

SECURITIES AND EXCHANGE COMMISSION**[Release No. IC-27120; 812-12934]****Gladstone Capital Corporation, et al.; Notice of Application**

October 25, 2005.

AGENCY: Securities and Exchange Commission ("Commission").**ACTION:** Notice of application for an order under section 57(i) of the Investment Company Act of 1940 (the "Act") and rule 17d-1 under the Act to permit certain joint transactions otherwise prohibited by section 57(a)(4) of the Act and under section 17(d) of the Act and rule 17d-1 under the Act authorizing certain joint transactions.

Summary of Application: Applicants requests an order to permit Gladstone Capital Corporation and Gladstone Investment Corporation, both business development companies ("BDCs"), and certain registered closed-end investment companies, to co-invest with an affiliate in portfolio companies.

Applicants: Gladstone Capital Corporation ("GCC"), Gladstone Investment Corporation ("GIC"), Gladstone Partners Fund LP ("Partners"), Gladstone Management Corporation ("GMC") and Gladstone General Partner, LLC.

Filing Dates: The application was filed on February 27, 2003 and amended on October 24, 2005.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on November 21, 2005, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F St., NE., Washington, DC 20549-9303. Applicants: c/o R. Charles Miller, Esq., Kirkpatrick & Lockhart Nicholson Graham LLP, 1800 Massachusetts Avenue, NW., Suite 200, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Marilyn Mann, Senior Counsel, at (202)

551-6813, or Mary Kay Frech, Branch Chief, at (202) 551-6821 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 100 F St., NE., Washington, DC 20549-0102 (tel. 202-551-5850).

Applicants' Representations

1. GCC is a closed-end management investment company that has elected to be regulated as a BDC under the Act. GCC's investment objective is to achieve a high level of current income by investing in debt securities, such as senior notes, senior subordinated notes and subordinated notes, with particular emphasis on senior subordinated notes, of established private businesses that are backed by leveraged buyout funds, venture capital funds or others. In connection with the transactions in which GCC would purchase debt securities, it would generally expect to receive interests, such as warrants or conversion privileges, in the issuers' common equity, which offer the potential of long-term appreciation. GCC has entered into a combined investment advisory and administration agreement with GMC.

2. Partners will be organized as a limited liability company, limited liability company interests of which will be placed privately with institutional investors, and will be excluded from the definition of investment company by section 3(c)(1) of the Act. Partners' investment objective will be similar to that of GCC. Gladstone General Partner, LLC, is the general partner of Partners. Upon completion of its private placement, Partners will enter into an advisory agreement with GMC and an administration agreement with Gladstone Administration, LLC ("Gladstone Administration"), which is a wholly owned subsidiary of GMC.

3. GIC is a recently organized closed-end management investment company that has elected to be regulated as a BDC. GIC's investment objective is to generate both current income and capital gains through debt and equity investments. GIC has entered into an investment advisory agreement with GMC and has entered into an administration agreement with Gladstone Administration.

4. GMC is an investment adviser registered under the Investment Advisers Act of 1940. The investment advisory agreements between GMC and GCC and between GMC and GIC, among

other things, require GMC to make available significant managerial assistance to the portfolio companies of GCC and GIC. GMC may in the future provide investment advisory services to other closed-end management investment companies that elect to be regulated as BDCs or other registered closed-end management investment companies (the "Future Co-Investors" and together with GIC and GCC, the "Investors"). The applicants request that the relief apply to the Future Co-Investors, which will comply with the terms and conditions of the application.

5. Applicants request relief permitting GCC, GIC and any Future Co-Investor to make co-investments with Partners ("Co-investment Transactions"). The requested order will not extend to any transaction in which more than one Investor is a participant.

Applicants' Legal Analysis

1. Section 57(a)(4) of the Act prohibits certain affiliated persons of a BDC from participating in a joint transaction with the BDC in contravention of rules as prescribed by the Commission. In addition, under section 57(b)(2) of the Act, any person who is directly or indirectly controlling, controlled by or under common control with a BDC is subject to section 57(a)(4). Applicants state that Partners is under common control with each of the Investors and therefore is subject to section 57(a)(4). Section 57(i) of the Act provides that, until the Commission prescribes rules under section 57(a)(4), the Commission's rules under section 17(d) of the 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.

2. Section 17(d) of the Act and rule 17d-1 under the Act prohibit affiliated persons of a registered investment company from participating in joint transactions with the company unless the Commission has granted an order permitting such transactions. Because certain of the Future Co-Investors may be registered closed-end investment companies, section 17(d) and rule 17d-1 apply. In passing upon applications under rule 17d-1, the Commission considers whether the company's participation in the joint transactions is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

3. Applicants state that allowing co-investment between GCC or GIC and Partners and the Future Co-Investors

and Partners will provide a substantial benefit to GCC's, GIC's and the Future Co-Investors' stockholders by making available greater resources that will allow applicants to obtain access to more attractive investment opportunities.

4. Applicants state that the terms and conditions set forth in the application ensure that the terms on which co-investments may be made will be identical, thus protecting the stockholders of any Investor from being disadvantaged. Applicants state that the proposed relief is consistent with rule 17d-1 in that the participation of the Investors will not be on a basis different from or less advantageous than that of Partners.

Applicants' Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. The requested order will not extend to any transaction in which more than one Investor is a participant.

2.(a) If considering an investment opportunity that may constitute a Co-investment Transaction, GMC will make an independent determination of the appropriateness of the Investor's participation in such transaction in light of the Investor's then-current circumstances.

(b) If GMC deems the Investor's participation in any such investment opportunity to be appropriate for the Investor, it will then determine an appropriate level of investment for the Investor. If the aggregate amount recommended by GMC to be invested by the Investor in such Co-investment Transaction, together with the amount proposed to be invested by Partners in the same transaction, exceeds the amount of the investment opportunity, the amount proposed to be invested by each such party will be allocated among them pro rata based on the ratio of each party's total assets to the aggregated total assets of both parties, up to the amount proposed to be invested by each. GMC will provide the required majority (as defined in section 57(o) of the Act) ("Required Majority") with information concerning Partners' total assets to assist the Required Majority with their review of the Investor's investments for compliance with these allocation procedures.

(c) After making the determinations required in (a) and (b) above, GMC will distribute written information concerning the Co-investment Transaction, including the amount proposed to be invested by Partners, to the non-interested directors for their consideration. The Investor will co-

invest with Partners only if, prior to the Investor's participation in the Co-investment Transaction, a Required Majority concludes that:

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

(ii) The transaction is consistent with (A) The interests of the stockholders of the Investor; and

(B) The Investor's investment objectives and strategies (as described in the Investor's registration statements on Form N-2 and other filings made with the Commission by the Investor under the Securities Act of 1933, as amended, any reports filed by the Investor with the Commission under the Securities Exchange Act of 1934, as amended, and the Investor's reports to stockholders);

(iii) The investment by Partners would not disadvantage the Investor, and participation by the Investor is not on a basis different from or less advantageous than that of Partners; *provided*, that if Partners, but not the Investor, 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 shall not be interpreted to prohibit the Required Majority from reaching the conclusions required by this condition (2)(c)(iii), if

(A) The Required Majority shall have the right to ratify the selection of such director or board observer, if any; and

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

(iv) The proposed investment by the Investor will not benefit GMC or Partners or any affiliated person of either of them (other than Partners), except to the extent permitted under sections 17(e) and 57(k) of the Act.

(d) The Investor has the right to decline to participate in any Co-investment Transaction or to invest less than the amount proposed to the Investor.

(e) GMC will present to the Board of Directors, on a quarterly basis, a record of all investments made by Partners during the preceding quarter that fell within the Investor's then current investment objectives 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.

3. Except for follow-on investments made pursuant to condition 6 below, the Investor will not invest in any portfolio company in which GMC or Partners or any affiliated person of either of them is an existing investor.

4. The Investor will not participate in any Co-investment Transaction unless the terms, conditions, price, class of securities to be purchased, settlement date, and registration rights will be the same for the Investor and Partners. The grant to Partners, 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 4, if conditions 2(c)(iii)(A) and (B) are met.

5. If Partners elects to sell, exchange or otherwise dispose of an interest in a security that was acquired by the Investor and Partners in a Co-investment Transaction, GMC will

(a) Notify the Investor of the proposed disposition at the earliest practical time; and

(b) Formulate a recommendation as to participation by the Investor in any such disposition and provide a written recommendation to the non-interested directors.

The 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. The Investor will participate in such disposition to the extent that a Required Majority determines that it is in the Investor's best interests to do so. The Investor and Partners will each bear its own expenses in connection with any such disposition.

6. If Partners desires to make a "follow-on investment" (*i.e.*, an additional investment in the same entity) in a portfolio company whose securities were acquired by the Investor and Partners in a Co-investment Transaction or to exercise warrants or other rights to purchase securities of the issuer, GMC will

(a) Notify the Investor of the proposed transaction at the earliest practical time; and

(b) Formulate a recommendation as to the proposed participation, including the amount of the proposed follow-on investment, by the Investor and provide the recommendation to the non-interested directors.

The non-interested directors will make their own determination with respect to follow-on investments. To the extent that

(i) The amount of a follow-on investment opportunity is not based on the Investor's and Partners' initial investments; and

(ii) The aggregate amount recommended by GMC to be invested by the Investor in such follow-on investment, together with the amount proposed to be invested by Partners in the same transaction, exceeds the amount of the follow-on investment opportunity, the amount invested by each such party will be allocated among them *pro rata* based on the ratio of each party's total assets to the aggregated total assets of both parties, up to the maximum amount to be invested by each. The Investor will participate in such investment to the extent that the Required Majority determines that it is in the Investor's best interest. The acquisition of follow-on investments as permitted by this condition will be subject to the other conditions set forth in the application.

7. The non-interested directors will be provided quarterly for review all information concerning Co-investment Transactions, including investments made by Partners which the Investor considered but declined to participate, so that the non-interested directors may determine whether all investments made during the preceding quarter, including those investments which the Investor considered but declined to participate, comply with the conditions of the order. In addition, the non-interested directors will consider at least annually the continued appropriateness of the standards established for co-investments by the Investor, including whether the use of the standards continues to be in the best interests of the Investor and its shareholders and does not involve overreaching on the part of any person concerned.

8. The 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 non-interested directors under section 57(f).

9. No non-interested director will also be a director, general partner or principal, or otherwise an "affiliated person" (as defined in the Act) of, Partners.

10. 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 Securities Act of 1933) shall, to the extent not payable solely by GMC under its investment advisory agreements with the Investor and Partners, be shared by the Investor and Partners in proportion to the relative amounts of their securities to be acquired or disposed of, as the case may be, by the Investor and Partners.

11. Any transaction fee (including break-up or commitment fees but excluding broker's fees contemplated by section 17(e)(2) of the Act) received in connection with a Co-investment Transaction will be distributed to the Investor and Partners on a *pro rata* basis based on the amount they invested or committed, as the case may be, in such Coinvestment 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 Act, and the account will earn a competitive rate of interest that will also be divided *pro rata* between the Investor and Partners based on the amount they invest in such Coinvestment Transaction. Partners, GMC or any affiliated person of the Investor will not receive additional compensation or remuneration of any kind (other than (i) the *pro rata* transaction fees described above and (ii) investment advisory fees paid in accordance with investment advisory agreements with the Investor and Partners) as a result of or in connection with a Co-investment Transaction.

12. The Board of Directors of each Investor will satisfy the fund governance standards as defined in rule 0-1(a)(7) under the Act by the compliance date for the rule.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52657; SR-Amex-2005-047; SR-BSE-2005-39; SR-CBOE-2005-68; SR-ISE-2005-42; SR-PCX-2005-104; SR-Phlx-2005-27]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change and Amendment No. 1 by the American Stock Exchange LLC; a Proposed Rule Change by the Boston Stock Exchange, Inc.; a Proposed Rule Change by the Chicago Board Options Exchange, Incorporated; a Proposed Rule Change and Amendment No. 1 by the International Securities Exchange, Inc.; a Proposed Rule Change by the Pacific Exchange, Inc.; and a Proposed Rule Change and Amendment No. 1 by the Philadelphia Stock Exchange, Inc. Relating to the Definition of Firm Customer Quote Size and Limitations on Sending Secondary P/A Orders

October 24, 2005.

I. Introduction

On April 26, 2005, April 28, 2005, August 29, 2005, August 31, 2005, September 7, 2005, and September 13, 2005, the Philadelphia Stock Exchange, Inc. ("Phlx"), the American Stock Exchange LLC ("Amex"), the Chicago Board Options Exchange, Incorporated ("CBOE"), the International Securities Exchange, Inc. ("ISE"), the Pacific Exchange, Inc. ("PCX"), and the Boston Stock Exchange, Inc. ("BSE") (collectively, the "Options Exchanges"), respectively, filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² proposed rule changes to amend each of their respective rules governing the operation of the intermarket option linkage ("Linkage") to conform with a proposed amendment³ to the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage ("Linkage Plan").⁴ Each of the Exchanges is

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 52401 (September 9, 2005), 70 FR 54781 (September 16, 2005) (File No. 4-429) ("Amendment No. 16").

⁴ On July 28, 2000, the Commission approved a national market system plan for the purpose of creating and operating an intermarket option market linkage proposed by the Amex, CBOE, and ISE. See Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000). Subsequently, upon separate requests by the Phlx, PCX, and BSE, the Commission issued orders to permit these exchanges to participate in the Linkage Plan. See Securities Exchange Act Release Nos. 43573 (November 16, 2000), 65 FR 70850 (November 28,

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