

SBA ANNEX GDP
Version 3.0
PROVISIONS FOR
AN AGREEMENT OF LIMITED PARTNERSHIP
FOR AN SBIC ISSUING DEBENTURES ONLY

SBA ANNEX OF PROVISIONS FOR
AN AGREEMENT OF LIMITED PARTNERSHIP
FOR A SECTION 301(c) LICENSEE ISSUING DEBENTURES ONLY

The original version of this document was drafted by the law firm of O'Sullivan Graev & Karabell, in collaboration with the law firms of Pepper, Hamilton & Scheetz and Foley, Hoag & Eliot, the National Association of Small Business Investment Companies, and the Office of the General Counsel of the United States Small Business Administration.

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ARTICLE 1

General Provisions

Section 1.01 Definitions.

For the purposes of this Annex, the following terms have the following meanings:

"Act" means the state statute under which the Partnership is organized.

"Affiliate" has the meaning stated in the SBIC Act.

"Agreement" means this agreement of limited partnership, as amended from time to time. References to this Agreement will be deemed to include all provisions incorporated in this Agreement by reference.

"Assets" means common and preferred stock (including warrants, rights and other options relating to such stock), notes, bonds, debentures, trust receipts and other obligations, instruments or evidences of indebtedness, and other properties or interests commonly regarded as securities, and in addition, interests in real property, whether improved or unimproved, and interests in personal property of all kinds (tangible or intangible) choses in action, and cash, bank deposits and so-called "money market instruments".

"Assets Under Management" means, as of any specified date, the value of all Assets owned by the Partnership (the value to be determined as provided in this Agreement), including contributions requested and due from Partners and uncalled amounts of Commitments that are included in the Partnership's regulatory capital (as such term is used in the SBIC Act), less the amount of any liabilities of the Partnership, determined in accordance with generally accepted accounting principles, consistently applied.

"Associate" has the meaning stated in the SBIC Act.

"Certificate of Limited Partnership" means the certificate of limited partnership with respect to the Partnership filed for record in the state in which the Partnership is organized.

"Code" means the Internal Revenue Code of 1986, as amended, and the regulations thereunder and interpretations thereof promulgated by the Internal Revenue Service, as in effect from time to time.

"Commitments" means the capital contributions to the Partnership that the Partners have made or are obligated to make to the Partnership. The amounts and terms of the Commitments of the General Partner and the Private Limited Partners will be as stated in this Agreement.

"Control Person" has the meaning stated in the SBIC Act.

"Debentures" has the meaning stated in the SBIC Act.

"Designated Party" means any of the General Partner, any Investment Adviser/Manager, and any partner, member, manager, stockholder, director, officer, employee or Affiliate of the General Partner and any Investment Adviser/Manager.

"Distributable Securities" has the meaning stated in the SBIC Act.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended, and the regulations thereunder and interpretations thereof promulgated by the Department of Labor, as in effect from time to time.

"General Partner" means the general partner or general partners of the Partnership, as set forth in this Agreement.

"Indemnifiable Costs" means all costs, expenses, damages, claims, liabilities, fines and judgments (including the reasonable cost of the defense, and any sums which may be paid with the consent of the Partnership in settlement), incurred in connection with or arising from a claim, action, suit, proceeding or investigation, by or before any court or administrative or legislative body or authority.

"Investment Company Act" means the Investment Company Act of 1940, as amended, and the regulations thereunder and interpretations thereof promulgated by the Securities and Exchange Commission, as in effect from time to time.

"Investment Adviser/Manager" has the meaning stated in the SBIC Act.

"Leverage" has the meaning stated in the SBIC Act.

"Management Compensation" means the amounts payable by the Partnership to the General Partner or Investment Adviser/Manager, as provided in Section 3.03.

"Outstanding Leverage" means the total amount of outstanding securities (including, but not limited to, Debentures) issued by the Partnership which qualify as Leverage and have not been redeemed or repaid as provided in the SBIC Act.

"Partners" means the General Partner and the Private Limited Partners.

"Partnership" means the limited partnership established by this Agreement.

"Private Limited Partners" means any limited partners of the Partnership.

"SBA" means the United States Small Business Administration.

"SBA Agreements" has the meaning stated in Section 8.08.

"SBIC" means a small business investment company licensed under the SBIC Act.

"SBIC Act" means the Small Business Investment Act of 1958, as amended, and the rules and regulations thereunder and interpretations thereof promulgated by SBA, as in effect from time to time.

"Specified Majority in Interest of the Private Limited Partners" means Private Limited Partners whose capital contributions represent a majority (or such other greater percentage as is set forth here: _____ percent (___%)) of the capital contributions of all Private Limited Partners as of the time of determination.

Section 1.02 Admission of Partners.

Without the prior approval of SBA, no person may be admitted as:

- (i) a General Partner, or

- (ii) a Private Limited Partner with an ownership interest of ten percent (10%) or more of the Partnership's capital.¹

Section 1.03 Representations of Partners.

- (a) This Agreement is made with the General Partner in reliance upon the General Partner's representation to the Partnership and SBA, that:
 - (i) it is duly organized, validly existing and in good standing under the laws of the State in which it is organized, and is qualified to do business under the laws of each state where such qualification is required to carry on the business of the Partnership;
 - (ii) it has full power and authority to execute and deliver this Agreement and to act as General Partner under this Agreement;
 - (iii) this Agreement has been authorized by all necessary actions by it, has been duly executed and delivered by it, and is a legal, valid and binding obligation of it, enforceable according to its terms; and
 - (iv) the execution and delivery of this Agreement and the performance of its obligations under this Agreement will not conflict with, or result in any violation of, or default under, any provision of any governing instrument applicable to it, or any agreement or other instrument to which it is a party or by which it or any of its properties are bound, or any provision of law, statute, rule or regulation, or any ruling, writ, order, injunction or decree of any court, administrative agency or governmental body applicable to it.
- (b) This Agreement is made with each Private Limited Partner in reliance upon each Private Limited Partner's representation to the General Partner, the Partnership and SBA, that:
 - (i) it has full power and authority to execute and deliver this Agreement and to act as a Private Limited Partner under this Agreement; this Agreement has been authorized by all necessary actions by it; this Agreement has been duly executed and delivered by it; and this Agreement is a legal, valid and binding obligation of it, enforceable against it according to its terms;

¹ See 13 C.F.R. § 107.400(a) which requires SBA approval for the issuance or transfer of ownership interests of 10% or more of the capital of an SBIC.

- (ii) the execution and delivery of this Agreement and the performance of its obligations under this Agreement do not require the consent of any third party not previously obtained, and will not conflict with, or result in any violation of, or default under, any provision of any governing instrument applicable to it, or any agreement or other instrument to which it is a party or by which it or any of its properties are bound, or any provision of law, statute, rule or regulation, or any ruling, writ, order, injunction or decree of any court, administrative agency or governmental body applicable to it;
- (iii) if the Private Limited Partner is a bank (as the term is used in the SBIC Act, at 15 U.S.C. § 682(b)), the total amount of such Private Limited Partner's investments in SBICs, including such Private Limited Partner's interest in the Partnership, does not exceed five percent (5%) of such Private Limited Partner's capital and surplus²;

Section 1.04 Notices With Respect to Representations by Private Limited Partners.

- (a) If any representation made by a Private Limited Partner in Section 1.03(b)(i), (ii) or (iii) ceases to be true, then the Private Limited Partner will promptly provide the Partnership with a correct separate written representation as provided in each such Section.
- (b) The Partnership will give SBA prompt notice of any corrected representation received from any Private Limited Partner under Section 1.04(a).

Section 1.05 Liability of Partners.

Nothing in this Agreement limits any liability of any Partner under any agreement between the Partner and SBA.

Section 1.06 Incorporation of this Annex into the Agreement.

The Agreement shall contain the following provision evidencing the incorporation of this Annex:

"The provisions of SBA Annex GDP attached to this Agreement are incorporated in this Agreement with the same force and effect as if fully set forth herein."

² See Section 302(b) of the Small Business Investment Company Act of 1958, as amended.

ARTICLE 2

Purpose and Powers

Section 2.01 Purpose and Powers.

- (a) The Partnership is organized solely for the purpose of operating as a small business investment company under the SBIC Act and conducting the activities described under Title III of the SBIC Act. The Partnership has the powers and responsibilities, and is subject to the limitations, provided in the SBIC Act. The operations of the Partnership and the actions taken by the Partnership and the Partners will be conducted and taken in compliance with the SBIC Act.
- (b) Subject to Section 2.01(a), the Partnership may make, manage, own and supervise investments of every kind and character in conducting its business as a small business investment company.
- (c) Subject to the provisions of the SBIC Act, the Partnership has all powers necessary, suitable or convenient for the accomplishment of the purposes set forth in Section 2.01(a) and Section 2.01(b), alone or with others, as principal or agent, including without limitation, to engage in any lawful act or activity for which limited partnerships may be organized under the Act.

ARTICLE 3

Management

Section 3.01 Authority of General Partner.

- (a) The management and operation of the Partnership and the formulation of investment policy is vested exclusively in the General Partner.
- (b) The act of the General Partner in carrying on the business of the Partnership will bind the Partnership.
- (c) In the case of any General Partner other than a natural person, at any time that the Partnership is licensed as an SBIC, the General Partner will not allow any person to serve as a general partner, director, officer or manager of the General Partner, unless such person has been approved by SBA.³
- (d) So long as the General Partner remains the general partner of the Partnership:

³ Note that 13 C.F.R. § 107.410 provides that any transaction resulting in control by any person not previously approved by SBA requires prior approval by SBA.

- (i) it will comply with the requirements of the SBIC Act, including, without limitation, 13 C.F.R. § 107.160(a) and (b),⁴ as in effect from time to time; and
- (ii) in the case of any General Partner other than a natural person, except as set forth in Section 3.01(d)(iii), it will devote all of its activities to the conduct of the business of the Partnership and will not engage actively in any other business, unless its engagement is related to and in furtherance of the affairs of the Partnership.⁵
- (iii) The General Partner may, however:
 - (A) act as the general partner or Investment Adviser/Manager for one or more other SBICs, and
 - (B) receive, hold, manage and sell Assets received by it from the Partnership (or other SBIC for which it acts as general partner or Investment Adviser/Manager), or through the exercise or exchange of Assets received by it from the Partnership (or other SBIC for which it acts as general partner or Investment Adviser/Manager).

Section 3.02 The Investment Adviser/Manager.⁶

- (a) Any agreement delegating any part of the authority of the General Partner to an Investment Adviser/Manager will:
 - (i) be in writing, executed by the General Partner, the Partnership and the Investment Adviser/Manager,

⁴ These regulations describe the organizational requirements for the General Partner.

⁵ See 13 C.F.R. § 107.160(b), which requires that if a general partner of a limited partnership SBIC is an entity (rather than a natural person), it must be organized for the sole purpose of serving as the general partner of one or more SBICs.

⁶ See 13 C.F.R. § 107.50 for the definition of Investment Adviser/Manager, 13 C.F.R. § 107.510 for the basic requirements for a management contract and 13 C.F.R. §§ 107.140 and 107.510 for the requirements for SBA approval of Management Expenses.

- (ii) specify the authority so delegated, and
 - (iii) expressly require that such delegated authority will be exercised by the Investment Adviser/Manager in conformity with the terms and conditions of such agreement, this Agreement and the SBIC Act.
- (b) Each agreement with an Investment Adviser/Manager, and any material amendment to any such agreement, is subject to the prior approval of SBA.⁷

Section 3.03 Management Compensation.

The Partnership will not pay any Management Compensation with respect to any fiscal year in excess of the amount of Management Compensation approved by SBA.⁸

Section 3.04 Partnership Expenses.⁹

All Partnership expenses paid by the Partnership will be made against appropriate supporting documentation. The payment by the Partnership of Partnership expenses will be due and payable as billed.

Section 3.05 Valuation of Assets.¹⁰

- (a) The Partnership will adopt written guidelines for determining the value of its Assets. Assets held by the Partnership will be valued by the General Partner in a manner consistent with the Partnership's written guidelines and the SBIC

⁷ This Section relates to 13 C.F.R. § 107.510(b), which requires SBA approval for any material amendment of a management contract. Note that even if a change does not require advance approval, 13 C.F.R. § 107.680(a) may still require a non-material amendment to be reported to SBA.

⁸ 13 C.F.R. § 107.520 provides that SBA consent is required for increases in Management Expenses if an SBIC has Outstanding Leverage, and § 107.520(c) discusses required SBA approval of Management Expenses.

⁹ 13 C.F.R. § 107.520 defines the types of expenses that will be considered Management Expenses, and certain types of expenses that are not considered Management Expenses.

¹⁰ 13 C.F.R. § 107.503 discusses how an SBIC must value its portfolio investments.

Act. The Valuation Guidelines attached to this Agreement as Exhibit I are the Partnership's written guidelines for valuation.¹¹

- (b) To the extent that the SBIC Act requires any Asset held by the Partnership to be valued other than as provided in this Agreement, the General Partner will value the Asset in such manner as it determines to be consistent with the SBIC Act.
- (c) Assets held by the Partnership will be valued at least annually (or more often, as SBA may require), and will be valued at least semi-annually (or more often, as SBA may require) at any time that the Partnership has Outstanding Leverage.¹²

Section 3.06 Standard of Care.

- (a) No Designated Party will be liable to the Partnership or any Partner for any action taken or omitted to be taken by it or any other Partner or other person in good faith and in a manner it reasonably believed to be in or not opposed to the best interests of the Partnership, and, with respect to any criminal action or proceeding, had no reasonable cause to believe its conduct was unlawful.
- (b) Neither any Private Limited Partner, nor any member of any Partnership committee or board who is not an Affiliate of the General Partner, will be liable to the Partnership or any Partner as the result of any decision made in good faith by the Private Limited Partner or member, in its capacity as such.
- (c) Any Designated Party, any Private Limited Partner and any member of a Partnership committee or board, may consult with independent legal counsel selected by it and will be fully protected, and will incur no liability to the Partnership or any Partner, in acting or refraining to act in good faith in reliance upon the opinion or advice of such counsel.

¹¹ 13 C.F.R. § 107.503(b) provides that an SBIC must either adopt without change SBA's model valuation policy set forth in section III of the Valuation Guidelines for SBICs or obtain SBA's prior written approval of an alternative valuation policy. The model valuation policy is attached to this Agreement as Exhibit I.

¹² See 13 C.F.R. §§ 107.503(d) and 107.650, regarding the timing of valuations and reports.

- (d) This Section does not constitute a modification, limitation or waiver of Section 314(b) of the SBIC Act, or a waiver by SBA of any of its rights under Section 314(b).¹³
- (e) In addition to the standards of care stated in this Section, this Agreement may also provide for additional (but not alternative) standards of care that must also be met.

Section 3.07 Indemnification.

- (a) The Partnership will indemnify and hold harmless, but only to the extent of Assets Under Management (less any Outstanding Leverage not included as a liability in the computation of Assets Under Management), any Designated Party, from any and all Indemnifiable Costs which may be incurred by or asserted against such person or entity, by reason of any action taken or omitted to be taken on behalf of the Partnership and in furtherance of its interests.
- (b) The Partnership will indemnify and hold harmless, but only to the extent of Assets Under Management (less any Outstanding Leverage not included as a liability in the computation of Assets Under Management), the Private Limited Partners, and members of any Partnership committee or board who are not Affiliates of the General Partner or any Investment Adviser/Manager from any and all Indemnifiable Costs which may be incurred by or asserted against such person or entity, by any third party on account of any matter or transaction of the Partnership, which matter or transaction occurred during the time that such person has been a Private Limited Partner or member of any Partnership committee or board.
- (c) The Partnership has power, in the discretion of the General Partner, to agree to indemnify on the same terms and conditions applicable to persons indemnified under Section 3.07(b), any person who is or was serving, under a prior written request from the Partnership, as a consultant to, agent for or representative of the Partnership as a director, manager, officer, employee, agent of or consultant to another corporation, partnership, limited liability company, joint

¹³ Section 314(b) of the SBIC Act reads:

"(b) It shall be unlawful for any officer, director, employee, agent, or other participant in the management or conduct of the affairs of a licensee to engage in any act or practice, or to omit any act, in breach of his fiduciary duty as such officer, director, employee, agent, or participant, if, as a result thereof, the licensee has suffered or is in imminent danger of suffering financial loss or other damages."

venture, trust or other enterprise, against any liability asserted against such person and incurred by the person in any such capacity, or arising out of the person's status as such.

- (d) No person may be entitled to claim any indemnity or reimbursement under Section 3.07(a), (b) or (c) in respect of any Indemnifiable Cost that may be incurred by such person which results from the failure of the person to act in accordance with the provisions of this Agreement and the applicable standard of care stated in Section 3.06. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, will not, of itself, preclude a determination that such person acted in accordance with the applicable standard of care stated in Section 3.06.
- (e) To the extent that a person claiming indemnification under Section 3.07(a), (b) or (c) has been successful on the merits in defense of any action, suit or proceeding referred to in Section 3.07(a), (b) or (c) or in defense of any claim, issue or matter in any such action, suit or proceeding, such person must be indemnified with respect to such matter as provided in such Section. Except as provided in the foregoing sentence and as provided in Section 3.07(h) with respect to advance payments, any indemnification under this Section will be paid only upon determination that the person to be indemnified has met the applicable standard of conduct stated in Section 3.06(a) or Section 3.06(b).
- (f) A determination that a person to be indemnified under this Section has met the applicable standard stated in Section 3.06(a) or Section 3.06(b) may be made by (i) the General Partner, with respect to the indemnification of any person other than a person claiming indemnification under Section 3.07(a), (ii) a committee of the Partnership whose members are not affiliated with the General Partner or any Investment Adviser/Manager with respect to indemnification of any person indemnified under Section 3.07(a) or (iii) at the election of the General Partner, independent legal counsel selected by the General Partner, with respect to the indemnification of any person indemnified under this Section, in a written opinion.
- (g) In making any determination with respect to indemnification under (f), the General Partner, a committee of the Partnership whose members are not affiliated with the General Partner or any Investment Adviser/Manager or independent legal counsel, as the case may be, is authorized to make the determination on the basis of its evaluation of the records of the General Partner, the Partnership or any Investment Adviser/Manager to the Partnership and of the statements of the party seeking indemnification with respect to the matter in question and is not required to perform any independent investigation in connection with any determination. Any party making any such determination is authorized, however, in its sole discretion, to take such other actions (including engaging counsel) as it deems advisable in making the determination.

- (h) Expenses incurred by any person in respect of any Indemnifiable Cost may be paid by the Partnership before the final disposition of any such claim or action upon receipt of an undertaking by or on behalf of such person to repay such amount unless it is ultimately determined as provided in Section 3.07(e) or (f) that the person is entitled to be indemnified by the Partnership as authorized in this Section.
- (i) The rights provided by this Section will inure to the benefit of the heirs, executors, administrators, successors, and assigns of each person eligible for indemnification under this Agreement.
- (j) The rights to indemnification provided in this Section are the exclusive rights of all Partners to indemnification by the Partnership. No Partner may have any other rights to indemnification from the Partnership or enter into, or make any claim under, any other agreement with the Partnership (whether direct or indirect) providing for indemnification.
- (k) The Partnership may not enter into any agreement with any person (including, without limitation, any Investment Advisor/Manager, Partner or any person that is an employee, officer, director, partner or shareholder, or an Affiliate, Associate or Control Person of any Partner) providing for indemnification of any such person (i) except as provided for under this Section, and (ii) unless such agreement provides for a determination with respect to the indemnification as provided under Section 3.07(f)(ii) or (iii).
- (l) The provisions of this Section do not apply to indemnification of any person which is not at the expense (whether in whole or in part) of the Partnership.

ARTICLE 4

Small Business Investment Company Matters

Section 4.01 SBIC Act.

The provisions of this Agreement must be interpreted to the fullest extent possible in a manner consistent with the SBIC Act. If any provision of this Agreement conflicts with any provision of the SBIC Act (including, without limitation, any conflict with respect to the rights of SBA or the respective Partners under this Agreement), the provisions of the SBIC Act will control.

Section 4.02 Consent or Approval of, and Notice to, SBA.

- (a) The requirements of the prior consent or approval of, and notice to, SBA in this Agreement will be in effect at any time that the Partnership is licensed as an SBIC or has Outstanding Leverage. These requirements will not be in

effect if the Partnership is not licensed as an SBIC and does not have any Outstanding Leverage.¹⁴

- (b) Except as provided in the SBIC Act¹⁵, a consent or approval required to be given by SBA under this Agreement will be deemed given and effective for purposes of this Agreement only if the consent or approval is:
 - (i) given by SBA in writing, and
 - (ii) delivered by SBA to the party requesting the consent or approval in the manner provided for notices to such party under Section 8.03.

Section 4.03 Provisions Required by the SBIC Act for Issuers of Debentures.¹⁶

- (a) The provisions of 13 C.F.R. § 107.1810(i) are incorporated by reference in this Agreement as if fully stated in this Agreement.
- (b) The Partnership and the Partners consent to the exercise by SBA of all of the rights of SBA under 13 C.F.R. § 107.1810(i), and agree to take all actions that SBA may require in accordance with 13 C.F.R. § 107.1810(i).
- (c) This Section will be in effect at any time that the Partnership has outstanding Debentures, and will not be in effect at any time that the Partnership does not have outstanding Debentures.
- (d) Nothing in this Section may be construed to limit the ability or authority of SBA to exercise its regulatory authority over the Partnership as a licensed small business investment company under the SBIC Act.

¹⁴ Note that if an applicant for an SBIC license begins operations prior to receiving its license, SBA approval may be required for certain actions taken while the application is pending (e.g., prelicensing investments).

¹⁵ In certain cases the SBIC Act provides that SBA will be deemed to have consented to an action if SBA does not act within a specified period after receiving notice of the action. See, for example, 13 C.F.R. § 107.680(c).

¹⁶ This Section incorporates regulations relating to the special rights of SBA when the Partnership has outstanding Debentures. See also 13 C.F.R. § 107.1140 regarding the automatic agreement to and incorporation of 13 C.F.R. §§ 107.1800 through 107.1820 by an SBIC at the time of any issuance of Leverage.

Section 4.04 Effective Date of Incorporated SBIC Act Provisions.¹⁷

- (a) Any section of this Agreement which relates to Debentures issued by the Partnership and incorporates or refers to the SBIC Act or any provision of the SBIC Act (including, without limitation, 13 C.F.R. §§ 107.1810(i) and 107.1830 - 107.1850)) will, with respect to each Debenture, be deemed to refer to the SBIC Act or such SBIC Act provision as in effect on the date on which the Debenture was purchased from the Partnership.
- (b) Section 4.04(a) will not be construed to apply to:
 - (i) the provisions of the SBIC Act which relate to the regulatory authority of SBA under the SBIC Act over the Partnership as a licensed small business investment company; or
 - (ii) the rights of SBA under any other agreement between the Partnership and SBA.
- (c) The parties acknowledge that references in this Agreement to the provisions of the SBIC Act relating to SBA's regulatory authority refer to the provisions as in effect from time to time.

Section 4.05 SBA as Third Party Beneficiary.

SBA will be deemed an express third party beneficiary of the provisions of this Agreement to the extent of the rights of SBA under this Agreement and under the Act. SBA will be entitled to enforce the provisions (including, without limitation, the obligations of each Partner to make capital contributions to the Partnership) for the benefit of SBA, as if SBA were a party to this Agreement.

ARTICLE 5

Partners' Capital Contributions

¹⁷ See 13 C.F.R. § 107.1140 regarding the automatic agreement to and incorporation of 13 C.F.R. §§ 107.1800 through 107.1820 by an SBIC at the time of any issuance of Leverage.

Section 5.01 Capital Contributions by Private Limited Partners.¹⁸

All capital contributions to the Partnership by Private Limited Partners must be in cash, except as provided in this Agreement and approved by SBA.

Section 5.02 Capital Contributions by the General Partner.

All capital contributions to the Partnership by the General Partner must be in cash, except as provided in this Agreement and approved by SBA.¹⁹

Section 5.03 Conditions to the Commitments of the General Partner and the Private Limited Partners.

- (a) Notwithstanding any provision in this Agreement to the contrary, on the earlier of (i) the completion of the liquidation of the Partnership or (ii) one year from the commencement of the liquidation, the General Partner and the Private Limited Partners will be obligated to contribute any amount of their respective Commitments, not previously contributed to the Partnership, if and to the extent that the other Assets of the Partnership have not been sufficient to permit at that time the redemption of all Outstanding Leverage, the payment of all amounts due with respect to the Outstanding Leverage as provided in the SBIC Act, and the payment of all other amounts owed by the Partnership to SBA.
- (b) The provisions of this Section do not apply to the Commitment of any Private Limited Partner whose obligation to make capital contributions has been terminated or who has withdrawn from the Partnership, with the consent of SBA, under a provision of Article 5 or Article 8 or any agreement, release, settlement or action under any provision of this Agreement. No Private Limited Partner or General Partner has any right to delay, reduce or offset any obligation to contribute capital to the Partnership called under this Section by reason of any counterclaim or right to offset by the Partner or the Partnership against SBA.

¹⁸ SBA approval of noncash contributions is generally limited to qualified prelicensing investments. See 13 C.F.R. § 107.240 for the regulatory limitations on non-cash capital contributions.

¹⁹ See 13 C.F.R. § 107.240. Note that SBA approval of noncash contributions will be limited to qualified prelicensing investments.

Section 5.04 Failure to Make Required Capital Contributions.

The Partnership is entitled to enforce the obligations of each Partner to make the contributions to capital specified in this Agreement. The Partnership has all rights and remedies available at law or equity if any such contribution is not so made.

Section 5.05 Notice and Consent of SBA with regard to Capital Contribution Defaults.

- (a) The Partnership must give SBA prompt written notice of any default by a Private Limited Partner in making any capital contribution to the Partnership required under this Agreement which continues beyond any applicable grace period specified in this Agreement.
- (b) Unless SBA has given its prior consent or the provisions of Section 5.05(c) have become applicable, the Partnership will not (i) take any action (including entering into any agreement (whether oral or written), release or settlement with any Partner) which defers, reduces, or terminates the obligations of the Partner to make contributions to the capital of the Partnership, or (ii) commence any legal proceeding or arbitration, which seeks any such deferral, reduction or termination of such obligation. Without the consent of SBA (including SBA's deemed consent under Section 5.05(c)) no such agreement, release, settlement or action taken will be effective with respect to the Partnership or any Partner.
- (c) If the Partnership has given SBA thirty (30) days prior written notice of any proposed legal proceeding, arbitration or other action described under Section 5.05(b) with respect to any default by a Private Limited Partner in making any capital contribution to the Partnership, and the Partnership has not received written notice from SBA that it objects to the proposed action within the thirty (30) day period, then SBA will be deemed to have consented to the proposed Partnership action.
- (d) Any notice given by the Partnership to SBA under this Section must:
 - (i) be given by separate copies directed to each of the Investment Division and the Office of the General Counsel of SBA;
 - (ii) explicitly state in its caption or first sentence that the notice is being given with respect to a specified default by a Private Limited Partner in making a capital contribution to the Partnership and a proposed legal proceeding, arbitration, agreement, release, settlement or other action with respect to that default; and
 - (iii) state the nature of the default, the identity of the defaulting Private Limited Partner, and the nature and terms of the proposed legal

proceeding, arbitration, agreement, release, settlement or other action with respect to that default.

Section 5.06 Termination of the Obligation to Contribute Capital.

- (a) Any Private Limited Partner may elect to terminate its obligation in whole or in part to make a capital contribution required under this Agreement, or upon demand by the General Partner, will no longer be entitled to make such capital contribution, if the Private Limited Partner or the General Partner obtains an opinion of counsel as provided under Section 5.07 to the effect that making such contribution would require the Private Limited Partner to withdraw from the Partnership under Section 6.02 through Section 6.07.
- (b) Upon receipt by the General Partner of a notice and opinion as provided under Section 5.07, unless cured within the period provided under Section 5.08, the Commitment of the Private Limited Partner delivering the opinion will be deemed to be reduced by the amount of such unfunded capital contribution and this Agreement will be deemed amended to reflect a corresponding reduction of aggregate Commitments to the Partnership.

Section 5.07 Notice and Opinion of Counsel.

- (a) A copy of any opinion of counsel issued as described in Section 5.06 or Section 6.02 through Section 6.07 must be sent by the General Partner to SBA, together with (i) the written notice of the election of the Private Limited Partner or (ii) the written demand of the General Partner, to which the opinion relates.
- (b) An opinion rendered to the Partnership as provided in Section 5.06 or Section 6.02 through Section 6.07 will be deemed sufficient for the purposes of those Sections only if the General Partner and SBA each approve (i) the counsel rendering the opinion, and (ii) the form and substance of the opinion.

Section 5.08 Cure, Termination of Capital Contributions and Withdrawal.

- (a) Unless within ninety (90) days after the giving of written notice and opinion of counsel, as provided in Section 5.07, the Private Limited Partner or the Partnership eliminates the necessity for termination of the obligation of the Private Limited Partner to make further capital contributions or for the withdrawal of the Private Limited Partner from the Partnership in whole or in part to the reasonable satisfaction of the Private Limited Partner and the General Partner, the Private Limited Partner will withdraw from the Partnership in whole or in part to the extent required, effective as of the end of the ninety (90) day period.

- (b) Subject to the provisions of Section 5.04, in its discretion the General Partner may waive all or any part of the ninety (90) day cure period and cause such termination of capital contributions or withdrawal to be effective at an earlier date as stated in the waiver.
- (c) Any distributions made to a Private Limited Partner with respect to such Partner's withdrawal under this Section will be subject to and made as provided in Section 6.08 .

ARTICLE 6

Dissolution, Liquidation, Winding Up and Withdrawal

Section 6.01 Dissolution.

- (a) The Partnership will be dissolved upon the first to occur of the following:
 - (i) the later of:
 - (A) the close of business on the date of dissolution of the Partnership (as such date is set forth in the Agreement in effect as of the date of formation of the Partnership); or
 - (B) ten (10) years from the date of formation of the Partnership; or
 - (C) two years after all Outstanding Leverage has matured; or²⁰
 - (ii) the determination of the Partners to dissolve and terminate the Partnership as provided in Section 6.01(c).
- (b) The Partnership will not dissolve upon the withdrawal, dissolution, bankruptcy, death or adjudication of incompetency or insanity of any Private Limited Partner.
- (c) A Specified Majority (or such other percentage as is specified here: _____ percent (___%)) in Interest of the Private Limited Partners may elect to dissolve the Partnership by giving notice to each Partner and SBA of the election. Any notice of an election to dissolve the Partnership may only be given:

²⁰ See 13 C.F.R. § 107.160(c)(1) which prescribes the minimum duration for an SBIC in limited partnership form.

- (i) on or after the later to occur of: (A) the close of business on the date of dissolution of the Partnership (as such date is set forth in the Agreement in effect as on the date of formation of the Partnership) or (B) ten (10) years from the formation of the Partnership;
- (ii) if all Outstanding Leverage has been repaid or redeemed; and
- (iii) if all amounts due SBA, its agent or trustee have been paid.²¹

Any election to dissolve the Partnership given under this Section will not be effective until the later of: (A)) thirty (30) days (unless another period is specified here: _____ (__) days) from the date the notice is given to all parties or (B) the effective date of dissolution stated in the notice.

Section 6.02 Withdrawal of the General Partner.

To the extent required by the SBIC Act, no transfer of the interest of the General Partner, or any portion of such interest, will be effective without the consent of SBA.

Section 6.03 Withdrawal by ERISA Regulated Pension Plans.²²

Notwithstanding any other provision of this Agreement, any Private Limited Partner that is an "employee benefit plan" within the meaning of, and subject to the provisions of, ERISA, may elect to withdraw from the Partnership in whole or in part, or upon demand by the General Partner must withdraw from the Partnership in whole or in part, if either such Private Limited Partner or the General Partner obtains an opinion of counsel to the effect that, as a result of ERISA, (i) the withdrawal of the Private Limited Partner from the Partnership to such extent is required to enable the Private Limited Partner to avoid a violation of, or breach of the fiduciary duties of any person under ERISA (other than a breach of the fiduciary duties of any such person based upon the investment strategy or performance of the Partnership) or any provision of the Code related to ERISA or (ii) all or any portion of the assets of the Partnership (as opposed to the Private Limited Partner's partnership interest) constitute assets of the Private Limited Partner for purposes of ERISA and are subject to the provisions of ERISA to substantially the same extent as if owned directly by the Private Limited Partner.

²¹ See 13 C.F.R. § 107.160(c)(1) which specifies the minimum duration and other requirements that must be met before an SBIC in limited partnership form can elect to dissolve.

²² See also Section 5.06, Section 5.07 and Section 5.08 with respect to the requirements for an opinion of counsel to be effective.

Section 6.04 Withdrawal by Government Plans Complying with State and Local Law.²³

Notwithstanding any other provision of this Agreement, any Private Limited Partner that is a "government plan" within the meaning of ERISA may elect to withdraw from the Partnership in whole or in part, or upon demand by the General Partner must withdraw from the Partnership in whole or in part, if either such Private Limited Partner or the General Partner obtains an opinion of counsel to the effect that as a result of state statutes, regulations, case law, administrative interpretations or similar authority applicable to the "government plan", the withdrawal of such Private Limited Partner from the Partnership to such extent is required to enable the Private Limited Partner or the Partnership to avoid a violation (other than a violation based upon the investment performance of the Partnership) of the applicable state law.

Section 6.05 Withdrawal by Government Plans Complying with ERISA.²⁴

Notwithstanding any other provision of this Agreement, any Private Limited Partner that is a "government plan" within the meaning of ERISA may elect to withdraw from the Partnership in whole or in part, if the "government plan" obtains an opinion of counsel to the effect that, as a result of ERISA, (i) the withdrawal of the "government plan" from the Partnership to such extent would be required if it were an "employee benefit plan" within the meaning of, and subject to the provisions of, ERISA, to enable the "government plan" to avoid a violation of, or breach of the fiduciary duties of any person under ERISA (other than a breach of the fiduciary duties of any such person based upon the investment strategy or performance of the Partnership) or any provision of the Code related to ERISA or (ii) all or any portion of the assets of the Partnership would constitute assets of the "government plan" for the purposes of ERISA, if the "government plan" were an "employee benefit plan" within the meaning of, and subject to the provisions of, ERISA and would be subject to the provisions of ERISA to substantially the same extent as if owned directly by the "government plan."

²³ See also Section 5.06, Section 5.07 and Section 5.08 with respect to the requirements for an opinion of counsel to be effective.

²⁴ See also Section 5.06, Section 5.07 and Section 5.08 with respect to the requirements for an opinion of counsel to be effective.

Section 6.06 Withdrawal by Tax Exempt Private Limited Partners.²⁵

Notwithstanding any other provision of this Agreement, any Private Limited Partner that is exempt from taxation under Section 501(a) or 501(c)(3) of the Code may elect to withdraw from the Partnership in whole or in part, if the Private Limited Partner obtains an opinion of counsel to the effect that as a result of applicable statutes, regulations, case law, administrative interpretations or similar authority, the withdrawal of the Private Limited Partner from the Partnership to such extent is required to enable the tax exempt Private Limited Partner to avoid loss of its tax exempt status under Section 501(a) or 501(c)(3) of the Code.

Section 6.07 Withdrawal by Registered Investment Companies.²⁶

Notwithstanding any other provision of this Agreement, any Private Limited Partner that is an "investment company" subject to registration under the Investment Company Act, may elect to withdraw from the Partnership in whole or in part, or upon demand by the General Partner must withdraw from the Partnership in whole or in part, if either such Private Limited Partner or the General Partner obtains an opinion of counsel to the effect that, as a result of the Investment Company Act, the withdrawal of the Private Limited Partner from the Partnership to such extent is required to enable such Private Limited Partner or the Partnership to avoid a violation of applicable provisions of the Investment Company Act or the requirement that the Partnership register as an investment company under the Investment Company Act.

Section 6.08 Distributions on Withdrawal.

- (a) Subject to the provisions of Section 6.08(b), upon withdrawal under any provision of this Agreement, a Private Limited Partner will have the rights to distributions provided in the Act with respect to distributions to be made to limited partners upon withdrawal from a limited partnership.
- (b) The Partnership will not make any distribution to any Partner in connection with its withdrawal under any provision of this Agreement or the Act, unless the distribution is permitted by the SBIC Act and SBA has given its consent to such distribution before the distribution is made.

²⁵ See also Section 5.06, Section 5.07 and Section 5.08 with respect to the requirements for an opinion of counsel to be effective.

²⁶ See also Section 5.06, Section 5.07 and Section 5.08 with respect to the requirements for an opinion of counsel to be effective.

- (c) Except in the case of distributions made as permitted under subsection (b), the right of any Partner to receive any distribution from the Partnership as a result of such Partner's withdrawal, including any right any Partner may have as a creditor of the Partnership with respect to the amount of any such distribution, is subordinate to any amount due to SBA by the Partnership.²⁷

ARTICLE 7

Accounts, Reports and Auditors

Section 7.01 Books of Account.

The Partnership must maintain books and records in accordance with the provisions of the SBIC Act²⁸ regarding financial accounts and reporting and, except as otherwise provided in this Agreement, generally accepted accounting principles.

Section 7.02 Audit and Report.

The financial statements of the Partnership must be audited and certified as of the end of each fiscal year by a firm of independent certified public accountants selected by the Partnership.

Section 7.03 Fiscal Year.

The fiscal year of the Partnership will be a twelve-month year (except for the first and last partial years, if any) ending on December 31.²⁹

ARTICLE 8

²⁷ Unless an agreement otherwise provides, RULPA provides that at the time a partner is entitled to receive a distribution the partner has the rights of a creditor with respect to the amount of the distribution. See Delaware RULPA § 17-606.

²⁸ See 13 C.F.R. § 107.600 with respect to recordkeeping requirements for an SBIC.

²⁹ SBA may permit an SBIC to adopt a different fiscal year, as in the case of an SBIC with a parent entity, where the different year is desired to conform to the parent's fiscal year.

Miscellaneous

Section 8.01 Assignability.³⁰

- (a) No General Partner or Private Limited Partner may transfer any interest of ten percent (10%) or more in the capital of the Partnership without the prior approval of SBA.³¹
- (b) The General Partner may not assign, pledge or otherwise grant a security interest in its interest in the Partnership or in this Agreement, except with the prior consent of SBA and the prior approval of a Specified Majority (or such other percentage as is specified here: _____ percent (__%)) in Interest of the Private Limited Partners.
- (c) No transfer of any interest in the Partnership will be allowed if such transfer or the actions to be taken in connection with that transfer would:
 - (i) result in any violation of the SBIC Act;
 - (ii) result in a violation of any law, rule or regulation by the Partnership;
 - (iii) cause the termination or dissolution of the Partnership; or
 - (iv) cause the Partnership to be classified other than as a partnership for Federal income tax purposes.

Section 8.02 Binding Agreement.

Subject to the provisions of Section 8.01, this Agreement is binding upon, and inures to the benefit of, the heir, successor, assign, executor, administrator, committee, guardian, conservator or trustee of any Partner.

³⁰ See 13 C.F.R. §§ 107.400 through 107.450 regarding changes of ownership or control of an SBIC.

³¹ See 13 C.F.R. § 107.400(a) with respect to transfers of 10% or more of the partnership capital of an SBIC.

Section 8.03 Notices.

- (a) All notices under this Agreement must be in writing and may be given by personal delivery, telex, telegram, private courier service or registered or certified mail.
- (b) A notice is deemed to have been given:
 - (i) by personal delivery, telex, telegram, or private courier service, as of the day of delivery of the notice to the addressee; and
 - (ii) by mail, as of the fifth (5th) day after the notice is mailed.
- (c) Notices must be sent to:
 - (i) the Partnership, at the address of the General Partner in the Certificate of Limited Partnership, or such other address or addresses as to which the Partners have been given notice;
 - (ii) the Private Limited Partners, at the addresses in Schedule A attached to this Agreement (as Schedule A may be amended from time to time) or such other addresses as to which the Partnership has been given notice; and
 - (iii) SBA, at the address of the Investment Division of SBA and, if so required under any Section of this Agreement, in duplicate at the address of the Office of the General Counsel of SBA.

Section 8.04 Consents and Approvals.

A consent or approval required to be given by any party under this Agreement will be deemed given and effective for purposes of this Agreement only if the consent or approval is:

- (i) given by such party in writing, and
- (ii) delivered by such party to the party requesting the consent or approval in the manner provided for notices to such party under Section 8.03.

Section 8.05 Amendments.

- (a) This Agreement may not be amended except by an instrument in writing executed by the holders of a Specified Majority (or such other percentage as is

specified here: _____ percent (___%) in Interest of the Private Limited Partners who have not withdrawn as of the effective date of that amendment and the General Partner, and approved by SBA.³²

- (b) The General Partner must distribute to each Private Limited Partner and SBA a copy of:
 - (i) any Certificate of Amendment to the Certificate of Limited Partnership, and
 - (ii) any amendment to this Agreement.
- (c) Copies of any Certificate of Amendment to the Certificate of Limited Partnership, and any amendment to this Agreement must be distributed in the same manner as provided for notices in Section 8.03.

Section 8.06 Applicable Law.

This Agreement is governed by, and construed in accordance with, applicable Federal laws and the laws of the state in which the Partnership is organized.

Section 8.07 Severability.

If any one or more of the provisions contained in this Agreement, or any application of any such provision, is invalid, illegal, or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained in this Agreement and all other applications of any such provision will not in any way be affected or impaired.

Section 8.08 Entire Agreement.

This Agreement, and all other written agreements executed by or on behalf of the General Partner and/or the Private Limited Partners and executed or approved by SBA up to and including the date of this Agreement (such other written agreements, collectively, the "SBA Agreements"), state the entire understanding among the parties relating to the subject matter of this Agreement and the SBA Agreements. Any and all prior conversations, correspondence, memoranda or other writings are merged in, and replaced by this Agreement and the SBA Agreements, and are without further effect on this

³² Note that SBA approval is required for all amendments to the Agreement.

Agreement and the SBA Agreements. No promises, covenants, representations or warranties of any character or nature other than those expressly stated in this Agreement and the SBA Agreements have been made to induce any party to enter into this Agreement or any SBA Agreement.

EXHIBIT I

Valuation Guidelines

General

The General Partner has sole responsibility for determining the Asset Value of each of the Loans and Investments and of the portfolio in the aggregate.

Loans and Investments shall be valued individually and in the aggregate at least semi-annually - as of the end of the second quarter of the fiscal year-end and as of the end of the fiscal year. [...at least annually - as of the end of the fiscal year.] Fiscal year-end valuations are audited as set forth in SBA's Accounting Standards and Financial Reporting Requirements for Small Business Investment Companies.

This Valuation Policy is intended to provide a consistent, conservative basis for establishing the Asset Value of the portfolio. The Policy presumes that Loans and Investments are acquired with the intent that they are to be held until maturity or disposed of in the ordinary course of business.

Interest-Bearing Securities

Loans shall be valued in an amount not greater than cost with Unrealized Depreciation being recognized when value is impaired. The valuation of loans and associated interest receivables on interest-bearing securities should reflect the portfolio concern's current and projected financial condition and operating results, its payment history and its ability to generate sufficient cash flow to make payments when due.

When a valuation relies more heavily on asset versus earnings approaches, additional criteria should include the seniority of the debt, the nature of any pledged collateral, the extent to which the security interest is perfected, the net liquidation value of tangible business assets, and the personal integrity and overall financial standing of the owners of the business. In those instances where a loan valuation is based on an analysis of certain collateralized assets of a business or assets outside the business, the valuation should, at a minimum, consider the net liquidation value of the collateral after reasonable selling expenses. Under no circumstances, however, shall a valuation based on the underlying collateral be considered as justification for any type of loan appreciation.

Appropriate unrealized depreciation on past due interest which is converted into a security (or added to an existing security) should be recognized when collection is doubtful. Collection is presumed to be in doubt when one or both of the following conditions occur: (i) interest payments are more than 120 days past due; or (ii) the small concern is in bankruptcy, insolvent, or there is substantial doubt about its ability to continue as a going concern.

The carrying value of interest bearing securities shall not be adjusted for changes in interest rates.

Valuation of convertible debt may be adjusted to reflect the value of the underlying equity security net of the conversion price.

Equity Securities - Private Companies

Investment cost is presumed to represent value except as indicated elsewhere in these guidelines.

Valuation should be reduced if a company's performance and potential have significantly deteriorated. If the factors which led to the reduction in valuation are overcome, the valuation may be restored.

The anticipated pricing of a Small Concern's future equity financing should be considered as a basis for recognizing Unrealized Depreciation, but not for Unrealized Appreciation. If it appears likely that equity will be sold in the foreseeable future at a price below the Licensee's current valuation, then that prospective offering price should be weighed in the valuation process.

Valuation should be adjusted to a subsequent significant equity financing that includes a meaningful portion of the financing by a sophisticated, unrelated new investor. A subsequent significant equity financing that includes substantially the same group of investors as the prior financing should generally not be the basis for an adjustment in valuation. A financing at a lower price by a sophisticated new investor should cause a reduction in value of the prior securities.

If substantially all of a significant equity financing is invested by an investor whose objectives are in large part strategic, or if the financing is led by such an investor, it is generally presumed that no more than 50% of the increase in investment price compared to the prior significant equity financing is attributable to an increased valuation of the company.

Where a company has been self-financing and has had positive cash flow from operations for at least the past two fiscal years, Asset Value may be increased based on a very conservative financial measure regarding P/E ratios or cash flow multiples, or other appropriate financial measures of similar publicly-traded companies, discounted for illiquidity. Should the chosen valuation cease to be meaningful, the valuation may be restored to a cost basis, or if of significant deterioration in performance or potential, to a valuation below cost to reflect impairment.

With respect to portfolio companies that are likely to face bankruptcy or discontinue operations for some other reason, liquidating value may be employed. This value may be determined by estimating the realizable value (often through professional appraisals or firm offers to purchase) of all assets and then subtracting all liabilities and all associated liquidation costs.

Warrants should be valued at the excess of the value of the underlying security over the exercise price.

Equity Securities - Public Companies

Public securities should be valued as follows: (a) For over-the-counter stocks, take the average of the bid price at the close for the valuation date and the preceding two days, and (b) for listed stocks, take the average of the close for the valuation date and the preceding two days.

The valuation of public securities that are restricted should be discounted appropriately until the securities may be freely traded. Such discounts typically range from 10% to 40%, but the discounts can be more or less, depending upon the resale restrictions under securities laws or contractual agreements.

When the number of shares held is substantial in relation to the average daily trading volume, the valuation should be discounted by at least 10%, and generally by more.