Dated: November 23, 1998.

**Karen A. Cook,**

*General Counsel.*

[FR Doc. 98–31909 Filed 12–1–98; 8:45 am]

**BILLING CODE 4310–4R–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 23572; 813–186]**

## KECALP Inc., et al.; Notice of Application

November 24, 1998.

**AGENCY:** Securities and Exchange Commission (''Commission'').

**ACTION:** Notice of application for an order under sections 6(b) and 17(b) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act to amend a prior order and under sections 6(b) and 17(b) to permit certain transaction otherwise prohibited by section 17(a) of the Act.

**SUMMARY OF THE APPLICATION:** Applicant request an order to exempt certain limited partnerships registered under the Act as closed-end management investment companies form certain provisions of the Act and permit the partnerships to engage in certain joint transactions. Each partnership is an ''employees' securities company'' as defined in section 2(a)(13) of the Act. The requested order amends several previous orders (collectively, the ''KECALP Order'').[1] In addition, applicant request relief to permit two partnerships to transfer interests in certain investments to an affiliated entity in exchange for limited partnership interests in that entity.

**APPLICANTS:** KECALP Inc. (''General Partner''); Merrill Lynch KECALP L.P. 1986 (''1986 Partnership''), Merrill Lynch KECALP L.P. 1987 (''1987 Partnership''), Merrill Lynch KECALP L.P. 1989 (''1989 Partnership''), Merrill Lynch KECALP L.P. 1991 (''1991 Partnership''), Merrill Lynch KECALP L.P. 1994 (''1994 Partnership''), Merrill Lynch KECALP L.P. 1997 (''1997 Partnership''), and Merrill Lynch KECALP L.P. 1999 (''1999 Partnership'') (collectively, together with other partnerships that may be organized by the General Partner in the future, the ''Partnerships''); and Merrill Lynch Global Emerging Markets Partners, L.P. (''Global Investment Fund'').

**FILING DATES:** The application was filed on April 14, 1998, and amended on September 15, 1998. Applicants have agreed to file and amendment during the notice period, the substance of which is reflected in this notice.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application 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 December 16, 1998, and should be accompanied by proof of service on applicants in the form of a affidavit or, for lawyers, a certificate of service. Hearing request 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 tot he Commission's Secretary.

**ADDRESSES:** Secretary, Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants, South Tower, World Financial Center, 225 Liberty Street, New York, NY 10080–6123.

**FOR FURTHER INFORMATION CONTACT:** Michael W. Mundt, Staff Attorney, at (202) 942–0578, or Edward P. Macdonald, Branch Chief, at (202) 942–0564 (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, 450 Fifth Street, N.W., Washington, D.C. 20549 (tel. (202) 942–8090).

### Applicants' Representations

1. Each Partnership is a Delaware limited partnership registered under the Act as a non-diversified, closed-end management investment company. Each Partnership is an ''employees' securities company'' with in the meaning of section 2(a)(13) of the Act and operates according to the terms of the KECALP Order. Limited partnership interests in the Partnerships were offered to certain employees of Merrill Lynch & Co., Inc. (''ML & Co.'') and its subsidiaries and to non-employee directors of ML & Co. The 1997 Partnership also offered limited partnership interests to ML & Co. in connection with certain deferred compensation arrangements. Applicants state that the Partnerships enable directors and certain officers and other employees to pool their investment resources and to receive the benefit of certain investment opportunities that come to the attention of ML & Co. or its subsidiaries. Applicants assert that the Partnerships are primarily for the benefit of the employee/director limited partners and are a significant way for ML & Co. and its subsidiaries to attract and retain qualified personnel.

2. Applicants expect that the General Partner will organize additional partnerships in the future (such partnerships, together with the 1999 Partnership, ''Future Partnerships'').[2] Interests in Future Partnerships will be offered to employees of ML& Co. and its subsidiaries who earn, or whose annualized salary is, at least $100,000 for the calendar year preceding the offering. No employee meting this requirement will be permitted to invest more than 15% of the employee's cash compensation form ML & Co. and its subsidiaries in any partnership unless such employee is an ''accredited investor,'' as defined in rule 501(a) of Regulation D under the Securities Act of 1933 (''1933 Act''). Future Partnerships also may offer limited partnership interests to persons on retainer with ML & Co. or its subsidiaries if the persons qualify as ''accredited investors'' Other than the requirement that they be ''accredited investors,'' persons on retainer will participate in Future Partnerships on the same terms as employees of ML & Co. In addition, ML & Co. and its affiliates may acquire limited partnership interests in Future Partnerships to mirror the election by select employees of ML & Co. and its subsidiaries to participate in compensation or investment programs where the return is linked to the performance of a Partnership. To make such an investment, ML & Co. or its affiliate must (i) determine that the eligibility requirements for employee participation in the compensation or investment program are at least equal to the standards for direct investment by employees of ML & Co. in the Partnership and (ii) agree to vote its interests in Partnership in identical proportions to other limited partners. Persons eligible to invest in the

[1] Merrill Lynch KECALP Ventures Limited Partnership 1982, et al., Investment Company Act Rel. Nos. 12290 (Mar. 11, 1982) (notice) and 12363 (Apr. 8, 1982) (order); Merrill Lynch KECALP Growth Investments Limited Partnership 1983, et al., Investment Company Act Rel. Nos. 18082 (Apr. 8, 1991) (notice) and 18137 (May 7, 1991) (order); Merrill Lynch KECALP Growth Investments L.P. 1983, et al., Investment Company Act Rel. Nos. 20280 (May 5, 1994) (notice) and 20328 (June 1, 1994) (order); Merrill Lynch KECALP L.P. 1994, et al., Investment Company Act Rel. Nos. 21124 (June 8, 1995) (notice) and 21187 (Jul. 5, 1995) (order); and Merrill Lynch KECALP L.P. 1997, et al., Investment Company Act Rel. Nos. 22647 (Apr. 30, 1997) (notice) and 22689 (May 28, 1997) (order).

[2] Any entity that currently intends to rely on the requested order is named as an applicant. Any other existing or future entity that relies on the requested order will comply with the terms and conditions of the application.

Partnerships are referred to as ''Limited Partners.'' Interests in the Partnerships are non-transferable except with the express consent of the General Partner and, in any event, are not transferable to persons who are not Limited Partners, except that interests may be transferred to members of a Limited Partner's immediate family or, by operation of law, to certain other parties under special circumstances.

3. The General Partner is an indirect, wholly-owned subsidiary of ML & Co. that is registered as an investment adviser under the Investment Advisers Act of 1940. The General Partner is responsible for the management of the Partnerships and has the authority to make all decisions regarding the acquisition, management, and disposition of the partnerships' investments. The board of directors of the General Partner (''Board'') will continue to have overall responsibility for a Partnerships' investments.

4. Under the partnership agreements of the Partnerships, the General Partner pays operating expenses in connection with the Partnerships and is entitled to receive annual reimbursements from the Partnerships of up to 1.5% of the Limited Partners' capital contributions. In addition, the General Partner is responsible for any commissions chargeable to the Partnerships with respect to portfolio transactions. Future partnership may pay operating expenses directly and reimburse the General partner for personnel, overhead and other administrative expenses. Amounts paid by the Future Partnership for operating expenses and reimbursements to the General Partner will be subject to an annual aggregate limit of 1.5% of Limited Partners' capital commitments. Appropriate disclosure regarding payments and reimbursements will be set forth in a Future Partnership's offering documents. To the extent provided in their organizational documents, Future Partnerships also may be responsible for payment of commissions and other fees and expenses relating to the acquisition, monitoring and disposition of portfolio investments.

5. The Global Investment Fund is a Delaware limited partnership formed to achieve capital appreciation principally through privately negotiated equity and equity-linked investments in companies operating primarily in emerging markets. ML Global Capital L.L.C., an affiliate of ML & Co., is the general partner of the Global Investment Fund, and ML Global Partners, Inc., a subsidiary of ML & Co., performs the management services. The Global Investment Fund is exempt from regulation under the Act in reliance on section 3(c)(7) of the Act. The Global Investment Fund seeks relief so that the 1994 Partnership and 1997 Partnership may transfer interests in certain investments to the Global Investment Fund in exchange for limited partnership interests in the Global Investment Fund.

6. Under the KECALP Order, ML & Co. or a subsidiary may acquire an investment approved by the General Partner for acquisition by the Partnership and hold the investment (''Warehoused Investment'') until the closing of the Partnership's offering to Limited Partners. Upon completion of its offering, the Partnership would purchase each Warehoused Investment from ML & Co. or the subsidiary at the lesser of each Warehoused Investment's (a) fair value on the date of purchase by the Partnership or (b) purchase cost paid by ML & Co. and its subsidiaries. Applicants assert that the Warehoused Investment procedure facilitates the Partnerships' investment process. The requested order would permit the Partnerships to acquire Warehoused Investments from ML & Co. and its subsidiaries subject to modified conditions that would afford the Partnerships greater flexibility.

7. Under the KECALP Order, the Partnerships also may engage in certain joint transactions and investments with affiliates of the Partnerships. Applicants seek relief to permit certain joint transactions, including transactions involving restructurings and recapitalizations, (collectively, ''Merrill Lynch Investments'') in which the Partnerships are participants with ML & Co. and other affiliated persons of the Partnerships (''Affiliated Co-Investors'') subject to the conditions detailed below.

**Applicants' Legal Analysis**

*A. Warehoused Investments*

1. Section 17(a) of the Act generally prohibits sales or purchases of securities between a registered investment company and any affiliated person of that company. ML & Co. and each of its direct and indirect wholly-owned subsidiaries, including the General Partner, are affiliated persons under section 2(a)(3)(C) of the Act. The General Partner is an affiliated person of the Partnerships under section 2(a)(3)(D) of the Act. As a result of these affiliations, sales of securities or other property on a principal basis by the General Partner or an affiliate to the Partnership may be prohibited under section 17(a).

2. Section 6(b) of the Act provides that the Commission shall exempt employees' securities companies from the provisions of the Act to the extent that such exemption is consistent with the protection of investors. Section 17(b) of the Act permits the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned, the proposed transaction is consistent with the policy of each investment company concerned, and the proposed transaction is consistent with the general purposes of the Act.

3. Applicants request relief from section 17(a) pursuant to sections 6(b) and 17(b) of the Act to permit the Partnerships to acquire Warehoused Investments from ML & Co. and direct and indirect wholly-owned subsidiaries of ML & Co. (including the General Partner) subject to conditions modified from the KECALP Order. Under the requested order, (i) the warehouse period during which ML & Co. or a subsidiary may hold a Warehoused Investment would be increased from 12 to 18 months; (ii) the purchase price paid by a Partnership for the Warehoused Investments would be calculated on an aggregate basis, rather than for each Warehoused Investment individually; and (iii) the approval of a Warehoused Investment by the Board for acquisition by a Partnership would be made either prior to or within 30 days of the acquisition of the Warehoused Investment by ML & Co. or its subsidiary.[3]

4. Applicants state that with the proposed changes, the transactions involving Warehoused Investments will continue to meet the standards of sections 6(b) and 17(b). Applicants assert that the revised conditions would allow for a valuation method for Warehoused Investments that is more fair to the public shareholders of ML & Co. and that will not cause a Partnership to pay more than the aggregate fair value of Warehoused Investments acquired on its behalf. In addition, applicants state that the change in the timing of the Board approval will provide the Partnerships with increased investment flexibility by allowing for circumstances where a Partnership has been presented with the opportunity to invest in a transaction, but the Board of Directors of the General Partner has not been able to make all of the required findings prior

[3] Under the KECALP Order, the Board approved the acquisition of a Warehoused Investment prior to its purchase by ML & Co. or a subsidiary and approved the acquisition a second time after the closing of the Partnership's offering to the Limited Partners.

to the purchase by ML & Co. or its subsidiaries.

*B. Transaction with the Global Investment Fund*

1. Applicants request relief pursuant to sections 6(b) and 17(b) of the Act from section 17(a) of the Act to permit the 1994 Partnership and 1997 Partnership to transfer their interests in certain investments to the Global Investment Fund in exchange for limited partnership interests in the Global Investment Fund. The 1994 Partnership and the 1997 Partnership are invested in certain portfolio companies in which the Global Investment Fund also is invested. Applicants state that the exchange will have no economic effect on the Partnerships because it would be structured so that each Partnership would only change the vehicle through which the Partnerships hold these investments, and the Partnerships' interests in the Global Investment Fund would correspond only to the transferred investments. The transfer of the Partnerships' investments to the Global Investment Fund would not be deemed by the Partnerships to be an event requiring any change in the valuation of the Partnerships' interests in the investments. The Partnerships will not pay any fees to ML & Co. or its affiliates in connection with the transfer. Upon disposition of an investment by the Global Investment Fund, each Partnership would receive the portion of any net proceeds corresponding to its indirect interest in the investments.

*C. Joint Investments by the Partnerships and their Affiliates*

1. Section 17(d) of the Act and rule 17d–1 under the Act prohibit affiliated persons from participating in joint arrangements with a registered investment company unless authorized by the Commission. Rule 17d–1 provides that in passing on applications for such orders, the Commission will consider whether the participation by the investment company is consistent with the provisions, policies, and purpose of the Act, and the extent to which the participation is on a basis different from or less advantageous than that of the other participants.

2. Applicants seek relief pursuant to section 6(b) and rule 17d–1 to permit Merrill Lynch Investments in which the Partnerships are participants with Affiliated Co-Investors. Applicants assert that the proposed conditions that would govern these transactions would assure that the Partnerships participate on a basis no less advantageous than that of Affiliated Co-Investors. Applicants also assert that the community of interest between the Partnerships and ML & Co. would further assure that the transactions would be in the best interests of the Partnerships.

*D. Certain Compensation to ML & Co. or Affiliates*

1. Section 17(e) of the Act and rule 17e–1 under the Act limit the compensation an affiliated person may receive when acting as agent or broker for a registered investment company. Applicants request an exemption from section 17(e) pursuant to section 6(b) to permit ML & Co. or an affiliated person, acting as an agent or broker, to receive placement fees, financial advisory fees or other compensation in connection with the purchase and sale of securities by a Partnership, provided that the fees or other compensation can be deemed ''usual and customary.'' Applicants state that fees or other compensation will be deemed ''usual and customary'' only if: (i) the Partnership is purchasing or selling securities alongside other unaffiliated third parties who are also similarly purchasing or selling securities; (ii) the fees or other compensation that are being charged to the Partnership are also being charged to the unaffiliated third parties; and (iii) the amount of securities being purchased or sold by a Partnership does not exceed 50% of the total amount of securities being purchased or sold by the Partnership and the unaffiliated third parties. Applicants assert that compliance with section 17(e) could prevent a Partnership from participating in a transaction in which ML & Co. or an affiliate does not, for other business reasons, wish a Partnership to be treated in a more favorable manner than unaffiliated parties also participating in the transaction.

2. Applicants also request an exemption from rule 17e–1 to the extent necessary to permit each Partnership to comply with rule 17e–1 without the necessity of having a majority of the directors of the General Partner who are not ''interested persons'' take the actions and make the approvals specified in the rule. Because all the directors of the General Partner will be affiliated persons, a Partnership could not comply with rule 17e–1 without the requested relief. Applicants state that each Partnership will have a majority of the directors of the General Partner take the actions and make the approvals required in the rule. Each Partnership will otherwise comply with the requirements of rule 17e–1.

*F. Custody of Partnership's Assets*

1. Section 17(f) of the Act prescribes certain requirements as to the custody of assets of registered investment companies. The KECALP Order permits certain subsidiaries of ML & Co. to act as custodians of the Partnerships' assets without a written contract required by section 17(f). Rule 17f–1(b)(4) under the Act requires that securities held by a custodian that is a member of a national securities exchange be verified periodically by independent public accountants. Applicants request relief from this requirement pursuant to section 6(b) with respect to the Partnerships' assets held by an ML & Co. subsidiary pursuant to the rule. Applicants state that the Partnerships' assets so held are subject to an annual independent audit and that in light of the community of interest between ML & Co. and the Partnerships, compliance with this requirement in the rule would be unduly burdensome.

*F. Periodic Reporting*

1. Section 30(h) of the Act requires that every officer, director, and member of an advisory board of a closed-end investment company be subject to the same duties and liabilities as those imposed upon similar classes of persons under section 16 of the Securities Exchange Act of 1934. As a result, the General Partner of each Partnership and certain other persons are required to file Forms 3, 4, and 5 with respect to their ownership of interests in a Partnership. Applicants request an exemption pursuant to section 6(b) from the requirements of section 30(h) to the extent necessary to exempt the General Partner, directors and officers of the General Partner, and any other persons who may be deemed members of an advisory board of a Partnership from filing these forms. Applicants assert that the requirement is not necessary for the protection of investors because there is no trading market for the Partnerships' interests and transfers of these interests are severely restricted.

**Applicants' Conditions**

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

*Condition Relating to Warehoused Investments*

1. (a) In order for an investment to quality as a Warehoused Investment to be purchased pursuant to the requested relief, (i)(A) the Board must approve such investment for the subsequent Partnership in the manner described in sub-paragraph (b) of condition 1 prior to the time the investment is acquired by

the General Partner or an affiliate thereof and (B) such investment must be acquired by ML & Co. (which term, in these conditions, includes its subsidiaries) with the intention of acquiring the Warehoused Investment for the subsequent Partnership and selling it to such Partnership after the completion of its initial offering or (ii)(A) the Board must approve such investment in the manner described in sub-paragraph (b) of condition 1 within 30 days after the date of the acquisition by ML & Co. and (B) ML & Co. must thereafter hold such investment with the intention of selling it to a Partnership after the completion of the initial offering of the Partnership. The General Partner will maintain at the Partnerships' office written records stating ML & Co.'s intention in acquiring such security, and stating the factors considered by the Board in approving the investment.

(b) Prior to the acquisition of a Warehoused Investment by a Partnership, (i) the Board must make the following fundings: (A) The terms of the Warehoused Investment, including the consideration to be paid, are reasonable and fair and do not involve overreaching of the Partnership or its Limited Partners on the part of any person concerned; (B) the proposed transaction is consistent with the policy of the Partnership as indicated in its filings under the 1933 Act and its reports to Limited Partners; and (C) participation by the Partnership in the proposed transaction is in the best interest of the Limited Partners of the Partnership; and (ii) with respect to any Warehoused Investment that is part of a co-investment with an affiliate, the Board must approve the investment in accordance with the terms of any orders issued by the Commission that are applicable to such co-investment, including the required findings by the Board. The General Partner will maintain at the Partnerships' office written records of the factors considered in any decision regarding a Warehoused Investment.

(c) The purchase price to be paid by a Partnership for Warehoused Investments acquired for the Partnership prior to the closing of its initial offering shall be the lower of (i) the aggregate cost to ML & Co. of purchasing the Warehoused Investments, plus carrying costs as described below in sub-paragraph (d) or (ii) the aggregate fair value of the Warehoused Investments at the time of purchase by the Partnership (as determined by the Board). The General Partner will maintain at the Partnerships' office written records of the factors considered in any determination regarding the value of a Warehoused Investment.

(d) Carrying costs shall be calculated from the date ML & Co. acquired the Warehoused Investment to the date of the acquisition of the proposed investment by the Partnership from ML & Co. and shall consist of interest charges computed at the lower of (i) the prime commercial lending rate charged by Citibank, N.A. (or any successor), during the period for which carrying costs are permitted to be paid until the Partnership acquires the securities or (ii) the effective cost of borrowings by ML & Co. during such period. The effective cost of borrowings by ML & Co. is its actual ''Average Cost of Funds,'' which it calculates on a daily basis by dividing its consolidated financing expenses by the total amount of borrowings during this period.

(e) A Partnership may only acquire a Warehoused Investment from ML & Co. during the lesser of (i) 18 months from the time ML & Co. purchases the Warehoused Investment or (ii) 30 days from the date of closing of the Partnership's initial offering.

*Conditions Relating to Joint Transactions*

2. (a) To the extent that a Partnership has funds available for investment, the Board will review, among other investments, co-investments with Affiliated Co-investors that may be brought to the attention of the General Partner. The Board will make a determination as to whether each particular investment meets applicable investment criteria and is consistent with the existing composition of the Partnership's portfolio in terms of diversification of investments.

(b) The General Partner will commit to a co-investment with an Affiliated Co-investor only if the Board, by a majority vote at a properly called and held meeting prior to making the investment, concludes, after consideration of all information deemed relevant, that:

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

(ii) The transaction is consistent with the interests of the Limited Partners of the Partnership and is consistent with the Partnership's investment objectives and policies as recited in filings made by the Partnership under the 1933 Act, its registration statement, and reports to its Limited Partners; and

(iii) The investment by an Affiliated Co-investor in such transaction would not disadvantage the Partnership in the making of its investment, maintaining its investment position, or disposing of the investment.

3. The General Partner will not invest the funds of any Partnership in any investments in which ML & Co. or an affiliate has or proposes to acquire the same class of securities of the same issuer, when the investment involves a joint enterprise or other joint arrangement within the meaning of rule 17d–1 in which the Partnership and ML & Co. or an affiliate are participants, unless ML & Co. or any such affiliate agrees that, prior to disposing of all or part of its investment, it will (i) give the General Partner sufficient, but not less than one day, notice of its intention to dispose of such investment and (ii) refrain from disposing of its investment unless the Partnership has the opportunity to dispose of the Partnership's investment prior to or concurrently with, on the same terms as, and pro rata with ML & Co. or such affiliate; provided, however, that the requirements specified in clauses (i) and (ii) will not be deemed to limit or prevent the disposition of an investment by an affiliate to its direct or indirect subsidiary, to any company (a ''Parent'') of which the affiliate is a direct or indirect wholly-owned subsidiary or to a direct or indirect wholly-owned subsidiary of its Parent. For purposes of this condition 3, the term ''affiliate'' of ML & Co. refers to direct and indirect wholly-owned subsidiaries of ML & Co. and to other entities with respect to which ML & Co. or any such subsidiary is authorized to cause such entity to provide the opportunity for a Partnership to participate in the sale of an investment as contemplated by this condition 3.

4. The Board will review quarterly all information concerning co-investment transactions by the Partnerships with Affiliated Co-investors to determine whether all such investments made during the preceding quarter complied with conditions 2 and 3.

5. At least annually, the General Partner will provide to the Partnerships' Limited Partners a written list of co-investment transactions by the Partnerships with Affiliated Co-investors.

6. In any case where co-investments are made with an Affiliated Co-investor, any individual involved in the management of both the Partnerships and the Affiliated Co-investor will not participate in the Partnerships' determination of whether to effect any co-investment transaction.

7. In connection with proposed transactions otherwise prohibited by section 17(d) of the Act and rule 17d–1 under the Act, the General Partner will adopt, and periodically review and update, procedures designed to ensure that reasonable inquiry is made, prior to the consummation of any such transaction, with respect to the possible involvement in the transaction of any affiliated person or promoter of or principal underwriter for the Partnership, or any affiliated person of such person, promoter, or principal underwriter.

8. Each Partnership and the General Partner will maintain and preserve, for the life of each such Partnership and at least two years thereafter, such accounts, books, and other documents as constitute the record forming the basis for the audited financial statements that are to be provided to the Limited Partners, and each annual report of such Partnership required by the terms of the applicable partnership agreement, to be sent to the Limited Partners, and agree that all such records will be subject to examination by the Commission and its staff. Each Partnership will preserve the accounts, books and other documents required to be maintained in an easily accessible place for the first two years.

9. The General Partner will send Partnership financial statements to each Limited Partner who had an interest in a Partnership at any time during the fiscal year then ended. The statements will be audited by the Partnership's independent accountants. At the end of each fiscal year, the General Partner will make a valuation or have a valuation made of all of the assets of the Partnership as of such fiscal year end. In addition, within 90 days after the end of each fiscal year of each of the Partnerships or as soon as practicable thereafter, the General Partner shall send a report to each person who was a Limited Partner at any time during the fiscal year then ended setting forth such tax information as shall be necessary for the preparation by the Limited Partner of his or her federal and state income tax returns, and a report of the investment activities of the Partnership during such year.

*Conditions Relating to Certain Other Affiliated Transactions*

10. If a Partnership is presented with the opportunity to invest in a transaction where the General Partner has not been able to consider the determinations set forth in sub-paragraph (b) of condition 2, the Partnership may subsequently acquire the investment from ML & Co. or an affiliate to the extent the investment determination of the Board takes place as soon as practicable but no more than 30 days after the date of the acquisition by ML & Co. or its affiliate and payment by the Partnership is made within five business days after approval by the Board. The purchase price paid by a Partnership for any such investment shall be the lower of (i) the fair value of the investment on the date it is acquired by the Partnership (as determined in good faith by the Board) or (ii) the cost of ML & Co. or its affiliate of purchasing the investment.

11. (a) Sales or tenders by the Partnership to an issuer that is an affiliated person of the Partnership may be made only (i) pursuant to a uniform offer by the issuer to purchase its securities on a pro rata basis made to all holders of the class of securities held by the Partnership (provided that the offer need not be made to employees of the issuer) or (ii) pursuant to an offer made to fewer than all holders of the class of securities held by the Partnership, provided that the Partnership will not participate in such transaction unless a securityholder that is an institutional investor with total assets of at least $100 million and is not an affiliated person of the Partnership or ML & Co. participates in such sale or tender on the same terms as the Partnership.

(b) Prior to entering into any transaction specified in paragraph (a) above, the Board must determine, that such action is in the best interests of the particular Partnership and does not involve overreaching of the Partnership on the part of any person. The General Partner shall record in each Partnership's records the basis for such decision. Transactions entered into pursuant to this paragraph must be effected on the same terms applicable to any affiliate participating in the transaction.

12. The Board will adopt procedures pursuant to which it will monitor potential conflicts of interest between the Partnerships and ML & Co. and its affiliates, including other partnerships that may invest in leveraged buyout investments for which Merrill Lynch MBP Inc. (''MBP''), an indirect wholly-owned subsidiary of ML & Co., acts as general partner, in connection with the Partnerships' investments. Such procedures will provide that the officers of the General Partner will annually prepare and present to the Board written information regarding all potential investments made available to the Partnership during the prior year, including Merrill Lynch Investments. The Board's findings regarding potential conflicts of interest, the specific factors considered, and any further actions to be taken based on or in order to implement the directors' findings will be recorded in each Partnership's records.

13. No person will serve as a member of the Board if such person also is a member of the board of directors of MBP.

14. Each of the 1994 Partnership and the 1997 Partnership may transfer its interests in investments it has acquired to the Global Investment Fund in exchange for interests in such fund, provided that prior to such a transfer the General Partner determines that (i) such transfer has no economic effect on the Partnership and (ii) such transfer is consistent with the best interests of such Partnership.

*Other Conditions*

15. In order for ML & Co. or an affiliate to acquire limited partnership interests in a Partnership in connection with a compensation or investment program offered to select employees of ML & Co. or its subsidiaries, ML & Co. or such affiliate must (i) determine that the eligibility requirements for participation in such compensation program or investment program are at least equal to the standards for direct investment by employees of ML & Co. in the Partnership and (ii) agree to vote its interests in a Partnership in identical proportions as other Limited Partners in respect of any matter submitted for a vote of Limited Partners.

16. Any Partnership created in the future will not be offered to employees of ML & Co. and its subsidiaries who earned, or whose annualized salary was, less than $100,000 with respect to the calendar year preceding the offering of such Partnership. No employee meeting the requirement in the preceding sentence will be permitted to invest more than 15% of his cash compensation from ML & Co. and its subsidiaries in any Partnership unless such employee is an ''accredited investor,'' as defined in rule 501(a) under the 1933 Act.

17. The General Partner will maintain the records required by section 57(f)(3) of the Act and will comply with the provisions of section 57(h) of the Act as if each Partnership were a business development company. All records referred to or required under this order will be available for inspection by the Limited Partners of each Partnership and the Commission.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 98–32043 Filed 12–1–98; 8:45 am]

BILLING CODE 8010–01–M

## SECURITIES AND EXCHANGE COMMISSION

**[Rel. No. IC–23573; 812–11006]**

## Technology Funding Venture Capital Fund VI, LLC, et al.; Notice of Application

November 25, 1998.

**AGENCY:** Securities and Exchange Commission (''SEC'').

**ACTION:** Notice of application for an order under section 57(i) of the Investment Company Act of 1940 (the ''Act''), and under rule 17d–1 under the Act permitting certain joint transactions otherwise prohibited by section 57(a)(4) of the Act.

**SUMMARY OF APPLICATION:** Applicants request an order to permit a business development company (''BDC'') to co-invest with certain affiliates in portfolio companies. The order would supersede several prior orders.[1]

**APPLICANTS:** Technology Funding Venture Capital Fund VI, LLC (the ''Company''), Technology Funding Medical Partners I, L.P. (''TFMP I''), Technology Funding Venture Partners V, An Aggressive Growth Fund, L.P. (''TFP V''), Technology Funding Venture Partners IV, An Aggressive Growth Fund, L.P. (''TFP IV''), Technology Funding Partners III, L.P. (''TFP III''); Technology Funding Inc. (''TFI'') and Technology Funding Ltd. (''TFL'') (TFI and TFL together are the ''Investment Managers''). Applicants also request that the relief apply to any BDCs currently or in the future advised by the Investment Managers or by entities controlling, controlled by, or under common control with the Investment Managers (''Future Funds'').[2]

**FILING DATES:** The application was filed on February 13, 1998, and amended on October 13, 1998 and on November 23, 1998.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the requested relief will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 17, 1998 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 SEC's Secretary.

**ADDRESSES:** Secretary, SEC, 450 Fifth Street, N.W., Washington, DC 20549. Applicants, 2000 Alameda de las Pulgas, San Mateo, CA 94403.

**FOR FURTHER INFORMATION CONTACT:** Lisa McCrea, Attorney Adviser, at (202) 942–0562, or Mary Kay Frech, Branch Chief, at (202) 942–0564 (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 SEC's Public Reference Branch, 450 5th Street N.W., Washington, DC 20549 (tel. 202–942–8090).

### Applicants' Representations

1. Each of the Company, TFMP I, TFP V, TFP IV, and TFP III (collectively, the ''Funds'') is organized as either a limited liability company or a limited partnership and has elected to be regulated as a BDC under the Act. TFI and TFL are both registered as investment advisers under the Investment Advisers Act of 1940, and serve as investment advisers to the Funds. TFI and TFL also serve as managing general partners (''Managing General Partners'') of the Funds. TFI is a wholly-owned subsidiary of TFL. Each Fund's investment objectives are long-term capital appreciation from venture capital investment in emerging growth companies, and preservation of investor capital through risk management and active involvement with such companies.

2. Each Fund is governed by a board of directors or general partners (''Directors'' or ''General Partners''). At least a majority of the Directors or General Partners of each Fund are natural persons who are not interested persons of the Fund within the meaning of section 2(a)(19) of the Act (''Independent Directors'' and ''Independent General Partners''). No Independent Director or Independent General Partner of a Fund will serve as an Independent Director or Independent General Partner of any other Fund at the same time.

3. Applicants request relief to permit the Funds and any Future Funds (collectively, the ''Co-Investing Funds'') to co-invest in portfolio companies. Applicants state that the Co-Investing Funds will have substantially similar investment objectives.

### 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 such rules as the SEC may prescribe. Section 57(i) of the act provides, in part, that, until the SEC prescribes rules under section 57(a)(4), the SEC's rules under section 17(d) of the Act applicable to closed-end investment companies shall be deemed to apply to transactions subject to section 57(d). Because the SEC has not adopted any rules under section 57(a)(4), rule 17d–1 applies.

2. Rule 17d–1 under the Act generally prohibits affiliated persons of a registered investment company from entering into a joint transaction with the company unless the SEC has issued an order permitting the transaction. In passing upon applications under rule 17d–1, the SEC will consider whether the participation by the BDC in such joint transaction 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, because the Co-Investing Funds may be deemed to be under the common control of the Investment Managers, the Co-Investing Funds may be prohibited by section 57(a)(4) of the Act and rule 17d–1 from participating in the proposed co-investments without exemptive relief.

4. Applicants state that each Co-Investing Fund will participate in the proposed transactions on the same terms as any other Co-Investing Fund. Applicants further state that the proposed conditions would assure, among other things, oversight of the proposed transactions by each Co-Investing Fund's Independent General Partners of Independent Directors.

[1] *Technology Funding Partners III, L.P., et al.,* Investment Company Act Release Nos. 17523 (June 6, 1990) (notice) and 17571 (July 5, 1990) (order); *Technology Funding Partners III, L.P., et al.,* Investment Company Act Release Nos. 17581 (July 11, 1990) (notice) and 17654 (Aug. 7, 1990) (order); *Technology Funding Partners III, L.P., et al.,* Investment Company Act Release Nos. 17600 (July 18, 1990) (notice) and 17685 (Aug. 17, 1990) (order); and *Technology Funding Medical Partners I, L.P., et al.,* Investment Company Act Release Nos. 19615 (Aug. 6, 1993) (notice) and 19672 (Sept. 1, 1993).

[2] All existing BDCs that currently intend to rely on the order have been named as applicants, and any other existing or future entities that subsequently rely on the order will comply with the terms and conditions in the application.