Disagreement and the FHFA concise statement, if any, will also be disclosed.

§ 1204.6 What does it cost to get records under the Privacy Act?

(a) *Must I agree to pay fees?* Your Privacy Act request is your agreement to pay all applicable fees, unless you specify a limit on the amount of fees you agree to pay. FHFA will not exceed the specified limit without your written agreement.

(b) *How does FHFA calculate fees?* FHFA will charge a fee for duplication of a record under the Privacy Act in the same way it charges for duplication of records under FOIA (5 U.S.C. 552) in 12 CFR 1202.11. There are no fees to search for or review records.

§ 1204.7 Are there any exemptions from the Privacy Act?

(a) *What is a Privacy Act exemption?* The Privacy Act allows the Director to exempt records or information in a system of records from some of the Privacy Act requirements, if the Director determines that the exemption is necessary.

(b) *How do I know if the records or information I want are exempt?* (1) Each notice of a system of records will advise you if the Director has determined records or information in records are exempt from Privacy Act requirements. If the Director has claimed an exemption for a system of records, the System of Records Notice will identify the exemption and the provisions of the Privacy Act from which the system is exempt.

(2) Until superseded by FHFA Systems of Records, the following OFHEO and FHFB Systems of Records are, under 5 U.S.C. 552a(k)(2) or (k)(5), exempt from the Privacy Act requirements of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f):

(i) OFHEO–11 Litigation and Enforcement Information System;

(ii) FHFB–5 Agency Personnel Investigative Records; and

(iii) FHFB–6 Office of Inspector General Audit and Investigative Records.

§ 1204.8 How are records secured?

(a) *What controls must FHFA have in place?* Each FHFA office must establish administrative and physical controls to prevent unauthorized access to its systems of records, unauthorized or inadvertent disclosure of records, and physical damage to or destruction of records. The stringency of these controls should correspond to the sensitivity of the records that the controls protect. At a minimum, the administrative and physical controls must ensure that:

(1) Records are protected from public view;

(2) The area in which records are kept is supervised during business hours to prevent unauthorized persons from having access to them;

(3) Records are inaccessible to unauthorized persons outside of business hours; and

(4) Records are not disclosed to unauthorized persons or under unauthorized circumstances in either oral or written form.

(b) *Is access to records restricted?* Access to records is restricted only to authorized employees who require access in order to perform their official duties.

§ 1204.9 Does FHFA collect and use Social Security numbers?

FHFA collects Social Security numbers only when it is necessary and authorized. At least annually, the Privacy Act Officer or the Senior Agency Official for Privacy will inform employees who are authorized to collect information that:

(a) Individuals may not be denied any right, benefit, or privilege as a result of refusing to provide their Social Security numbers, unless the collection is authorized either by a statute or by a regulation issued prior to 1975; and

(b) They must inform individuals who are asked to provide their Social Security numbers:

(1) If providing a Social Security number is mandatory or voluntary;

(2) If any statutory or regulatory authority authorizes collection of a Social Security number; and

(3) The uses that will be made of the Social Security number.

§ 1204.10 What are FHFA employee responsibilities under the Privacy Act?

At least annually, the Privacy Act Officer or the Senior Agency Official for Privacy will inform employees about the provisions of the Privacy Act, including the Privacy Act's civil liability and criminal penalty provisions. Unless otherwise permitted by law, an authorized FHFA employee shall:

(a) Collect from individuals only information that is relevant and necessary to discharge FHFA responsibilities;

(b) Collect information about an individual directly from that individual whenever practicable;

(c) Inform each individual from whom information is collected of:

(1) The legal authority to collect the information and whether providing it is mandatory or voluntary;

(2) The principal purpose for which FHFA intends to use the information;

(3) The routine uses FHFA may make of the information; and

(4) The effects on the individual, if any, of not providing the information.

(d) Ensure that the employee's office does not maintain a system of records without public notice and notify appropriate officials of the existence or development of any system of records that is not the subject of a current or planned public notice.

(e) Maintain all records that are used in making any determination about an individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to ensure fairness to the individual in the determination.

(f) Except for disclosures made under the FOIA, make reasonable efforts, prior to disseminating any record about an individual, to ensure that the record is accurate, relevant, timely, and complete.

(g) When required by the Privacy Act, maintain an accounting in the specified form of all disclosures of records by FHFA to persons, organizations, or Federal agencies.

(h) Maintain and use records with care to prevent the unauthorized or inadvertent disclosure of a record to anyone.

(i) Notify the appropriate official of any record that contains information that the Privacy Act does not permit FHFA to maintain.

CHAPTER XVII—OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

PART 1702—[REMOVED]

■ 3. Remove part 1702.

Dated: July 9, 2009.

James B. Lockhart III,

Director, Federal Housing Finance Agency.

[FR Doc. E9–16678 Filed 7–13–09; 8:45 am]

BILLING CODE 8070–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 107

RIN 3245–AF92

Small Business Investment Companies—Leverage Eligibility and Portfolio Diversification Requirements

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: This interim final rule implements certain provisions of the American Recovery and Reinvestment Act of 2009 affecting small business

investment companies (SBICs). These provisions increase the maximum amount of SBA leverage available to an SBIC, change the calculation of the maximum investment size that an SBIC is permitted to make, and simplify the requirement for an SBIC to devote a portion of its investment activity to smaller enterprises. SBA is publishing this rule as an interim final rule in light of the urgent need to help small businesses sustain and survive during this economic downturn.

DATES: *Effective Date:* This rule is effective July 14, 2009.

Comment Date: Comments must be received on or before September 14, 2009.

ADDRESSES: You may submit comments, identified by RIN: 3245–AF92 by any of the following methods:

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

SBA will post all 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 Harry Haskins, 409 Third Street, SW, Washington, DC 20416, or send an e-mail to *sbic@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Carol Fendler, Investment Division, Office of Capital Access, (202) 205–7559 or *sbic@sba.gov.*

SUPPLEMENTARY INFORMATION:

I. Background Information

The American Recovery and Reinvestment Act of 2009 (Recovery Act), Public Law 111–05 was enacted on February 17, 2009, to among other things, promote economic recovery by preserving and creating jobs, and assisting those most impacted by the severe economic conditions facing the nation. The U.S. Small Business Administration is one of several agencies that are intended to play a role in achieving these goals. The SBA received funding and authority through the Recovery Act to modify existing loan programs or establish new loan programs to help re-invigorate small business lending.

The specific permanent changes to the Small Business Investment Company (SBIC) program made by the Recovery Act increase the maximum amount of SBA leverage that an SBIC may have outstanding, change the limit on the maximum amount that an SBIC can invest in a single company and its affiliates, and simplify the requirement for SBICs to invest in smaller enterprises.

II. Section by Section Analysis

Section 107.700—Compliance with size standards in part 121 of this chapter as a condition of Assistance. The order of two cross-references in this section has been corrected, so that the reader is referred to § 121.301(c)(2) for the SBIC program financial size standards and to § 121.301(c)(1) for the industry size standards.

Section 107.710—Requirement to finance Smaller Enterprises. Revised paragraph (b) of this section incorporates the Smaller Enterprise financing requirement established by the Recovery Act. As a condition of receiving leverage, an SBIC must now certify that at least 25 percent of its aggregate financing dollars will be provided to Smaller Enterprises, as defined in § 107.710(a). This provision is a simplification of the previous two-part requirement, which set a general minimum of 20 percent but also required 100 percent of any leverage above $90 million to be invested in Smaller Enterprises.

In this rule, the Smaller Enterprise financing requirements must be satisfied not only when an SBIC applies for a leverage draw, but also at the close of each fiscal year; this year-end requirement applies to all SBICs, including those with no leverage. The Smaller Enterprise financing requirement has applied to both leveraged and non-leveraged SBICs since it was first added to the regulations in 1997. The financial size standards applicable to the SBIC program are considerably higher than those used in other SBA programs, and SBA considers it important for all SBICs to focus a portion of their investment activity on businesses at the lower end of the permitted size range.

Any SBIC licensed after the Recovery Act date of enactment (February 17, 2009), whether leveraged or non-leveraged, must satisfy the 25 percent requirement in revised § 107.710(b)(1). An SBIC licensed before the date of enactment must satisfy either revised § 107.710(b)(2) or (b)(3). The applicable paragraph depends on whether or not the SBIC has received a leverage commitment from SBA after the date of enactment. For an SBIC that has not received a leverage commitment after February 17, 2009, paragraph (b)(2) provides that the SBIC must have at least 20 percent of its aggregate financing dollars (plus 100 percent for leverage over $90 million) invested in Smaller Enterprises. For an SBIC that has received a new SBA leverage commitment after February 17, 2009, paragraph (b)(3) provides that the SBIC may divide its investments into two segments; the SBIC must meet the old 20 percent requirement (plus 100 percent for leverage over $90 million), for investments made before the date of the first leverage commitment issued after February 17, 2009, but must meet the new 25 percent requirement for investments made on or after such date.

For a non-leveraged SBIC licensed before February 17, 2009, the applicable paragraph would be § 107.710(b)(2).

This rule will eliminate the phase-in requirement under which an SBIC must provide at least 10 percent of its investment dollars to Smaller Enterprises by the end of its first fiscal year, and at least 20 percent by the end of each subsequent year. SBA is making this change for several reasons. SBA's review of the financing data submitted by SBICs indicated that the vast majority of SBICs have satisfied the Smaller Enterprise financing requirements with considerable room to spare, suggesting that the phase-in period is unnecessary. In addition, the Recovery Act does not provide for a phase-in.

Former paragraph § 107.710(d), dealing with requirements related to leverage in excess of $90 million, is incorporated into revised § 107.710(b)(2) and (b)(3), as explained above.

Revised paragraph § 107.710(e) contains updated cross-references to § 107.1120, but no other changes.

Section 107.740—Portfolio diversification (''overline'' limit). SBICs that intend to use SBA leverage are required to diversify their portfolios as a way of managing program risk. Diversification is accomplished by limiting the maximum amount that an SBIC can invest in a single company or group of affiliated companies; SBA regulations refer to this maximum investment amount as an SBIC's ''overline'' limit. The Recovery Act changed the calculation of the overline limit from 20 percent of an SBIC's private capital to 10 percent of the sum of private capital and ''the total amount

of leverage projected by [the SBIC] in [its] business plan that was approved by [SBA] at the time of the grant of the company's license.'' Since most SBICs project the use of two tiers of leverage (*i.e.*, leverage equal to two times their private capital), this calculation is generally equivalent to raising the overline limit to 30 percent of private capital. However, for the small number of SBICs that are approved for less than two tiers of leverage, the revised overline calculation may provide a smaller increase, or no increase, in the overline limit.

In revised § 107.740, paragraph (a) provides, as a general rule, that an SBIC's overline limit will be 30 percent of its Regulatory Capital, incorporating the assumption that most SBICs will be approved to issue two tiers of leverage. Paragraphs (a)(1) through (a)(3) retain the same adjustments to Regulatory Capital that are present in the current regulations; the purpose of these adjustments is to avoid penalizing an SBIC that realizes proceeds on one or more of its investments and begins to return capital to its investors.

Paragraph (b) provides the overline limit for an SBIC that is approved for less than two tiers of leverage, either 20 percent of Regulatory Capital for one tier or 25 percent of Regulatory Capital for 1.5 tiers (the rule does not specify percentages for other amounts of projected leverage because they are rarely requested, but they can be calculated by interpolation if necessary). Under this rule, no existing SBIC will have an overline limit below the level permitted by current regulations.

Paragraphs (a) and (b) do not include the language from former § 107.740 that permitted an SBIC to exceed its prescribed overline limit with SBA's prior written approval. The Recovery Act does allow SBA to approve overline exceptions, and it is not SBA's intent to eliminate this possibility. However, SBA believes that the vast majority of the overline exceptions it has approved in the past would fall within the new overline formula established by the Recovery Act. SBA expects that exceptions for investments above the new limit will be rare. In keeping with that view, if an SBIC seeks to make an investment in excess of the amount permitted by revised § 107.740, it must request a regulatory exemption under § 107.1920. To obtain a regulatory exemption, an SBIC must show that its request is not contrary to the purposes of the Small Business Investment Act; that the proposed action is fair and equitable; and that the exemption is reasonably calculated to advance the best interests of the SBIC program. An exemption must be approved in writing by the Associate Administrator for Investment.

Section 107.740 will no longer provide a separate overline limit for specialized SBICs, which were licensed until 1996 under section 301(d) of the Small Business Investment Act. These companies had an overline limit of 30 percent of Regulatory Capital under existing regulations and will retain that limit under the general rule in revised § 107.740(a)(1).

This section also removes an optional method for an SBIC to increase its overline limit by adding net unrealized gains on publicly traded and marketable securities to its Regulatory Capital (former § 107.740(c)). This provision has been unattractive to SBICs, and in fact SBA has strongly advised companies not to use it, because the consequences for an SBIC in the event that the publicly traded securities drop in value are likely to be extremely serious. SBA is not aware of any SBIC that is currently making use of this provision.

Section 107.800—Financing in the form of Equity Securities. The only change in this section is the addition of a cross-reference in paragraph (b). The purpose of this revision is to make clear that the reference to ''Equity Securities'' in new § 107.1150(c)(1) encompasses only those securities that satisfy the requirements concerning redemption of Equity Securities in § 107.850.

Section 107.1120—General eligibility requirements for Leverage. Revised paragraph (d) of this section provides for a new certification by SBICs under common control seeking to increase their aggregate outstanding leverage above $150 million. As explained further in the discussion of changes to § 107.1150, the Recovery Act changes now permit SBICs under common control to have aggregate outstanding leverage of up to $225 million, but only if none of the SBICs has a condition of capital impairment. Former § 107.1120(d) contained a certification regarding Smaller Enterprise financing with the proceeds of leverage over $90 million, which is no longer needed based on the changes made in § 107.710.

New paragraphs (e) and (f) provide for certifications by SBICs licensed on or after October 1, 2009, seeking leverage in excess of the general limits of $150 million for a single SBIC and $225 million for two or more SBICs under common control, pursuant to § 107.1150(c)(2). As a condition of eligibility for this additional leverage, which can be as much as $25 million, the Recovery Act requires SBICs to certify that at least 50 percent of their total Financing dollars will be invested in companies located in low-income geographic areas. For any leverage request that would result in a group of SBICs under common control having aggregate outstanding leverage of more than $225 million, the certification requirement applies to each SBIC in the group, even those that are not themselves requesting additional leverage.

Section 107.1150—Maximum amount of Leverage for a Section 301(c) Licensee. The Recovery Act increased the maximum permitted amount of outstanding leverage for a single SBIC and for two or more SBICs under common control. Revised § 107.1150(a) incorporates the new formula for an individual SBIC, which is the lesser of 300 percent of Leverageable Capital or $150 million. In accordance with the Recovery Act changes, the three leverage brackets and the annual inflation adjustment of the leverage ceiling have been eliminated.

Revised § 107.1150(b) provides the new aggregate leverage ceiling of $225 million for two or more SBICs under common control. As a condition of eligibility for the $225 million, the Recovery Act requires the SBICs under common control to be ''not under capital impairment''. In this rule, for any leverage draw that would result in a group of SBICs under common control having aggregate outstanding leverage of more than $150 million, each SBIC is required to certify that it does not have a condition of capital impairment. This provision affects only the ability to draw new leverage; it does not affect any SBIC's ability to receive a leverage commitment, nor would SBA deem an SBIC with leverage already outstanding to be in default solely because one of its affiliates becomes impaired.

Although paragraphs (a) and (b) will provide SBICs with access to increased leverage, all leverage commitment and draw approvals remain subject to SBA's current credit policies as defined in its standard operating procedures. One important aspect of those policies, regarding access to a third tier of leverage, is addressed in new introductory text that has been added to revised § 107.1150. The major points of this paragraph are that an SBIC seeking a third tier must first demonstrate consistently profitable financial performance while adhering to a relatively low-risk investment strategy; the third tier of leverage must be used to continue the SBIC's successful investment strategy rather than beginning a new investment strategy; and there must be a high degree of certainty regarding the SBIC's ability to repay all of its obligations to SBA.

This section eliminates former § 107.1150(b)(2), which contained special rules for certain SBICs with leverage issued before March 31, 1993. As all of the subject leverage has matured, this provision is no longer needed.

New paragraph (c) implements two provisions, one included in the Recovery Act and another that was previously enacted, that may provide additional leverage eligibility to SBICs that make investments in low-income geographic areas. The definition of ''low-income geographic area'' was developed in connection with SBA's New Markets Venture Capital (NMVC) program and can be found in the NMVC regulations, § 108.50.

Paragraph (c)(1) adjusts the leverage eligibility formula in § 107.1150(a) by subtracting from an SBIC's outstanding leverage the cost basis of investments that the SBIC has made in the Equity Securities (as defined in § 107.800(b)) of Smaller Enterprises. The amount that can be subtracted is limited to 50 percent of the SBIC's Leverageable Capital.

Paragraph (c)(2) implements a provision of the Recovery Act that will be available only to new SBICs licensed on or after October 1, 2009. Paragraph (c)(2) makes a maximum of $175 million available to an individual SBIC and $250 million available to a group of SBICs under common control, compared with the respective general ceilings of $150 million and $225 million. To be eligible for the additional Leverage, an individual SBIC must show, at the time of its draw request, that at least half of the total dollar amount it has invested to date was provided to Small Businesses in low-income geographic areas; furthermore, it must certify that at least half of the total dollar amount it will invest in the future will be provided to Small Businesses in low-income geographic areas. If the SBIC making the leverage request is under common control with any other SBICs, and the requested draw would result in the group having aggregate outstanding leverage above $225 million, then each SBIC in the group must meet the same two requirements.

An SBIC licensed on or after October 1, 2009 can seek leverage under either paragraph (c)(1) or (c)(2), but the Small Business Investment Act does not provide for the two paragraphs to be used together. The SBIC can obtain additional leverage under paragraph (c)(1) as an exception to paragraph (a), but not to paragraph (b) or paragraph (c)(2). Alternatively, additional Leverage can be obtained under paragraph (c)(2) by an individual SBIC as an exception to paragraph (a), or by a group of SBICs under common control as an exception to paragraph (b), but in neither case as an exception to paragraph (c)(1).

Section 107.1160—Maximum amount of Leverage for a Section 301(d) Licensee. The only change in this section is an updated cross-reference in § 107.1160(b), reflecting the revisions to § 107.1150 made by this rule.

Section 107.1810—Events of default and SBA's remedies for Licensee's noncompliance with terms of Debentures. Revised § 107.1810(f)(9) deletes a cross-reference to former § 107.1150(b)(2), which has been removed by this rule.

III. Justification for Publication as Interim Final Rule

In general, before issuing a final rule, SBA publishes the rule for public comment in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 553. The APA provides an exception from the general rule where the agency finds good cause to omit public participation. 5 U.S.C. 553(c)(3)(B). The good cause requirement is satisfied when prior public participation can be shown to be impracticable, unnecessary, or contrary to the public interest. Under such circumstances, an agency may publish an interim final rule without soliciting public comment.

In enacting the good cause exception to standard rulemaking procedures, Congress recognized that emergency situations arise where an agency must issue a rule without public participation. The current turmoil in the financial markets is having a negative impact on the availability of financing for small businesses. There is an urgent need to assist viable small businesses that are experiencing financial hardships due to the current economic environment. Many SBICs have reported to SBA that cash flow lending by banks has been sharply reduced and that they are experiencing a surge in demand for assistance from small businesses that are unable to obtain financing from other sources. Without SBIC financing, these businesses must curtail expansion plans, postpone acquisitions or transfers of ownership, or forgo modernization of plant and equipment, thereby reducing their ability to contribute to the nation's economic recovery.

SBA finds that good cause exists to publish this rule as an interim final rule in light of the urgent need to help small businesses sustain and survive during this economic downturn. Advance solicitation of comments for this rulemaking would be impracticable, contrary to the public interest, and would harm those small businesses that need immediate access to capital.

Although this rule is being published as an interim final rule, comments are solicited from interested members of the public. These comments must be submitted on or before September 14, 2009. The SBA will consider these comments and the need for making any amendments as a result of these comments.

IV. Justification for Immediate Effective Date

The APA 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.'' 5 U.S.C. 553(d)(3).

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 in order to enable SBICs to continue to finance small businesses at a crucial time. In light of the current economic downturn and the sharp reduction in commercial lending, a delay in providing SBIC financing will, in many cases, have a direct impact on the survivability of many small businesses, making it necessary to implement this rule immediately.

SBA finds that that there is good cause for making this rule effective immediately instead of observing the 30-day period between publication and effective date. Delaying implementation of the rule would have a serious adverse impact on the nation's small businesses.

Compliance With Executive Orders 12866, 12988, 13175 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 (OMB) has determined that this rule constitutes a significant regulatory action for purposes of Executive Order 12866.

Executive Order 12988

This action meets applicable standards set forth in sections 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 preemptive effect and portions of this rule are effective February 17, 2009 to coincide with the effective date of the Recovery Act.

Executive Order 13132

This rule does not have federalism implications as defined in Executive Order 13132. It 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, as specified in the Executive Order. As such it does not warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act

The SBA has determined that this interim final rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

Regulatory Flexibility Act

Because this rule is an interim final rule, there is no requirement for SBA to prepare a Regulatory Flexibility Act (RFA) analysis. The RFA requires administrative agencies to consider the effect of their actions on small entities, small non-profit businesses, and small local governments. Pursuant to the RFA, when an agency issues a rule, the agency must prepare analysis that describes whether the impact of the rule will have a significant economic impact on a substantial number of small entities. However, the RFA requires such analysis only where notice and comment rulemaking is required.

List of Subjects in 13 CFR Part 107

Investment companies, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, SBA amends 13 CFR part 107 as follows:

PART 107—SMALL BUSINESS INVESTMENT COMPANIES

■ 1. The authority citation for part 107 is revised 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. Revise the second sentence of § 107.700 to read as follows:

§ 107.700 Compliance with size standards in part 121 of this chapter as a condition of Assistance.

* * * To determine whether an applicant is a Small Business, you may use either the financial size standards in § 121.301(c)(2) of this chapter or the industry standard covering the industry in which the applicant is primarily engaged, as set forth in § 121.301(c)(1) of this chapter.

■ 3. Amend § 107.710 by revising paragraph (b), removing paragraph (d), redesignating paragraphs (e) and (f) as (d) and (e), and revising the second sentence of redesignated paragraph (e) to read as follows:

§ 107.710 Requirement to finance Smaller Enterprises.

* * * * *

(b) *Smaller Enterprise Financings.* At the close or each of your fiscal years, and at the time of any application to draw Leverage, you must satisfy the Smaller Enterprise financing requirement in this paragraph (b) that applies to you.

(1) If you were licensed after February 17, 2009, at least 25 percent (in dollars) of your Financings must have been invested in Smaller Enterprises.

(2) If you were licensed on or before February 17, 2009, and you have received no SBA Leverage commitment issued after February 17, 2009, at least 20 percent (in dollars) of your Financings, excluding Financings made in whole or in part with Leverage in excess of $90 million, must have been invested in Smaller Enterprises. In addition, 100 percent of all Financings made in whole or in part with Leverage in excess of $90 million (including aggregate Leverage over $90 million issued by two or more Licensees under Common Control) must have been invested in Smaller Enterprises.

(3) If you were licensed on or before February 17, 2009, and you have received an SBA Leverage commitment after February 17, 2009:

(i) For all Financings made after the date of the first Leverage commitment issued after February 17, 2009, at least 25 percent (in dollars) of your Financings must have been invested in Smaller Enterprises, and

(ii) For all Financings made before February 17, 2009, at least 20 percent (in dollars) of your Financings, excluding Financings made in whole or in part with Leverage in excess of $90 million, must have been invested in Smaller Enterprises. In addition, 100 percent of all Financings made in whole or in part with Leverage in excess of $90 million (including aggregate Leverage over $90 million issued by two or more Licensees under Common Control) must have been invested in Smaller Enterprises.

* * * * *

(e) *Non-compliance with this section.* * * * However, you will not be eligible for additional Leverage until you reach the required percentage (*see* § 107.1120(c) and (g)).

■ 4. Revise § 107.740 to read as follows:

§ 107.740 Portfolio diversification (“overline” limitation).

(a) *General rule.* This § 107.740 applies if you have outstanding Leverage or intend to issue Leverage in the future. Unless SBA approved your license application based upon a plan to issue less than two tiers of Leverage, you may provide Financing or a Commitment to a Small Business if the resulting amount of your aggregate Financings and Commitments to such Small Business and its Affiliates does not exceed 30 percent of the sum of:

(1) Your Regulatory Capital as of the date of the Financing or Commitment; plus

(2) Any Distribution(s) you made under § 107.1570(b), during the five years preceding the date of the Financing or Commitment, which reduced your Regulatory Capital; plus

(3) Any Distribution(s) you made under § 107.585, during the five years preceding the date of the Financing or Commitment, which reduced your Regulatory Capital by no more than two percent or which SBA approves for inclusion in the sum determined in this paragraph (a).

(b) *Lower overline limit.* If SBA approved your license application based upon a plan to issue less than two tiers of Leverage, the applicable percentage of the amount computed in paragraphs (a)(1) though (a)(3) of this section will be:

(1) 20 percent if the plan contemplates one tier of Leverage.

(2) 25 percent if the plan contemplates 1.5 tiers of Leverage.

(c) Outstanding Financings. For the purposes of paragraphs (a) and (b) of this section, you must measure each outstanding Financing at its original cost (including any amount of the Financing that was previously written off).

■ 5. Amend § 107.800 by revising the second sentence of paragraph (b) to read as follows:

§ 107.800 Financings in the form of Equity Securities.

* * * * *

(b) *Definition.* * * * If the Financing agreement contains debt-type acceleration provisions or includes redemption provisions, other than those permitted under § 107.850, the security will be considered a Debt Security for

purposes of § 107.855 and § 107.1150(c)(1).

■ 6. Amend § 107.1120 by revising paragraph (d), redesignating paragraphs (e) through (h) as (g) through (j), and adding new paragraphs (e) and (f), to read as follows:

§ 107.1120 General eligibility requirements for Leverage.

* * * * *

(d) For any Leverage draw that would cause you and any other Licensees under Common Control to have aggregate outstanding Leverage in excess of $150 million, certify that none of the Licensees has a condition of Capital Impairment. *See* also § 107.1150(b).

(e) For any Leverage request pursuant to § 107.1150(c)(2)(i), certify that at least 50 percent (in dollars) of your Financings made on or after the date of such request will be invested in Small Businesses located in low-income geographic areas.

(f) For any Leverage request pursuant to § 107.1150(c)(2)(ii), certify at least 50 percent (in dollars) of the Financings made by each Licensee under Common Control on or after the date of such request will be invested in Small Businesses located in low-income geographic areas.

* * * * *

■ 7. Revise § 107.1150 to read as follows:

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

A Section 301(c) Licensee may have maximum outstanding Leverage as set forth in paragraphs (a) through (c) of this section. In general, SBA will approve Leverage commitment requests in excess of 200 percent of Regulatory Capital and draw requests in excess of 200 percent of Leverageable Capital only after a Licensee has demonstrated consistent, sustainable profitability based on a conservative investment strategy that limits downside risk. Any such Leverage request must be supported by an up-to-date business plan that reflects continuation of the Licensee's successful investment strategy and demonstrates the Licensee's ability to pay all SBA obligations in accordance with their terms.

(a) *Individual Licensee.* Subject to SBA's credit policies, if you are a Section 301(c) Licensee, the maximum amount of Leverage you may have outstanding at any time is the lesser of:

(1) 300 percent of your Leverageable Capital, or

(2) $150 million.

(b) *Multiple Licensees under Common Control.* Subject to SBA's credit policies, two or more Licenses under Common Control may have maximum aggregate outstanding Leverage of $225 million. However, for any Leverage draw(s) by one or more such Licensees that would cause the aggregate outstanding Leverage to exceed $150 million, each of the Licensees under Common Control must certify that it does not have a condition of Capital Impairment. *See* also § 107.1120(d).

(c) *Additional Leverage based on investment in low-income geographic areas.* Subject to SBA's credit policies, you may have outstanding Leverage in excess of the amounts permitted by paragraphs (a) and (b) of this section in accordance with this paragraph (c). If you were licensed before October 1, 2009, you may seek additional Leverage under paragraph (c)(1) only. If you were licensed on or after October 1, 2009, you may seek additional Leverage under paragraph (c)(1) or paragraph (c)(2), but not both. In this paragraph (c), ''low-income geographic areas'' are as defined in § 108.50 of this chapter.

(1) *Investment in Smaller Enterprises located in low-income geographic areas.* 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 investments in the Equity Securities of a Smaller Enterprise located in a low-income geographic area.

(ii) Calculate the amount that equals 50 percent of your Leverageable Capital.

(iii) Subtract from your outstanding Leverage the lesser of (c)(1)(i) or (c)(1)(ii).

(iv) If the amount calculated in paragraph (c)(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.

(2) *Investment in Small Businesses located in low-income geographic areas.* This paragraph (c)(2) applies only to Licensees licensed on or after October 1, 2009. You may substitute a maximum Leverage amount of $175,000,000 for the $150,000,000 set forth in paragraph (a)(2) of this section, and a maximum Leverage amount of $250,000,000 for the $225,000,000 set forth in paragraph (b) of this section, if you satisfy the following conditions:

(i) At least 50 percent (in dollars) of your Financings preceding the date of such request must have been invested in Small Businesses located in low-income geographic areas. In addition, you must certify that at least 50 percent (in dollars) of your Financings on or after the date of such request will be invested in Small Businesses located in low-income geographic areas.

(ii) If you are requesting a draw that would cause you and any other Licensees under Common Control to have aggregate outstanding Leverage in excess of $225,000,000, at least 50 percent (in dollars) of the Financings made by each Licensee under Common Control preceding the date of such request must have been invested in Small Businesses located in low-income geographic areas. In addition, each such Licensee must certify that at least 50 percent (in dollars) of its Financings on or after the date of such request will be invested in Small Businesses located in low-income geographic areas.

■ 8. Amend § 107.1160 by revising the first sentence of paragraph (b) to read as follows:

§ 107.1160 Maximum amount of Leverage for a Section 301(d) Licensee.

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(b) *Maximum amount of total Leverage.* Use § 107.1150 to determine your maximum amount of Leverage as if you were a Section 301(c) Licensee. * * *

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■ 9. Amend § 107.1810 by revising the first sentence of paragraph (f)(9) to read as follows:

§ 107.1810 Events of default and SBA's remedies for Licensee's noncompliance with terms of Debenture.

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(f) *Events of default with opportunity to cure.* * * *

(9) *Failure to maintain investment ratios.* You fail to maintain the investment ratio for Leverage in excess of 300 percent of Leverageable Capital (see § 107.1160(c)), if applicable to you, as of the end of each fiscal year. * * *

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Dated: July 8, 2009.

Karen G. Mills,

Administrator.

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