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1940 Act – Rule 23c-2

December 4, 2019

Mr. Paul Cellupica  
Deputy Director and Chief Counsel  
Division of Investment Management  
United States Securities and Exchange Commission  
100 F Street, N.E. Washington, DC 20549

Dear Mr. Cellupica:

We are writing on behalf of Gladstone Investment Corporation (the “Company”), a closed-end management investment company that has elected to be regulated as a business development company (“BDC”). The Company respectfully requests that the Staff of the Division of Investment Management (the “Staff”) of the U.S. Securities and Exchange Commission (the “Commission”) confirm that it will not recommend enforcement action to the Commission against the Company for violations of Sections 63 and 23(c) of the Investment Company Act of 1940 (the “Act”), and Rule 23c-2 thereunder, if the Company files Form N-23C-2 with the Commission fewer than thirty days prior to, including on the same business day as, the Company’s redemption of an entire class or series of its preferred shares. This letter seeks confirmation of oral no-action relief provided by the Staff to Eric S. Purple of Stradley Ronon Stevens & Young, LLP on August 10, 2018.

I. Background

In July of 2018, Gladstone Management Corporation, the Company’s SEC registered investment adviser, saw an opportunity to refinance the Company’s outstanding series of term preferred stock at a lower interest rate and longer maturity. At the end of July 2018, the Company had outstanding two series of cumulative term preferred stock: 1,656,000 shares of 6.75% Series B Cumulative Term Preferred Stock (“Series B”) and 1,610,000 shares of 6.50% Series C Cumulative Term Preferred Stock (“Series C”) (collectively, the “Prior

Series”).<sup>1</sup> Per the terms of the Articles Supplementary, the Company undertook on August 15, 2018 to redeem the Prior Series with proceeds obtained in part from an issuance of new term preferred shares. The Company offered a new series of term preferred shares, 6.375% Series E Cumulative Term Preferred Stock (the “New Series”). The proceeds from the sale of the New Series were used to fund a portion of the optional redemption of the Prior Series, with borrowings on the Company’s credit facility used to retire the remainder of the Prior Series. The New Series has a lower dividend rate and has a term that extends through 2025. The net effect of the issuance of the New Series was to refinance the Company’s capital structure so that its term preferred shares have a lower dividend rate, and a greater length of existence, which will benefit current common stockholders by providing a lower-cost form of leverage.

Prior to redeeming the Prior Series, however, the Company was required to file Form N-23C-2 with the Commission pursuant to Rule 23c-2(b) under the 1940 Act. This rule would have further required that the Company file the notice at least thirty days prior to any redemption of the Prior Series.

Compliance with the thirty day advance notice provision would have impaired the Company’s ability to raise new capital without incurring additional leverage. As noted above, proceeds from the offering of the shares of New Series were used to redeem the Prior Series. Complying with the thirty day advance notice period would have required the Company to postpone its offering until the expiration of the thirty day advance notice period in order to eliminate or minimize the amount of time that the Company had both the Prior Series and the New Series outstanding. If the Company was to have postponed its offering for this period, such a delay might have undermined the Company’s ability to take advantage of what the Company’s underwriters had indicated was a very attractive and very narrow market window for issuing the New Series. Conversely, sales of the New Series too far in advance of the redemption date of the Prior Series could have caused the Company to maintain a level of leverage that it would not otherwise choose to maintain, could have

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<sup>1</sup> The Prior Series were issued pursuant to Certificates of Designation filed with the State of Delaware, on November 7, 2014 and May 11, 2015, respectively (the “Designations”). In addition, with respect to Series B, a Certificate of Amendment to the Certificate of Designation was filed with the State of Delaware on August 4, 2015 (the “Amendment,” and together with the Designations, the “Articles Supplementary”). The Articles Supplementary required that the Company redeem the Existing Series on December 31, 2021 and May 31, 2022, respectively. The Articles Supplementary also allowed the Company to redeem the Prior Series prior to those dates at its option.

increased the amount of dividends that it needed to pay preferred shareholders and could have caused the Company to maintain a significant cash position with no investment purpose, which could have affected the performance of the Company.

Based on discussions with the Staff, the Company filed the notice required by Rule 23c-2 on August 15, 2018 sixteen days prior to the redemption of the Prior Series on August 31, 2018.<sup>2</sup> The filing was filed in advance of the redemption of the Prior Series, and was made contemporaneously with the commencement of the offering of the New Series and contained all of the information required by Rule 23c-2.

## II. Analysis

Rule 23c-2(b), which was adopted in 1942 pursuant to Section 23(c) of the 1940 Act,<sup>3</sup> states in pertinent part:

A registered closed-end investment company which proposes to call or redeem any securities of which it is the issuer shall file with the Commission notice of its intention to call or redeem such securities at least 30 days prior to the date set for the call or redemption....

The notice must contain certain required information including: (1) the title of the class of securities to be called or redeemed, (2) the date on which the securities are to be called or redeemed, (3) the applicable provisions of the governing instrument pursuant to which the securities are to be called or redeemed and, (4) if less than all the outstanding securities of a class or series are to be called or redeemed, the principal amount or number of shares and the basis upon which the securities to be called or redeemed are to be selected.

We believe that a full redemption of a series or class of preferred stock by a closed-end fund does not present any of the unfair discrimination concerns reflected in Section 23(c) and Rule 23c-2, as such full redemption necessarily treats all preferred shareholders equally.<sup>4</sup>

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<sup>2</sup> See Form N-23C-2 filed by Gladstone Investment Corp. on August 15, 2018.

<sup>3</sup> See Call and Redemption of Securities Issued by Closed-End Registered Investment Companies, 7 Fed.Reg. 6669 (1942). Section 63 of the 1940 Act applies Section 23 to business development companies “to the same extent as if the [BDC] were a registered closed-end investment company....” As a result, Rule 23c-2 also applies to a BDC.

<sup>4</sup> Similarly, the text of Rule 23c-2 indicates the Commission’s view that partial redemptions by lot or on a pro rata basis would not unfairly discriminate against any holder of the  
(footnote continued on next page)

We respectfully submit that the rule's adopting release does not provide a rationale for the thirty day notice requirement. In addition, while the rule requires filing the notice with the Commission, as opposed to delivery of such notice to affected shareholders, we are not aware of any statement by the Commission that addresses or explains the purpose of the thirty-day advance notification period. However, we believe that since the adoption of the Rule, technology and communication systems have advanced to the point that this amount of lead time is no longer necessary. While the thirty day notification period might have been useful in the historical context of 1942 when the rule was adopted, it seems to be less essential in an age of electronic filings and rapid communications.<sup>5</sup>

The Company believes that its request is supported by technological advances in the ability to disseminate information that have occurred since the Rule's adoption, the lack of any potential overreaching related to this type of redemption, and by recent Staff experience with abbreviated notice periods under the Rule. We respectfully submit that the Company's request appears to be consistent with past Staff action and views in this area. We have examined the Rule 23c-2 notices that have been filed on the Commission's EDGAR database since 2008. We have identified at least 775 separate instances in which a closed-end management investment company or BDC has filed a Rule 23c-2 notice with the Commission stating that the notice is being filed less than thirty days prior to the redemption date pursuant to permission granted by the Commission staff.<sup>6</sup>

### III. Conclusion

We believe that the requested relief is further supported by the following representations made by the Company:

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securities of the class or series being redeemed. We note, however, that we are not seeking the Staff's view on such partial redemptions, as the Company intends to redeem each series fully.

<sup>5</sup> We note that filings of notices under 23c-2(b) have been required to be filed electronically on EDGAR since 1997. See Adoption of EDGAR Filer Manual, SEC Rel. No. IC-22522 (Feb. 27, 1997).

<sup>6</sup> Based on a review of EDGAR filings, the first instance of such a filing occurred on March 11, 2008. From that date to October 11, 2019, there have been 1,442 Forms N-23c-2 filed with the Commission (excluding amended filings).

1. The filing of Form N-23C-2 (the "Notice") will contain all of the information required by the Rule;
2. Filing the Notice on an abbreviated time frame is permitted under relevant state law and the Company's governing documents;
3. The Notice will be filed prior to<sup>7</sup>:
  - a. redemption of any existing preferred stock;
  - b. commencement of the offering of a replacement preferred stock; and
  - c. sending notification to existing preferred stock shareholders of the redemption;
4. The Company will call or redeem the entire class or series of preferred stock.

For the reasons discussed in this letter, the Company respectfully requests the Staff of the Division of Investment Management to confirm that it will not recommend enforcement action against the Company to the Commission for violations of Sections 63 and 23(c) of the Act, and Rule 23c-2 thereunder, if the Company files Form N-23C-2 with the Commission fewer than thirty days prior to, including on the same business day as, the Company's redemption of a series of preferred stock, as outlined in this letter.

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Please contact me at (202) 507-5154 if you need additional information or would like to discuss these matters further.

Very truly yours,



Eric S. Purple

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<sup>7</sup> The Company respectfully submits that it is possible that the Company may file the Notice on the same business day as, but in all such cases immediately prior to, the steps outlined in this representation.

Mr. Paul Cellupica  
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cc: Nadya Roytblat, Assistant Chief Counsel, Division of Investment Management,  
David Marcinkus, Branch Chief, Division of Investment Management  
Asen Parachkevov, Senior Counsel, Division of Investment Management  
David Gladstone, Chairman and CEO – Gladstone Capital Corporation  
Michael LiCalsi, Internal Legal Counsel – Gladstone Capital Corporation