

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28168; 812-13367]

Kohlberg Capital Corporation; Notice of Application

February 25, 2008

Agency: Securities and Exchange Commission (“Commission”).

Action: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the “Act”) for an exemption from sections 23(a), 23(b) and 63 of the Act, and under sections 57(a)(4) and 57(i) of the Act and rule 17d-1 under the Act permitting certain joint transactions otherwise prohibited by section 57(a)(4) of the Act.

Summary of the Application: Applicant, Kohlberg Capital Corporation (“Kohlberg Capital”) requests an order to permit it to issue restricted shares of its common stock to its officers and employees under the terms of its equity incentive plan.

Filing Dates: The application was filed on February 27, 2007, and amended on February 13, 2008 and February 22, 2008. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission’s Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 21, 2008, 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, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090. Applicant, 295 Madison Avenue, 6<sup>th</sup> Floor, New York, NY, 10017.

For Further Information Contact: Bruce R. MacNeil, Senior Counsel, at (202) 551-6817, or Julia Kim Gilmer, Branch Chief, at (202) 551-6821, (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 Commission's Public Reference Desk, 100 F Street, NE, Washington, DC 20549-1520 (tel. 202-551-5850).

Applicant's Representations:

1. Kohlberg Capital, a Delaware corporation, is an internally managed, non-diversified, closed-end investment company that has elected to be regulated as a business development company ("BDC") under the Act.<sup>1</sup> Kohlberg Capital provides debt and equity growth capital to privately-held middle market companies and its investment objective is to generate current income and capital appreciation from the investments made by those companies in senior secured term loans, mezzanine debt and selected equity investments. Kohlberg Capital may also invest in loans to larger, publicly traded companies, high-yield bonds, distressed debt securities and debt and equity securities issued by collateralized debt obligation funds. Shares of Kohlberg Capital's common stock are traded on the NASDAQ Global Select Market under the

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<sup>1</sup> Kohlberg Capital was organized on August 8, 2006. On December 4, 2006, Kohlberg Capital filed with the Commission its registration statement on Form N-2 under the Securities Act of 1933, as amended, in connection with its initial public offering of common stock (the "IPO"). On December 5, 2006, Kohlberg Capital elected to be regulated as a BDC. 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 such securities. Kohlberg Capital completed its IPO on December 15, 2006.

symbol “KCAP.” As of September 30, 2007, there were 17, 997,611 shares of Kohlberg Capital’s common stock outstanding. As of that date, Kohlberg Capital had 26 employees, including the employees of its wholly-owned consolidated subsidiaries.<sup>2</sup>

2. Kohlberg Capital currently has a seven-member board of directors (the “Board”) of whom three are “interested persons” of Kohlberg Capital within the meaning of section 2(a)(19) of the Act and four are not interested persons (the “non-interested directors”). The four non-interested directors are neither employees nor officers of Kohlberg Capital (“Non-employee Directors”). Currently, Kohlberg Capital’s Non-employee Directors are all non-interested Directors, but it is possible that Kohlberg Capital may have Non-employee Directors in the future who are interested persons of Kohlberg Capital.

3. Kohlberg Capital believes that its successful operation depends on its ability to offer compensation packages to its professionals that are competitive with those offered by its competitors. Kohlberg Capital believes its ability to adopt a compensation plan providing for the periodic issuance of shares of restricted stock (i.e., stock that, at the time of issuance, is subject to certain forfeiture restrictions, and thus is restricted as to its transferability until such forfeiture restrictions have lapsed) (the “Restricted Stock”) is vital to its future growth and success. Kohlberg Capital wishes to adopt an equity-based compensation plan (the “Plan”) for its officers and employees (“Employees”), as well as employees of its wholly owned consolidated subsidiaries (together with the Employees, the “Participants”).

4. The Plan will authorize the issuance of shares of Restricted Stock subject to certain forfeiture restrictions. These restrictions may relate to continued employment, the performance of Kohlberg Capital, or other restrictions deemed by the Board to be appropriate. The Restricted Stock will be subject to restrictions on transferability and other restrictions as required by the

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<sup>2</sup> Kohlberg Capital does not currently have any wholly-owned consolidated subsidiaries.

Board. Except to the extent restricted under the terms of the Plan, a Participant granted Restricted Stock will have all the rights of any other shareholder, including the right to vote the Restricted Stock and the right to receive dividends. During the restriction period, the Restricted Stock generally may not be sold, transferred, pledged, hypothecated, margined, or otherwise encumbered by the Participant. Except as the Board otherwise determines, upon termination of a Participant's employment during the applicable restriction period, Restricted Stock for which forfeiture restrictions have not lapsed at the time of such termination shall be forfeited.

5. The maximum amount of Restricted Stock that may be issued under the Plan will be 10% of the outstanding shares of Kohlberg Capital's common stock on the effective date of the Plan plus 10% of the outstanding shares of Kohlberg Capital's common stock issued or delivered by Kohlberg Capital (other than pursuant to compensation plans) during the term of the Plan.<sup>3</sup> The Plan limits the total number of shares that may be awarded to any single Participant in a single year to 500,000 shares. In addition, no Restricted Stock Participant may be granted more than 25% of the shares reserved for issuance under the Plan. The Plan will be administered by the Board, which will award shares of Restricted Stock to the Participants from time to time as part of the Participants' compensation based on a Participant's actual or expected performance and value to Kohlberg Capital.

6. Each issuance of Restricted Stock under the Plan will be approved by the required majority, as defined in section 57(o) of the Act,<sup>4</sup> of Kohlberg Capital's directors on the basis that

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<sup>3</sup> For purposes of calculating compliance with this limit, Kohlberg Capital will count as Restricted Stock all shares of its common stock that are issued pursuant to the Plan less any shares that are forfeited back to Kohlberg Capital and cancelled as a result of forfeiture restrictions not lapsing.

<sup>4</sup> The term "required majority," when used with respect to the approval of a proposed transaction, plan, or arrangement, means both a majority of a BDC's directors or general partners who have no financial interest in such transaction, plan, or arrangement and a majority of such directors or general partners who are not interested persons of such company.

the issuance is in the best interests of Kohlberg Capital and its shareholders. The date on which the required majority approves an issuance of Restricted Stock will be deemed the date on which the subject Restricted Stock is granted.

7. The Plan was approved by the Board on February 5, 2008, including by a majority of the non-interested directors and the required majority as defined in section 57(o) of the Act. The Plan will be submitted for approval to Kohlberg Capital's shareholders, and will become effective upon such approval, subject to and following receipt of the order.

Applicant's Legal Analysis:

Sections 23(a) and (b), Section 63

1. Under section 63 of the Act, the provisions of section 23(a) of the Act generally prohibiting a registered closed-end investment company from issuing securities for services or for property other than cash or securities are made applicable to BDCs. This provision would prohibit the issuance of Restricted Stock as a part of the Plan.

2. Section 23(b) generally prohibits a closed-end management investment company from selling its common stock at a price below its current net asset value ("NAV"). Section 63(2) makes section 23(b) applicable to BDCs unless certain conditions are met. Because Restricted Stock that would be granted under the Plan would not meet the terms of section 63(2), sections 23(b) and 63 prohibit the issuance of the Restricted Stock.

3. Section 6(c) provides that the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of the Act, if and to the extent that the exemption is necessary or 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.

4. Kohlberg Capital requests an order pursuant to section 6(c) of the Act granting an exemption from the provisions of sections 23(a) and (b) and section 63 of the Act. Kohlberg Capital states that the concerns underlying those sections include: (a) preferential treatment of investment company insiders and the use of options and other rights by insiders to obtain control of the investment company; (b) complication of the investment company's structure that makes it difficult to determine the value of the company's shares; and (c) dilution of shareholders' equity in the investment company. Kohlberg Capital states that the Plan does not raise the concern about preferential treatment of Kohlberg Capital's insiders because the Plan is bona fide compensation plan of the type that is common among corporations generally. In addition, section 61(a)(3)(B) of the Act permits a BDC to issue to its officers, directors and employees, pursuant to an executive compensation plan, warrants, options and rights to purchase the BDC's voting securities, subject to certain requirements. Kohlberg Capital states that, for reasons that are unclear, section 61 and its legislative history do not address the issuance by a BDC of restricted stock as incentive compensation. Kohlberg Capital states, however, that the issuance of Restricted Stock is substantially similar, for purposes of investor protection under the Act, to the issuance of warrants, options, and rights as contemplated by section 61. Kohlberg Capital also asserts that the Plan would not become a means for insiders to obtain control of Kohlberg Capital because the number of shares of Kohlberg Capital issuable under the Plan would be limited as set forth in the application. Moreover, no individual Restricted Stock Participant could be issued more than 25% of the shares reserved for issuance under the Plan.

5. Kohlberg Capital further states that the Plan will not unduly complicate Kohlberg Capital's capital structure because equity-based compensation arrangements are widely used among corporations and commonly known to investors. Kohlberg Capital notes that the Plan

will be submitted to its shareholders for their approval. Kohlberg Capital represents that a concise, “plain English” description of the Plan, including its potential dilutive effect, will be provided in the proxy materials that will be submitted to Kohlberg Capital’s shareholders. Kohlberg Capital also states that it will comply with the proxy disclosure requirements in Item 10 of Schedule 14A under the Securities Exchange Act of 1934 (the “Exchange Act”). Kohlberg Capital further notes that the Plan will be disclosed to investors in accordance with the requirements of the Form N-2 registration statement for closed-end investment companies, and pursuant to the standards and guidelines adopted by the Financial Accounting Standards Board for operating companies. In addition, Kohlberg Capital will comply with the disclosure requirements for executive compensation plans applicable to operating companies under the Exchange Act.<sup>5</sup> Kohlberg Capital thus concludes that the Plan will be adequately disclosed to investors and appropriately reflected in the market value of Kohlberg Capital’s shares.

6. Kohlberg Capital acknowledges that, while awards granted under the Plan would have a dilutive effect on the shareholders’ equity in Kohlberg Capital, that effect would be outweighed by the anticipated benefits of the Plan to Kohlberg Capital and its shareholders. Kohlberg Capital asserts that it needs the flexibility to provide the requested equity-based employee compensation in order to be able to compete effectively with other financial services firms for talented professionals. These professionals, Kohlberg Capital suggests, in turn are likely to increase Kohlberg Capital’s performance and shareholder value. Kohlberg Capital also

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<sup>5</sup> Kohlberg Capital will comply with the amendments to the disclosure requirements for executive and director compensation, related party transactions, director independence and other corporate governance matters, and security ownership of officers and directors to the extent adopted and applicable to BDCs. See Executive Compensation and Related Party Disclosure, Securities Act Release No. 8655 (Jan. 27, 2006) (proposed rule); Executive Compensation and Related Party Disclosure, Securities Act Release No. 8732A (Aug. 29, 2006) (final rule and proposed rule), as amended by Executive Compensation Disclosure, Securities Act Release No. 8765 (Dec. 22, 2006) (adopted as interim final rules with request for comments).

asserts that equity-based compensation would more closely align the interests of Kohlberg Capital's Employees with those of its shareholders. In addition, Kohlberg Capital states that its shareholders will be further protected by the conditions to the requested order that assure continuing oversight of the operation of the Plan by Kohlberg Capital's Board.

Section 57(a)(4), Rule 17d-1

7. Section 57(a) proscribes certain transactions between a BDC and persons related to the BDC in the manner described in section 57(b) ("57(b) persons"), absent a Commission order. Section 57(a)(4) generally prohibits a 57(b) person from effecting a transaction in which the BDC is a joint participant absent such an order. Rule 17d-1, made applicable to BDCs by section 57(i), proscribes participation in a "joint enterprise or other joint arrangement or profit-sharing plan," which includes a stock option or purchase plan. Employees and directors of a BDC are 57(b) persons. Thus, the issuance of shares of Restricted Stock could be deemed to involve a joint transaction involving a BDC and a 57(b) person in contravention of section 57(a)(4). Rule 17d-1(b) provides that, in considering relief pursuant to the rule, the Commission will consider (i) whether the participation of the company in a joint enterprise is consistent with the Act's policies and purposes and (ii) the extent to which that participation is on a basis different from or less advantageous than that of other participants.

8. Kohlberg Capital requests an order pursuant to section 57(a)(4) and rule 17d-1 to permit the Plan. Kohlberg Capital states that the Plan, although benefiting the Participants and Kohlberg Capital in different ways, are in the interests of Kohlberg Capital's shareholders because the Plan will help Kohlberg Capital attract and retain talented professionals, help align the interests of Kohlberg Capital's employees with those of its shareholders, and in turn help produce a better return to Kohlberg Capital's shareholders.



Applicant's Conditions:

Applicant agrees that the order granting the requested relief will be subject to the following conditions:

1. The Plan will be authorized by Kohlberg Capital's shareholders.
2. Each issuance of Restricted Stock to an Employee will be approved by the required majority, as defined in section 57(o) of the Act, of Kohlberg Capital's directors on the basis that such issuance is in the best interest of Kohlberg Capital and its shareholders.
3. The amount of voting securities that would result from the exercise of all of Kohlberg Capital's outstanding warrants, options, and rights, together with any Restricted Stock issued pursuant to the Plan at the time of issuance shall not exceed 25% of the outstanding voting securities of Kohlberg Capital, except that if the amount of voting securities that would result from the exercise of all of Kohlberg Capital's outstanding warrants, options, and rights issued to Kohlberg Capital's directors, officers, and employees, together with any Restricted Stock issued pursuant to the Plan, would exceed 15% of the outstanding voting securities of Kohlberg Capital, then the total amount of voting securities that would result from the exercise of all outstanding warrants, options, and rights, together with any Restricted Stock issued pursuant to the Plan, at the time of issuance shall not exceed 20% of the outstanding voting securities of Kohlberg Capital.
4. The maximum amount of shares of Restricted Stock that may be issued under the Plan will be 10% of the outstanding shares of common stock of Kohlberg Capital on the effective date of the Plan plus 10% of the number of shares of Kohlberg Capital's common stock issued or delivered by Kohlberg Capital (other than pursuant to compensation plans) during the term of the Plan.

5. The Board will review the Plan at least annually. In addition, the Board will review periodically the potential impact that the issuance of Restricted Stock under the Plan could have on Kohlberg Capital's earnings and NAV per share, such review to take place prior to any decisions to grant Restricted Stock under the Plan, but in no event less frequently than annually. Adequate procedures and records will be maintained to permit such review. The Board will be authorized to take appropriate steps to ensure that the grant of Restricted Stock under the Plan would not have an effect contrary to the interests of Kohlberg Capital's shareholders. This authority will include the authority to prevent or limit the granting of additional Restricted Stock under the Plan. All records maintained pursuant to this condition will be subject to examination by the Commission and its staff.

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

Florence E. Harmon  
Deputy Secretary