

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 27815; 812-13312]

Hercules Technology Growth Capital, Inc.; Notice of Application

May 2, 2007

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 authorizing certain joint transactions otherwise prohibited by section 57(a)(4) of the Act.

Summary of the Application: Applicant, Hercules Technology Growth Capital, Inc. (“HTGC”) requests an order to permit it to issue shares of its restricted common stock as part of the compensation packages for certain of its employees and directors, and certain employees of its wholly-owned consolidated subsidiaries.

Filing Dates: The application was filed on July 7, 2006 and amended on April 4, 2007 and May 1, 2007.

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 HTGC with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on May 22, 2007, and should be accompanied by proof of service on HTGC, 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. HTGC, c/o Manuel A. Henriquez, Chairman of the Board and Chief Executive Officer, HTGC, 400 Hamilton Avenue, Suite 310, Palo Alto, California 94301.

For Further Information Contact: Laura J. Riegel, Senior Counsel, at (202) 551-6873, or Nadya B. Roytblat, Assistant Director, 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 20549-0102 (tel. 202-551-5850).

Applicant's Representations:

1. HTGC, a Maryland 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> HTGC is a specialty finance company that provides debt and equity growth capital to technology-related and life-science companies at all stages of development. Shares of HTGC's common stock are traded on The NASDAQ Global Market under the symbol "HTGC." As of December 31, 2006, there were 21,927,034 shares of HTGC's common stock outstanding. As of that date,

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<sup>1</sup> HTGC was organized on December 18, 2003. On February 22, 2005, HTGC 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") and elected to be regulated as a BDC on the same date. 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. On June 11, 2005, HTGC completed its IPO.

HTGC had 26 employees, including the employees of its wholly-owned consolidated subsidiaries.

2. HTGC currently has a four member board of directors (“Board”) of whom one is considered to be an “interested person” of HTGC within the meaning of section 2(a)(19) of the Act and three are not-interested persons (“Non-interested Directors”). HTGC has three directors who are not officers or employees of HTGC (the “Non-employee Directors”). Currently, HTGC’s Non-employee Directors are all Non-interested Directors, but it is possible that HTGC may have Non-employee Directors in the future who are interested persons of HTGC.

3. In May, 2006, HTGC adopted the 2006 Non-employee Director Plan (the “2006 Plan”) for the purpose of advancing the interests of HTGC by providing for the grant of awards under the 2006 Plan to eligible directors of HTGC who are Non-employee Directors.<sup>2</sup> HTGC proposes to amend and restate the 2006 Plan to permit the issuance of restricted 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”) to its Non-employee Directors (the “Amended and Restated 2006 Plan”).

4. In May, 2006, HTGC adopted the Amended and Restated 2004 Equity Incentive Plan (the “2004 Plan”) for the purpose of attracting and retaining the services of executive officers, employee directors, and other key employees. HTGC proposes to amend and restate the 2004 Plan to permit the issuance of shares of Restricted Stock to its

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<sup>2</sup> The Commission has issued an order under Section 61(a)(3)(B) of the Act approving the 2006 Plan and the grant of options to Non-employee Directors under the 2006 Plan. Hercules Technology Growth Capital, Inc., Investment Company Act Release Nos. 27668 (Jan. 19, 2007) (notice) and 27669 (Feb. 15, 2007) (order).

employees and the employees of its wholly-owned consolidated subsidiaries (the “Amended and Restated 2004 Plan”; each of the Amended and Restated 2004 Plan and the Amended and Restated 2006 Plan is an “Amended and Restated Plan” and together, the “Amended and Restated Plans”).

5. HTGC requests an order to permit it to issue shares of Restricted Stock to its Non-employee Directors and employees, and the employees of its wholly-owned consolidated subsidiaries (collectively, the “Restricted Stock Participants” and each, a “Restricted Stock Participant”).<sup>3</sup> HTGC believes that the Amended and Restated Plans would enable HTGC to offer the Restricted Stock Participants compensation packages that are competitive with those offered by its competitors and other investment management businesses, which would enhance the ability of HTGC to hire and retain key senior management and other key personnel.

6. The Amended and Restated Plans will authorize the issuance of shares of Restricted Stock subject to certain forfeiture restrictions. These restrictions may relate to continued employment or service on the Board, as the case may be (lapsing either on an annual or other periodic basis or on a “cliff” basis, i.e., at the end of a stated period of time), the performance of HTGC, or other restrictions deemed by the Board from time to time to be appropriate and in the best interests of HTGC and its stockholders. The Restricted Stock will not be transferable except for disposition by gift, will or intestacy. Except to the extent restricted under the terms of an Amended and Restated Plan, a Restricted Stock Participant granted Restricted Stock will have all the rights of any other stockholder, including the right to vote the Restricted Stock and the right to receive

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<sup>3</sup> HTGC requests that the order also permit the issuance of Restricted Stock to its future Non-employee Directors under the Amended and Restated 2006 Plan and to its future employees and the future employees of its wholly-owned consolidated subsidiaries under the Amended and Restated 2004 Plan.

dividends. During the restriction period (i.e., prior to the lapse of applicable forfeiture restrictions), the Restricted Stock generally may not be sold, transferred, pledged, hypothecated, margined, or otherwise encumbered by the Restricted Stock Participant. Except as the Board otherwise determines, upon termination of a Restricted Stock Participant's employment or service on the Board during the applicable restriction period, Restricted Stock for which forfeiture restrictions have not lapsed at the time of such termination shall be forfeited.

7. The maximum amount of shares that may be issued under the Amended and Restated Plan will be 10% of the outstanding shares of common stock of HTGC on the effective date of the Amended and Restated Plans plus 10% of the outstanding number of shares of HTGC's common stock issued or delivered by HTGC (other than pursuant to compensation plans) during the term of the Amended and Restated Plans.<sup>4</sup> In addition, no Restricted Stock Participant may be granted more than 25% of the shares of common stock reserved for issuance under the Amended and Restated Plans. The Board would award shares of Restricted Stock to the Restricted Stock Participants from time to time as part of the Restricted Stock Participant's compensation based on a Restricted Stock Participant's actual or expected performance and value to HTGC. The Board would have the responsibility to ensure that the Amended and Restated Plans are operated in a manner that best serves the interests of HTGC and its stockholders.

8. Subject to HTGC's stockholders' approval of the Amended and Restated 2006 Plan and issuance of the order, the Amended and Restated 2006 Plan will provide for the grant of 3,333 shares of Restricted Stock to Non-employee Directors upon their

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<sup>4</sup> For purposes of calculating compliance with this limit, HTGC will count as Restricted Stock all shares of HTGC's common stock that are issued pursuant to the Amended and Restated Plans less any shares that are forfeited back to HTGC and cancelled as a result of forfeiture restrictions not lapsing.

initial election to the Board, for which forfeiture restrictions would lapse as to one-half of such shares on the anniversary of the grant for each of the first two years of service, and an additional grant of 5,000 shares of Restricted Stock at the time of such Non-employee Directors' re-election to the Board, for which forfeiture restrictions would lapse as to one-third of such shares on the anniversary of such grant over three years. Subject to HTGC's stockholders' approval of the Amended and Restated 2006 Plan, Non-employee Directors who hold office on the date of the order will receive a grant at the 2007 annual meeting of HTGC's stockholders equal to the pro rata portion of such grant of 5,000 shares of Restricted Stock based on the length of the Non-employee Directors' remaining current term, for which forfeiture restrictions would lapse as to one-third of such shares on the anniversary of the grant over three years. The grants of Restricted Stock to Non-employee Directors under the Amended and Restated 2006 Plan will be automatic and will not be changed without Commission approval.

9. Each issuance of Restricted Stock under the Amended and Restated 2004 Plan will be approved by the required majority, as defined in Section 57(o) of the Act,<sup>5</sup> of HTGC's directors on the basis that the issuance is in the best interests of HTGC and its stockholders. 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. The Amended and Restated Plans will be submitted for approval to HTGC's stockholders, and will become effective upon such approval, subject to the issuance of the order.

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<sup>5</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.

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 Amended and Restated Plans.

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 Amended and Restated Plans 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, in part, that the Commission may, by order upon application, conditionally or unconditionally exempt any person, security, or transaction, or any class or classes thereof, 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. HTGC 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. HTGC states that the concerns underlying those sections include: (i) preferential treatment of investment company insiders and the use of options and other rights by

insiders to obtain control of the investment company; (ii) complication of the investment company's structure that makes it difficult to determine the value of the company's shares; and (iii) dilution of stockholders' equity in the investment company. HTGC states that the Amended and Restated Plans do not raise the concern about preferential treatment of HTGC's insiders because the Amended and Restated Plans are bona fide compensation plans of the type that are common among corporations generally. In addition, section 61(a)(3) 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. HTGC 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. HTGC 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. HTGC also asserts that the Amended and Restated Plans would not become a means for insiders to obtain control of HTGC because the maximum number of HTGC's voting securities that are represented by shares of Restricted Stock and that may be issued to an individual Restricted Stock Participant will be limited as set forth in the conditions to the order.

5. HTGC further states that the Amended and Restated Plans will not unduly complicate HTGC's structure because equity-based employee compensation arrangements are widely used among corporations and commonly known to investors. HTGC notes that the Amended and Restated Plans will be submitted to HTGC's stockholders for their approval. HTGC represents that a concise, "plain English"

description of the Amended and Restated Plans, including their potential dilutive effect, will be provided in the proxy materials that will be submitted to HTGC's stockholders. HTGC also states that it will comply with the proxy disclosure requirements in Item 10 of Schedule 14A under the Securities Exchange Act of 1934. HTGC further notes that the Amended and Restated Plans will be disclosed to investors in accordance with the requirements of the Form N-2 registration statements for closed-end investment companies, and pursuant to the standards and guidelines adopted by the Financial Accounting Standards Board for operating companies. In addition, HTGC is subject to the same executive disclosure requirements that the Commission has adopted for operating companies.<sup>6</sup> HTGC thus concludes that the Amended and Restated Plans will be adequately disclosed to investors and appropriately reflected in the market value of HTGC's shares.

6. HTGC acknowledges that, while awards granted under the Amended and Restated Plans would have a dilutive effect on the stockholders' equity in HTGC, that effect would be outweighed by the anticipated benefits of the Amended and Restated Plans to HTGC and its stockholders. HTGC 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, HTGC suggests, in turn are likely to increase HTGC's performance and stockholder value. HTGC also asserts that equity-based compensation would more closely align the interests of the Non-employee Directors and HTGC's employees with those of HTGC's stockholders. HTGC believes that the granting of shares of Restricted

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<sup>6</sup> See Executive Compensation and Related Person Disclosure, Release No. 33-8732A (Aug. 29, 2006), as amended by, Executive Compensation Disclosure, Release No. 33-8765 (Dec. 22, 2006) (adopted as interim final rules).

Stock to Non-employee Directors under the Amended and Restated 2006 Plan is fair and reasonable because of the skills and experience that such directors provide to HTGC. Such skills and experience are necessary for the management and oversight of HTGC's investments and operations. HTGC believes that granting the shares of Restricted Stock will provide significant incentives for Non-employee Directors to remain on the Board and to devote their best efforts to the success of HTGC's business in the future, as they have done in the past. The issuance of shares of Restricted Stock will also provide a means for HTGC's Non-employee Directors to increase their ownership interest in HTGC, thereby helping to ensure a close identification of their interests with those of HTGC and its stockholders.

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

Applicant's Conditions:

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

1. The Amended and Restated Plans will be authorized by HTGC's stockholders.
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 HTGC's directors on the basis that such issuance is in the best interests of HTGC and its stockholders.
3. The amount of voting securities that would result from the exercise of all of HTGC's outstanding warrants, options, and rights, together with any Restricted Stock issued pursuant to the Amended and Restated Plans, at the time of issuance shall not exceed 25% of the outstanding voting securities of HTGC, except that if the amount of voting securities that would result from the exercise of all of HTGC's outstanding warrants, options, and rights issued to HTGC's directors, officers, and employees,

together with any Restricted Stock issued pursuant to the Amended and Restated Plans, would exceed 15% of the outstanding voting securities of HTGC, 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 Amended and Restated Plans, at the time of issuance shall not exceed 20% of the outstanding voting securities of HTGC.

4. The maximum amount of shares of Restricted Stock that may be issued under the Amended and Restated Plans will be 10% of the outstanding shares of common stock of HTGC on the effective date of the Amended and Restated Plans plus 10% of the number of shares of HTGC's common stock issued or delivered by HTGC (other than pursuant to compensation plans) during the term of the Amended and Restated Plans.

5. The Board will review the Amended and Restated Plans at least annually. In addition, the Board will review periodically the potential impact that the issuance of Restricted Stock under the Amended and Restated Plans could have on HTGC's earnings and NAV per share, such review to take place prior to any decisions to grant Restricted Stock under the Amended and Restated Plans, 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 Amended and Restated Plans would not have an effect contrary to the interests of HTGC's stockholders. This authority will include the authority to prevent or limit the granting of additional Restricted Stock under the

Amended and Restated Plans. 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