

SMALL BUSINESS INVESTMENT ACT OF 1958

affirming, modifying, or setting aside any such order of the Administration shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.

(f) If any licensee or other person against which or against whom an order is issued under this section fails to obey the order, the Administration may apply to the United States court of appeals, within the circuit where the licensee has its principal place of business, for the enforcement of the order and shall file a transcript of the record upon which the order complained of was entered. Upon the filing of the application the court shall cause notice thereof to be served on the licensee or other person. The evidence to be considered, the procedure to be followed, and the jurisdiction of the court shall be the same as is provided in subsection (e) for applications to set aside or modify orders.

Sec. 310. EXAMINATIONS AND INVESTIGATIONS

(a) The Administration may make such investigations as it deems necessary to determine whether a licensee or any other person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or of any rule or regulation under this Act, or of any order issued under this Act. The Administration shall permit any person to file with it a statement in writing, under oath or otherwise as the Administration shall determine, as to all the facts and circumstances concerning the matter to be investigated. For the purpose of any investigation, the Administration is empowered to administer oaths and affirmations, subpoena [sic] witnesses, compel their attendance, take evidence, and require the production of any books, papers, and documents which are relevant to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States. In case of contumacy by, or refusal to obey a subpoena [sic] issued to, any person, including a licensee, the Administration may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, and documents; and such court may issue an order requiring such person to appear before the Administration, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found.

(b) Each small business investment company shall be subject to examinations made by direction of the Investment Division of the Administration, which may be conducted with the assistance of a private sector entity that has both the qualifications to conduct and expertise in conducting such examinations, and the cost of such examinations, including the compensation of the examiners, may in the discretion of the Administration be assessed against the company examined and when so assessed shall be paid by such company. Fees collected under this subsection shall be deposited in the account for salaries and expenses of the Administration, and are authorized to be appropriated solely to cover the costs of examinations and other program oversight activities. Every such company shall make such reports to the Administration at such times and in such form as the Administration may require; except that the Administration is

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authorized to exempt from making such reports any such company which is registered under the Investment Company Act of 1940 to the extent necessary to avoid duplication in reporting requirements.

(c) Each small business investment company shall be examined at least every two years in such detail so as to determine whether or not--

(1) it has engaged solely in lawful activities and those contemplated by this title;

(2) it has engaged in prohibited conflicts of interest;

(3) it has acquired or exercised illegal control of an assisted small business;

(4) it has made investments in small businesses for not less than 1 year;

(5) it has invested more than 20 per centum of its capital in any individual small business, if such restriction is applicable,

(6) it has engaged in relending, foreign investments, or passive investments;

or

(7) it has charged an interest rate in excess of the maximum permitted by law:

Provided, That the Administration may waive the examination (A) for up to one additional year if, in its discretion, it determines such a delay would be appropriate, based upon the amount of debentures being issued by the company and its repayment record, the prior operating experience of the company, the contents and results of the last examination and the management expertise of the company, or (B) if it is a company whose operations have been suspended while the company is involved in litigation or is in receivership.

(d) VALUATIONS.—

(1) FREQUENCY OF VALUATIONS.—

(A) IN GENERAL.—Each licensee shall submit to the Administrator a written valuation of the loans and investments of the licensee not less often than semiannually or otherwise upon the request of the Administrator, except that any licensee with no leverage outstanding shall submit such valuations annually, unless the Administrator determines otherwise.

(B) MATERIAL ADVERSE CHANGES.—Not later than 30 days after the end of a fiscal quarter of a licensee during which a material adverse change in the aggregate valuation of the loans and investments or operations of the licensee occurs, the licensee shall notify the Administrator in writing of the nature and extent of that change.

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information submitted must be consistent with the size and type of the business and the amount of the proposed Financing.

(b) *Updated financial information.* (1) The terms of each Financing must require the Portfolio Concern to provide, at least annually, sufficient financial information to enable you to perform the following required procedures:

- (i) Evaluate the financial condition of the Portfolio Concern for the purpose of valuing your investment;
- (ii) Determine the continued eligibility of the Portfolio Concern; and
- (iii) Verify the use of Financing proceeds.

(2) The information submitted to you must be certified by the president, chief executive officer, treasurer, chief financial officer, general partner, or proprietor of the Portfolio Concern.

(3) For financial and valuation purposes, you may accept a complete copy of the Federal income tax return filed by the Portfolio Concern (or its proprietor) in lieu of financial statements, but only if appropriate for the size and type of the business involved.

(4) The requirements in this paragraph (b) do not apply when you acquire securities from an underwriter in a public offering (see § 107.825). In that case, you must keep copies of all reports furnished by the Portfolio Concern to the holders of its securities.

(c) *Information required for examination purposes.* You must obtain any information requested by SBA's examiners for the purpose of verifying the certifications made by a Portfolio Concern under § 107.610. In this regard, your Financing documents must contain provisions requiring the Portfolio Concern to give you and/or SBA's examiners access to its books and records for such purpose.

REPORTING REQUIREMENTS FOR LICENSEES

§ 107.630 Requirement for Licensees to file financial statements with SBA (Form 468).

(a) *Annual filing of Form 468.* For each fiscal year, you must submit to SBA financial statements and supplementary information prepared on SBA Form 468. You must file Form 468 on or before the last day of the third month following

the end of your fiscal year, except for the information required under paragraph (e) of this section, which must be filed on or before the last day of the fifth month following the end of your fiscal year.

(1) *Audit of Form 468.* The annual Form 468 must be audited by an independent public accountant acceptable to SBA.

(2) *Insurance requirement for public accountant.* Unless SBA approves otherwise, your independent public accountant must carry at least \$1,000,000 of Errors and Omissions insurance, or be self-insured and have a net worth of at least \$1,000,000.

(b) *Interim filings of Form 468.* When requested by SBA, you must file interim reports on Form 468. SBA may require you to file the entire form or only certain statements and schedules. You must file such reports on or before the last day of the month following the end of the reporting period. If you have an outstanding Leverage commitment from SBA, see the filing requirements in § 107.1220.

(c) *Standards for preparation of Form 468.* You must prepare SBA Form 468 in accordance with SBA's Accounting Standards and Financial Reporting Requirements for Small Business Investment Companies.

(d) *Where to file Form 468.* Submit all filings of Form 468 to the Investment Division of SBA.

(e) *Reporting of economic impact information on Form 468.* Your annual filing of SBA Form 468 must include an assessment of the economic impact of each Financing, specifying the full-time equivalent jobs created or retained, and the impact of the Financing on the revenues and profits of the business and on taxes paid by the business and its employees.

§ 107.640 Requirement to file Portfolio Financing Reports (SBA Form 1031).

For each Financing of a Small Business (excluding guarantees), you must submit a Portfolio Financing Report on SBA Form 1031 within 30 days of the closing date.

Excerpt from "energy saving debenture" proposed rule

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 describing 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