

(2) With respect to a Partnership NMVC Company or an LLC NMVC Company, upon written notice, to require you to remove the person(s) responsible for such occurrence and/or to remove the general partner or manager of the NMVC Company, which general partner or manager shall then be replaced in accordance with NMVC Company's Articles by a new general partner or manager approved by SBA; and/or

(3) With respect to a Corporate or Partnership or LLC NMVC Company, to obtain the appointment of SBA or its designee as your receiver under section 363(c) of the Act for the purpose of continuing your operations. The appointment of a receiver to liquidate a NMVC Company is not within such consent, but is governed instead by the relevant provisions of the Act.

COMPUTATION OF NMVC COMPANY'S
CAPITAL IMPAIRMENT

§ 108.1830 NMVC Company's Capital Impairment definition and general requirements.

(a) *Significance of Capital Impairment condition.* If you have a condition of Capital Impairment, you are not in compliance with the terms of your Leverage. As a result, SBA has the right to impose the applicable remedies for noncompliance in § 108.1810(g).

(b) *Definition of Capital Impairment condition.* You have a condition of Capital Impairment if your Capital Impairment Percentage, as computed in § 108.1840, exceeds 70 percent.

(c) *Quarterly computation requirement and procedure.* You must determine whether you have a condition of Capital Impairment as of the end of each fiscal quarter. You must notify SBA promptly if you are capitally impaired.

(d) *SBA's right to determine NMVC Company's Capital Impairment condition.* SBA may make its own determination of your Capital Impairment condition at any time.

§ 108.1840 Computation of NMVC Company's Capital Impairment Percentage.

(a) *General.* This section contains the procedures you must use to determine your Capital Impairment Percentage. You must compare your Capital Im-

pairment Percentage to the maximum permitted under § 108.1830(b) to determine whether you have a condition of Capital Impairment.

(b) *Preliminary impairment test.* If you satisfy the preliminary impairment test, your Capital Impairment Percentage is zero and you do not have to perform any more procedures in this section. Otherwise, you must continue with paragraph (c) of this section. You satisfy the test if the following amounts are both zero or greater:

(1) The sum of Undistributed Net Realized Earnings, as reported on SBA Form 468, and Includible Non-Cash Gains.

(2) Unrealized Gain (Loss) on Securities Held.

(c) *How to compute your Capital Impairment Percentage.* (1) If you have an Unrealized Gain on Securities Held, compute your Adjusted Unrealized Gain using paragraph (d) of this section. If you have an Unrealized Loss on Securities Held, continue with paragraph (c)(2) of this section.

(2) Add together your Undistributed Net Realized Earnings, your Includible Non-cash Gains, and either your Unrealized Loss on Securities Held or your Adjusted Unrealized Gain.

(3) If the sum in paragraph (c)(2) of this section is zero or greater, your Capital Impairment Percentage is zero.

(4) If the sum in paragraph (c)(2) of this section is less than zero, drop the negative sign, divide by your Regulatory Capital (excluding Treasury Stock), and multiply by 100. The result is your Capital Impairment Percentage.

(d) *How to compute your Adjusted Unrealized Gain.* (1) Subtract Unrealized Depreciation from Unrealized Appreciation. This is your "Net Appreciation".

(2) Determine your Unrealized Appreciation on Publicly Traded and Marketable securities. This is your "Class I Appreciation".

(3) Determine your Unrealized Appreciation on securities that are not Publicly Traded and Marketable and meet the following criteria, which must be substantiated to the satisfaction of SBA (this is your "Class 2 Appreciation"):

(i) The Small Business that issued the security received a significant subsequent equity financing by an investor whose objectives were not primarily strategic and at a price that conclusively supports the Unrealized Appreciation;

(ii) Such financing represents a substantial investment in the form of an arm's length transaction by a sophisticated new investor in the issuer's securities; and

(iii) Such financing occurred within 24 months of the date of the Capital Impairment computation, or the Small Business' pre-tax cash flow from operations for its most recent fiscal year was at least 10 percent of the Small Business' average contributed capital for such fiscal year.

(4) Perform the appropriate computation from the table in §107.1840(d)(4) of this chapter.

(5) Reduce the gain computed in paragraph (d) (4) of this section by your estimate of related future income tax expense. Subject to any adjustment required by paragraph (d)(6) of this section, the result is your Adjusted Unrealized Gain for use in paragraph (c)(2) of this section.

(6) If any securities that are the source of either Class 1 or Class 2 Appreciation are pledged or encumbered in any way, you must reduce the Adjusted Unrealized Gain computed in paragraph (d)(5) of this section by the amount of the related borrowing or other obligation, up to the amount of the Unrealized Appreciation on the securities.

Subpart L—Ending Operations as a NMVC Company

§ 108.1900 Termination of participation as a NMVC Company.

You may not terminate your participation as a NMVC Company without SBA's prior written approval. Your request for approval must be accompanied by an offer of immediate repayment of all of your outstanding Leverage (including any prepayment penalties thereon), or by a plan satisfactory to SBA for the orderly liquidation of the NMVC Company.

Subpart M—Miscellaneous

§ 108.1910 Non-waiver of SBA's rights or terms of Leverage security.

SBA's failure to exercise or delay in exercising any right or remedy under the Act or the regulations in this part does not constitute a waiver of such right or remedy. SBA's failure to require you to perform any term or provision of your Leverage does not affect SBA's right to enforce such term or provision. Similarly, SBA's waiver of, or failure to enforce, any term or provision of your Leverage or of any event or condition set forth in §108.1810 does not constitute a waiver of any succeeding breach of such term or provision or condition.

§ 108.1920 NMVC Company's application for exemption from a regulation in this part 108.

(a) *General.* You may file an application in writing with SBA to have a proposed action exempted from any procedural or substantive requirement, restriction, or prohibition to which it is subject under this part, unless the provision is mandated by the Act. SBA may grant an exemption for such applicant, conditionally or unconditionally, provided the exemption would not be contrary to the purposes of the Act.

(b) *Contents of application.* Your application must be accompanied by supporting evidence that demonstrates to SBA's satisfaction that:

(1) The proposed action is fair and equitable; and

(2) The exemption requested is reasonably calculated to advance the best interests of the NMVC program in a manner consistent with the policy objectives of the Act and the regulations in this part.

§ 108.1930 Effect of changes in this part 108 on transactions previously consummated.

The legality of a transaction covered by the regulations in this part is governed by the regulations in this part in effect at the time the transaction was consummated, regardless of later changes. Nothing in this part bars SBA enforcement action with respect to any transaction consummated in violation