

56. U.S. Institute of Peace—Chairperson  
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## SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC-23946; 812-11368]

### Allied Capital Corporation; Notice of Application

August 12, 1999.

**AGENCY:** Securities and Exchange Commission (the "SEC" or the "Commission").

**ACTION:** Notice of application for an order under section 61(a)(3)(B) of the Investment Company Act of 1940 (the "Act").

*Summary of Application:* Applicant, Allied Capital Corporation, requests an order approving its stock option plan (the "Plan") to grant options to directors who are neither employees nor officers of applicant (the "Eligible Directors").

*Filing Dates:* The application was filed on October 20, 1998, and amended on April 28, 1999. Applicant has agreed to file an amendment, the substance of which is incorporated in this notice, during the notice period.

*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 applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 on September 7, 1999, and should be accompanied by proof of service on applicant, 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, SEC, 450 5th Street, NW, Washington, DC 20549-0609. Applicant, 1919 Pennsylvania Avenue, NW, Washington, DC 20006-3434.

**FOR FURTHER INFORMATION CONTACT:** Elaine M. Boggs, Senior Counsel, at (202) 942-0572, or Christine Y. Greenlees, Branch Chief, at (202) 942-0564 (Division of Investment Management, Office of Investment Company Regulation).

**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, NW, Washington, DC 20549-0102 (tel. (202) 942-8090).

### Applicant's Representations

1. Applicant is a business development company ("BDC") within the meaning of section 2(a)(48) of the Act.<sup>1</sup> Applicant's primary business is making loans and investments in small and medium-sized companies.

Applicant's investment decisions are made by its management in accordance with policies approved by applicant's board of directors (the "Board").

Applicant does not have an external investment adviser within the meaning of section 2(a)(20) of the Act.

2. Applicant requests an order under section 61(a)(3)(B) of the Act approving the Plan for Eligible Directors, including each new Eligible Director who may be appointed in the future to the Board. Applicant has a twelve member Board, ten of whom are Eligible Directors.<sup>2</sup> None of the Eligible Directors is an "interested person," as defined in section 2(a)(19) of the Act, of applicant.

3. The Plan was approved by the Board on September 29, 1997, and approved by applicant's shareholders on November 26, 1997. The Board has implemented part of the Plan with respect to applicant's officers and employee directors. The portion of the Plan applicable to Eligible Directors will not be implemented until an order is received from the Commission approving that portion of the Plan.

4. The Plan provides that each Eligible Director serving at the time the requested order is issued, and each new Eligible Director at the time he or she joins the Board, will be entitled to receive options to purchase 10,000 shares. Thereafter, incumbent Eligible Directors will be awarded options to purchase 5,000 shares each year. Options may be granted under the Plan for a maximum of 6,250,000 shares, which is approximately 12% of applicant's current outstanding shares. Applicant has no warrants, options, or rights to purchase its voting stock

<sup>1</sup> Section 2(a)(48) 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 Act and makes available significant managerial assistance with respect to the issuers of the securities.

<sup>2</sup> Each of applicant's Eligible Directors receives \$1,000 for each meeting of the Board attended. In addition, members of the executive committee of the Board receive annual compensation of \$10,000. Eligible Directors receive no other compensation for their services to applicant.

outstanding other than those issued pursuant to the Plan.

5. The exercise price of the options will be the closing price of applicant's common stock on the Nasdaq National Market, or on the exchange where applicant's shares are traded, on the date the option is granted. Each option states the period or periods of time within which the option may be exercised by the optionee, which may not exceed ten years from the date the option is granted. All rights to exercise options will terminate 60 days after an Eligible Director ceases to be a director for any reason other than death or permanent disability. If an Eligible Director dies or becomes permanently disabled, the Eligible Directors estate may exercise his or her options during the one-year period following the date of death or permanent disability. Options will not be transferable other than by will or the laws of descent and distribution. In the future, the Plan may be amended to permit options to be transferable pursuant to a qualified domestic relations order ("QDRO") as defined by section 414(p) of the Internal Revenue Code of 1986, as amended (the "Code").<sup>3</sup>

6. Applicant's compensation committee (the "Committee") will administer the Plan. The Committee, which currently has four members, is and will be comprised of members of the Board who (a) are non-employee directors; (b) have no financial interest in grants of stock options to applicant's officers under the Plan; and (c) are not "interested persons," as defined in section 2(a)(19) of the Act, of applicant. Decisions by the Committee are subject to review and approval by the full Board. The Plan may be modified, revised, or terminated by the Board at any time. The Board is permitted to make any modifications or revisions to any provision of the Plan without shareholder approval except with respect to the number of shares underlying options authorized for issuance under the Plan. The Plan as it relates to grants of options to Eligible Directors will not be modified materially from the description in the application without obtaining an order of the Commission or approval of the Commission staff.

<sup>3</sup> Applicant states that a QDRO is made pursuant to a court order or decree under state domestic relations law (e.g., involving divorce, child support, alimony, or marital property rights). Under section 414(p) of the Code, a QDRO permits as state domestic relations court to issue orders that will allow for employee plan benefits to be paid to an alternate payee.

### Applicant's Legal Analysis

1. Section 61(a)(3)(B) of the Act provides, in pertinent part, that a BDC may issue to its Eligible Directors options to purchase its voting securities pursuant to an executive compensation plan, provided that: (a) the options expire by their terms within 10 years; (b) the exercise price of the options is not less than the current market value of the underlying securities at the date of the issuance of the options, or if no market exists, the current net asset value of the voting securities; (c) the proposal to issue the options is authorized by the BDC's shareholders, and is approved by order of the SEC on the basis that the terms of the proposal are fair and reasonable and does not involve overreaching of the BDC or its shareholders; (d) the options are not transferable except for disposition by gift, will, or intestacy; (e) no investment adviser of the BDC receives any compensation described in paragraph (1) of section 205 of the Investment Advisers Act of 1940, except to the extent permitted by clause (A) or (B) of that section; and (f) the BDC does not have a profit-sharing plan as described in section 57(n) of the Act.

2. In addition, section 61(a)(3)(B) of the Act provides that the amount of the BDC's voting securities that would result from the exercise of all outstanding warrants, options, and rights at the time of issuance may not exceed 25% of the BDC's outstanding voting securities, except that if the amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights issued to the BDC's directors, officers, and employees pursuant to an executive compensation plan would exceed 15% of the BDC's outstanding voting securities, then the total amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights at the time of issuance will not exceed 20% of the outstanding voting securities of the BDC.

3. Applicant states that the terms of the Plan meet all the requirements of section 61(a)(3)(B) of the Act. Applicant states that the number of voting securities that would result from the exercise of all options issued or issuable to officers and non-officer directors under the Plan is 6,250,000 shares, or 12% of the company's outstanding stock. The total number of shares of applicant's common stock issuable under the Plan that may be granted in any one year to current Eligible Directors represents about .08% of applicant's outstanding common stock.

Applicant states that given the small number of shares of common stock issuable upon exercise of the options, the exercise of the options pursuant to the Plan will not have a substantial dilutive effect on the net asset value of applicant's common stock.

4. Applicant submits that the terms of the Plan are fair and reasonable and do not involve overreaching of applicant or its shareholders. Applicant states that the Eligible Directors are actively involved in the management and oversight of applicant's business and operations and are likely to have specific experience with respect to industries in which applicant makes a significant number of investments. Applicant asserts that the options will have value only to the extent that applicant's market value increases above the exercise price of the options, which will encourage the Eligible Directors to remain on the Board and to devote their best efforts to the success of applicant's business. In addition, applicant states that the Plan will assist it in attracting qualified persons to serve as Eligible Directors in future. Applicant further states that the options will provide a means for the Eligible Directors to increase their ownership interests in applicant, thereby ensuring close identification of their interests with the interests of applicant and its shareholders.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-41735; File No. SR-Amex-99-24]

#### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC Relating to the Amendment of Commentary .01 to Exchange Rule 340 and Amendment of Exchange Rule 590

August 12, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 9, 1999, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the

<sup>1</sup> 15 U.S.C. 78s (b)(1).

<sup>2</sup> 17 CFR 240.19b-4

Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The text of the proposed rule change is available at the Office of the Secretary, the Amex and at the Commission.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

In 1993, the New York Stock Exchange ("NYSE") amended its rules to require all clerks to submit their fingerprints and Forms U-4 as a prerequisite to admission to the trading floor.<sup>3</sup> The intent of the rule was to prevent an individual subject to a statutory disqualification from being employed on the exchange. At the same time, the NYSE required employers to report the termination of a clerk on Form U-5. The NYSE also amended its rules to provide for the imposition of a \$1,000 fine on members and member organizations that failed to comply with the NYSE's floor clerical personnel procedures.<sup>4</sup> The Amex currently requires candidates for membership to be fingerprinted and complete Form U-4, but does not impose a similar requirement on clerks. The Amex also does not require members and member

<sup>3</sup> NYSE Rule 35, Supplementary Material .50 and .60. See Securities Exchange Act Release No. 33045 (October 14, 1993), 58 FR 54179 (October 20, 1993) (File No. SR-NYSE-93-28).

<sup>4</sup> See Securities Exchange Act Release No. 32422 (June 7, 1993), 58 FR 32972 (June 14, 1993) (File No. SR-NYSE-93-14).