



6450-01-P

DEPARTMENT OF ENERGY

10 CFR Part 611

Advanced Technology Vehicles Manufacturer Assistance Program

AGENCY: Loan Programs Office, Department of Energy.

ACTION: Interpretive rule.

SUMMARY: The Department of Energy (“DOE”) is adopting an interpretive rule to clarify its interpretation of Section 136 of the Energy Independence and Security Act of 2007, as amended (“EISA”) and its implementing regulations for the Advanced Technology Vehicle Manufacturing Loan Program (the “ATVM Loan Program”) authorized by Section 136. Section 136(f), which establishes requirements for the administrative costs associated with loans under the ATVM Loan Program, was implemented by DOE pursuant to a 2008 interim final rule governing the operation of the ATVM Program. The implementing regulation in part provided that the borrower would be required to pay at the time of the closing of the loan, an “Administrative Fee” equal to 10 basis points of the principal amount of the loan. DOE is adopting this interpretive rule to explain its view that the administrative costs imposed by Congress under Section 136(f) is separate from the cost of the outside advisors engaged by DOE in connection with the review and processing of their respective loan applications, negotiation of conditional commitments, and closing of loans.

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

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SUPPLEMENTARY INFORMATION:

I. Introduction and Background

II. Approval of the Office of the Secretary

I. Introduction and Background

Section 136 of EISA authorizes the Secretary of Energy (the “Secretary”) to issue grants and direct loans to applicants for the costs of reequipping, expanding, or establishing manufacturing facilities in the United States to produce qualified advanced technology vehicles, or qualifying components. Section 136 also authorizes the Secretary to issue grants and direct loans for the costs of engineering integration performed in the United States of qualifying advanced technology vehicles and qualifying components. DOE promulgated regulations implementing Section 136 at 10 CFR part 611, 73 FR 66721 (November 12, 2008). The regulations included implementation of Section 136(f), “Fees,” which specifies that administrative costs shall be no more than \$100,000 or 10 basis points of the loan. This statutory requirement is implemented at 10 CFR 611.107(e), which states that “[t]he Borrower will be required to pay at the time of the closing of the loan a fee equal to 10 basis points of the principal amount of the loan.” This payment is referred to as the “Administrative Fee.”

Although the Administrative Fee has been the sole fee imposed by DOE under the ATVM Loan Program to date, DOE does not interpret Section 136(f) as restricting its ability to assess other fees and charges on borrowers or other applicants, as defined in the implementing regulation at 10 CFR 611.2. Moreover, DOE does not interpret Section 136(f) as limiting the Secretary’s discretion to impose on borrowers or other applicants the cost of outside advisors engaged by DOE in connection with the processing and review of their respective loan applications or the negotiation and closing of their respective loan commitments and closings (collectively, “Transaction Advisory Costs”). In the 2008 rulemaking, DOE discussed its interpretation of Section 136(f), explaining that DOE interprets the statute as authorizing DOE to charge borrowers an administrative fee and as providing DOE with the flexibility to choose either monetary option set forth in the statute. DOE decided in the 2008 rulemaking that

administrative costs imposed on each borrower will be 10 basis points of the loan, to be paid by the borrower on the closing date of the loan. DOE based its decision on the need for fairness among borrowers and the belief that administrative costs for a loan would be in excess of 10 basis points, and by selecting 10 basis points as the fee for all loans, DOE ensured that borrowers of smaller loans would pay smaller Administrative Fees. Nothing in the rulemaking sought to define “administrative costs,” nor did it suggest that Section 136(f) limited DOE’s authority to recover costs not considered “administrative costs.” In this regard, the preamble to the 2008 interim final rule refers to a “fee”, but does not suggest that the fee is exclusive. Moreover, both Section 136(f) and the implementing regulations are silent as to the allocation, between DOE and applicants, of Transaction Advisory Costs or other costs that fall outside of the scope of administrative costs.

Generally, the costs incurred by DOE to date to carry out the ATVM Loan Program can be divided into two categories: those costs attributable generally to the overall administration of the ATVM Program, including payroll and other overhead costs of the Loan Programs Office ATVM Division, which are incurred irrespective of the volume or complexity of loan applications (“Category I Costs”), and those costs attributable directly to the review, processing, closing and management of specific loan transactions, including Transaction Advisory Costs (“Category II Costs”). Transaction Advisory Costs and other Category II Costs vary significantly in relation to the maturity and organization of the applicant and the complexity of the proposed project, among other factors.

In this rulemaking, DOE interprets “administrative costs” as used in Section 136(f) not to include Category II Costs, including Transactional Advisory Costs. DOE interprets Section 136(f) to instead establish a limit on the Category I Costs of the ATVM Loan Program that can be recovered through the imposition of the Administrative Fee. Allocating to the applicant the responsibility for Transaction Advisory Costs associated with the applicant’s transaction is consistent with the prevailing practices of similar federal financing programs and commercial lenders in similar transactions. Accordingly, DOE does not interpret either Section 136(f) or the implementing regulations to restrict DOE’s ability to

allocate the Transaction Advisory Costs or other Category II Costs associated with a particular application to the relevant applicant.

Based on its interpretation of the statute as explained in this rule, applicants for ATVM loans can bear all Transaction Advisory Costs associated with their respective applications. Applicants would pay Transaction Advisory Costs pursuant to direct agreements executed by and between the applicant and each relevant outside transaction advisor, in a form acceptable to DOE and each such transaction advisor, no later than the date determined by DOE in its discretion with respect to such pending application.

II. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this interpretive rule.

List of Subjects in 10 CFR Part 611

Administrative practice and procedure, Loan programs – energy, Reporting and recordkeeping requirements.

Issued in Washington, DC, on August 24, 2017.

John Sneed,
Executive Director, Loan Programs Office.
[FR Doc. 2017-18400 Filed: 8/29/2017 8:45 am; Publication Date: 8/30/2017]