

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Part 107

RIN 3245–AF86

#### Small Business Investment Companies—Energy Saving Qualified Investments

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Proposed rule.

**SUMMARY:** In this proposed rule, the U.S. Small Business Administration (SBA) is setting forth the new defined terms, “Energy Saving Qualified Investment” and “Energy Saving Activities”, for the Small Business Investment Company (SBIC) Program. The new definitions are being established to facilitate implementation of 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 would also implement 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, as defined in SBA regulations.

**DATES:** Comments must be received on or before February 11, 2011.

**ADDRESSES:** You may submit comments, identified by RIN 3245–AF 86, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail, Hand Delivery/Courier:* Sean Greene, Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

SBA will post comments on <http://www.regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.regulations.gov>, please submit the information to Carol Fendler, Investment Division, 409 Third

Street, SW., Washington, DC 20416. Highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will review the information and make the final determination of whether it will publish the information or not.

#### FOR FURTHER INFORMATION CONTACT:

Carol Fendler, Investment Division, Office of Capital Access, (202) 205–7559 or [sbic@sba.gov](mailto:sbic@sba.gov).

#### 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.

##### II. Section by Section Analysis

*Section 107.50—Definitions.* The Energy Act provides that energy saving debentures are to be issued at a discount, have a 5-year or 10-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 new statutory provisions, SBA proposes to add “Energy Saving Qualified Investment” and “Energy Saving Activities” as defined terms in § 107.50.

##### “Energy Saving Qualified Investment”

The proposed regulatory definition of Energy Saving Qualified Investment has several key points. First, as specified in

the 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”).

##### “Energy Saving Activities”

The proposed rule defines Energy Saving Activities primarily by reference to various criteria established by the Department of Energy and other Federal agencies to identify energy efficient products and services and to encourage the provision of renewable energy sources. As one example, the manufacturing of products that satisfy the criteria for use of the Energy Star trademark label would qualify as an Energy Saving Activity. For each type of Energy Saving Activity, the proposed rule provides a reference to the appropriate Federal program or Internal Revenue Code section, or a detailed definition that would allow users to determine whether the manufacture or development of a specific product, or the provision of a specific service, qualifies under the definition. SBA believes that reference wherever possible to existing standards for energy efficient products and services will ensure that Energy Saving Qualified Investments satisfy the objectives of the Energy Act. This approach will also allow the definition of Energy Saving Activities to be more easily updated as energy efficiency standards expand to include new products and services.

In addition, paragraph (4) of the definition would allow SBA to determine whether activities not specifically addressed in the proposed rule are Energy Saving Activities. This approach will provide flexibility to accommodate activities based on technologies or practices that may emerge in the future. Paragraph (4) encompasses the manufacturing of products, provision of services, and conduct of research and development activities that reduce (or are anticipated to reduce) the consumption of non-

renewable energy, either through the more efficient use of such energy or by providing energy from renewable sources. An SBIC requesting a determination by SBA under paragraph (4) will be asked to submit written information and certifications (see also the discussion of proposed § 107.610 in this preamble). The proposed definition identifies the information required to be submitted and the factors that SBA will take into account in determining whether activities are Energy Saving Activities, although an SBIC would be free to provide other information to support its request. Ideally, the claimed energy savings will have been tested by an independent engineer or other recognized professional with expertise in the subject technology. The results of in-house or other non-independent testing may also be considered if the SBIC can document that tests were designed, performed and evaluated by qualified personnel following appropriate professional standards. SBA will also consider such factors as patents held by the Small Business, grants awarded by Federal or State government agencies, foundations, etc. to promote energy efficiency or energy savings, and licenses purchased by the Small Business to make use of energy-saving technologies developed by others. For research and development-stage companies that have not yet brought a product or service to market, SBA will consider projected energy savings, but the SBIC must also provide evidence supporting the feasibility and commercial potential of the products or services under development. Finally, SBA will consider whether an activity that would have been eligible for an energy-related Federal tax credit in past years should be considered an Energy Saving Activity, even though the subject credit is not currently available.

SBA welcomes comments regarding additional activities that may be candidates for inclusion in the Energy Saving Activities definition. For example, SBA is open to suggestions regarding activities that could reduce the consumption of non-renewable fuels by reducing the dependency on automobiles for transportation, such as provision of telework facilities, carpooling services, or improved transit options.

#### *Electronic Access to Criteria for Evaluation of "Energy Saving Activities"*

SBA intends to link its Investment Division Web site (<http://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:

1. *Energy Star*: <http://www.energystar.gov/products>
2. *Federal Energy Management Program*: [www1.eere.energy.gov/femp/technologies/eep\\_purchasingspecs.html](http://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](http://www.irs.gov/irb/2010-18_IRB/ar11.html)
4. *Energy Credit (Internal Revenue Code Section 48)*: [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&SIZE=98870&TYPE=PDF)
5. *Installation-related Federal Tax Credits for Consumer Energy Efficiency*: [http://www.energystar.gov/index.cfm?c=tax\\_credits.tx\\_index](http://www.energystar.gov/index.cfm?c=tax_credits.tx_index)

#### *Determining Whether a Concern is "Primarily Engaged" in Energy Saving Activities*

The proposed rule presumes that a company is "primarily engaged" in Energy Saving Activities if it derived at least 50% of its total revenues for its most recently completed fiscal year directly from Energy Saving Activities. However, SBA recognizes that one of the objectives of creating the Energy Saving debenture, which does not require the payment of interest during the first five years following issuance, may be to allow SBICs to invest in earlier stage enterprises that do not meet this revenue test for Energy Saving Activities. In some cases, small businesses may be engaged in research and development activities with little or no revenues. In other instances, a company may already have revenue from activities not related to Energy Saving Activities, but may be heavily engaged in activities that are expected to produce revenue from Energy Saving Activities in the future. Therefore, the proposed rule would allow SBA to determine that a small business is primarily engaged in Energy Saving Activities based on the totality of the circumstances, as evidenced by such factors as the distribution of the company's revenues; the percentage of total employees engaged in Energy Saving Activities; the expenditures (which may include both amounts expensed and amounts capitalized) allocated to Energy Saving Activities; activities related to the development and use of intellectual property held by the company related to Energy Saving

Activities; and Energy Saving Activities contemplated by a business plan presented to outside investors as part of a formal fund-raising effort.

#### *Energy Saving Debenture*

As provided in section 1205(b) of the Energy Act, the energy saving debenture 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 that was licensed after September 30, 2008, and 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.

*Section 107.610—Required Certifications for Loans and Investments.* An SBIC that intends to issue energy saving debentures based on its Energy Saving Qualified Investments or that intends to seek additional leverage based on its Energy Saving Qualified Investments in Smaller Enterprises must have an appropriate certification for each such investment. Proposed § 107.610(f) makes a distinction between investments for which SBA needs to make a pre-financing determination of eligibility and those for which it does not. If the small business concern is engaged in activities that are specifically included in the Energy Saving Activities definition, and it is presumed to be "primarily engaged" in those activities based on the source of its revenues, the SBIC only needs to certify the basis for the concern's eligibility and retain the certification and supporting documentation in its files. If SBA must make a pre-financing determination as to whether the concern is engaged in Energy Saving Activities and/or whether it is "primarily engaged" in such

activities, the proposed rule would require the SBIC to provide SBA with all available information from the concern that is relevant to those determinations, along with certifications by the SBIC and the concern that the submitted information is true and correct. SBA recognizes the burden that may be inherent in this type of “total facts and circumstances” determination, but believes it is preferable to offer this option to SBICs rather than to define Energy Saving Qualified Investments more narrowly.

*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. This paragraph adjusts the 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. Furthermore, as required by the Energy Act, only the cost basis of Energy Saving Qualified Investments that individually do not exceed 20% of the SBIC’s Regulatory Capital may be subtracted, even though SBICs in general can invest up to 30% of their Regulatory Capital in a single company.

*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*

The Office of Management and Budget has determined that this rule is a “significant” regulatory action under Executive Order 12866. The Regulatory Impact Analysis is set forth below.

1. Necessity of Regulation

This proposed regulatory action would implement 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 the Department of Energy (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 presumes 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. SBA also considered a higher percentage requirement, but chose 50% to encourage energy-saving investments as much as possible while meeting statutory requirements. Alternatively, an SBIC may ask SBA to determine whether a concern is “primarily engaged” in Energy Saving Activities based on an evaluation of various factors. As stated in the proposed definition of Energy Saving Qualified Investments, these factors include “the distribution of revenues, employees and expenditures, intellectual property rights held, and business plans presented to investors as part of a formal solicitation”. SBA believes the combination of these two approaches provides a reasonable balance between simplicity and inclusiveness.

3. Potential Benefits and Costs

SBA anticipates that this rule will provide marginal benefit to small businesses seeking investments by SBICs under those circumstances in which the investment structure does not lend itself well to SBA’s standard debenture. Standard debentures require the SBIC to make semi-annual interest payments, while the energy saving debenture contemplated by the statute would be issued at a discount, have a 5-year or 10-year maturity, and require no interest payment or annual charge for the first five years. This structure is the same as the SBIC program’s currently available low and moderate income (LMI) debenture.

Since the structure of the energy saving debenture mirrors that of the LMI debenture, in determining this rule’s benefit to both SBICs and small businesses, SBA analyzed the impact of the LMI debenture. The LMI debenture was first issued in FY 2001. Between FY 2001 and March 31, 2010, SBICs have issued approximately \$4.2 billion in debentures, with less than \$45 million in LMI debentures (approximately 1% of all debenture leverage issued since FY 2001). The proceeds of LMI debentures can only be used to make LMI financings; however, SBA estimates that only 2% of LMI financings by SBICs issuing debentures were funded using the LMI debenture. SBICs placed 21.5% of their investment dollars in portfolio companies in LMI zones between FY 2001 and July 31, 2010, compared with 21.6% in fiscal years

1998–2000 when the LMI debenture was not available. The structural similarities between the LMI debenture and the energy saving debenture suggest that this rule will have a similarly marginal impact.

In estimating the impact, the SBA also considered available industry data. The PricewaterhouseCoopers/National Venture Capital Association MoneyTree™ Report indicates that \$1.9 billion in Cleantech investments were made in calendar year 2009, representing approximately 11% of all venture financings. SBA believes that Cleantech investments are fairly representative of energy saving investments. SBA estimates that the percentage of the SBIC portfolio directed towards Energy Saving Qualified Investments will be similar to the percentage of Cleantech investments in the venture industry. However, only SBICs licensed after September 30, 2008, will be eligible to issue energy saving debentures and many such SBICs will choose to use the standard debenture to make these types of financings. Therefore, the SBA estimates that approximately half of the anticipated SBIC energy saving investments will be performed using the new energy saving debenture or 5% of all financings by SBICs issuing debentures. In FY 2009, SBICs issuing debentures provided \$1.2 billion in financing to small businesses.

With respect to potential costs of the regulation to SBICs, the cost has been incorporated into the program formulation model which determines the annual fee to keep the debenture program to zero subsidy cost as required by law. Because the structure of the LMI debenture is the same as the energy saving debenture, SBA used its performance as a proxy for the energy saving debenture. SBA's estimate that energy saving debentures would constitute 5% of total demand for debenture leverage resulted in an increase to the annual fee of 14.3 basis points versus formulations with no energy saving debentures. This increase reflects the additional risk associated with underlying SBIC equity investments contemplated in the usage of this debenture. Despite this increase, the annual fee is estimated to remain substantially lower than the ten year average and far below the statutory maximum of 1.38%. It should be noted that if the energy saving debenture was formulated as a stand-alone program (apart from the standard debenture) it is likely that its annual fee would exceed the statutory maximum. SBA will review the demand for and performance of the energy saving debenture on an

annual basis to determine if these assumptions should be changed. Should the actual or anticipated demand for the energy saving debenture exceed 5% of all debenture leverage issued in any given year, SBA will consider separately formulating the energy saving debenture as a separate program so that its higher cost would be borne directly by users rather than spread among all SBICs.

#### *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*

The rule will not have substantial direct effects on the States, or the distribution of power and responsibilities among the various levels of government. Therefore, for the purposes of Executive Order 13132, Federalism, SBA determines that this proposed 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 proposed 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. As a result of proposed changes in this rule, SBA will also amend an existing approved information collection, Portfolio Financing Report, SBA Form 1031 (OMB Control Number 3245–0078). The titles, descriptions and respondent descriptions of the information collections provisions 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.

SBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper

performance of SBA's functions, including whether the information will have a practical utility; (2) the accuracy of SBA's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Please send comments by the closing date for comment for this proposed rule to Wendy Liberante, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20503 and to Harry Haskins, Deputy Associate Administrator for Investment, Office of Investment, Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

#### A. "Primarily Engaged" and "Energy Saving Activity" Determinations

*Title:* Financing Eligibility Statement for Usage of Energy Saving Debentures [no SBA form number].

*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 the proposed rule: (1) Whether a Small Business is "primarily engaged" in Energy Saving Activities, as described in the proposed definition of "Energy Saving Qualified Investment" in § 107.50 and as used in § 107.610(f)(2)(i), and/or (2) whether a particular activity in which a Small Business is engaged is an "Energy Saving Activity", as described in the proposed definition of that term and as used in § 107.610(f)(2)(ii). The SBIC must provide supporting evidence of the Small Business's eligibility based on the factors listed in the proposed rule.

*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. The proposed 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:* Small business investment companies 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 300 active SBICs; only about 10% of these 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 aggregate 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 form. 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 proposes to revise 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).

*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. Proposed § 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 currently required to submit SBA Form 1031 within 30 days after closing an investment. The current estimate of 3,700 responses per year is not affected by this proposed rule. SBA proposes to add a single additional 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 \$5.00 per response (based on \$25.00 per hour). The total estimated burden is 740 hours per annum at an aggregate cost of \$18,500.

The recordkeeping requirements under the proposed 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 percent of its revenues from the sales of these products or services; 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 (5 U.S.C. 601-612) requires the agency to prepare an initial regulatory flexibility analysis (IRFA) which will describe 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 proposed rule affects all SBICs issuing debentures, of which there are approximately 160, most of which are small entities. Therefore, SBA has determined that this proposed 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 14 basis points; however, the fee would continue to remain low by historical standards. Accordingly, the Administrator of the SBA hereby certifies that this rule will not have a significant impact on a substantial number of small entities. SBA welcomes comment from members of the public who believe there will be a significant impact either on SBICs, or on companies that receive funding from SBICs.

#### **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 proposes to amend 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 U.S.C. 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 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 and 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 petroleum consumption through the use of advanced batteries, power electronics, or electric motors; advanced combustion engine technology; 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, or heat recovery steam generators for industrial application;

(v) 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; or

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

(3) Auditing and/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) in this definition;

(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;

(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; and

(3) Is made to a Small Business that is primarily engaged in Energy Saving Activities. A Small Business that derived at least 50% of its revenues during its most recently completed fiscal year from Energy Saving Activities is presumed to be primarily engaged in such activities. Alternatively, a Licensee licensed after September 30, 2008 may request 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.

\* \* \* \* \*

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 paragraph (f)(2) 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; and

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

the concern and the percentage of its revenues derived from Energy Saving Activities during its most recently completed fiscal year.

(2) If a pre-Financing determination of eligibility by SBA is required under the definition of Energy Saving Activities or Energy Saving Qualified Investment:

(i) If the concern did not derive at least 50% of its revenues during its most recently completed fiscal year from 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 both you and the concern to be true and correct to the best of your knowledge.

(ii) If you are requesting a determination by SBA that the activities in which the concern is primarily 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 both you and the concern to be true and correct to the best of your knowledge.

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)(1)(i) or (d)(1)(ii).

(iv) If the amount calculated in paragraph (d)(1)(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: January 6, 2011.

**Karen G. Mills,**  
*Administrator.*

[FR Doc. 2011-486 Filed 1-11-11; 8:45 am]

**BILLING CODE 8025-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 17

[Docket No. FAA-2010-0840; Notice No. 10-18]

RIN 2120-AJ82

#### Procedures for Protests and Contracts Dispute

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action would update, simplify, and streamline the current regulations governing the procedures for bid protests brought against the FAA and contract disputes brought against or by the FAA. It would also add a voluntary dispute avoidance and early resolution process. This action is necessary to ensure the regulations reflect the changes that have evolved since 1999 when they were first implemented. The intended effect of this action is to streamline and further improve the protest and dispute process.

**DATES:** Send your comments on or before March 14, 2011.

**ADDRESSES:** You may send comments identified by Docket Number FAA-2010-0840 using any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for sending your comments electronically.

- *Mail:* Send comments to Docket Operations, M-30; U.S. Department of Transportation, 1200 New Jersey

Avenue, SE., Room W12-140, West Building Ground Floor, Washington, DC 20590-0001.

- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

- *Fax:* Fax comments to Docket Operations at 202-493-2251.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

*Privacy:* We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78) or you may visit <http://DocketsInfo.dot.gov>.

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

**FOR FURTHER INFORMATION CONTACT:** Marie A. Collins, Senior Attorney and Dispute Resolution Officer, FAA Office of Dispute Resolution for Acquisition, AGC-70, Room 8332, Federal Aviation Administration, 400 7th Street, SW., Washington, DC 20590, telephone (202) 366-6400.

**SUPPLEMENTARY INFORMATION:** Later in this preamble under the Additional Information section, we discuss how you can comment on this proposal and how we will handle your comments. Included in this discussion is related information about the docket, privacy, and the handling of proprietary or confidential business information. We also discuss how you can get a copy of related rulemaking documents.

#### Authority for This Rulemaking and Background

In 1995 Congress, through the Department of Transportation