

GLADSTONE CAPITAL CORP

Form 40-APP/A

June 29, 2012

File No. 812-13878

Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of the Application of:

GLADSTONE CAPITAL CORPORATION
GLADSTONE INVESTMENT CORPORATION
GLADSTONE LENDING CORPORATION
GLADSTONE PARTNERS FUND, LP
GLADSTONE MANAGEMENT CORPORATION

THIRD AMENDED AND RESTATED APPLICATION FOR AN ORDER UNDER
SECTIONS 17(d), 57(a)(4), and 57(i) OF THE INVESTMENT COMPANY ACT OF
1940 AND RULE 17d-1 UNDER THE INVESTMENT COMPANY ACT OF 1940
PERMITTING CERTAIN JOINT TRANSACTIONS OTHERWISE PROHIBITED BY
SECTIONS 17(d), 57(a)(4), and 57(i) OF THE INVESTMENT COMPANY ACT OF
1940 AND RULE 17d-1

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This document contains 21 pages (including exhibits),
which have been numbered sequentially.

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the matter of:

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GLADSTONE MANAGEMENT CORPORATION
1521 Westbranch Dr., Suite 200
McLean, VA 22102

Third Amended and Restated Application for an Order under Sections 17(d), 57(a)(4), and 57(i) of the Investment Company Act of 1940 and Rule 17d-1 under the Investment Company Act of 1940 Permitting Certain Joint Transactions Otherwise Prohibited by Sections 17(d), 57(a)(4), and 57(i) of the Investment Company Act of 1940 and Rule 17d-1.

I. Summary of Application

Gladstone Capital Corporation (“GLAD”), Gladstone Investment Corporation (“GAIN”), Gladstone Lending Corporation (“Lending,” and collectively with GLAD and GAIN, the “Funds”), Gladstone Partners Fund, LP (“Partners”), Gladstone Management Corporation (“GMC”) on behalf of itself and its successors,¹ and any Closed-End Fund (as defined below) (collectively with the Funds, Partners and GMC, the “Applicants”) hereby seek an order from the Securities and Exchange Commission (the “Commission”) under Sections 17(d), 57(a)(4), and 57(i) of the Investment Company Act of 1940 (the “1940 Act”) and Rule 17d-1 under the 1940 Act to the extent necessary to permit two or more of GLAD, GAIN, Lending, Partners, and each Closed-End Fund (as defined below),² to (a) co-invest with each other in securities issued by issuers in private placement transactions in which GMC negotiates terms in addition to price (“Private Placement Securities”);³ and (b) make additional investments in securities of such issuers, including through the exercise of warrants, conversion privileges, and other rights to purchase securities of the issuers (“Follow-On Investments”). “Co-Investment Transaction” means any transaction in which an Investor (as defined below) participated together with

¹ The term “successor,” as applied to GMC means an entity that results from a reorganization into another jurisdiction or change in the type of business organization.

² All existing entities that currently intend to rely upon the requested Order have been named as Applicants. Any other existing or future entity that subsequently relies on the Order will comply with the terms and conditions of the Application.

³ The term “private placement transactions” means transactions in which the offer and sale of securities by the issuer are exempt from registration under the Securities Act of 1933 (the “1933 Act”).

Partners and/or one or more other Investors in reliance on the requested order (“Order”).⁴ “Potential Co-Investment Transaction” means any investment opportunity in which an Investor could not participate together with Partners and/or one or more other Investors without obtaining and relying on the Order. The Order sought by this application would supersede the previous co-investment order issued to GLAD, GAIN, Partners, Gladstone General Partner, LLC, and GMC.⁵

II. Background

GLAD is a Maryland corporation, and GAIN is a Delaware Corporation, that are each organized as a closed-end management investment company that has elected to be regulated as a business development company (“BDC”) under Section 54(a) of the 1940 Act. GLAD was organized on May 30, 2001 and commenced operations on August 31, 2001. As of September 30, 2011, GLAD had net assets of approximately \$317 million. GLAD’s Objectives and Strategies (as defined below) are to achieve a high level of current income by investing in debt securities, consisting primarily of senior notes, senior subordinated notes and junior subordinated notes, issued by established private businesses that are substantially owned by leveraged buyout funds, individual investors or are family-owned businesses, with a particular focus on senior notes. GAIN was organized on February 18, 2005, and commenced operations on June 22, 2005. As of September 30, 2011, GAIN had net assets of approximately \$295 million. GAIN’s Objectives and Strategies are to achieve a high level of current income and capital gains by investing in debt and equity securities of established private businesses. Lending is a Maryland Corporation organized as a closed-end management investment company that has filed a notice of intent to elect to be regulated as a BDC pursuant to Section 6(f) of the 1940 Act. Lending was organized on December 7, 2009, but has not yet commenced operations. As of September 30, 2011, Lending had net assets of \$0. Lending’s proposed Objectives and Strategies are to generate current income and, to a lesser extent, long-term capital appreciation through investing in syndicated and non-syndicated debt investments of small to mid-sized corporations that are typically larger companies than those in which GLAD or GAIN invest, but which may from time to time be similar to the types of investments in which GLAD and GAIN invest. To the extent that there is an investment that falls within the Objectives and Strategies of Lending and of GLAD or GAIN, Lending intends to co-invest with those two entities. “Objectives and Strategies” means an Investor’s investment objectives and strategies, as described in the Investor’s registration statement on Form N-2, other filings the Investor has made with the Commission under the 1933 Act, or under the Securities Exchange Act of 1934, as amended, and the Investor’s reports to shareholders. The outstanding shares of beneficial interest for each of GLAD and GAIN are listed and traded on the NASDAQ. At present, there is no intent to list Lending’s shares on any exchange, however Lending would consider listing its shares on an exchange if market conditions were to support such an action.

⁴ No Non-Interested Director of an Investor (as defined below) will have a financial interest in any Co-Investment Transaction, other than indirectly through share ownership in one of the Investors.

⁵ In re Gladstone Capital et al., SEC Rel. No. IC-27120 (Oct. 25, 2005)(notice), SEC Rel. No. IC-27150 (Nov. 22, 2005)(order) (the “Existing Order”).

Partners is a limited partnership organized under Delaware law. Partners' limited partnership interests have been privately placed with institutional investors, and Partners is excluded from the definition of investment company by Section 3(c)(1) of the Act. Partners' investment objective is similar to that of GLAD. GMC is the general partner of Partners. Partners has entered into an advisory agreement with GMC and an administration agreement with Gladstone Administration, LLC, which is a wholly owned subsidiary of GMC.

GMC, an investment adviser registered with the Commission under the Investment Advisers Act of 1940 ("Advisers Act"), serves as investment adviser to each Fund and manages each Fund's portfolio in accordance with the Fund's Objectives and Strategies, makes investment decisions for each Fund, places purchase and sale orders for portfolio transactions for each Fund and otherwise manages the day-to-day operations of each Fund, subject to the oversight of each Fund's Board of Directors. GMC is a corporation formed and existing under the laws of the State of Delaware. GMC is a wholly owned subsidiary of Gladstone Holding Corporation, which in turn is wholly owned by Gladstone Management Corporation Ltd. Mr. David Gladstone owns all of the voting securities of Gladstone Management Corporation Ltd., a Bermuda corporation. Mr. Gladstone is the Chairman and Chief Executive Officer of GMC and controls GMC. He is also the Chief Executive Officer and a Director of each Fund. Currently, Mr. Gladstone, along with George Stelljes III, and Terry Brubaker, are responsible for investment selection on behalf of each Fund.

For the services provided to the Funds by GMC pursuant to an advisory agreement with each Fund, each Fund pays, or in the case of Lending will pay, a base management fee and two incentive based fees. GLAD and GAIN currently pay GMC a base management fee an annualized rate of 2.0% of total assets, including investments made with proceeds of borrowings, less any uninvested cash or cash equivalents resulting from borrowings. Lending will pay GMC a base management fee at an annualized rate of 1.0% of average gross assets invested in senior syndicated first lien loans and 2.0% of all other average gross assets, except there is no base management fee on cash and cash equivalents. Each Fund also pays, or in the case of Lending will pay, GMC a two part incentive fee: (i) a income-based incentive fee and (ii) a capital gains-based incentive fee. The income-based incentive fee rewards GMC if each Fund's quarterly net investment income, prior to the deduction of any incentive fee, exceeds the hurdle rate and is paid by each Fund as follows:

no incentive fee in any calendar quarter in which a Fund's pre-incentive fee net investment income does not exceed the hurdle rate (7% annualized);

100% of each Fund's pre-incentive fee net investment income with respect to that portion of such pre-incentive fee net investment income, if any, that exceeds the hurdle rate but is less than 2.1875% in any calendar quarter (8.75% annualized); and

20% of the amount of each Fund's pre-incentive fee net investment income, if any, that exceeds 2.1875% in any calendar quarter (8.75% annualized).

The capital gains-based incentive fee is equal to 20.0% of the net realized capital gains since each Fund's inception, if any, computed net of all realized capital losses and unrealized capital depreciation since each Fund's inception, less any prior payments, and is determined and payable at the end of each fiscal year. As of December 1, 2011, Mr. Gladstone owned 1,136,974 shares, Mr. Brubaker owned 198,068 shares, and Mr. Stelljes owned 16,337 shares of GLAD (representing 5.4%, .94%, and .08% respectively of the outstanding shares). As of the same date, Mr. Gladstone owned 225,205 shares, Mr. Brubaker owned 34,821 shares, and Mr. Stelljes owned 26,053 shares of GAIN (representing 1.02%, .16% and .12% respectively of the outstanding shares). GMC does not own any shares of GLAD or GAIN. The initial shares of Lending are wholly owned by GMC.

Each Fund invests its assets so as to qualify for U.S. federal income tax treatment as a regulated investment company. Under current applicable income tax regulations, this will require, among other things, that at the end of each quarter, subject to certain exceptions, no more than 25% of the value of each Fund's consolidated gross assets be invested in the securities of any single issuer or affiliated issuers and no more than 50% of the value of each Fund's consolidated gross assets be invested in the securities of issuers representing in the case of any single issuer more than 5% of the Fund's consolidated gross assets or more than 10% of that issuer's voting securities.

The board of directors of GLAD (the "GLAD Board") and the board of directors of GAIN (the "GAIN Board") will be identical and each will be comprised of nine directors, five of whom are not "interested persons," within the meaning of Section 2(a)(19) of the 1940 Act (the "Non-Interested Directors"), of either GLAD or GAIN.⁶ The board of directors of Lending (the "Lending Board", and collectively with the GLAD Board and GAIN Board, the "Funds' Boards") will consist of seven directors upon commencement of its initial public offering of shares of registered, non-traded common stock, four of whom will be Non-Interested Directors. The Ethics, Nominating and Corporate Governance Committee of each the Funds' Boards selects and nominates any additional Non-Interested Directors who may be selected to serve on a Board. Each of the GLAD Board and GAIN Board will consist of the same nine directors. In addition, all of the members of the Lending Board serve on the GLAD Board and the GAIN Board.

⁶ Mr. Gerard Mead, a Non-Interested Director of the GLAD Board and the GAIN Board, elected not to stand for re-election at GLAD and GAIN's respective annual shareholder meetings. Consequently, Mr. Mead is no longer a director of GLAD, and as of August 9, 2012, the date of GAIN's annual shareholder meeting, Mr. Mead will no longer be a director of GAIN. As a result, the GLAD Board has been reduced to nine directors, five of whom are Non-Interested Directors, and the GAIN Board will be reduced to that number as of August 9, 2012.

Members of the GLAD Board and GAIN Board

David Gladstone
George Stelljes III
Terry Brubaker
David Dullum
Paul Adelgren (Non-Interested)
Michela English (Non-Interested)
John Outland (Non-Interested)
Anthony Parker (Non-Interested)
John Reilly (Non-Interested)

Members of Lending Board

David Gladstone
George Stelljes III
Terry Brubaker
Paul Adelgren (Non-Interested)
Michela English (Non-Interested)
John Outland (Non-Interested)
Anthony Parker (Non-Interested)

From time to time GMC, or an entity controlling, controlled by, or under common control with GMC, may serve as investment adviser or sub-adviser to other closed-end management investment companies that have elected to be regulated as a BDC or other registered closed-end management investment companies (each a “Closed-End Fund”) that will engage in investment activities similar to those engaged in by GLAD, GAIN, and Lending. Companies sub-advised by GMC or an entity controlling, controlled by, or under common control with GMC are included in the term “Closed-End Fund” only if the sub-adviser controls the Closed-End Fund.

III. Order Requested

The Applicants respectfully request an order (the “Order”) of the Commission under Sections 17(d), 57(a)(4), and 57(i) under the 1940 Act, and Rule 17d-1 under the 1940 Act to permit, subject to the terms and conditions set forth below in this Application (the “Conditions”), GLAD, GAIN, Lending, and each Closed-End Fund (each of GLAD, GAIN, Lending and the Closed-End Funds an “Investor,” and collectively the “Investors”) to be able to participate in Co-Investment Transactions together, or together with Partners. Applicants request that the requested order supersede and replace the Existing Order.

The Investors and Partners seek relief to invest in Co-Investment Transactions because such Co-Investment Transactions would otherwise be prohibited by Sections 17(d) and 54(a)(4) of the 1940 Act and Rule 17d-1 under the 1940 Act. This Application seeks relief in order to (i) enable the Investors and Partners to avoid the practical difficulties of trying to structure, negotiate and persuade counterparties to enter into transactions while awaiting the granting of the relief requested in individual applications with respect to

each Co-Investment Transaction that arises in the future and (ii) enable the Investors and Partners to avoid the significant legal and other expenses that would be incurred in preparing such individual applications.

A. Section 17(d) and Section 57(a)(4)

Section 17(d) of the 1940 Act generally prohibits an affiliated person (as defined in Section 2(a)(3) of the 1940 Act), or an affiliated person of such affiliated person, of a registered closed-end investment company acting as principal, from effecting any transaction in which the registered closed-end investment company is a joint or a joint and several participant, in contravention of such rules as the Commission may prescribe for the purpose of limiting or preventing participation by the registered closed-end investment company on a basis different from or less advantageous than that of such other participant. Rule 17d-1 under the 1940 Act generally prohibits participation by a registered investment company and an affiliated person (as defined in Section 2(a)(3) of the 1940 Act) or principal underwriter for that investment company, or an affiliated person of such affiliated person or principal underwriter, in any “joint enterprise or other joint arrangement or profit-sharing plan,” as defined in the rule, without prior approval by the Commission by order upon application.

Similarly, with regard to BDCs, Section 57(a)(4) prohibits certain persons specified in Section 54(b) of the 1940 Act from participating in a joint transaction with the BDC, or a company controlled by the BDC in contravention of rules as prescribed by the Commission. In particular Section 57(a)(4) applies to:

Any director, officer, employee, or member of an advisory board of a BDC; or any person (other than the BDC itself) who is an affiliated person of the forgoing pursuant to section 2(a)(3)(C) of the 1940 Act; or

Any investment adviser or promoter of, general partner in, principal underwriter for, or person directly or indirectly either controlling, controlled by, or under common control with, a BDC;⁷ or any person who is an affiliated person of any of the forgoing within the meaning of section 2(a)(3)(C) or (D) of the 1940 Act.

Section 2(a)(3)(C) of the 1940 Act defines an “affiliated person” of another person to include any person directly or indirectly controlling, controlled by, or under common control with, such other person. Section 2(a)(9) of the 1940 Act defines “control” as the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with that company. Under Section 2(a)(9) a person who beneficially owns, either directly or through one or more controlled companies, more than 25% of the voting securities of a company is presumed to control such company. The Commission and its staff have indicated on a number of occasions their belief that an investment adviser controls the fund that it advises,

⁷ Excluded from this category are the BDC itself and any person who, if it were not directly or indirectly controlled by the BDC, would not otherwise be under common control with the BDC.

absent compelling evidence to the contrary.⁸ GMC is the investment adviser to each Fund and GMC, or an entity controlling, controlled by, or under common control with GMC, will be an investment adviser or sub-advisor to each of the Closed-End Funds. In addition, GMC is the investment adviser to, and general partner of, Partners. The Investors and Partners may be deemed to be under common control, and thus affiliated persons of each other under Section 2(a)(3)(C) of the 1940 Act.⁹ As a result, these relationships might cause each Investor and Partners participating in Co-Investment Transactions to be subject to Sections 17(d) or 54(a)(4), and thus subject to the provisions of Rule 17d-1.

B. Rule 17d-1

Rule 17d-1 under the 1940 Act generally prohibits participation by a registered investment company and an affiliated person (as defined in Section 2(a)(3) of the 1940 Act) or principal underwriter for that investment company, or an affiliated person of such affiliated person or principal underwriter, in any “joint enterprise or other joint arrangement or profit-sharing plan,” as defined in the rule, without prior approval by the Commission by order upon application.

Rule 17d-1 was promulgated by the Commission pursuant to Section 17(d) and made applicable to BDCs by Section 57(i). Section 57(i) of the 1940 Act provides that, until the Commission prescribes rules under section 57(a)(4), the Commission's rules under Section 17(d) of the 1940 Act applicable to registered closed-end investment companies will be deemed to apply. Because the Commission has not adopted any rules under Section 57(a)(4), Rule 17d-1 applies.

Applicants seek relief pursuant to Rule 17d-1, which permits the Commission to authorize joint transactions upon application. In passing upon applications filed pursuant to Rule 17d-1, the Commission is directed by Rule 17d-1(b) to consider whether the participation of a registered investment company or controlled company thereof in the joint enterprise or joint arrangement under scrutiny is consistent with provisions, policies and purposes of the 1940 Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

The Commission has stated that Section 17(d), upon which Rule 17d-1 is based, and upon which Section 54(a)(4) was modeled, was designed to protect investment companies from self-dealing and overreaching by insiders. The Commission has also taken

⁸ See, e.g., *In re Investment Company Mergers*, SEC Rel. No. IC-25259 (Nov. 8, 2001); *In re Steadman Security Corp.*, 46 S.E.C. 896, 920 n.81 (1977) (“[T]he investment adviser almost always controls the fund. Only in the very rare case where the adviser's role is simply that of advising others who may or may not elect to be guided by his advice...can the adviser realistically be deemed not in control.”). Depending on the nature of GMC’s sub-advisory role with a Closed-End Fund, it could be deemed to control the Closed-End Fund pursuant to the theory enunciated in *Steadman*, which would necessitate the requested relief.

⁹ Section 2(a)(20) of the 1940 Act defines “investment adviser” to an investment company to encompass both top-level investment advisers and sub-advisers to a fund. As a result, GMC would be deemed under the 1940 Act to be an investment adviser of each Closed-End Fund, even if it were acting solely as a sub-adviser.

notice that there may be transactions subject to these prohibitions that do not present the dangers of overreaching. See Protecting Investors: A Half-Century of Investment Company Regulation, 1504 Fed. Sec. L. Rep., Extra Edition (May 29, 1992) at 488 et seq. The Court of Appeals for the Second Circuit has enunciated a like rationale for the purpose behind Section 17(d): “The objective of [Section] 17(d) . . . is to prevent . . . injuring the interest of stockholders of registered investment companies by causing the company to participate on a basis different from or less advantageous than that of such other participants.” Securities and Exchange Commission v. Talley Industries, Inc., 399 F.2d 396, 405 (2d Cir. 1968), cert. denied, 393 U.S. 1015 (1969). Furthermore, Congress acknowledged that the protective system established by the enactment of Section 57 is “similar to that applicable to registered investment companies under section 17 of the Act, and rules thereunder, but is modified to address concerns relating to unique characteristics presented by business development companies.” H.Rep. No. 96-1341, 96th Cong., 2d Sess. 45 (1980) reprinted in 1980 U.S.C.C.A.N. 4827.

Applicants believe that the terms and conditions of the application would ensure that the conflicts of interest that Section 17(d) and Section 54(a)(4) were designed to prevent would be addressed and the standards for an order under Rule 17d-1 are met.

C. Protection Provided by the Proposed Conditions

Applicants believe that the proposed conditions, and discussed more fully in Section III.D. of this Application (the “Conditions”), will ensure the protection of shareholders of the Investors and compliance with the purposes and policies of the 1940 Act with respect to the Co-Investment Transactions. In particular, the Conditions, as outlined below, would ensure that each Investor would only invest in investments that are appropriate to the interests of shareholders and the investment needs and abilities of that Investor. In addition, each Investor would be able to invest on equal footing with each other Investor and Partners, including identical terms, conditions, price, class of securities purchased, settlement date, and registration rights. Each Investor would have the ability to engage in Follow-On Investments in a fair manner consistent with the protections of the other conditions. Each Investor would have the ability to participate on a proportionate basis, at the same price and on the same terms and conditions in any sale of a security purchased in a Co-Investment Transaction. Fees and expenses of Co-Investment Transactions would be borne by GMC, or shared pro-rata among the Investors and Partners who participate in the Co-Investment Transactions. The conditions would also prevent an Investor from investing in any current investments of an affiliated person, which eliminates the possibility of an Investor from being forced to invest in a manner that would benefit an affiliated person’s existing investment. Also, sufficient records of the transactions would be maintained to permit the examination staff of the Commission to monitor compliance with the terms of the requested order.

The Conditions impose a variety of duties on GMC with respect to Co-Investment Transactions and Potential Co-Investment Transactions by the Investors. These duties include determinations regarding investment appropriateness, the appropriate level of investment, and the provision of information to the board of directors of any Investor. In addition, when considering Potential Co-Investment Transactions for any Investor, GMC

will consider only the Objectives and Strategies, investment policies, investment positions, capital available for investment, and other pertinent factors applicable to that Investor. GMC undertakes to perform these duties consistently for the Investors regardless of whether GMC serves as investment adviser or sub-adviser to these entities.

In sum, the Applicants believe that the proposed conditions would ensure that each Investor that participated in a Co-Investment Transaction does not participate on a basis different from, or less advantageous than, that of such other participants. As a result, Applicants believe that the participation of the Investors in Co-Investment Transactions done in accordance with the Conditions would be consistent with the provisions, policies, and purposes of the 1940 Act, and would be done in a manner that was not different from, or less advantageous than, the other participants.

D. Proposed Conditions

Applicants agree that any Order granting the requested relief shall be subject to the following Conditions:

1. Each time GMC considers a Potential Co-Investment Transaction for Partners or another Investor that falls within an Investor's then-current Objectives and Strategies, GMC will make an independent determination of the appropriateness of the investment for the Investor in light of the Investor's then-current circumstances.

2. (a) If GMC deems an Investor's participation in any Potential Co-Investment Transaction to be appropriate for the Investor, it will then determine an appropriate level of investment for the Investor.

(b) If the aggregate amount recommended by GMC to be invested in the Potential Co-investment Transaction by the Investors and Partners, collectively, in the same transaction, exceeds the amount of the investment opportunity, the amount proposed to be invested by each party will be allocated among them pro rata based on each party's total assets, up to the amount proposed to be invested by each. GMC will provide the directors who are eligible to vote under Section 57(o) of the Act (the "Eligible Directors") of each participating Investor with information concerning each participating party's total assets to assist the Eligible Directors with their review of the Investor's investments for compliance with these allocation procedures.

(c) After making the determinations required in conditions 1 and 2(a), GMC will distribute written information concerning the Potential Co-Investment Transaction (including the amount proposed to be invested by each Investor and Partners) to the Eligible Directors of each participating Investor for their consideration. An Investor will co-invest with another Investor or Partners only if, prior to participating in the Potential Co-Investment Transaction, a "required majority," as defined in Section 57(o) of the Act ("Required Majority") concludes that:

(i) the terms of the transaction, including the consideration to be paid, are reasonable and fair to the Investor and its shareholders and do not involve overreaching in respect of the Investor or its shareholders on the part of any person concerned;

(ii) the transaction is consistent with:

(A) the interests of the shareholders of the Investor; and

(B) the Investor's then-current Objectives and Strategies;

(iii) the investment by other Investors or Partners would not disadvantage the Investor, and participation by the Investor would not be on a basis different from or less advantageous than that of other Investors or Partners; provided that, if any other Investor or Partners, but not the Investor itself, gains the right to nominate a director for election to a portfolio company's board of directors or the right to have a board observer or any similar right to participate in the governance or management of the portfolio company, such event will not be interpreted to prohibit the Required Majority from reaching the conclusions required by this condition (2)(c)(iii), if:

(A) the Eligible Directors will have the right to ratify the selection of such director or board observer, if any;

(B) GMC agrees to, and does, provide, periodic reports to the Investor's board of directors with respect to the actions of the director or the information received by the board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and

(C) any fees or other compensation that Partners or any Investor or any affiliated person of Partners or any Investor receives in connection with the right of Partners or the Investor to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among Partners (who may, in turn, share its portion with its affiliated persons) and the participating Investors in accordance with the amount of each party's investment; and

(iv) the proposed investment by the Investor will not benefit GMC, Partners or the other Investors or any affiliated person of any of them (other than the parties to the Co-Investment Transaction), except (A) to the extent permitted by condition 13, (B) to the extent permitted by section 17(e) or 57(k) of the Act, as applicable, (C) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction, or (D) in the case of fees or other compensation described in condition 2(c)(iii)(C).

3. Each Investor has the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. GMC will present to the board of directors of each Investor, on a quarterly basis, a record of all investments in Potential Co-Investment Transactions made by any of the other Investors or Partners during the preceding quarter that fell within the Investor's then-current Objectives and Strategies that were not made available to the Investor, and an explanation of why the investment opportunities were not offered to the Investor. All information presented to the board of directors pursuant to this condition will be kept for the life of the Investor and at least two years thereafter, and will be subject to examination by the Commission and its staff.

5. Except for Follow-On Investments made in accordance with condition 8, an Investor will not invest in reliance on the Order in any issuer in which another Investor or Partners or any affiliated person of such Investor or Partners is an existing investor.

6. An Investor will not participate in any Potential Co-Investment Transaction unless the terms, conditions, price, class of securities to be purchased, settlement date, and registration rights will be the same for each participating Investor and Partners. The grant to Partners or another Investor, but not the Investor, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this condition 6, if conditions 2(c)(iii)(A), (B) and (C) are met.

7. (a) If Partners or any Investor elects to sell, exchange or otherwise dispose of an interest in a security that was acquired in a Co-Investment Transaction, GMC will:

(i) notify each Investor that participated in the Co-Investment Transaction of the proposed disposition at the earliest practical time; and

(ii) formulate a recommendation as to participation by each Investor in the disposition.

(b) Each Investor will have the right to participate in such disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to Partners and any other Investor.

(c) An Investor may participate in such disposition without obtaining prior approval of the Required Majority if: (i) the proposed participation of each Investor and Partners in such disposition is proportionate to its outstanding investments in the issuer immediately preceding the disposition; (ii) the board of directors of the Investor has approved as being in the best interests of the Investor the ability to participate in such dispositions on a pro rata basis (as described in greater detail in this application); and (iii) the board of directors of the Investor is provided on a quarterly basis with a list of all dispositions made in accordance with this condition. In all other cases, GMC will provide its written recommendation as to the Investor's participation to the Eligible Directors, and the Investor will participate in such disposition solely to the extent that a Required Majority determines that it is in the Investor's best interests.

(d) Partners and each Investor will bear their own expenses in connection with any such disposition.

8. (a) If Partners or any Investor desires to make a Follow-On Investment in a portfolio company whose securities were acquired in a Co-Investment Transaction, GMC will:

(i) notify each Investor that participated in the Co-Investment Transaction of the proposed transaction at the earliest practical time; and

(ii) formulate a recommendation as to the proposed participation, including the amount of the proposed Follow-On Investment, by each Investor.

(b) An Investor may participate in such Follow-On Investment without obtaining prior approval of the Required Majority if: (i) the proposed participation of each Investor and Partners in such investment is proportionate to its outstanding investments in the issuer immediately preceding the Follow-On Investment; and (ii) the board of directors of the Investor has approved as being in the best interests of the Investor the ability to participate in Follow-On Investments on a pro rata basis (as described in greater detail in this application). In all other cases, GMC will provide its written recommendation as to the Investor's participation to the Eligible Directors, and the Investor will participate in such Follow-On Investment solely to the extent that a Required Majority determines that it is in the Investor's best interests.

(c) If, with respect to any Follow-On Investment:

- (i) the amount of the opportunity is not based on the Investors' and Partners' outstanding investments immediately preceding the Follow-On Investment; and
 - (ii) the aggregate amount recommended by GMC to be invested by each Investor in the Follow-On Investment, together with the amount proposed to be invested by Partners in the same transaction, exceeds the amount of the opportunity; then the amount invested by each such party will be allocated among them pro rata based on each party's total assets, up to the amount proposed to be invested by each.
- (d) The acquisition of Follow-On Investments as permitted by this condition will be considered a Co-Investment Transaction for all purposes and subject to the other conditions set forth in this application.

9. The Non-Interested Directors of each Investor will be provided quarterly for review all information concerning Potential Co-Investment Transactions and Co-Investment Transactions, including investments made by other Investors or Partners that the Investor considered but declined to participate in, so that the Non-Interested Directors may determine whether all investments made during the preceding quarter, including those investments that the Investor considered but declined to participate in, comply with the conditions of the Order. In addition, the Non-Interested Directors will consider at least annually the continued appropriateness for the Investor of participating in new and existing Co-Investment Transactions.

10. Each Investor will maintain the records required by section 57(f)(3) of the Act as if each of the investments permitted under these conditions were approved by the Required Majority under section 57(f).

11. No Non-Interested Director of an Investor will also be a director, general partner, managing member or principal, or otherwise an "affiliated person" (as defined in the 1940 Act), of Partners.

12. The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including, without limitation, the expenses of the distribution of any such securities registered for sale under the 1933 Act) will, to the extent not payable by GMC under its investment advisory agreements with the Investors and Partners, be shared by the Investors and Partners in proportion to the relative amounts of the securities held or being acquired or disposed of, as the case may be.

13. Any transaction fee (including break-up or commitment fees but excluding broker's fees contemplated by Section 17(e) or 57(k) of the 1940 Act, as applicable) received in connection with a Co-Investment Transaction will be distributed to the participating Investors and Partners on a pro rata basis based on the

amounts they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by GMC pending consummation of the transaction, the fee will be deposited into an account maintained by GMC at a bank or banks having the qualifications prescribed in Section 26(a)(1) of the 1940 Act, and the account will earn a competitive rate of interest that will also be divided pro rata among the Investors and Partners based on the amounts they invest in such Co-Investment Transaction. None of Partners, GMC or any affiliated person of the Investors will receive additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction (other than (a) in the case of the Investors and Partners, the pro rata transaction fees described above and fees or other compensation described in condition 2(c)(iii)(C) and (b) in the case of GMC, investment advisory fees paid in accordance with the agreements between GMC and the Investors or Partners).

IV. Statement in Support of Relief Requested

Applicants submit that allowing the Co-investment Transactions described by this Application is justified on the basis of (i) the potential benefits to the Investors and the shareholders thereof and (ii) the protections found in the terms and conditions set forth in this Application.

A. Potential Benefits

In the absence of the relief sought hereby, in some circumstances the Investors would be limited in their ability to participate in attractive and appropriate investment opportunities. Section 17(d), Section 54(a)(4) and Rule 17d-1 of the 1940 Act should not prevent BDCs and registered closed-end investment companies from making investments that are in the best interests of their shareholders.

Each Investor and its shareholders will benefit from the ability to participate in Co-Investment Transactions. The Board of each Fund, including the Non-Interested Directors, has determined that it is in the best interests of the Fund to participate in Co-Investment Transactions because, among other matters, (i) the Fund will be able to participate in a larger number and greater variety of transactions; (ii) the Fund will be able to participate in larger transactions; (iii) the Fund will be able to participate in all opportunities approved by a Required Majority or otherwise permissible under the Order rather than risk underperformance through rotational allocation of opportunities among the Investors; (iv) the Fund and any other Investors participating in the proposed investment will have greater bargaining power, more control over the investment and less need to bring in other external investors or structure investments to satisfy the different needs of external investors; (v) the Fund will be able to obtain greater attention and better deal flow from investment bankers and others who act as sources of investments; and (vi) the general terms and conditions of the proposed Order are fair to the Investors and their shareholders.¹⁰ The Board of each Fund, including the Non-Interested Directors, also de-

¹⁰ It is anticipated that the Board of Directors of each Closed-End Fund will make similar findings before engaging in a Co-Investment Transaction in reliance on the requested order.

terminated that it is in the best interests of the Fund and its shareholders to obtain the Order at the earliest possible time and instructed the officers of the Fund, GMC and counsel to use all appropriate efforts to accomplish such goal. For these reasons, the Board of each Fund has determined that is proper and desirable for each Fund to participate in Co-Investment Transactions with other Investors and Partners.

B. Protective Representations and Conditions

The terms and conditions set forth in this application ensure that the proposed Co-Investment Transactions are consistent with the protection of each Investor's shareholders and with the purposes intended by the policies and provisions of the 1940 Act. Specifically, the Conditions incorporate the following critical protections: (i) in each Co-Investment Transaction, all Investors participating in the Co-Investment Transactions will invest at the same time for the same price and with the same terms, conditions, class, registration rights and any other rights, so that none of them receives terms more favorable than any other; (ii) a Required Majority of each Investor must approve various investment decisions with respect to such Investor in accordance with the Conditions; and (iii) the Investors are required to retain and maintain certain records.

Other than pro rata dispositions and Follow-On Investments as provided in conditions 7 and 8, and after making the determinations required in conditions 1 and 2(a), GMC will present each Potential Co-Investment Transaction and the proposed allocation to the Eligible Directors, and the Required Majority will approve each Co-Investment Transaction prior to any investment by the participating Investor. With respect to the pro rata dispositions and Follow-On Investments provided in conditions 7 and 8, an Investor may participate in a pro rata disposition or Follow-On Investment without obtaining prior approval of the Required Majority if, among other things: (i) the proposed participation of each Investor and Partners in such disposition is proportionate to its outstanding investments in the issuer immediately preceding the disposition or Follow-On Investment, as the case may be; and (ii) the board of directors of the Investor has approved that Investor's participation in pro rata dispositions and Follow-On Investments as being in the best interests of the Investor. If the board does not so approve, any such disposition or Follow-On Investment will be submitted to the Investor's Eligible Directors. The board of any Investor may at any time rescind, suspend or qualify its approval of pro rata dispositions and Follow-On Investments with the result that all dispositions and/or Follow-On Investments must be submitted to the Eligible Directors.

Applicants believe that participation by the Investors in pro rata dispositions and Follow-On Investments, as provided in conditions 7 and 8, is consistent with the provisions, policies and purposes of the 1940 Act and will not be made on a basis different from or less advantageous than that of other participants. A formulaic approach, such as pro rata dispositions and Follow-On Investments, eliminates the discretionary ability to make allocation determinations, and in turn eliminates the possibility for overreaching and promotes fairness. Applicants note that the Commission has adopted a similar pro rata approach in the context of Rule 23c-2, which relates to the redemption by a closed-end investment company of less than all of a class of its securities, indicating the general fairness and lack of overreaching that such approach provides.

V. Precedents

The Commission previously has issued orders permitting certain investment companies subject to regulation under the 1940 Act and their affiliated persons to co-invest in Private Placement Securities. See H&Q Health Care Investors Investment Company Act Rel. No. 28426 (notice) and 28472 (Oct. 28, 2008) (order); Ridgewood Capital Energy Growth Fund, LLC, et al. Investment Company Act Rel. No.28931 (Sep. 25, 2009) (notice) and (Oct. 21, 2009) (order); also recent co-investing orders Special Value Opportunities Fund, LLC, Investment Company Act Rel. No. 27287 (Apr. 11, 2006) (notice) and 27316 (May 9, 2006) (order); Gladstone Capital Corp., Investment Company Act Rel. Nos. 27120 (Oct. 25, 2005) (notice) and 27150 (Nov. 22, 2005) (order).

VI. Procedural Matters

Pursuant to Rule 0-2(f) under the 1940 Act, each Applicant states that its address is as indicated below:

c/o Gladstone Management Corporation
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McLean, VA 22102
Attention: David Gladstone
Michael LiCalsi

Applicants further state that all written or oral communications concerning this Application should be directed to:

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