

FIDUS MEZZANINE CAPITAL LP
Form 40-APP/A
February 28, 2012

No. 812-13879

U.S. SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

AMENDMENT NO. 2 TO APPLICATION FOR AN ORDER UNDER SECTIONS 6(c),
12(d)(1)(J), AND 57(c) OF THE INVESTMENT COMPANY ACT OF 1940 ("1940 ACT")
GRANTING EXEMPTIONS FROM SECTIONS 12(d)(1)(A), 18(a), 21(b), 57(a)(1)-(a)(3),
AND 61(a) OF THE 1940 ACT; UNDER SECTION 57(i) OF THE 1940 ACT AND RULE 17d-1
UNDER THE 1940 ACT TO PERMIT CERTAIN JOINT TRANSACTIONS OTHERWISE
PROHIBITED BY SECTION 57(a)(4) OF THE 1940 ACT; AND UNDER SECTION 12(h) OF
THE SECURITIES EXCHANGE ACT OF 1934 ("EXCHANGE ACT") GRANTING AN
EXEMPTION FROM SECTION 13(a) OF THE EXCHANGE ACT

FIDUS INVESTMENT CORPORATION,
FIDUS MEZZANINE CAPITAL, L.P.,
FIDUS INVESTMENT GP, LLC,
and
FIDUS INVESTMENT ADVISORS, LLC

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1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

February 27, 2012

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of:) AMENDMENT NO. 2 TO APPLICATION
) FOR AN ORDER UNDER SECTIONS 6(c),
FIDUS INVESTMENT CORPORATION,) 12(d)(1)(J), AND 57(c) OF THE
FIDUS MEZZANINE CAPITAL, L.P.,) INVESTMENT COMPANY ACT OF 1940
FIDUS INVESTMENT GP, LLC,) GRANTING EXEMPTIONS FROM
and) SECTIONS 12(d)(1)(A), 18(a), 21(b),
FIDUS INVESTMENT ADVISORS, LLC) 57(a)(1)-(a)(3), AND 61(a) OF THE 1940
) ACT; UNDER SECTION 57(i) OF THE
1603 Orrington Avenue) 1940 ACT AND RULE 17d-1 UNDER THE
Suite 820) 1940 ACT TO PERMIT CERTAIN JOINT
Evanston, Illinois 60201) TRANSACTIONS OTHERWISE
) PROHIBITED BY SECTION 57(a)(4) OF
File No. 812-13879) THE 1940 ACT; AND UNDER SECTION
Investment Company Act of 1940) 12(h) OF THE SECURITIES EXCHANGE
) ACT OF 1934 GRANTING AN
) EXEMPTION FROM SECTION 13(a) OF
THE EXCHANGE ACT

Fidus Investment Corporation, a Maryland corporation (the “Company”), Fidus Mezzanine Capital, L.P., a Delaware limited partnership (“Fidus SBIC”), Fidus Investment GP, LLC, a Delaware limited liability company (“New General Partner”) and Fidus Investment Advisors, LLC (“Fidus Advisors”) (collectively, the “Applicants”), hereby file an application (“Application”) for an order (the “Order”) of the U.S. Securities and Exchange Commission (the “Commission”) pursuant to Sections 6(c), 12(d)(1)(J), 57(c), and 57(i) of the Investment Company Act of 1940, as amended (the “1940 Act”),¹ and Rule 17d-1 thereunder,² and under Section 12(h) of the Securities Exchange Act of 1934, as amended (“Exchange Act”). The requested relief would permit the Company and Fidus SBIC to operate effectively as one company, specifically allowing them to:

¹ Unless otherwise indicated, all section references herein are to the 1940 Act.

² Unless otherwise indicated, all rule references herein are to rules under the 1940 Act.

(1) engage in certain transactions with each other; (2) invest in securities in which the other is or proposes to be an investor; (3) be subject to modified consolidated asset coverage requirements for senior securities issued by a business development company (“BDC”) and its small business investment company (“SBIC”) subsidiary; and (4) file consolidated reports with the Commission. The Company may, in the future, create wholly owned subsidiaries that may also be licensed by the Small Business Administration (“SBA”) to operate under the Small Business Investment Act of 1958 (“SBA Act”) as an SBIC (collectively, the “SBIC Subsidiaries,” and each an “SBIC Subsidiary”) or in some cases may not be SBICs. All currently existing entities that intend to rely on the requested order have been named as Applicants. Applicants are not requesting relief for any future wholly owned subsidiaries at this time.

I. STATEMENT OF FACTS AND BACKGROUND

A. The Company

The Company was organized under the General Corporation Law of the state of Maryland on February 14, 2011 for the purpose of operating as an externally-managed, non-diversified, closed-end management investment company. On June 16, 2011, the Company filed a registration statement on Form 8-A to register its common stock under Section 12 of the Exchange Act. Accordingly, the Company is subject to the periodic reporting requirements under Section 13(a) of the Exchange Act. On June 20, 2011, the Company filed a notice of its election to be regulated as a BDC within the meaning of Section 2(a)(48) of the 1940 Act on Form N-54A. It completed the initial public offering (the “IPO”) of its shares of common stock on June 24, 2011. The Company’s common stock is traded on the NASDAQ Global Market under the symbol “FDUS.”

In addition, the Company intends to elect to be treated as a regulated investment company (“RIC”) for tax purposes as defined under Subchapter M of the Internal Revenue Code of 1986, as amended (the “Code”), and intends to continue to make such election in the future.

The Company provides customized mezzanine debt and equity financing solutions to lower middle-market companies located throughout the United States that have revenues between \$10 million and \$150 million. As of June 30, 2011, the Company had total assets of \$228.8 million. The Company’s investment objective is to provide attractive risk-adjusted returns by generating both current income from debt investments and capital appreciation from equity related investments. The Company’s investment philosophy is to partner with business owners, management teams and financial sponsors to provide customized financing for strategic acquisitions, business expansion and other growth initiatives, ownership transactions and recapitalizations.

The Company’s investments generally range from \$5 million to \$15 million per portfolio company. In certain situations, the Company may partner with other unaffiliated funds to provide larger financing commitments. The Company operates Fidus SBIC as an SBIC subsidiary and utilizes the proceeds of the sale of SBA guaranteed debentures to enhance returns to the Company’s stockholders. The Company’s executive offices are located at 1603 Orrington Avenue, Suite 820, Evanston, Illinois 60201.

The Company's board of directors (the "Board") consists of five members, three of whom are not "interested persons" of the Company within the meaning of Section 2(a)(19) of the 1940 Act. Pursuant to the Company's charter, members of the Board are divided into three classes. Each class of directors will hold office for a three year term. However, the initial members of the three classes have initial terms of one, two and three years, respectively. At each annual meeting of the Company's stockholders, the successors to the class of directors whose terms expire at such meeting will be elected to hold office for a term expiring at the annual meeting of stockholders held in the third year following the year of their election. The Company's charter permits the Board to elect directors to fill vacancies that are created either through an increase in the number of directors or due to the resignation, removal or death of any director.

B. Fidus SBIC

Fidus SBIC was organized as a limited partnership under the laws of the state of Delaware on February 5, 2007 and received its license from the SBA on October 22, 2007 to operate as an SBIC under the SBA Act. The principals of Fidus SBIC sought an SBIC license in order to give Fidus SBIC access to attractive fixed-rate SBA guaranteed debentures. As of June 30, 2011, Fidus SBIC had total assets of \$185.3 million, representing investments in 19 portfolio companies. Fidus SBIC has the same investment objectives and strategies as the Company, as summarized above.

On March 1, 2011, Fidus SBIC filed its registration statement on Form N-5 with the Commission, as a co-registrant with the Company on its registration statement on Form N-2. As a result of the IPO and a series of transactions (the "Formation Transactions"), Fidus SBIC could be deemed to fail to meet the requirements for exclusion from the definition of an investment company set forth in (1) Section 3(c)(1) by reason of subparagraph (A) of Section 3(c)(1) and (2) Section 3(c)(7) by virtue of its failure to qualify as a "qualified purchaser" within the meaning of Section 2(a)(51) by virtue of Rule 2a51-3(a) of the 1940 Act, as the Company could be deemed to have been formed for the purpose of investing in Fidus SBIC. Accordingly, on June 20, 2011, Fidus SBIC filed an election to be regulated as a BDC within the meaning of Section 2(a)(48) of the 1940 Act on Form N-54A under the 1940 Act in connection with the effectiveness of its registration statement on Form N-5. On June 16, 2011, Fidus SBIC filed a registration statement on Form 8-A to register its common stock under Section 12 of the Exchange Act. Accordingly, Fidus SBIC is subject to the periodic reporting requirements under Section 13(a) of the Exchange Act.

The Company owns a 99.99% limited partnership interest in Fidus SBIC. The New General Partner, a wholly owned subsidiary of the Company, owns a 0.01% general partnership interest in Fidus SBIC. Therefore, Fidus SBIC is a wholly owned subsidiary of the Company because the Company and the New General Partner own all of the partnership and voting interests in Fidus SBIC. Fidus SBIC is and will remain, at all times, a wholly owned subsidiary of the Company and consolidated with the Company for financial reporting purposes.

Notwithstanding its limited partnership structure, the Second Amended and Restated Agreement of Limited Partnership of Fidus SBIC (“LP Agreement”) permits the appointment of a board of directors, which appointment is permitted by the Delaware Revised Uniform Limited Partnership Act, with authority to manage the business and affairs of Fidus SBIC and take all action that the general partner could otherwise take except any action required by statute to be taken by the general partner of a Delaware limited partnership. Consequently, pursuant to the LP Agreement, the General Partner of Fidus SBIC has appointed a board of directors (“Fidus SBIC Board”) consisting of three persons who are not “interested persons” of Fidus SBIC within the meaning of Section 2(a)(19) of the 1940 Act and two persons who are “interested persons” of Fidus SBIC. The members of Fidus SBIC Board are appointed each year by the equity owners of Fidus SBIC (i.e., the New General Partner). Under the LP Agreement, the New General Partner has irrevocably delegated the authority to manage the business affairs of Fidus SBIC to the Fidus SBIC Board. The SBA has approved the LP Agreement and the members of the Fidus SBIC Board pursuant to SBA regulations.

C. The General Partner and the New General Partner

Fidus Mezzanine Capital GP, LLC (the “General Partner”) was organized as a limited liability company under the laws of the state of Delaware on February 5, 2007. The New General Partner was organized as a limited liability company under the laws of the state of Delaware on March 14, 2011. The New General Partner is the sole general partner of Fidus SBIC. Upon consummation of the Formation Transactions described below in more detail, the Company entered into a new investment advisory and management agreement with Fidus Advisors. In addition, upon consummation of the Formation Transactions, the General Partner merged with and into the New General Partner and the New General Partner is the surviving entity. As a consequence, the New General Partner’s only role is to perform ministerial functions that result from decisions made by Fidus Advisors; the New General Partner is not able to prevent Fidus Advisors from acting independently.

D. Fidus Advisors

Fidus Advisors was organized as a limited liability company under the laws of the state of Delaware on February 11, 2011, and serves as the investment adviser to the Company and Fidus SBIC. Fidus Advisors is registered as an investment adviser under the Investment Advisers Act of 1940. Pursuant to an investment management agreement with the Company that satisfies the requirements under Sections 15(a) and (c), Fidus Advisors manages the consolidated assets of the Company, including those of Fidus SBIC. The investment professionals of Fidus Advisors are responsible for sourcing potential investments, conducting research and diligence on potential investments and equity sponsors, analyzing investment opportunities, structuring investments and monitoring the investments and portfolio companies of the Company and its wholly owned subsidiaries, including Fidus SBIC.

E. The Formation Transactions

Prior to the closing of the IPO, through the Formation Transactions, the Company acquired all of the partnership interests in Fidus SBIC and the General Partner, and each of Fidus SBIC and the New General Partner (as the surviving entity in the merger of the General Partner and the New General Partner) operate as a subsidiary of the Company. Thus, on June 20, 2011:

- The Company acquired 100% of the limited partnership interests in Fidus SBIC through a merger of Fidus SBIC with a wholly owned subsidiary of the Company, which retained its SBIC license, elected to be treated as a BDC and continues to hold its existing investments. As a result of this merger, Fidus SBIC is the surviving entity and the Company issued an aggregate of 3,702,778 shares of its common stock to the then limited partners of Fidus SBIC in exchange for their partnership interests in Fidus SBIC. Upon consummation of the IPO, the Company contributed approximately \$21.1 million of approximately \$63.9 million net proceeds of the IPO to Fidus SBIC, and Fidus SBIC will continue to make new investments with the net proceeds of the IPO and proceeds from the United States SBA guaranteed debentures issued from time to time by Fidus SBIC.
 - The Company acquired 100% of the membership interests in the General Partner through the merger of the General Partner with and into the New General Partner, a wholly owned subsidiary of the Company. As a result of this merger, the New General Partner is the surviving entity and the Company issued 353,743 shares of its common stock to the General Partner in exchange for its partnership interests in Fidus SBIC. The General Partner distributed such shares of the Company's common stock to its members.

- The Company issued 4,670,000 shares of common stock to the public for net proceeds (after underwriting discounts and offering expenses) of approximately \$63.9 million. In addition, the Company issued an additional 700,500 shares of common stock pursuant to the exercise by its underwriters of their over-allotment option for net proceeds of approximately \$9.8 million.

After giving effect to these transactions, (1) the Company owns 100% of the membership interests in the New General Partner, which is the sole general partner of Fidus SBIC, and (2) the Company owns 100% of the limited partnership interests in Fidus SBIC. The consummation of the Formation Transactions has been approved by the SBA. A diagram of the Company's current corporate structure is set forth on Exhibit A to this Application.

II. PROPOSED OPERATIONS AS ONE COMPANY

A. Future Operations of the Company and Fidus SBIC

As currently contemplated by Applicants, the following types of transactions may arise in the future involving both the Company and its wholly owned subsidiary, Fidus SBIC.

1. The Company may from time to time transfer funds to Fidus SBIC. Additional funding may be structured as contributions of additional capital or as loans. Such funding might be made for the purpose of increasing Fidus SBIC's regulatory capital to allow Fidus SBIC to issue additional SBA guaranteed debentures or increasing the size of its "overline" limit for any one investment (defined by SBA regulations as 10% of the sum of private capital, i.e., paid in capital and surplus, and the "total amount of leverage projected by the [SBIC] in [its] business plan that was approved by SBA at the time of the grant of the company's license.").

2. Fidus SBIC may from time to time make distributions of profits and capital to the Company in respect of the Company's investment in Fidus SBIC, subject in each case to the requirements of the SBA Act and regulations issued thereunder.

3. Fidus SBIC may from time to time make loans or other advances to the Company, subject in each case to the requirements of the SBA Act and regulations issued thereunder. Such loans and advances might be made for the purpose of providing funds to the Company with which to pay dividends to maintain its qualification as a RIC or to make investments for its own account or to pay operating expenses. Fidus SBIC will not purchase or otherwise acquire any of the common stock of the Company.

4. The Company and Fidus SBIC may determine from time to time to invest in securities of the same issuer, simultaneously or sequentially, in the same or different securities of such issuer, and to purchase or sell such investments separately or jointly.

5. The Company and Fidus SBIC may from time to time purchase all or a portion of the portfolio investments held by the other in order to enhance the liquidity of the selling company or for other reasons, subject in each case to the requirements of the SBA Act and the regulations thereunder.

B. Exemptive Relief Requested from Section 12(d)(1)

1. General. Section 12 is made applicable to BDCs by virtue of Section 60 of the 1940 Act. Section 12(d)(1)(A) makes it unlawful for any registered investment company to purchase or otherwise acquire the securities of another investment company, except to the limited extent permitted by Sections 12(d)(1)(A)(i), (ii) and (iii).

2. Application of Section 12(d) to Applicants. The Company may make loans or advances to Fidus SBIC, which could be deemed acquisitions of equity or debt securities of Fidus SBIC. Rule 60a-1 under the 1940 Act exempts the acquisition by a BDC of the securities of an SBIC that is operated as a wholly owned subsidiary of the BDC from Section 12(d)(1)(A) of the 1940 Act. Accordingly, since the Company has elected BDC status and since Fidus SBIC is operated as a wholly owned subsidiary of the Company, the transfer of assets from the Company to Fidus SBIC should be exempt from the provisions of Section 12(d)(1)(A) by virtue of Rule 60a-1.

However, the provisions of Section 12(d)(1) also apply to the activities of Fidus SBIC since Fidus SBIC has elected BDC status under the 1940 Act. As set forth above, Fidus SBIC will not own voting stock of the Company. However, any loans or advances by Fidus SBIC to the Company might be deemed to violate Section 12(d)(1)(A)(ii) or (iii) if the loans or advances are construed as purchases of the securities of the Company by Fidus SBIC.

3. Requested Exemptions. Section 12(d)(1)(J) of the 1940 Act provides that the Commission may exempt persons or transactions from any provision of Section 12(d)(1) if and to the extent such exception is consistent with the public interest and the protection of investors. Therefore, Applicants request an order of the Commission exempting from the provisions of Section 12(d)(1)(A)(ii) and (iii) of the 1940 Act the acquisition by Fidus SBIC of any securities of the Company representing indebtedness.

C. Exemptive Relief Requested from Sections 57(a)(1) and (2)

1. General. Sections 57(a)(1) and (2) make it unlawful for any person related to a BDC in the manner described in Section 57(b), or any affiliated person of that person (1) to sell any security or other property to the BDC or to any company controlled by the BDC (except securities of which the buyer is the issuer or securities of which the seller is the issuer and which are part of a general offering to the holders of a class of its securities), and (2) to purchase from any BDC or from any company controlled by such BDC any security or other property (except securities of which the seller is the issuer).

Section 57(b) specifies the person to whom the prohibitions of Section 57(a)(1) and (2) apply. These persons include the following: (1) any director, officer, employee, or other member of an advisory board of the BDC or any person who controls, is controlled by, or is under common control with such director, officer, employee or advisory board member; or (2)(A) any investment adviser or promoter of, general partner in, principal underwriter for, or person directly or indirectly either controlling, controlled by, or under common control with, the BDC (except the BDC itself and any person who, if it were not directly or indirectly controlled by the BDC, would not be directly or indirectly under the control of a person who controls the BDC), or (B) any person (i) who controls, is controlled by, or is under common control with the BDC or (ii) who is an officer, director, partner, copartner or employee of such adviser, promoter, general partner, principal underwriter, or person controlling, controlled by, or under common control with the BDC.

2. Application of Section 57(a)(1) and (2) to Applicants. The Company is an affiliated person of Fidus SBIC by reason of its direct ownership of all of the limited partnership interests in Fidus SBIC and its indirect ownership of all the general partnership interests in Fidus SBIC through its 100% ownership of the New General Partner. Fidus SBIC is an affiliated person of the Company because it is deemed to be under the control of the Company. Accordingly, the Company is related to Fidus SBIC in the manner set forth in Section 57(b), and Fidus SBIC is related to the Company in the manner set forth in Section 57(b). There may be circumstances when it is in the interest of the Company and its stockholders that Fidus SBIC invest in securities of an issuer that may be deemed to be a controlled portfolio affiliate of the Company or that the Company invest in securities of an issuer that may be deemed to be a controlled portfolio affiliate of Fidus SBIC. For example, a portfolio company may be deemed to be affiliated with the Company or Fidus SBIC within the meaning of Section 2(a)(3)(C) of the 1940 Act as a result of the Company's or Fidus SBIC's ownership of more than 25% of the portfolio company's voting securities.

If the Company were to engage in SBIC activities other than through a subsidiary, transactions with affiliated portfolio companies, whether controlled or not controlled, would be permissible without Commission approval. With regard to controlled portfolio affiliates, Rule 57b-1 provides an exception. With regard to non-controlled portfolio affiliates, in Investment Company Act Release 11493 (December 16, 1980) adopting Rule 57b-1 (the “1980 Adopting Release”), the Commission stated in relevant part:

However, non-controlled portfolio affiliates of a business development company are not among those persons whose participation in transactions with the business development company requires Commission approval (under section 57(c) [15 U.S.C. 80a-56(c)] or specific statutory findings regarding the transaction by the company’s Board of Directors (under section 57(f) [15 U.S.C. 80a-56(f)]. The legislative history of the 1980 Amendments indicates that Congress also did not intend to require Commission approval or such specific statutory findings by the Board of Directors of a business development company for transactions between the company and a controlled portfolio affiliate. As the House Committee Report on the bill which became the 1980 Amendments states:

Conspicuously absent from the prohibitions in section 57 against transactions with the business development company are persons which it controls or of which it holds at least 5 percent of the outstanding securities. Also omitted from the prohibitions are persons affiliated with such so-called “downstream affiliates” of the business development company. In this regard, it should be noted that the Commission has undertaken through rulemaking to exempt all investment companies from prohibitions relating to transactions solely between investment companies and such downstream affiliates. The Committee again wishes to note that if experience demonstrates that under such exclusion from statutory prohibitions investors are not being adequately protected, the Committee would expect to revisit this area.

H.R. REP. No. 1341, at 48 (1980) (Comm. Rep.) (emphasis added).

However, due to an apparently inadvertent drafting error, Business Development Company transactions involving controlled portfolio affiliates and certain affiliated persons of such affiliates must be approved by the Commission. The Commission proposes to correct this error by the rulemaking.

As pointed out in the House Committee Report, even if the Company were an investment company but not a BDC, it would be exempt from prohibitions relating to transactions between itself and its downstream affiliates. See Rules 17a-6 and 17d-1(d)(5) and (6). Thus, transactions between BDCs or investment companies and their downstream affiliates are exempt from the prohibitions of Sections 57(a) and 17(a) and (d). However, without the Order requested by this Application, transactions between Fidus SBIC and controlled portfolio affiliates (as such term is described in the 1980 Adopting Release) of the Company and transactions between the Company and controlled portfolio affiliates (as such term is described in the 1980 Adopting Release) of Fidus SBIC may violate Section 57(a) of the 1940 Act. As a condition of the grant of the order sought by this Application, the Company undertakes that (A) the Company will at all times beneficially own, and directly or through a wholly owned subsidiary hold of record, all of the outstanding equity interests of Fidus SBIC; and (B) Fidus SBIC will at all times be wholly owned by the Company (including the 0.01% interest owned by the New General Partner) and will therefore never have public shareholders. Moreover, no person shall serve as a member of the Fidus SBIC Board who shall not have also been elected a member of the Board of the Company. Thus, the Company and Fidus SBIC should not be precluded from investing in portfolio affiliates of each other if such investments would be permitted if the Company and Fidus SBIC were treated as one combined company.

Applicants note that (1) Fidus SBIC cannot rely on Rule 57b-1 for transactions between itself and the Company because the Company controls Fidus SBIC; (2) Fidus SBIC cannot rely on Rule 57b-1 for transactions between itself and a controlled portfolio affiliate of the Company because that affiliate would be a controlled person of the Company, a BDC, as well as a related person of Fidus SBIC because they are under the common control of the Company and so does not fit Rule 57b-1's requirement of "solely" controlled; and (3) the Company cannot rely on Rule 57b-1 for transactions between itself and a controlled portfolio affiliate of Fidus SBIC because, similarly, the affiliate would be in a control relationship with both the Company and Fidus SBIC. In addition, Applicants cannot rely on Rule 17a-6 for transactions to which Rule 57b-1 does not apply, because the Company is "a person directly or indirectly controlling the fund" and thus, pursuant to subparagraph (a)(2) of Rule 17a-6, the exemption is not available.

3. Requested Exemptions. Accordingly, the Applicants respectfully request an Order of the Commission pursuant to Section 57(c) exempting from the provisions of Sections 57(a)(1) and (2) any transaction solely between the Company and Fidus SBIC with respect to the purchase or sale of securities or other property. The Applicants also request an Order of the Commission exempting from the provisions of Sections 57(a)(1) and (2) any transaction involving the Company and/or Fidus SBIC and portfolio affiliates of either or both of the Company and/or Fidus SBIC, but only to the extent that any such transaction would not be prohibited if Fidus SBIC (and all of its assets and liabilities) were deemed to be part of the Company and not a separate company. It is the intent of this request only to permit the Company and Fidus SBIC to do that which they otherwise would be permitted to do within the provisions of the 1940 Act if they were one company, as opposed to Fidus SBIC being a wholly owned subsidiary of the Company (including the 0.01% interest owned by the New General Partner).

D. Exemptive Relief Requested from Sections 21(b) and 57(a)(3)

1. General. Section 57(a)(3) of the 1940 Act makes it unlawful for certain affiliated persons of a BDC, and certain affiliated persons of those persons, set out in Section 57(b), to borrow money or other property from such BDC or from any company controlled by the BDC (unless the borrower is controlled by the lender), except as permitted by Section 21(b) or Section 62. Section 21(b) (made applicable to BDCs by Section 62) provides that it shall be unlawful for a BDC to lend any money or property, directly or indirectly, to any person that controls or is under common control with the BDC, except to any company that owns all of the outstanding securities of the BDC other than directors' qualifying shares.

2. Application of Sections 21(b) and 57(a)(3) to Applicants. The Company is an affiliated person of Fidus SBIC by reason of its direct ownership of all of the limited partnership interests in Fidus SBIC and its indirect ownership of all of the general partnership interests in Fidus SBIC through its 100% ownership of the New General Partner. The Company does not directly own all of the outstanding securities of Fidus SBIC because the New General Partner holds a 0.01% general partnership interest in Fidus SBIC and Fidus SBIC has issued SBA guaranteed debentures and, in the future, may have other outstanding securities in the form of indebtedness. Fidus SBIC is an affiliated person of the Company because it is deemed to be under the control of the Company. In addition, the New General Partner and Fidus SBIC may be deemed to be affiliated persons of each other under Section 2(a)(3)(C) of the 1940 Act because they are wholly owned subsidiaries of the Company. Accordingly, the Company is related to Fidus SBIC in the manner set forth in Section 57(b) and Fidus SBIC is related to the Company in the manner set forth in Section 57(b).

There may be instances when it would be in the best interests of the Company and its stockholders for the Company to make loans to Fidus SBIC. There may also be instances when it would be in the best interests of the Company and its stockholders for Fidus SBIC to make loans to the Company. In the case of loans from Fidus SBIC to the Company, the loans would be prohibited by Section 21(b) and Section 57(a)(3) because in those cases, the borrower controls the lender and the lender may have outstanding securities (such as, the general partnership interests owned by the New General Partner, or SBA guaranteed debentures) not owned by the borrower.

3. Requested Exemptions. Accordingly, the Applicants respectfully request an Order of the Commission pursuant to Section 57(c) exempting from the provisions of Section 57(a)(3) the borrowing of money or property by the Company from Fidus SBIC.³ The Applicants also respectfully request an Order of the Commission pursuant to Section 6(c) exempting from the provisions of Section 21(b) the lending of money or other property by Fidus SBIC to the Company and by the Company to Fidus SBIC. It is the intent of this request only to permit the Company and Fidus SBIC to do that which they otherwise would be permitted to do within the provisions of the 1940 Act if they were one company, as opposed to Fidus SBIC being a wholly owned, limited partnership subsidiary of the Company. The Company states that for purposes of analysis under Sections 57(a)(3) and 21(b), Fidus SBIC will always be collapsed into the Company and, without further order of the Commission, the Company and Fidus SBIC will never be deemed separate entities in order to elicit more liberalized treatment under the 1940 Act.

³ The Applicants are not seeking relief from Section 57(a)(3) for loans from the Company to Fidus SBIC because under the existing control structure, no such relief is necessary.

E. Exemptive Relief Requested from Section 57(a)(4) and Rule 17d-1

1. General. Section 57(a)(4) makes it unlawful for certain persons related to a BDC in the manner set forth in Section 57(b), acting as principal, to knowingly effect any transaction in which the BDC or a company controlled by the BDC is a joint or joint and several participant with that person in contravention of such rules and regulations as the Commission may prescribe for the purpose of limiting or preventing participation by the BDC or controlled company on a basis less advantageous than that of the other participant. Section 57(i) states that the rules and regulations of the Commission under Section 17(d) applicable to registered closed-end investment companies (e.g., Rule 17d-1) shall be deemed to apply to transactions subject to Section 57(a) until the adoption by the Commission of rules and regulations under Section 57(a).

Rule 17d-1(a) prohibits an affiliate or, when applying Rule 17d-1 to implement Section 57(a)(4), a person related to a BDC in a manner described in Section 57(b) acting as principal, from participating in, or effecting any transaction in connection with any joint enterprise or joint arrangement or profit-sharing plan in which any such BDC, or a company controlled by such BDC, is a participant, except pursuant to an order of the Commission. Rule 17d-1(d)(5) grants exemptions for certain transactions described therein where so-called “upstream affiliates” of any registered investment company participants are also participants in the transaction.

2. Application of Section 57(a)(4) and Rule 17d-1(a) to Applicants. As described above, the Company and Fidus SBIC are affiliates of each other. There may be circumstances when it is in the interest of the Company and its stockholders that the Company and Fidus SBIC invest in securities of the same issuer, either simultaneously or sequentially, in the same or different securities of that issuer, and that they deal with their investments separately or jointly. Such transactions would not involve upstream affiliates of any party (except for the Company as a controlling person of Fidus SBIC). Also, these activities could conceivably involve joint investments in persons under the common control of the Company and Fidus SBIC, in which case the exemption provided by Rule 17d-1(d)(5) does not appear to be available. However, if the Company and Fidus SBIC were one combined investment company, Rule 17d-1(d)(5) would exempt transactions between that company and downstream affiliates, and if they were one combined BDC, the transactions would be exempted by Rule 57b-1. Because these exemptions may not be available in the circumstances proposed, Applicants are seeking an Order permitting this class of transactions under Section 57(a)(4) and Rule 17d-1. Applicants cannot rely on Rule 17d-1(d)(5) because the availability of the rule must be analyzed with each of the Company and Fidus SBIC taking the part of the “registered investment company,” and while Fidus SBIC is a portfolio affiliate (as defined in Rule 17a-6) of the Company, the Company is not a portfolio affiliate of Fidus SBIC. Applicants submit that it is reasonable and fair to permit these kinds of transactions since the Company would not be subject to the provisions of Section 57(a)(4) and Rule 17d-1 had it decided to conduct its SBIC activities itself instead of through its wholly owned subsidiary.

3. Requested Exemptions. Accordingly, the Applicants respectfully request an Order of the Commission pursuant to Section 57(i) and Rule 17d-1 thereunder, permitting any joint transaction that would otherwise be prohibited by Section 57(a)(4) between the Company and Fidus SBIC with respect to any transaction involving investments by the Company or Fidus SBIC in portfolio companies in which either is or is proposed to become an investor, but only to the extent that the transaction would not be prohibited if Fidus SBIC (and all of its assets and liabilities) were deemed to be part of the Company, and not a separate company. As stated above, the intent of this request is only to permit the Company, Fidus SBIC, and the New General Partner to conduct their businesses as otherwise permitted by the 1940 Act, as if the Company and Fidus SBIC were a single company.

F. Exemptive Relief Requested from Sections 18(a) and 61(a)

1. General. Section 18(a) prohibits a registered closed-end investment company from issuing any class of senior security or selling any such security of which it is the issuer, unless it complies with the asset coverage requirements set forth in that Section. "Asset coverage" is defined in Section 18(h) to mean, with respect to a class of senior security representing an indebtedness of an issuer, the ratio that the value of the total assets of an issuer, less all liabilities and indebtedness not represented by senior securities, bears to the aggregate amount of senior securities representing indebtedness of such issuer. Under the provisions of Section 18(a)(1)(A), senior securities of closed-end investment companies representing indebtedness must have an asset coverage of 300 percent immediately after their issuance or sale. Section 61(a) applies Section 18 to a BDC to the same extent as if the BDC were a registered closed-end investment company, subject to certain exceptions. One of the exceptions provides that the asset coverage requirement of Section 18(a)(1)(A) applicable to BDCs is 200 percent. Section 18(k), however, provides an exemption from Section 18(a)(1)(A) and (B) (relating to senior securities representing indebtedness) for SBICs. Section 18(k) makes the asset coverage and other requirements of subparagraphs (A) and (B) of paragraph (1) of Section 18(a) inapplicable to investment companies operating under the SBA Act. However, companies operating under the SBA Act, such as Fidus SBIC, are subject to the SBA's substantial regulation of permissible leverage in their capital structure. An SBIC with outstanding SBA guaranteed debentures may not incur any secured third-party debt or refinance any debt with secured third-party debt without prior written approval of the SBA. Fidus SBIC is regulated by the SBA and operates under the SBA Act.

2. Application of Sections 18(a) and 61(a) to Applicants. It appears that Fidus SBIC, as an investment company licensed as an SBIC under the SBA Act, would, on a stand-alone basis, be exempt from Sections 18(a)(1)(A) and (B) and Section 61(a) by reason of the exemption provided by Section 18(k). The Company, however, will have Fidus SBIC, itself a BDC, as its wholly owned subsidiary. A question exists, therefore, as to whether the Company must comply with the asset coverage requirements of Section 18 on a consolidated basis because the Company may be an indirect issuer of senior securities with respect to Fidus SBIC indebtedness. To do so would mean that the Company would treat as its own all assets held directly by the Company and Fidus SBIC (with the value of the Company's investment in Fidus SBIC eliminated) and would also treat as its own any liabilities of Fidus SBIC (with intercompany receivables and liabilities eliminated), including liabilities of Fidus SBIC with respect to senior securities as to which Fidus SBIC is exempt from the provisions of Sections 18(a)(1)(A) and (B) by virtue of Section 18(k).

3. Requested Exemptions. Accordingly, the Applicants request relief under Section 6(c) from Sections 18(a) and 61(a) to permit the Company to exclude from its consolidated asset coverage ratio any senior security representing indebtedness that is issued by Fidus SBIC.

G. Precedents

In connection with the preparation of this Application, with respect to transactions between the Applicants, Applicants have reviewed previous exemptive orders issued by the Commission granting exemptive relief similar to that requested herein. See Triangle Capital Corporation, et. al., Investment Company Act Release No. 28437, File No. 812-13355 (October 14, 2008) (“Triangle”); Main Street Capital Corporation, et. al., Investment Company Act Release No. 28129, File No. 812-13411 (Jan. 16, 2008) (“Main Street”); Elk Associates Funding Corporation, et. al., Investment Company Act Release No. 24121, File No. 812-11420 (Nov. 2, 1999) (“Elk Associates”); Berthel Growth & Income Trust I, et. al., Investment Company Act Release No. 23864, 69 SEC Docket 2233 (June 8, 1999) (“Berthel”); Allied Capital Corporation, et. al., Investment Company Act Release No. 22941, 66 SEC Docket 297 (Dec. 16, 1997) (“Allied Capital”); Capital Southwest Corporation, et. al., Investment Company Act Release No. 22586, 64 SEC Docket 457 (Mar. 26, 1997) (“Capital Southwest”); MACC Private Equities Inc., et. al., Investment Company Act Release No. 20887, 58 SEC Docket 2067 (Feb. 7, 1995) (“Private Equities”); Allied Capital Corporation II, et. al., Investment Company Act Release No. 17492, 46 SEC Docket 343 (May 16, 1990) (“Allied Capital II”); and Great Washington Investors, et. al., Investment Company Act Release No. 16055, 39 SEC Docket 549 (Oct. 15, 1987) (“Greater Washington”).

In Triangle, a parent BDC with an SBIC subsidiary that had also elected to be regulated as a BDC obtained the same relief as requested herein, and on the same representations and conditions as contained herein, except as modified to reflect that the SBIC subsidiary was a limited liability limited partnership rather than a limited partnership. The Triangle order permits a parent BDC and its wholly owned SBIC/BDC subsidiary to engage in certain transactions that would be permitted if the BDC and its BDC subsidiary were one company and permits the parent BDC to adhere to modified asset coverage requirements.

In Berthel, a parent BDC with a BDC/SBIC subsidiary obtained the same relief as requested herein, and on the same representations and conditions as contained herein, except as modified to reflect that the parent was a trust rather than a corporation and that the subsidiary was a limited liability company rather than a limited partnership. In Capital Southwest, a parent BDC with a closed-end management investment company/SBIC subsidiary, obtained exemptive relief similar to the relief requested in this application, and on the same kind of representations and conditions as contained in this application, except that the condition relating to senior security asset coverage requirements was different due to the fact that the subsidiary in Capital Southwest was not a BDC. The Private Equities case involved a reorganization pursuant to a bankruptcy plan which provided for the transfer of all of the capital stock of an SBIC subsidiary of the debtors to a newly created BDC, and the election of the SBIC also to be regulated as a BDC. The Greater Washington, and Allied Capital II, cases involved existing SBICs that reorganized by establishing wholly owned subsidiaries to which the parent would transfer its SBIC license. The parent company in each case remained a BDC with public ownership. As in Berthel and Private Equities, the Applicants will be structured as a BDC with an SBIC/BDC subsidiary. Accordingly, the circumstances and exemptive relief sought with respect to intercompany transactions are substantially the same, and the analysis under the 1940 Act for the intercompany transactions is the same, as in Berthel and Private Equities.

The Company is requesting the ability to engage in exactly the same transactions with its SBIC subsidiary as did Triangle, Main Street, Berthel, Elk Associates, Allied Capital, Capital Southwest, Private Equities, Greater Washington and Allied Capital II with respect to their wholly owned SBIC subsidiaries. Because it represents the most recent order involving an SBIC/BDC subsidiary and involves a corporate parent and subsidiary, Applicants have used the Triangle application as a model, making the same kind of representations and agreeing to similar conditions; except that Triangle was an internally managed BDC that owned 99.9% of the SBIC subsidiary with the remaining 0.1% owned by the SBIC subsidiary's general partner, and to the extent that this aspect of the Triangle situation raised additional issues and required additional exemptive relief, it is not reflected in this application.

H. Applicants' Legal Arguments

1. Section 6(c).

Section 6(c) of the 1940 Act permits the Commission to conditionally or unconditionally exempt any person or transaction from any provision or provisions of the 1940 Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the 1940 Act.

(a) The Exemptions Requested are Appropriate in the Public Interest.

The operation of the Company as a BDC with a wholly owned SBIC subsidiary is intended to permit the Company to engage in an expanded scope of operations beyond that which would be available to it if it conducted the SBIC operations itself. The Company and Fidus SBIC are engaged in operations permitted (and in fact contemplated) by the 1940 Act and subject to the provisions thereof, as they are applied to BDCs. Moreover, since Fidus SBIC is and will at all times be a wholly owned subsidiary of the Company, any activity carried on by it will in all material respects have the same economic effect and substance with respect to the Company's stockholders as it would if done directly by the Company.

With respect to the exemptions from Sections 21(b) and 57(a)(3), the transactions are solely between the Company and Fidus SBIC, as its wholly owned subsidiary. Thus, these transactions will have no substantive economic effect, and there is no basis for overreaching or harm to the public interest.

With respect to the Sections 18(a) and 61(a) exemptions, the net effect of application of the “asset coverage” requirements on a consolidated basis as to the Company and Fidus SBIC, if relief were not obtained, could be to restrict the ability of Fidus SBIC to obtain the kind of financing that would be available to the Company if it were to conduct the SBIC operations itself. Section 18(k) exempts any class of senior securities representing an indebtedness issued by certain closed-end companies from the asset coverage and other requirements of subparagraphs (A) and (B) of paragraph (1) of Section 18(a), whether or not such class of “senior” securities representing an indebtedness is held or guaranteed by the SBA. The application of Section 18(k) to the Company would not expose investors to the risks of unconstrained leverage because the SBA regulates the capital structure of Fidus SBIC. Accordingly, no harm to the public interest will occur if these exemptions are granted.

Based on the foregoing, it is clear that the public interest will not be harmed by the granting of the requested exemptions, while the interests of the Company and its stockholders will be enhanced.

(b) The Exemptions Requested are Consistent with the Protection of Investors and the Purposes Fairly Intended by the Policies and Provisions of the 1940 Act.

With respect to the exemptions requested in relation to transactions between the Company and Fidus SBIC, as noted above, the Sections 18(a) and 61(a) exemptions will have no material adverse financial or economic impact on the Company’s stockholders because Fidus SBIC is a wholly owned subsidiary of the Company, and the Company’s stockholders will own, directly or indirectly through the New General Partner, all equity interests in Fidus SBIC. Also, the representations and agreements of the Company made in this Application effectively eliminate any substantive differences between applying the regulatory framework to the Company conducting its SBIC activities as one entity and the framework applicable to the Company and Fidus SBIC as separate entities.

Congress meant to encourage the development of venture capital companies by the enactment of the 1980 amendments to the 1940 Act (“the “1980 Amendments”). A principal purpose of the 1980 Amendments was to remove regulatory burdens on venture capital companies while assuring adequate protection of the interests of investors in such companies. S. REP. No. 958, at 5 (1980); H.R. REP. No. 1341, at 21-22 (1980), as reprinted in 1980 U.S.C.C.A.N. 4803, 4904. The 1980 Amendments sought to eliminate provisions of the 1940 Act that created unnecessary disincentives to venture capital activities. *Id.* One goal underlying elimination of these disincentives was to increase investment by the public, particularly institutional investors, in professionally managed venture capital companies in order to provide a new source of risk capital for small developing companies. See Reginald L. Thomas & Paul F. Roye, Regulation of Business Development Companies Under the Investment Company Act, 55 S. Cal. L. Rev. 895, 912 (1982).

In adopting interim Rules 60a-1 and 57b-1, the Commission recognized this goal, stating “The 1980 Amendments, which became effective immediately upon their signing by the President, represent the considerable efforts of Congress and numerous other participants, including representatives of the Commission and the “venture capital” industry, to enhance the flow of capital to small, developing businesses and financially troubled businesses.” Investment Company Act Release No. 11493, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) 183,704 (Dec. 16, 1980). The Commission also stated in this Release that “it is clear that Congress did not intend to prohibit business development companies from acquiring the securities of and operating wholly owned SBICs. Indeed, the 1980 Amendments specifically recognized the possibility of such ownership.” Subsidiary SBICs are also contemplated by Item 8 of the instructions to Form N-2.

The Applicants submit that the proposed transactions are entirely consistent with the general purposes of the 1980 Amendments. By this Application, the Company seeks relief that will allow it, together with its wholly owned SBIC subsidiary, to expand and broaden its activities consistent with the Congressional policies described above and without creating conflicting regulatory problems. The plan can be accomplished only by obtaining the exemptions requested. The proposed transactions are clearly consistent with the general purposes of the 1940 Act, as amended by the 1980 Amendments.

It is submitted that granting the requested exemption on the terms set forth in this Application is consistent with the policies and provisions of the 1940 Act and will enhance the interests of the Company's stockholders while retaining for them the important protections afforded by the provisions of the 1940 Act.

2. Section 12(d)(1)(J).

Applicants request an Order of the Commission exempting from the provisions of Section 12(d)(1) any loans or advances by Fidus SBIC to the Company that may be deemed to violate Section 12(d)(1)(A)(ii) or (iii) if the loans or advances were construed as purchases by Fidus SBIC of the securities of the Company representing indebtedness.⁴ Section 12(d)(1)(J) permits the Commission to conditionally or unconditionally exempt any person or transaction from any provision of Section 12(d)(1) if and to the extent that the exemption is consistent with the public interest and the protection of investors.

⁴ As set forth above, Fidus SBIC will not own any of the voting securities of the Company.

With respect to the exemption from Sections 12(d)(1)(A)(ii) and (iii) allowing Fidus SBIC to make loans or advances to the Company without creating a prohibited purchase of securities from a related BDC, Fidus SBIC's wholly owned subsidiary status and consolidated financial reporting with the Company will both eliminate the possibility of overreaching and prevent confusion as to the financial status of the Company to the Company's stockholders, who are the investors that the 1940 Act is intended to protect.

3.