBIC has made in Smaller Enterprises. The amount that can be subtracted is limited to 33% of the SBIC's Leverageable Capital. SBA will use the information submitted on Form 1031 to track Energy Saving Qualified Investments that an SBIC may use in its leverage eligibility calculation, as well as for overall program evaluation purposes.

Description of Respondents: All SBICs are required to submit SBA Form 1031 within 30 days after closing an investment. The current estimate of 2,800 responses per year is not affected by this rule. SBA has added one field to the form to identify whether the investment is an Energy Saving Qualified Investment.

SBA estimates the burden of this collection of information as follows: An SBIC making an Energy Saving Qualified Investment will select that descriptor from a pull-down menu on SBA Form 1031. There is no incremental burden attributable to completion of this additional field. An SBIC will complete SBA Form 1031 for each of its completed financing transactions. The currently approved hour burden for this

collection is 12 minutes per response (0.2 hours), at a cost of \$7.00 per response (based on \$35.00 per hour). The total estimated burden is 560 hours per annum at an aggregate cost of \$19,600.

The recordkeeping requirements under the final rule relate to the information that an SBIC must maintain in its files to support the required certifications for Energy Saving Qualified Investments under § 107.610(f)(1). SBA expects that SBICs will be able to obtain the necessary documentation with minimal effort. The SBIC would first document that the contemplated investment is in a company that provides products or services included in the definition of Energy Saving Activities, generally by referring to one of the government web sites discussed in this preamble. Second, the SBIC would document that the company derives at least 50% of its revenues from the sales of these products or services, or, that the company will utilize 100% of the proceeds from the financing for Energy Saving Activities; the company would have this information available in the ordinary course of business.

Compliance with the Regulatory Flexibility Act, 5 U.S.C. 601-612

When an agency promulgates a rule, the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 – 612) requires the agency to prepare an initial regulatory flexibility analysis (IRFA) which describes the potential economic impact of the rule on small entities and alternatives that may minimize that impact. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an IRFA, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. This final rule affects all SBICs issuing debentures, of which there are approximately 160, most of which are small entities. Therefore, SBA has determined that this rule will have an

impact on a substantial number of small entities. However, SBA has determined that the impact on entities affected by the rule will not be significant. The Energy Saving Qualified Investment definition identifies the type of investment for which an SBIC will be permitted to seek SBA funding in the form of an Energy Saving Debenture; this instrument, because of its deferred interest feature, is expected to provide SBICs with greater flexibility in structuring qualified investments. The Energy Saving Debenture is expected to increase the annual fee charged on all new debenture commitments by approximately 15.5 basis points during fiscal year 2012; however, the fee would continue to remain well below the statutorily set maximum fee. Accordingly, the Administrator of the SBA hereby certifies that this rule will not have a significant impact on a substantial number of small entities.

List of Subjects in 13 CFR Part 107

Investment companies, Loan programs-business, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, SBA amends part 107 of title 13 of the Code of Federal Regulations as follows:

PART 107 - SMALL BUSINESS INVESTMENT COMPANIES

1. The authority citation for part 107 continues to read as follows:

Authority: 15 USC 681 et seq., 683, 687(c), 687b, 687d, 687g, 687m and Pub. L. 106-554, 114 Stat. 2763; and Pub. L. 111-5, 123 Stat. 115.

2. Amend §107.50 by adding in alphabetical order definitions of “Energy Saving Activities” and “Energy Saving Qualified Investment”, to read as follows:

§107.50 Definitions of terms.

Energy Saving Activities means any of the following:

(1) Manufacturing or research and development of products, integral product components, integral material, or related software that meet one or more of the following:

(i) Improves residential energy efficiency as demonstrated by meeting Department of Energy or Environmental Protection Agency criteria for use of the Energy Star trademark label;

(ii) Improves commercial energy efficiency as demonstrated by being in the upper 25% of efficiency for all similar products as designated by the Department of Energy's Federal Energy Management Program;

(iii) Improves automobile efficiency or reduces consumption of non-renewable fuels through the use of advanced batteries, power electronics, or electric motors; advanced combustion engine technology; alternative fuels; or advanced materials technologies, such as lightweighting;

(iv) Improves industrial energy efficiency through combined heat and power (CHP) prime mover or power generation technologies, heat recovery units, absorption chillers, desiccant dehumidifiers, packaged CHP systems, more efficient process heating equipment, more efficient steam generation equipment, heat recovery steam generators, or more efficient use of water recapture, purification and reuse for industrial application;

(v) Advances commercialization of technologies developed by recipients of awards from the Department of Energy under the Advanced Research Projects Agency – Energy, Small Business Innovation Research, or Small Business Technology Transfer programs;

(vi) Reduces the consumption of non-renewable energy by providing renewable energy sources, as demonstrated by meeting the standards, applicable to the year in which

the investment is made, for receiving a Renewable Electricity Production Tax Credit as defined in Internal Revenue Code Section 45 or an Energy Credit as defined in Internal Revenue Code Section 48;

(vii) Reduces the consumption of non-renewable energy for electric power generation as described in Internal Revenue Code Section 48(c)(1)(A) by providing highly efficient energy conversion systems that can use renewable or non-renewable fuel through fuel cells; or

(viii) Improves electricity delivery efficiency by supporting one or more of the smart grid functions as identified in 42 U.S.C. 17386(d), by means of a product, service, or functionality that serves one or more of the following smart grid operational domains: equipment manufacturing, customer systems, advanced metering infrastructure, electric distribution systems, electric transmission systems, storage systems, and cyber security.

(2) Installation and/or inspection services associated with the deployment of energy saving products as identified by meeting one or more of the following standards:

(i) Deploys products that qualify, in the year in which the investment is made, for installation-related Federal Tax Credits for Residential Consumer Energy Efficiency;

(ii) Deploys products related to commercial energy efficiency as demonstrated by deploying commercial equipment that is in the upper 25% of efficiency for all similar products as designated by the Department of Energy's Federal Energy Management Program;

(iii) Deploys combined heat and power products, goods, or services;

(iv) Deploys products that qualify, in the year in which the investment is made, for receiving a Renewable Electricity Production Tax Credit as defined in Internal Revenue Code Section 45 or an Energy Credit as defined in Internal Revenue Code Section 48; or

(v) Deploys a product, service, or functionality that improves electricity delivery efficiency by supporting one or more of the smart grid functions as identified in 42 U.S.C. 17386(d), and that serves one or more of the following smart grid operational domains: equipment manufacturing, customer systems, advanced metering infrastructure, electric distribution systems, electric transmission systems, or grid cyber security.

(3) Auditing or consulting services performed with the objective of identifying potential improvements of the type described in paragraph (1) or (2) of this definition.

(4) Other manufacturing, service, or research and development activities that use less energy to provide the same level of energy service or reduce the consumption of non-renewable energy by providing renewable energy sources, as determined by SBA. A Licensee must obtain such determination in writing prior to providing Financing to a Small Business. SBA will consider factors including but not limited to:

(i) Results of energy efficiency testing performed in accordance with recognized professional standards, preferably by a qualified third-party professional, such as a certified energy assessor, energy auditor, or energy engineer;

(ii) Patents or grants awarded to or licenses held by the Small Business related to Energy Saving Activities listed in subsection (1) or (2) above;

(iii) For research and development of products or services that are anticipated to reduce the consumption of non-renewable energy, written evidence from an independent,

certified third-party professional of the feasibility, commercial potential, and projected energy savings of such products or services; and

(iv) Eligibility of the product or service for a Federal tax credit cited in this definition that is not available in the year in which the investment is made, but was available in a previous year.

Energy Saving Qualified Investment means a Financing which:

(1) Is made by a Licensee licensed after September 30, 2008;

(2) Is in the form of a Loan, Debt Security, or Equity Security, each as defined in this section;

(3) Is made to a Small Business that is primarily engaged in Energy Saving Activities. A Licensee must obtain a determination from SBA prior to the provision of Financing as to whether a Small Business is primarily engaged in Energy Saving Activities. SBA will consider the distribution of revenues, employees and expenditures, intellectual property rights held, and Energy Saving Activities described in a business plan presented to investors as part of a formal solicitation in making its determination. However, a Small Business is presumed to be primarily engaged in Energy Saving Activities, and no pre-Financing determination by SBA is required, if:

(i) The Small Business derived at least 50% of its revenues during its most recently completed fiscal year from Energy Saving Activities; or

(ii) The Small Business will utilize 100% of the Financing proceeds received from a Licensee to engage in Energy Saving Activities.

* * * * *

3. Amend §107.610 by revising the last sentence of the introductory text and adding paragraph (f) to read as follows:

§ 107.610 Required certifications for Loans and Investments.

* * * Except for information and documentation prepared under paragraphs (f)(2) and (3) of this section, you must keep these documents in your files and make them available to SBA upon request.

* * * * *

(f) For each Energy Saving Qualified Investment:

(1) If a pre-Financing determination of eligibility by SBA is not required under the definition of Energy Saving Activities or Energy Saving Qualified Investment:

(i) A certification by you, dated as of the closing date of the Financing, as to the basis for the qualification of the Financing as an Energy Saving Qualified Investment;

(ii) Supporting documentation of the Energy Saving Activities engaged in by the concern;

(iii) Supporting documentation of either the percentage of its revenues derived from Energy Saving Activities during the concern's most recently completed fiscal year, which must be at least 50 percent, or the concern's intended use of the Financing proceeds, all of which must be used for Energy Saving Activities; and

(iv) A certification by the concern, dated as of the closing date of the Financing, that any information it provided to you in connection with this paragraph (f)(1) is true and correct to the best of its knowledge.

(2) If, prior to providing Financing, you must obtain a determination from SBA that the activities in which a concern is engaged are Energy Saving Activities, submit to SBA

in writing a description of the product or service being provided or developed, including all available documentation of the energy savings produced or anticipated, addressing the factors considered under paragraph (4) of the definition of “Energy Saving Activities” in § 107.50 and certified by the concern to be true and correct to the best of its knowledge.

(3) If, prior to providing Financing, you must obtain a determination from SBA that the concern is “primarily engaged” in Energy Saving Activities, submit to SBA in writing all available information concerning the factors considered under paragraph (3) of the definition of “Energy Saving Qualified Investment” in § 107.50, certified by the concern to be true and correct to the best of its knowledge.

(4) For each Financing closed after you obtain a determination from SBA under paragraph (f)(2) or (3) of this section, a certification by you, dated as of the closing date of the Financing, that to the best of your knowledge, you have no reason to believe that the materials submitted are incorrect.

(5) For each Financing closed based on supporting documentation of the concern’s intended use of proceeds for Energy Saving Activities under paragraph (f)(1)(iii) of this section:

(i) Documentation by the concern, dated no later than six months after the closing of the Financing, of the proceeds used to date for Energy Saving Activities, with further updates provided at six month intervals until 100 percent of the Financing proceeds have been accounted for; and

(ii) Documentation that you have reviewed the information submitted by the concern under paragraph (f)(5)(i) of this section and have reasonably determined that 100 percent of the Financing proceeds were used for Energy Saving Activities.

4. Amend §107.1150 by adding a sentence at the end of paragraph (c) introductory text and adding paragraph (d) to read as follows:

§ 107.1150 Maximum amount of Leverage for a Section 301(c) Licensee.

* * * * *

(c) * * * Any investment that you use as a basis to seek additional leverage under this paragraph (c) cannot also be used to seek additional leverage under paragraph (d) of this section.

* * * * *

(d) Additional Leverage based on Energy Saving Qualified Investments in Smaller Enterprises. (1) Subject to SBA's credit policies, if you were licensed on or after October 1, 2008, you may have outstanding Leverage in excess of the amounts permitted by paragraphs (a) and (b) of this section in accordance with this paragraph (d). Any investment that you use as a basis to seek additional Leverage under this paragraph (d) cannot also be used to seek additional Leverage under paragraph (c) of this section.

(2) To determine whether you may request a draw that would cause you to have outstanding Leverage in excess of the amount determined under paragraph (a) of this section:

(i) Determine the cost basis, as reported on your most recent filing of SBA Form 468, of any Energy Saving Qualified Investments in a Smaller Enterprise that individually do not exceed 20% of your Regulatory Capital.

(ii) Calculate the amount that equals 33% of your Leverageable Capital.

(iii) Subtract from your outstanding Leverage the lesser of (d)(2)(i) or (ii).

(iv) If the amount calculated in paragraph (d)(2)(iii) is less than the maximum Leverage determined under paragraph (a) of this section, the difference between the two amounts equals your additional Leverage availability.

Dated: February 9, 2012

Karen G. Mills,
Administrator.

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