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Subpart A—Introduction to Part 108

§ 108.10 Description of the New Markets Venture Capital Program.

The New Markets Venture Capital (“NMVC”) Program is a developmental venture capital program for the purpose of promoting economic development and the creation of wealth and

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job opportunities in low-income geographic areas and among individuals living in such areas. SBA selects and then enters into participation agreements with selected newly formed venture capital companies, and provides leverage in the form of debenture guarantees to such companies to allow them to make equity capital investments in smaller enterprises located in low-income geographic areas. SBA also awards grants to such companies and to Specialized Small Business Investment Companies so that they can provide operational assistance to such smaller enterprises in connection with such investments.

§ 108.20 Legal basis and applicability of this part 108.

The regulations in this part implement Part B of Title III of the Small Business Investment Act of 1958, as amended (15 U.S.C. 661 *et seq.*). All NMVC Companies must comply with all applicable SBA regulations, accounting guidelines and valuation guidelines for NMVC Companies, available from SBA.

§ 108.30 Amendments to Act and regulations.

A NMVC Company is subject to all provisions of the Act and parts 108 and 112 of title 13 of the Code of Federal Regulations.

§ 108.40 How to read this part 108.

(a) *Center headings.* All references in this part to SBA forms, and instructions for their preparation, are to the current issue of such forms (available from Investment Division, SBA). Center headings are descriptive and are used for convenience only. They have no regulatory effect.

(b) *Capitalizing defined terms.* Terms defined in § 108.50 have initial capitalization in this part 108.

(c) *“You.”* The pronoun “you” as used in this part 108 means a NMVC Company unless otherwise noted.

Subpart B—Definition of Terms Used in This Part 108

§ 108.50 Definition of terms.

The following definitions apply to this part 108:

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Act means the Small Business Investment Act of 1958, as amended (15 U.S.C. 661 *et seq.*).

Affiliate or *Affiliates* has the meaning set forth in §121.103 of this chapter.

Applicant means any entity submitting an application to SBA for designation as a NMVC Company under this part.

Articles mean articles of incorporation or charter for a Corporate NMVC Company, the partnership agreement or certificate for a Partnership NMVC Company, and the operating agreement or other organizational documents for a LLC NMVC Company.

Assistance or *Assisted* means Financing of or management services rendered to a Small Business by or through a NMVC Company pursuant to the Act and this part.

Associate of a NMVC Company means any of the following:

(1)(i) An officer, director, employee or agent of a Corporate NMVC Company;

(ii) A Control Person, employee or agent of a Partnership NMVC Company;

(iii) A managing member of a LLC NMVC Company;

(iv) An Investment Adviser/Manager of any NMVC Company, including any Person who contracts with a Control Person of a Partnership NMVC Company to be the Investment Adviser/Manager of such NMVC Company; or

(v) Any Person regularly serving a NMVC Company on retainer in the capacity of attorney at law.

(2) Any Person who owns or controls, or who has entered into an agreement to own or control, directly or indirectly, at least 10 percent of any class of stock of a Corporate NMVC Company or 10 percent of the membership interests of an LLC NMVC Company, or a limited partner's interest of at least 10 percent of the partnership capital of a Partnership NMVC Company. However, neither a limited partner in a Partnership NMVC Company nor a non-managing member in an LLC NMVC Company is considered an Associate if such Person is an entity Institutional Investor whose investment in the Partnership, including commitments, represents no more than 33 percent of the capital of the NMVC Com-

pany and no more than five percent of such Person's net worth.

(3) Any officer, director, partner (other than a limited partner), manager, agent, or employee of any Associate described in paragraph (1) or (2) of this definition.

(4) Any Person that directly or indirectly Controls, or is Controlled by, or is under Common Control with, a NMVC Company.

(5) Any Person that directly or indirectly Controls, or is Controlled by, or is under Common Control with, any Person described in paragraphs (1) and (2) of this definition.

(6) Any Close Relative of any Person described in paragraphs (1), (2), (4), and (5) of this definition.

(7) Any Secondary Relative of any Person described in paragraphs (1), (2), (4), and (5) of this definition.

(8) Any concern in which—

(i) Any person described in paragraphs (1) through (6) of this definition is an officer; general partner, or managing member; or

(ii) Any such Person(s) singly or collectively Control or own, directly or indirectly, an equity interest of at least 10 percent (excluding interests that such Person(s) own indirectly through ownership interests in the NMVC Company).

(9) Any concern in which any Person(s) described in paragraph (7) of this definition singly or collectively own (including beneficial ownership) a majority equity interest, or otherwise have Control. As used in this paragraph (9), "collectively" means together with any Person(s) described in paragraphs (1) through (7) of this definition.

(10) For the purposes of this definition, if any Associate relationship described in paragraphs (1) through (7) of this definition exists at any time within six months before or after the date that a NMVC Company provides Financing, then that Associate relationship is considered to exist on the date of the Financing.

(11) If any NMVC Company has any ownership interest in another NMVC Company, the two NMVC companies are Associates of each other.

Capital Impairment has the meaning set forth in §108.1830(b).

Central Registration Agent or *CRA* means one or more agents appointed by SBA for the purpose of issuing TCs and performing the functions enumerated in §108.1620 and performing similar functions for Debentures funded outside the pooling process.

Close Relative of an individual means:

- (1) A current or former spouse;
- (2) A father, mother, guardian, brother, sister, son, daughter; or
- (3) A father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, or daughter-in-law.

Commitment means a written agreement between a NMVC Company and an eligible Small Business that obligates the NMVC Company to provide Financing (except a guarantee) to that Small Business in a fixed or determinable sum, by a fixed or determinable future date. In this context the term “agreement” means that there has been agreement on the principal economic terms of the Financing. The agreement may include reasonable conditions precedent to the NMVC Company’s obligation to fund the commitment, but these conditions must be outside the NMVC Company’s control.

Common Control means a condition where two or more Persons, either through ownership, management, contract, or otherwise, are under the Control of one group or Person. Two or more NMVC companies are presumed to be under Common Control if they are Affiliates of each other by reason of common ownership or common officers, directors, or general partners; or if they are managed or their investments are significantly directed either by a common independent investment advisor or managerial contractor, or by two or more such advisors or contractors that are Affiliates of each other. This presumption may be rebutted by evidence satisfactory to SBA.

Community Development Finance means debt and equity-type investments in low-income communities.

Conditionally Approved NMVC Company means a company that—

- (1) Has applied for participation as a NMVC Company, and
- (2) SBA has conditionally approved to participate in the NMVC program for a specified period of time not to exceed two years, subject to the company

fulfilling the requirements to be a NMVC Company within that specified period of time.

Control means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a NMVC Company or other concern, whether through the ownership of voting securities, by contract, or otherwise.

Control Person means any Person that controls a NMVC Company, either directly or through an intervening entity. A Control Person includes:

- (1) A general partner of a Partnership NMVC Company;
- (2) Any Person serving as the general partner, officer, director, or manager (in the case of a limited liability company) of any entity that controls a NMVC Company, either directly or through an intervening entity;
- (3) Any Person that—
 - (i) Controls or owns, directly or through an intervening entity, at least 10 percent of a Partnership NMVC Company or any entity described in paragraphs (1) or (2) of this definition; and
 - (ii) Participates in the investment decisions of the general partner of such Partnership NMVC Company;
- (4) Any Person that controls or owns, directly or through an intervening entity, at least 50 percent of a Partnership NMVC Company or any entity described in paragraphs (1) or (2) of this definition.

Corporate NMVC Company. See definition of NMVC Company in this section.

Debentures means debt obligations issued by NMVC companies pursuant to section 355 of the Act and held or guaranteed by SBA.

Debt Securities are instruments evidencing a loan with an option or any other right to acquire Equity Securities in a Small Business or its Affiliates, or a loan which by its terms is convertible into an equity position. Consideration must be paid for all options that you acquire.

Developmental Venture Capital means capital in the form of Equity Capital Investments in Smaller Enterprises made with a primary objective of fostering economic development in Low-Income Geographic Areas.

Distribution means any transfer of cash or non-cash assets to SBA, its agent or Trustee, or to partners in a Partnership NMVC Company, or to shareholders in a Corporate NMVC Company, or to members in an LLC NMVC Company. Capitalization of Retained Earnings Available for Distribution constitutes a Distribution to the NMVC Company's non-SBA partners, shareholders, or members.

Equity Capital Investments means investments in the form of common or preferred stock, limited partnership interests, options, warrants, or similar equity instruments, including subordinated debt with equity features if such debt provides only for interest payments contingent upon and limited to the extent of earnings. Equity Capital Investments must not require amortization. Equity Capital Investments may be guaranteed by one or more third parties; however, neither Equity Capital Investments nor such guarantee may be collateralized or otherwise secured. Investments classified as Debt Securities are not precluded from qualifying as Equity Capital Investments. Equity Capital Investments may provide for royalty payments only if the royalty payments are based on the earnings of the concern.

Equity Securities means stock of any class in a corporation, stock options, warrants, limited partnership interests in a limited partnership, membership interests in a limited liability company, or joint venture interests.

Financing or *Financed* means outstanding financial assistance provided to a Small Business by a NMVC Company, whether through:

- (1) Loans;
- (2) Debt Securities;
- (3) Equity Securities;
- (4) Guarantees; or

(5) Purchases of securities of a Small Business through or from an underwriter (see § 108.825).

Guaranty Agreement means the contract entered into by SBA which is a guarantee backed by the full faith and credit of the United States Government as to timely payment of principal and interest on Debentures and SBA's rights in connection with such guarantee.

Includible Non-Cash Gains means those non-cash gains (as reported on SBA Form 468) that are realized in the form of Publicly Traded and Marketable securities or investment grade debt instruments. For purposes of this definition, investment grade debt instruments means those instruments that are rated "BBB" or "Baa", or better, by Standard & Poor's Corporation or Moody's Investors Service, respectively. Non-rated debt may be considered to be investment grade if a NMVC Company obtains a written opinion from an investment banking firm acceptable to SBA stating that the non-rated debt instrument is equivalent in risk to the issuer's investment grade debt.

Institutional Investor means:

(1) *Entities.* Any of the following entities if the entity has a net worth (exclusive of unfunded commitments from investors) of at least \$1 million, or such higher amount as is specified in this paragraph (1). (See also § 108.230(c)(4) for limitations on the amount of an Institutional Investor's commitment that may be included in Private Capital.)

(i) A State or National bank, trust company, savings bank, or savings and loan association.

(ii) An insurance company.

(iii) A 1940 Act Investment Company or Business Development Company (each as defined in the Investment Company Act of 1940, as amended (15 U.S.C. 8a-1 *et seq.*)).

(iv) A holding company of any entity described in paragraph (1)(i), (ii) or (iii) of this definition.

(v) An employee benefit or pension plan established for the benefit of employees of the Federal government, any State or political subdivision of a State, or any agency or instrumentality of such government unit.

(vi) An employee benefit or pension plan (as defined in the Employee Retirement Income Security Act of 1974, as amended (Public Law 93-406, 88 Stat. 829), excluding plans established under section 401(k) of the Internal Revenue Code of 1986 (26 U.S.C. 401(k)), as amended).

(vii) A trust, foundation or endowment exempt from Federal income taxation under the Internal Revenue Code of 1986, as amended.

(viii) A corporation, partnership or other entity with a net worth (exclusive of unfunded commitments from investors) of more than \$10 million.

(ix) A State, a political subdivision of a State, or an agency or instrumentality of a State or its political subdivision.

(x) An entity whose primary purpose is to manage and invest non-Federal funds on behalf of at least three Institutional Investors described in paragraphs (1)(i) through (1)(ix) of this definition, each of whom must have at least a 10 percent ownership interest in the entity.

(xi) Any other entity that SBA determines to be an Institutional Investor.

(2) *Individuals.* (i) Any of the following individuals if he/she is also a permanent resident of the United States:

(A) An individual who is an Accredited Investor (as defined in the Securities Act of 1933, as amended (15 U.S.C. 77a-77aa)) and whose commitment to the NMVC Company is backed by a letter of credit from a State or National bank acceptable to SBA.

(B) An individual whose personal net worth is at least \$2 million and at least ten times the amount of his or her commitment to the NMVC Company. The individual's personal net worth must not include the value of any equity in his or her most valuable residence.

(C) An individual whose personal net worth, not including the value of any equity in his or her most valuable residence, is at least \$10 million.

(ii) Any individual who is not a permanent resident of the United States but who otherwise satisfies paragraph (2)(i) of this definition provided such individual has irrevocably appointed an agent within the United States for the service of process.

Investment Adviser/Manager means any Person who furnishes advice or assistance with respect to operations of a NMVC Company under a written contract executed in accordance with the provisions of § 108.510.

Lending Institution means a concern that is operating under regulations of a state or Federal licensing, supervising, or examining body, or whose shares are publicly traded and listed on a recognized stock exchange or NASDAQ and which has assets in excess of \$500 million; and which, in either case, holds itself out to the public as engaged in the making of commercial and industrial loans and whose lending operations are not for the purpose of financing its own or an Associate's sales or business operations.

Leverage means financial assistance provided to a NMVC Company by SBA through the guaranty of a NMVC Company's Debentures, and any other SBA financial assistance evidenced by a security of the NMVC Company.

Leverageable Capital means Regulatory Capital, excluding unfunded commitments.

LLC NMVC Company. See definition of NMVC Company in this section.

Loan means a transaction evidenced by a debt instrument with no provision for you to acquire Equity Securities.

Loans and Investments means Portfolio securities, assets acquired in liquidation of Portfolio securities, operating concerns acquired, and notes and other securities received, as set forth in the Statement of Financial Position of SBA Form 468.

Low-Income Enterprise means a Smaller Enterprise that, as of the time of the initial Financing, has its Principal Office located in a Low-Income Geographic Area.

Low-Income Geographic Area ("LI Area") means—

(1) Any population census tract (or in the case of an area that is not tracted for population census tracts, the equivalent county division, as defined by the Bureau of the Census of the United States Department of Commerce for purposes of defining poverty areas), if—

(i) The poverty rate for that census tract is not less than 20 percent;

(ii) In the case of a tract—

(A) That is located within a metropolitan area, 50 percent or more of the households in that census tract have an income equal to less than 60 percent of the area median gross income; or

(B) That is not located within a metropolitan area, the median household

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income for such tract does not exceed 80 percent of the statewide median household income; or

(C) As determined by the Administrator in accordance with §108.1940 of this part, a substantial population of Low-Income Individuals reside, an inadequate access to investment capital exists, or other indications of economic distress exist in that census tract; or

(2) Any area located within—

(i) A Historically Underutilized Business Zone (“HUBZone”) as defined in section 3(p) of the Small Business Act and 13 CFR 126.103;

(ii) An Urban Empowerment Zone or Urban Enterprise Community (as designated by the Secretary of the United States Department of Housing and Urban Development); or

(iii) A Rural Empowerment Zone or Rural Enterprise Community (as designated by the Secretary of the United States Department of Agriculture).

Low-Income Individual means an individual whose income (adjusted for family size) does not exceed—

(1) For metropolitan areas, 80 percent of the area median income; and

(2) For nonmetropolitan areas, the greater of—

(i) 80 percent of the area median income, or

(ii) 80 percent of the statewide nonmetropolitan area median income.

Low-Income Investment means an Equity Capital Investment in a Low-Income Enterprise.

Management Expenses has the meaning set forth in §108.520.

NAICS Manual means the latest issue of the North American Industrial Classification System Manual, prepared by the Office of Management and Budget, and available from the U.S. Government Printing Office, Superintendent of Documents, P.O. Box 371954, Pittsburgh, Pa., 15250-7954.

New Markets Tax Credit program means the tax credit created by the Consolidated Appropriations Act of 2001, Public Law 106-554 (114 Stat. 2762A), enacted December 21, 2000, to be implemented by the Internal Revenue Service, United States Department of Treasury.

New Markets Venture Capital Company or *NMVC Company* means a corporation (Corporate NMVC Company), a limited

partnership organized as required by §108.160 (Partnership NMVC Company), or a limited liability company (LLC NMVC Company) that—

(1) Has been granted final approval by SBA under §108.380, and

(2) Has entered into a Participation Agreement with SBA. For certain purposes, the Entity General Partner of a Partnership NMVC Company is treated as if it were a NMVC Company (see §108.160(a)).

1940 Act Company means a NMVC Company which is registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*).

1980 Act Company means a NMVC Company which is registered under the Small Business Investment Incentive Act of 1980 (Public Law 96-447, 94 Stat. 2275).

Operational Assistance means management, marketing, and other technical assistance that assists a Small Business with its business development.

Original Issue Price means the price paid by the purchaser for securities at the time of issuance.

Participation Agreement means an agreement between SBA and a company to which SBA has granted final approval under §108.380, that—

(1) Details the company’s operating plan and investment criteria; and

(2) Requires the company to make investments in Smaller Enterprises at least 80 percent of which Smaller Enterprises are located in LI Areas.

Partnership NMVC Company. See definition of NMVC Company in this section.

Person means a natural person or legal entity.

Pool means an aggregation of SBA guaranteed Debentures approved by SBA.

Portfolio means the securities representing a NMVC Company’s total outstanding Financing of Smaller Enterprises. It does not include idle funds or assets acquired in liquidation of Portfolio securities.

Portfolio Concern means a Small Business Assisted by a NMVC Company.

Principal Office means the location where the greatest number of the concern’s employees at any one location perform their work. However, for those concerns whose “primary industry”

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(see 13 CFR 121.107) is service or construction (see 13 CFR 121.201), the determination of principal office excludes the concern's employees who perform the majority of their work at job-site locations to fulfill specific contract obligations.

Private Capital has the meaning set forth in § 108.230.

Publicly Traded and Marketable means securities that are salable without restriction or that are salable within 12 months pursuant to Rule 144 (17 CFR 230.144) of the Securities Act of 1933, as amended, by the holder thereof, and are of a class which is traded on a regulated stock exchange, or is listed in the Automated Quotation System of the National Association of Securities Dealers (NASDAQ), or has, at a minimum, at least two market makers as defined in the relevant sections of the Securities Exchange Act of 1934, as amended (15 U.S.C. 77b *et seq.*), and in all cases the quantity of which can be sold over a reasonable period of time without having an adverse impact upon the price of the stock.

Regulatory Capital means Private Capital, excluding any portion of Private Capital that is designated as matching resources in accordance with § 108.2030(b)(3).

Relevant Venture Capital Finance means Equity Capital Investments in small businesses in low-income communities or benefiting low-income communities.

Retained Earnings Available for Distribution means Undistributed Net Realized Earnings less any Unrealized Depreciation on Loans and Investments (as reported on SBA Form 468), and represents the amount that a NMVC Company may distribute to investors (including SBA) as a profit Distribution, or transfer to Private Capital.

SBA means the Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Secondary Relative of an individual means:

(1) A grandparent, grandchild, or any other ancestor or lineal descendent who is not a Close Relative;

(2) An uncle, aunt, nephew, niece, or first cousin; or

(3) A spouse of any person described in paragraph (1) or (2) of this definition.

Small Business means a small business concern as defined in section 103(5) of the Act (including its Affiliates), and which meets the criteria applicable to the Small Business Investment Company program as set forth in part 121 of this chapter.

Small Business Investment Company (SBIC) means a Licensee, as that term is defined in § 107.50 of this chapter.

Smaller Enterprise means any Small Business that:

(1) Together with its Affiliates has a net worth of not more than \$6.0 million and average net income after Federal income taxes (excluding any carry-over losses) for the preceding two years no greater than \$2.0 million; or

(2) Both together with its Affiliates, and by itself, meets the size standard of § 121.201 of this chapter at the time of Financing for the industry in which it is then primarily engaged.

Specialized Small Business Investment Companies (SSBICs) means any Small Business Investment Company that—

(1) Invests solely in small business concerns that contribute to a well-balanced national economy by facilitating ownership in such concerns by persons whose participation in the free enterprise system is hampered because of social or economic disadvantages; and

(2) Was licensed under section 301(d) of the Small Business Investment Act, as in effect before September 30, 1996.

Trust means the legal entity created for the purpose of holding guaranteed Debentures and the guaranty agreement related thereto, receiving, holding and making any related payments, and accounting for such payments.

Trust Certificate Rate means a fixed rate determined at the time Debentures are pooled.

Trust Certificates (TCs) means certificates issued by SBA, its agent or Trustee and representing ownership of all or a fractional part of a Trust or Pool of Debentures.

Trustee means the trustee or trustees of a Trust.

Undistributed Net Realized Earnings means Undistributed Realized Earnings less Non-cash Gains/Income, each as reported on SBA Form 468.

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Unrealized Appreciation means the amount by which a NMVC Company's valuation of each of its Loans and Investments, as determined by its Board of Directors or General Partner(s) in accordance with NMVC Company's valuation policies, exceeds the cost basis thereof.

Unrealized Depreciation means the amount by which a NMVC Company's valuation of each of its Loans and Investments, as determined by its Board of Directors or General Partner(s) in accordance with NMVC Company's valuation policies, is below the cost basis thereof.

Unrealized Gain (Loss) on Securities Held means the sum of the Unrealized Appreciation and Unrealized Depreciation on all of a NMVC Company's Loans and Investments, less estimated future income tax expense or estimated realizable future income tax benefit, as appropriate.

[66 FR 28609, May 23, 2001, as amended at 67 FR 68502, Nov. 12, 2002]

Subpart C—Qualifications for the NMVC Program

ORGANIZING A NMVC COMPANY

§ 108.100 Business form.

A NMVC Company must be a newly formed for-profit entity or, subject to § 108.150, a newly formed for-profit subsidiary of an existing entity. It must be organized under State law solely for the purpose of performing the functions and conducting the activities contemplated under the Act. It may be organized as a corporation ("Corporate NMVC Company"), a limited partnership ("Partnership NMVC Company"), or a limited liability company ("LLC NMVC Company").

§ 108.110 Qualified management.

An Applicant must show, to the satisfaction of SBA, that its current or proposed management team is qualified and has the knowledge, experience, and capability in Community Development Finance or Relevant Venture Capital Finance, necessary for investing in the types of businesses contemplated by the Act, the regulations in this part and its business plan. In determining whether an Applicant's

current or proposed management team has sufficient qualifications, SBA will consider information provided by the Applicant and third parties concerning the background, capability, education, training and reputation of its general partners, managers, officers, key personnel, and investment committee and governing board members. The Applicant must designate at least one individual as the official responsible for contact with SBA.

§ 108.120 Economic development primary mission.

The primary mission of a NMVC Company must be economic development of one or more LI Areas.

§ 108.130 Identified Low Income Geographic Areas.

A NMVC Company must identify the specific LI Areas in which it intends to make Developmental Venture Capital investments and provide Operational Assistance under the NMVC program.

§ 108.140 SBA approval of initial Management Expenses.

A NMVC Company must have its Management Expenses approved by SBA at the time of designation as a NMVC Company. (See § 108.520 for the definition of Management Expenses.)

§ 108.150 Management and ownership diversity requirement.

(a) *Diversity requirement.* You must have diversity between management and ownership in order to be a NMVC Company. To establish diversity, you must meet the requirements in paragraphs (b) and (c) of this section.

(b) *Percentage ownership requirement.* No Person or group of Persons who are Affiliates of one another may own or control, directly or indirectly, more than 70 percent of your Regulatory Capital or your Leverageable Capital.

(c) *Non-affiliation requirement.* At least 30 percent of your Regulatory Capital and Leverageable Capital must be owned and controlled by three Persons unaffiliated with your management and unaffiliated with each other, whose investments are significant in dollar and percentage terms as determined by SBA. Such Persons must not be your Associates (except for their