Golub Capital BDC, Inc.
Form 40-APP
May 19, 2011

No. 812-_____

U.S. SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

APPLICATION FOR AN ORDER PURSUANT TO SECTION 6(c)

OF THE INVESTMENT COMPANY ACT OF 1940 GRANTING AN EXEMPTION

FROM SECTION 12(d)(3) OF THE INVESTMENT COMPANY ACT OF 1940

GOLUB CAPITAL BDC, INC.

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UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

In the Matter of:

GOLUB CAPITAL BDC, INC.

150 South Wacker Drive, Suite 800
Chicago, Illinois 60606
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File No. 812-_____

Investment Company Act of 1940

APPLICATION FOR AN ORDER PURSUANT TO SECTION 6(c) OF THE INVESTMENT COMPANY ACT OF 1940 GRANTING AN EXEMPTION FROM THE PROVISIONS OF SECTION 12(d)(3) OF THE INVESTMENT COMPANY ACT OF 1940

I. INTRODUCTION

Golub Capital BDC, Inc. (the "Company"), a Delaware corporation operating as an externally managed, non-diversified, closed-end management investment company that has elected to be regulated as a business development company ("BDC")1 under Section 54(a) of the Investment Company Act of 1940, as amended (the "1940 Act"), hereby applies for an order (the "Order") of the U.S. Securities and Exchange Commission (the "Commission") pursuant to Section 6(c) of the 1940 Act2 granting an exemption from the provisions of Section 12(d)(3), to the extent necessary, to permit the Company to continue to hold up to 100% of the outstanding voting interests of a portfolio company ("Asset Manager")3 at such time as Asset Manager is formed and required to register as an investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act").

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1 Section 2(a)(48) of the 1940 Act defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in Sections 55(a)(1) through 55(a)(3) of the 1940 Act, makes available significant managerial assistance with respect to the issuers of such securities and has elected to be subject to the provisions of Sections 55 through 65 of the 1940 Act.

2 Unless otherwise indicated, all section and rule references herein are to the 1940 Act or the rules adopted thereunder.

3 Asset Manager will be formed prior to any grant of relief sought in this application. We note at the outset that Section 12(d)(3) prevents the Company from "purchas[ing] or otherwise acquir[ing]" any interest in a registered investment adviser without obtaining exemptive relief. However, from a practical perspective, in order to increase the value of any investment in Asset Manager, the Company will need to make additional investments in Asset Manager over the time it is invested in Asset Manager. Thus, the Company is seeking the relief requested in order for it to make initial and subsequent investments in Asset Manager.

As more fully described herein, Asset Manager will be required to register as an investment adviser with the Commission as a result of the Asset Manager's management of assets. The Company intends to form Asset Manager and will indirectly own 100% of Asset Manager's equity and voting interests. Asset Manager intends to rely on the exemption set forth in Section 203(b)(3) of the Investment Advisers Act of 1940, as amended (the "Advisers Act"), which provides generally that an investment adviser with fewer than 15 clients is not required to register with the Commission. After the effective date4 of the Private Fund Investment Advisers Registration Act of 2010 (the "2010 Act"), it is anticipated that Asset Manager will no longer be exempt from registration and, based on its assets under management, will be required to register with the Commission.

Asset Manager, or its subsidiary, will, from time to time, establish majority-owned subsidiaries through which it will manage one or more additional funds (the "Funds"). One or more of such future majority-owned subsidiaries may register with the Commission as investment advisers.5

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4 The 2010 Act becomes effective on July 21, 2011.

5 To the extent it is determined that a wholly owned subsidiary of Asset Manager is required to register with the Commission as an investment adviser, this request for relief is intended to cover the continued ownership by Asset Manager of the subsidiaries.

The Company believes that the requested relief is in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act. As discussed in greater detail below, the Commission has granted relief similar to that being requested herein to Baker, Fentress & Company, PMC Capital Inc., Broad Street Investing Corporation, and General American Investors Company, Inc. The Company and any other majority-owned subsidiaries that rely on the relief will comply with the terms and conditions in this Application, including that the Company will continue to hold, directly or indirectly, 50% or more of any majority-owned subsidiary of Asset Manager.

II. THE COMPANY

A. Organization and Business

The Company was organized as a limited liability company in 2007 and converted by operation of law into a stock corporation under the General Corporation Law of the State of Delaware on April 13, 2010 for the purpose of operating as an externally managed, non-diversified, closed-end management investment company that has elected to be regulated as a BDC under the 1940 Act. In addition, the Company has made an election to be treated for tax purposes as a regulated investment company ("RIC") under the Internal Revenue Code of 1986, as amended (the "Code"), and intends to continue to make such election in the future. The Company's principal place of business is 150 South Wacker Drive, Suite 800, Chicago, Illinois 60606.

In connection with its initial public offering of common stock (the "IPO"), effective April 14, 2010 the Company filed a registration statement on Form N-2 (File No. 333-163279) (the "N-2") under the Securities Act of 1933 and a notice under Form N-6F to be subject to Sections 55 through 65 of the 1940 Act. Effective April 13, 2010, the Company filed a registration statement on Form 8-A to register its common stock under Section 12 of the Securities Exchange Act of 1934, as amended (the "1934 Act"). The registration statement was declared effective on April 14, 2010 and the Company completed its initial public offering of its common stock, par value $0.001, on April 14, 2010. Accordingly, the Company is subject to the periodic reporting requirements under Section 13(a) of the 1934 Act. The Company's common stock is listed on the NASDAQ Global Select Market and trades under the ticker symbol "GBDC".

The Company operates as a BDC under the 1940 Act. The Company seeks to maximize the total return to its stockholders through both current income and capital appreciation through debt and minority equity investments. The Company intends to achieve its investment objective by (1) accessing the established loan origination channels developed by Golub Capital Incorporated and Golub Capital Management LLC (collectively "Golub Capital"), (2) selecting investments within its core middle-market company focus, (3) partnering with experienced private equity firms, or sponsors, (4) implementing the disciplined underwriting standards of Golub Capital and (5) drawing upon the aggregate experience and resources of Golub Capital, a leading lender to middle-market companies with more than $4.5 billion of capital as of March 31, 2011.

The board of directors of the Company (the "Board") has five members, of which three members are not considered "interested persons" of the Company within the meaning of Section 2(a)(19). As of March 31, 2011, the Company had no employees and three officers. Subject to the overall supervision of the Board, GC Advisors LLC (the "Investment Adviser"), a Delaware limited liability company that is registered as an investment adviser under the Investment Advisers Act of 1940, as amended, serves as the investment adviser to the Company pursuant to an investment advisory agreement dated March 5, 2010 (as amended and re-approved from time to time by the Board, the "Investment Advisory Agreement"). The Investment Adviser is registered under the Investment Advisers Act of 1940, as amended. The Investment Adviser is a member of the Golub Capital group of companies.

III. ASSET MANAGER

Asset Manager, a to-be-formed Delaware limited liability company, will act as the manager and investment adviser to certain funds which may or may not be portfolio companies of the Company. The Asset Manager will sponsor securitization vehicles and may also, from time to time, hold asset-backed securities, or the economic equivalent thereof, issued by another Asset Manager to the extent permitted under the 1940 Act. Asset Manager will have full time employees on its broadly syndicated loan team, which will make investment decisions on behalf of Asset Manager.

Asset Manager intends to rely on the exemption from registration set forth in Section 203(b)(3) of the Advisers Act, which provides generally that an investment adviser with fewer than 15 clients is not required to register with the Commission (i.e., the "private adviser" exemption). However, as a result of the elimination of the "private adviser" exemption by the 2010 Act, Asset Manager may be required to register as an investment adviser under the Advisers Act depending on the facts and circumstances at or around the time of the effective date of the 2010 Act, including, among other things, the dollar amount of its third-party assets under management.

IV. REASONS FOR REQUEST

A.The Growth and Increased Profitability of the Company

The Company believes that Asset Manager's business will grow, whether through organic growth or through acquisitions, which, in turn, will increase its assets under management. The Company believes that an increase in Asset Manager's assets under management is in the best interests of the Company and its shareholders because: (1) as Asset Manager's assets under management increase, the value of the Company's investment in Asset Manager will likely increase; (2) the Company intends to expend capital and other resources to develop Asset Manager and the Company's shareholders should be permitted to benefit from Asset Manager's growth and profitability as a registered investment adviser; and (3) there is an opportunity cost for the Company and, thus, the Company's shareholders, in the form of possible lost revenue streams from Asset Manager, for the Company to forego the formation of and continued investment in Asset Manager, which regulatory limitations would, absent relief, require.

1. As Asset Manager's assets under management increase, the value of the Company's investment will likely increase. As Asset Manager's assets under management increase, the revenue generated by the advisory fees it charges is also expected to increase. The increased revenue should, in turn, result in an increase in the value of the Company's investment in Asset Manager, which will inure to the benefit of the Company's shareholders. Further, Asset Manager may be even more attractive as an asset manager if it were a registered investment adviser, which could lead to additional assets under management, and this benefit should, again, inure to the Company's shareholders. In addition, the growth of Asset Manager's assets under management over time should reduce Asset Manager's initial operating expense ratios and, thus, increase its profitability. Asset Manager's operating expenses as a percentage of its assets under management are likely to decline as Asset Manager's assets under management increase because personnel and other operating expenses do not typically increase proportionately with increases in the amount of assets managed. Therefore, over time, the Company's shareholders should gain additional value from the Company's investment.

2. The Company intends to expend capital and other resources to develop Asset Manager and the Company's shareholders should be permitted to benefit from Asset Manager's future growth and profitability as a registered investment adviser. The Company enters into each investment it makes for the purpose of adding value to the portfolio company. The Company's proposed relationship to Asset Manager is an example of this approach to investing. Beginning with its initial formation of Asset Manager, the Company will contribute to Asset Manager's growth. The Company will provide financing to fund working capital and to support the asset management activities of Asset Manager. In addition, the Company's senior-level professionals will provide managerial assistance to Asset Manager's management team to assist them with building their business. These investments of capital and other resources are the means through which the Company grows the value of its portfolio investments and, in turn, grows its returns to its shareholders. The Company will significantly contribute to the organization of Asset Manager, and the Company believes that it is likely that Asset Manager will become valuable as a registered investment adviser. Allowing the Company to hold and invest in Asset Manager as a portfolio company following its registration as an investment adviser (which, absent relief, the Company would not be able to do) is both consistent with the investment objectives of the Company and beneficial to the Company's shareholders.

3. The opportunity cost for the Company of having to forego the investment in Asset Manager would likely cause economic harm to the Company and, thus, the Company's shareholders, in the form of possible lost revenue streams from the Company's ownership in Asset Manager. The Company intends to indirectly own 100% of the interests in Asset Manager, thereby causing Asset Manager to become an indirectly wholly owned portfolio company of the Company. As noted above, the imposition of the new regulatory regime under the 2010 Act makes it likely that Asset Manager will soon be required to register with the Commission as an investment adviser. If the requested Order is not issued, the Company would not be able to hold any investment interest in Asset Manager once Asset Manager becomes a registered investment adviser, thus not allowing the Company to participate in any growth of Asset Manager. Given the foregoing, it is only in the best interest of the Company and consequently, its shareholders, for the Company to develop and invest in Asset Manager if the requested relief is granted.

The Company's management and its Board have considered each of the factors discussed above and believe that having the ability to own and invest in Asset Manager is in the best interests of the Company's shareholders and its business. As discussed above, the Company's investment objective is to achieve current income and capital appreciation through debt and equity investments. Forming Asset Manager as a portfolio company and growing the Asset Manager business is consistent with the Company's investment objective and stated business model and furthers the Company's Congressional mandate as a BDC to bring capital to middle market companies. In the absence of the requested exemptive relief, the Company would be left with only one, undesirable, option—to forego the opportunity of creating and investing in Asset Manager because of the inevitable consequence of losing the potential revenue stream that the operation of Asset Manager as described herein is reasonably anticipated to provide. Being effectively prohibited from creating and investing in Asset Manager would require the Company to forego an opportunity to enhance the company's financial performance through activities closely related to its core lending business.

The Company will provide information regarding its investment in Asset Manager to its shareholders through its annual and periodic filings with the Commission and other public disclosure, as it does with its other portfolio investments. Any material risks to the Company and its business from the growth in its investment in Asset Manager and the expected growth of Asset Manager would also be identified and publicly disclosed. The Company's continued investment in Asset Manager once it becomes a registered investment adviser will not be subject to a shareholder vote.

The Company's investment in Asset Manager is expected to be approximately $35,000 as of December 31, 2011.

As discussed further in Section V, below, we believe that the operation of Asset Manager is wholly consistent with the Congressional mandate set forth in the legislation that created BDCs.

V. DISCUSSION OF AUTHORITY

A. Section 12(d)(3)

Section 12(d)(3) provides that:

[i]t shall be unlawful for any registered investment company and any company or companies controlled by such registered investment company to purchase or otherwise acquire any security issued by or any other interest in the business of any person who is a broker, a dealer, is engaged in the business of underwriting, or is either an investment adviser of an investment company or an investment adviser registered under title II of this Act, unless (A) such person is a corporation all the outstanding securities of which…are, or after such acquisition will be, owned by one or more registered investment companies; and (B) such person is primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, or any one or more of such or related activities, and the gross income of such person normally is derived principally from such business or related activities.

Section 60 provides that Section 12 shall apply to a BDC to the same extent as if it were a registered closed-end investment company.

Asset Manager will be an indirect wholly owned portfolio company of the Company. However, it is not expected that Asset Manager would also be a broker-dealer that is primarily engaged in the business of underwriting and distributing securities issued by other persons.6 The Company's proposed ownership of Asset Manager, if it becomes necessary for it to register as an investment adviser and if "related activities" is not interpreted to include advisory services, would not cause the Company to be in violation of the provisions of Section 12(d)(3); however, the Company would not be able to make investments in Asset Manager unless the requested Order is issued. As a practical matter, this would require the Company to forego an investment in Asset Manager because of the inevitable consequence of losing the potential revenue stream that Asset Manager is reasonably anticipated to provide.

Rule 12d3-1 under the Act provides certain limited relief from the restrictions of Section 12(d)(3). In relevant part, Rule 12d3-1 provides that:

(a) Notwithstanding section 12(d)(3) of the Act, a registered investment company, or any company or companies controlled by such registered investment company ("acquiring company") may acquire any security issued by any person that, in its most recent fiscal year, derived 15 percent or less of its gross revenues from securities related activities unless the acquiring company would control such person after the acquisition.

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6 While neither the Commission nor its staff has ever identified the threshold level of activity an entity must meet to be "primarily engaged" in the business of underwriting and distributing securities issued by other persons, the Commission in the investment company context has taken the position that "primarily engaged" means that the entity devotes at least 55 percent of its assets to a business and it derives at least 55 percent of its income from that business. See, e.g., Exemption from the Investment Company Act of 1940 for the Offer and Sale of Securities by Foreign Banks and Foreign Insurance Companies and Related Entities, Investment Company Act Release No. 17682 (Aug. 17, 1990) at fn. 33 ("In various contexts, the term 'primarily engaged' in a business has been taken to mean that at least 55% of a company's assets are employed in, and 55% of a company's income is derived from, that business.").

(b) Notwithstanding section 12(d)(3) of the Act, an acquiring company may acquire any security issued by a person that, in its most recent fiscal year, derived more than 15 percent of its gross revenues from securities related activities, provided that:

(1) Immediately after the acquisition of any equity security, the acquiring company owns not more than five percent of the outstanding securities of that class of the issuer's equity securities;

Since the Company expects that all of Asset Manager's gross revenues will be derived from "securities related activities" as defined in Rule 12d3-1, and since the Company would own a majority of the outstanding securities of Asset Manager, an exemption pursuant to Rule 12d3-1(a) or (b) from the provisions of Section 12(d)(3) does not appear to be applicable.

As more fully set forth below, the Company believes that being permitted to continuously make investments in Asset Manager is consistent with the purposes of the 1940 Act, including the protection of investors, and appropriate in the public interest. In addition, the Commission has previously granted similar exemptive relief to other BDCs and registered closed-end investment management companies to allow those companies to establish an investment adviser subsidiary.7

7 Prior to May 1996, Baker Fentress & Company was both a registered closed-end management investment company and a registered investment adviser. Similarly, from 1974 to 1991, General American Investors Company, Inc. operated as both a registered closed-end management investment company and registered investment adviser.

B. Ownership of Asset Manager is Consistent with the Purposes Fairly Intended by the 1940 Act's Policies and Provisions

Investing in Asset Manager as a portfolio company of the Company does not present the concerns against which Section 12(d)(3) was intended to safeguard, namely the entrepreneurial risks of securities-related businesses, conflicts of interest and reciprocal practices. Legislative history suggests that the prohibitions set forth within Section 12(d)(3) were intended, in part, to protect investment companies from making what were considered at the time to be risky investments.8 Specifically, the limitations imposed by Section 12(d)(3) were intended to limit the risk of a registered investment company's exposure to the "'entrepreneurial risks,' or general liabilities, that are peculiar to securities related businesses."9 Much of this concern stemmed from the fact that, in 1940, when Section 12(d)(3) was adopted, most securities-related businesses were organized as privately held general partnerships.10 As a result, an investment in such a company would expose an investment company to the unlimited liabilities of a general partner.

While the nascent securities-related business sector of the financial services industry of the 1930s may have been populated by companies that were viewed as risky investments because they were organized as private partnerships,11 today's financial services industry is subject to a much more robust body of regulation, which contributes to a more conservative risk profile for those companies that comprise the industry. Moreover, the risks presented by the form of organization of a securities-related business are no longer as germane as they were at the time of the adoption of Section 12(d)(3) because many formerly closely-held securities-related businesses have reorganized into corporate forms that are characterized by limited liability in an effort to raise capital through the public capital markets. Based on data collected from the Investment Adviser Registration Depository ("IARD") as of April 26, 2007, the vast majority (88.92%) of investment advisory firms were organized as either corporations or limited liability companies compared to a mere 4% of registered investment advisers that were organized as general partnerships.12

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8 See In the Matter of Pacific Coast Mortgage Company, 22 S.E.C. 829, at p. 832 (May 23, 1946) ("Manifestly, the rational of Section 12(d)(3) which is obviously intended to prevent operating investment companies from engaging in diverse financial activities in conjunction with persons other than investment companies.")

9 See Exemption of Acquisitions of Securities Issued by Persons Engaged in Securities-Related Businesses, Investment Company Act Release No. 19716 at 6 (Sept. 16, 1993). See Exemption of Acquisitions of Securities Issued by Persons Engaged in Securities Related Businesses, Investment Company Act Release No. 19204 (Jan. 4, 1993).

10 See Exemption of Acquisitions of Securities Issued by Persons Engaged in Securities Related Businesses, Investment Company Act Release No. 19204 (Jan. 4, 1993).

11 See Exemption for Acquisition by Registered Investment Companies of Securities Issued by Persons Engaged Directly or Indirectly in Securities Related Businesses, Investment Company Act Release No. 13725, 49 Fed. Reg. 2912 (Jan. 24, 1984) (according to the release, in 1940 most securities-related businesses were organized as private partnerships and, thus, exposed investment company shareholders to the entrepreneurial risks associated with general partnership interests in those securities related businesses).

12 Evolution-Revolution: A Profile of the Investment Adviser Profession (July 2007) (50.5% of all registered investment advisers were organized as corporations and 38.39% were organized as limited liability companies).

The Company's shareholders would not be exposed to the risk of unlimited liability associated with an interest in Asset Manager, because they will be insulated by a layer of liability protection between Asset Manager and the Company as Asset Manager will be organized as a separate entity and structured as a limited liability company and thus the Company also has limited liability with respect thereto. Therefore, if Asset Manager were to experience an unexpected and total loss of capital, the Company would lose only the capital invested in Asset Manager (and in the general partner) just as the Company would in the case of losses incurred by any other portfolio investment. Asset Manager may also establish majority-owned subsidiaries that may be required to register as investment advisers. The Company's business, including its other portfolio companies, would be protected from any additional monetary or legal liability. Further, the Company would be required to disclose any material risks to its investment in Asset Manager in its periodic filings with the Commission. Further, at such time as Asset Manager is required to register as an investment adviser under the Advisers Act, it will maintain formal policies and procedures related to its operations, including appointing a chief compliance officer, which are designed to ensure that management of Asset Manager is conducted in the best interests of the Funds, as well as the shareholders of Asset Manager and the Company.

Section 12(d)(3) was also intended to prevent potential conflicts of interest and reciprocal practices between investment companies and securities related businesses which might result in investment companies being organized, operated, managed, or their portfolio securities selected in the interests of brokers, dealers, underwriters, and investment advisers.13 As with the 1940 Act in general, Section 12(d)(3) was an attempt by the Commission to prevent situations in which brokers, securities dealers and other financial intermediaries were in a position to dominate investment companies. The Commission provided examples of such situations in the Report on the Study of Investment Trusts and Investment Companies (the "Investment Trust Study").14 For example, the Commission was concerned that investment company sponsors, such as investment banks, were using affiliated investment companies as a receptacle for illiquid and distressed securities.15 It was also concerned that investment banks were using the investment companies to acquire securities that were subject to the investment banks' underwriting endeavors in an effort to increase the banks' underwriting capacity.16 Another problematic practice that is sometimes discussed in conjunction with the concerns Section 12(d)(3) was intended to address what is commonly referred to as "propping." Propping occurred where a securities related business was in a position to exercise control and influence over an investment company and took advantage of this position to advance its own pecuniary interests by forcing the investment company to purchase or otherwise acquire the outstanding securities of the affiliated securities related business, regardless of the value to the investment company, in an effort to "prop" up the value of the affiliate's stock. As discussed in the Investment Trust Study, bank sponsored investment companies were particularly susceptible to propping.17

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13 15 U.S.C. § 80a-1(b)(2) (1940).

14 H.R. Doc. No. 707, 75th Cong., 3d Sess. (1938)

15 Id. part I, at 76-77.

16 Id.

17 Id. Part III, at 131 ("Following the market crash of October of 1929, the funds of the Chatham Phenix Allied Corporation were utilized to support the market price of the stock of Chatham Phenix National Bank & Trust Company.").

As early as 1964, however, the Commission recognized that the operation of Section 12(d)(3) was counterproductive under certain circumstances and unduly limited the investment options of investment companies.18 As operating companies and other non-securities related businesses acquired securities firms with more regularity in the early 1960s, it became clear that the literal application of Section 12(d)(3) was harming investment companies and denying their shareholders investment opportunities by preventing them from investing in large operating companies such as General Electric, Sears, Roebuck, and General Motors, which owned or controlled financial intermediaries such as broker-dealers, investment advisers, underwriters, and insurance companies.19

Propping and overreaching should not be a concern in the case of an adviser that is a downstream affiliate of a BDC. As discussed previously, the Company is a BDC that has an extensive portfolio of investments which is expected to continue to grow and of which Asset Manager will be a part. As a result, Asset Manager would, as a registered investment adviser, remain but a single component of a much larger organization, and will not be in a position to exercise control or influence over the Company. Further, the Company will own 100 percent of the voting interests in Asset Manager and, if the requested relief is granted, will maintain at least a majority ownership of the voting interests in Asset Manager for so long as it is one of the Company's portfolio companies in order to continue to exercise oversight for the strategic direction of Asset Manager, including the power to control the policies that affect the Company and to protect the Company from potential conflicts of interest and reciprocal practices.

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18 See Adoption of Rule 12d-1 to Provide Conditional Exemption of Certain Purchases or Acquisitions of Securities from the Prohibitions of Section 12(d)(3) of the Investment Company Act of 1940, Investment Company Act Release No. 4044 (Sept. 4, 1964) (hereinafter "Release 4044").

19 See id.

As a condition to the Company's requested relief, the Company will not dispose of any voting interests of Asset Manager if, as a result, the Company would own, directly or indirectly, 50 percent or less of the outstanding voting interests of Asset Manager unless the Company disposes of 100 percent of its interest in Asset Manager in order to prevent the Company from becoming a minority shareholder of Asset Manager. Moreover, because the Company is managed by Golub Capital and expects in the future to continue to be so managed, it will not be dependent on Asset Manager for the provision of investment advice or other services. In addition, while the Company intends for Asset Manager to continue to grow and succeed (which, in turn inures to the benefit of the Company's shareholders), the Company's financial success will not be dependent upon Asset Manager's success.

On several occasions, the Commission has recognized that some of the concerns that apparently led to the adoption of Section 12(d)(3) are no longer relevant due to the development and advancement of the securities industry. On each of these occasions, the Commission determined that the restrictions imposed by Section 12(d)(3) were overly restrictive and warranted certain exemptive relief. In 1964, the Commission adopted Rule 12d-1, which is now Rule 12d3-1, exempting certain acquisitions from the provisions of Section 12(d)(3).20 The Commission later substantively amended Rule 12d3-1 in 198421 and 1993.22

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20 See Release 4044, supra note 18.

21 See Exemption of Acquisitions by Registered Investment Companies of Securities Issued by Persons Engaged Directly or Indirectly in Securities Related Businesses, Investment Company Act Release No. 14036 (July 13, 1984).

22 See Investment Company Act Release No. 19716, supra note 10.

Holding Asset Manager as a portfolio company of the Company is consistent with the general intent behind the adoption of Rule 12d3-1. When the Rule was adopted in its original form in 1964, the Commission noted that "[i]t appears to the Commission that under certain circumstances the provisions of Section 12(d)(3) operate to reduce the range of securities that investment companies may select for and hold in their portfolios."23 The Commission further noted that "[i]t appears to the Commission that where the conditions set forth in the Rule are satisfied it is appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act to permit registered investment companies to acquire and hold such investment interests."24

Thus, in adopting the Rule, the Commission was attempting to reduce the restrictions on investment company investments in companies engaged in securities related activities as long as such reductions did not come at the expense of investor protection. As is noted above, Section 12(d)(3) was intended to protect investors, in part, by limiting entrepreneurial risks and by preventing potential conflicts of interest and reciprocal practices between investment companies and securities-related businesses.

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23 See Release 4044, supra note 18.

24 See Release 4044, supra note 18.

In the present case, the Company is requesting that the Commission reduce the restrictions on the investments that it can make in a company that is engaged in securities-related activities, and the Company submits that such investment will not raise issues regarding entrepreneurial risks and conflicts of interest and reciprocal practices. Such issues will not arise for the reasons noted herein and because the Company will always own at least a majority of the voting interests in Asset Manager. Furthermore, because Asset Manager would be a downstream affiliate of the Company, the ownership of Asset Manager by the Company would not involve prohibited affiliated transactions because of Rule 57b-1, which exempts from the provisions of Section 57(a) downstream affiliates of business development companies. In adopting Rule 57b-1, the Commission acknowledged that it was the intent of Congress that a statutory exemption be provided for a BDC's transactions with non-controlled and controlled downstream affiliates.

It is the Company's belief that an exemption from Section 12(d)(3) is warranted where a BDC maintains ownership of a registered investment adviser as a portfolio company. It will permit the Company to continue to realize the increase in the value of a portfolio company to which it has invested resources. Allowing the Company to make initial and subsequent investments in Asset Manager is both consistent with the purposes fairly intended by the 1940 Act's policies and provisions, and advances the primary purpose behind the legislation that created BDCs - namely, "to raise funds from both public and private sources and remove unnecessary statutory impediments to their entrepreneurial activities ...; [and to] encourage increased cooperation ... to promote capital formation."25 Further, as previously noted, if the requested relief is not granted, the Company will be forced to forego the opportunity of creating and investing in Asset Manager due to the inevitable consequence of losing the potential revenue stream that the operation of Asset Manager is reasonably anticipated to provide when it is required to register with the Commission as an investment adviser. Effectively prohibiting such an investment in Asset Manager runs counter to the purposes of the legislation governing BDCs, which mandates that BDCs assist in the growth and development of their portfolio companies.26

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25 S. Rep. 96-958, 96th Cong., 2d. Sess. at 3 (1980).

26 See Small Business Investment Incentive Act of 1980, Pub. L.No. 96-477, 94 Stat. 2275 (Oct. 21, 1980).

C. The Commission Has Previously Granted Relief to Permit Registered Investment Companies and BDCs to Own Significant Interests in Registered Investment Advisers

The Commission has previously granted similar exemptive relief to permit registered investment companies to establish an investment adviser subsidiary.27 For example, The Vanguard Group, Inc. ("TVGI"), obtained exemptive relief to permit the Vanguard Funds to acquire and capitalize TVGI, which became a registered investment adviser in August 1976.28 In contrast to the relief requested by the Vanguard Funds, the facts presented in this Application pose a less complicated relationship between the Company and Asset Manager that does not give rise to many of the concerns addressed in the requests for relief and subsequent orders issued to the Vanguard Funds. Such concerns largely stemmed from the fact that TVGI was and is responsible for providing advisory, administrative and distribution services to the Vanguard Funds.

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27 In addition, recently the staff of the Commission granted no-action relief to ASA Limited, SEC No-Action (pub. avail. July 23, 2010). In that request for relief, an internally managed, closed-end investment company requested assurance that the staff would not recommend enforcement action if the company formed an advisor subsidiary. ASA Limited asserted that such a structure would be efficient and beneficial to the company's shareholders. In footnote 13 of the staff's response, the staff noted with particularity that business development companies were not to rely on the relief as precedent. Notwithstanding footnote 13, the Company believes the conditions upon which the staff based its no-action relief are instructive and are willing to comply with similar conditions.

28 See Investment Company Act Release Nos. 8644 (Jan. 17, 1975) (notice) and 8676 (Feb. 18, 1975) (order) (permitting the Vanguard Funds to acquire and capitalize TVGI, and internalize their corporate administrative functions); Investment Company Act Release Nos. 9616 (Jan. 19, 1977) (notice) and 9664 (Mar. 4, 1977) (order) (permitting the Funds to continue to acquire shares of TVGI after TVGI registered as an investment adviser).

Particularly relevant to this request is the fact that the Commission has previously granted similar relief to permit internally managed, registered closed-end investment companies, which are functionally and structurally similar to BDCs, to establish wholly owned registered investment adviser subsidiaries.29 All but two of the previous requests involved a situation in which the subsidiary would provide advisory services to the parent following the complete or partial externalization of the closed-end fund's management function.30 The request for relief set forth herein does not present the same potential for conflicts of interest and reciprocal practices between investment companies and the investment adviser subsidiaries that were addressed in the previous requests for similar relief largely because Asset Manager will not serve as an investment adviser to the Company.

In 1996, the Commission issued an order to Baker, Fentress & Company, et al. ("Baker Fentress"), a registered, internally managed closed-end fund and registered investment adviser, to permit it to purchase all of the stock of John A. Levin & Co., Inc. ("LEVCO"), a registered investment adviser. Following the acquisition, the order further permitted LEVCO to, among other things, continue to operate and advise certain private investment companies structured as limited partnerships. Baker Fentress sought to generate growth by increasing the assets under management, but was constrained by Code limitations. Baker Fentress formed a wholly owned subsidiary to acquire LEVCO (with its established investment management business and its two wholly owned subsidiaries, one of which was a broker-dealer). LEVCO was then merged into the wholly owned subsidiary and LEVCO's registered investment adviser's wholly owned subsidiaries became wholly owned subsidiaries of the newly formed Baker Fentress subsidiary, New LEVCO. Upon completion of acquisition and merger, Baker Fentress expected that it would externalize the management of one of its portfolios to New LEVCO in addition to its management of the former LEVCO advisory clients.

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29 See, General American Investors Company, Inc., Investment Company Act Release Nos. 11345 (Sept. 10, 1980) (notice) and 11396 (Oct. 10, 1980) (order) (by the Commission); PMC Capital, Inc., Investment Company Act Release Nos. 19823 (Oct. 29, 1993) (notice) and 19895 (Nov. 23, 1993) (order) (pursuant to delegated authority); and Baker, Fentress & Company, Investment Company Act Release Nos. 21890 (April 15, 1996) (notice) and 21949 (May 10, 1996) (order) (pursuant to delegated authority).

30 The investment adviser subsidiary of PMC Capital, Inc. was organized for the purpose of providing advisory services to a real estate investment trust organized by PMC Capital, Inc.

Because New LEVCO would be Baker Fentress' investment adviser following the acquisition and merger, it was necessary for the Commission to grant an exemption from Section 2(a)(1), so that Baker Fentress' directors would not be deemed to be "interested" persons of Baker Fentress solely because of Baker Fentress' ownership of New LEVCO. As stated previously, the Company's request for exemptive relief does not raise this issue because Asset Manager will not be responsible for advising the Company. In addition, because of the nature of the transactions involved, it was necessary for Baker Fentress to request relief from Section 17 as well. The Company's request for relief does not raise any Section 17 concerns because Asset Manager would be a downstream affiliate of the Company. As a BDC, the limitations on transactions with affiliates are regulated by Section 57. Pursuant to Rule 57b-1, transactions with a downstream affiliate of the Company, like Asset Manager, are exempt from the provisions of Section 57(a). This exemption would also apply to any company controlled by Asset Manager because such companies would also be downstream affiliates of the Company. Lastly, the Baker Fentress exemptive application requested an exemption from Section 2(a)(3)(D) so that the limited partners of the private investment company partnerships, which were to be operated and advised by New LEVCO following the acquisition and merger of LEVCO, would not be deemed to be affiliated persons of Baker Fentress solely because of their status as limited partners. The Company's acquisition of Asset Manager would not raise similar concerns.

While the General American Investors Company, Inc., and Broad Street Investing Corporation requests for exemptive relief are largely similar to the Company's request, they each involved additional facts or circumstances that necessitated additional relief similar to the Baker Fentress application.

The General American Investors Company, Inc.31 and Broad Street Investing Corporation exemptive requests both involved the complete or partial externalization of internal management functions of internally managed funds to the newly formed investment adviser subsidiaries of the funds in question. The PMC Capital, Inc. request for relief proposed that PMC Capital, Inc. and the real estate investment trust advised by PMC Capital, Inc.'s newly formed investment adviser subsidiary would enter into a loan origination agreement, which raised the specter of a joint enterprise or other joint arrangement under Section 17(d). The present request for relief does not raise these additional concerns, but it does include many of the same protective conditions included in these prior exemptive relief requests. Therefore, this request should present a stronger case in support of granting exemptive relief.

D. Investing in Asset Manager is Consistent with the Protection of Investors

Asset Manager will employ the broadly syndicated loan team, which provides investments services to the Company. Such employees do not receive any additional compensation for providing these services to the Company. As a result, allowing the Company to invest and maintain its investments in Asset Manager is not only consistent with the protection of investors, but it benefits the Company and its shareholders. Creating and continuing to invest in Asset Manager as a portfolio company following its registration as a registered investment adviser ensures that the economic benefit to be derived from its operations will benefit the shareholders of the Company. Moreover, if the relief requested is not granted, the Company and, thus, the Company's shareholders, will likely suffer economic harm because the Company will be forced to forego the opportunity of investing in Asset Manager due to the inevitable consequence of being required to prematurely divest its investment in Asset Manager prior to Asset Manager achieving its maximum potential value.

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31 See, General American Investors Company, Inc., Investment Company Act Release Nos. 18277 (Aug. 19, 1991) (notice) and 18322 (Sept. 17, 1991) (order) (this order amended the order issued in 1980).