

**NOTIFICATION PROCEDURE:**

Address inquiries to the System Manager listed above.

**RECORD ACCESS PROCEDURES:**

The major part of this system is exempt from this requirement pursuant to 5 U.S.C. 552a(j)(2) and (k)(2). To the extent that this system is not subject to exemption, it is subject to access. A determination as to exemption shall be made at the time a request for access is received. A request for access to records contained in this system shall be made in writing, with the envelope and the letter clearly marked "Privacy Access Request." Include in the request the full name of the individual involved, his or her current address, date and place of birth, notarized signature (or submitted with date and signature under penalty of perjury), and any other identifying number or information which may be of assistance in locating the record. The requester shall also provide a return address for transmitting the information. Access requests shall be directed to the System Manager listed above.

**CONTESTING RECORDS PROCEDURES:**

Requesters shall direct their request to the System Manager listed above, stating clearly and concisely what information is being contested, the reason for contesting it, and the proposed amendment to the information.

**RECORD SOURCE CATEGORIES:**

The subjects of investigations and inquiries; individuals and entities with which the subjects of investigations and inquiries are associated; federal, state, local, and foreign law enforcement and non-law enforcement agencies and entities; private citizens; witnesses; informants; and public and/or commercially available source materials.

**ADDRESSES:** Comments may be submitted:

*By Mail or Hand Delivery:* Atticus Reaser, Office of General Counsel, Recovery Accountability and Transparency Board, 1717 Pennsylvania Avenue NW., Suite 700, Washington, DC 20006;

*By Fax:* (202) 254-7970; or

*By Email to the Board:* [comments@ratb.gov](mailto:comments@ratb.gov).

All comments on the proposed amended systems of records should be clearly identified as such.

**FOR FURTHER INFORMATION CONTACT:**

Atticus Reaser, Acting General Counsel, Recovery Accountability and Transparency Board, 1717 Pennsylvania Avenue NW., Suite 700, Washington, DC 20006, (202) 254-7900.

**SUPPLEMENTARY INFORMATION:** Title 5 U.S.C. 552a(e)(4) and (11) provide that the public be given a 30-day period in which to comment on any new routine use of a system of records. The Office of Management and Budget (OMB), which has oversight responsibilities under the Act, requires a 40-day period in which to conclude its review. Therefore, please submit any comments by April 23, 2012.

In accordance with 5 U.S.C. 552a(r), the Board has provided a report to OMB and the Congress on the proposed systems of records.

**Ivan J. Flores,**

*Paralegal Specialist, Recovery Accountability and Transparency Board.*

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**SECURITIES AND EXCHANGE COMMISSION**

**[Investment Company Act Release No. 29977; File No. 812-13847]**

**Ares Capital Corporation et al.; Notice of Application**

March 9, 2012.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of application for an order under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from section 12(d)(3) of the Act.

*Applicants:* Ares Capital Corporation (the "Company"), Ares Capital Management LLC ("ACM") and Ivy Hill Asset Management, L.P. ("Ivy Hill").

**SUMMARY:** *Summary of Application:* Applicants request an order ("Order") to permit the Company to (a) continue to own (directly or indirectly) up to 100% of the outstanding equity interests of Ivy Hill and (b) make additional investments in Ivy Hill, in each case, following such time as Ivy Hill is required to become a registered investment adviser under the Investment Advisers Act of 1940 ("Advisers Act").

**DATES:** *Filing Dates:* The application was filed on November 16, 2010, and amended on June 27, 2011, December 29, 2011, March 7, 2012, and March 9, 2012.

*Hearing or Notification of Hearing:* An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants 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 29, 2012, and should be accompanied by proof of service on applicants, 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:** Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC, 20549-1090. Applicants, Ares Capital Corporation, Ares Capital Management LLC and Ivy Hill Asset Management, L.P., 245 Park Avenue, 44th Floor, New York, NY 10167.

**FOR FURTHER INFORMATION CONTACT:**

Laura L. Solomon, Senior Counsel, at (202) 551-6915, or Daniele Marchesani, 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 via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

**Applicants' Representations**

1. The Company, a Maryland corporation, is an externally managed, non-diversified, closed-end management investment company that has elected to be regulated as a business development company ("BDC") under the Act.<sup>1</sup> Shares of the Company's common stock are traded on The NASDAQ Global Select market.

2. The Company's business and affairs are managed under the direction of a nine member board of directors ("Board"), of whom five are not considered interested persons of the Company within the meaning of section 2(a)(19) of the Act (the "Independent Directors"). The Board has delegated daily management and investment authority to ACM pursuant to an investment advisory and management agreement between ACM and the

<sup>1</sup> Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in sections 55(a)(1) through 55(a)(3) of the Act, makes available significant managerial assistance with respect to the issuers of such securities, and has elected to be subject to the provisions of sections 55 through 65 of the Act.

Company. ACM, a Delaware limited liability company, is an investment adviser registered under the Advisers Act.

3. The Company's investment objective is to generate both current income and capital appreciation through debt and equity investments. The Company invests primarily in U.S. middle market companies, where it believes the supply of primary capital is limited and investment opportunities are most attractive. The Company invests primarily in first and second lien senior loans and mezzanine debt, which in some cases includes an equity component like warrants.

4. Ivy Hill, a Delaware limited partnership, manages the investment and, if applicable, reinvestment of the assets of a number of private investment funds and also serves as sub-adviser or sub-manager to certain other private investment funds, whose investment advisers are not ACM or affiliates thereof (collectively, "Funds").<sup>2</sup> Ares Operations LLC (the "Administrator") provides both the Company and Ivy Hill with administrative services. Both ACM and the Administrator are wholly-owned direct subsidiaries of Ares Management LLC.

5. The Company directly or indirectly owns 100% of Ivy Hill's voting and equity interests. Ivy Hill Asset Management GP, LLC ("Ivy Hill GP") is the general partner of Ivy Hill and the Company is the sole member of Ivy Hill GP.<sup>3</sup> The Company will only rely on the Order with respect to its investment in Ivy Hill.

6. ACM maintains an investment committee for management of the Company, and Ivy Hill maintains two investment committees with responsibility for the management of designated Funds. On each of Ivy Hill's investment committees there are three members that also sit on ACM's investment committee. There is no overlap of employees between ACM and Ivy Hill.

7. Applicants state that while both the Company and the Funds share the same overall investment objective of investing in middle-market companies, each uses a different strategy to implement this objective. Specifically, the Company focuses on structuring, originating and leading investments directly with issuers while the Funds generally focus on acquiring middle-market investments

through secondary market purchases where the investment has been structured, originated and led by a third party. Applicants further state that in some cases, the Company and a Fund may acquire the same instruments from an issuer or other third party. The Company and the Funds may also enter into transactions such as purchases and sales of assets.<sup>4</sup> There may also be situations in which the Company and one or more Funds might invest in different instruments issued by the same issuer, such as where a Fund has purchased first lien debt and the Company invests in second lien or mezzanine debt. The Administrator's legal and compliance team monitors the portfolios and potential investments of both the Company and the Funds for potential conflicts of interest. Procedures are, where appropriate, implemented to restrict communications between Ivy Hill's and ACM's investment professionals so that those investment professionals are not conflicted when making decisions regarding such investments that are in the best interests of their respective clients.<sup>5</sup>

8. In addition to managing the Funds, from time to time, Ivy Hill invests in debt and/or equity securities issued by certain of the Funds and the Company has also invested, and may in the future invest, in securities issued by one or more of the Funds. Furthermore, entities managed by affiliates of ACM, including entities managed by Ares Management LLC, have invested, and such entities and/or entities managed by affiliates of ACM may in the future invest, in securities issued by one or more of the Funds.

9. Ivy Hill currently relies on the exemption set forth in section 203(b)(3) of the Advisers Act, which provides generally that an investment adviser with fewer than 15 clients is not required to register with the Commission. However, the Dodd-Frank Wall Street Reform and Consumer

<sup>4</sup> Applicants note that each of the Funds that would participate in such transactions has a mechanism for reviewing certain affiliate transactions, generally consisting of the approval of an individual otherwise unaffiliated with Ivy Hill and the Company who is engaged by the Fund for the purpose of reviewing such affiliate transactions.

<sup>5</sup> While there is no formal agreement regarding the sharing of non-public information ("Information Sharing") between ACM, on the one hand, and Ivy Hill, on the other, applicants believe that most opportunities for Information Sharing are beneficial to the Company and the Funds. The Administrator's legal and compliance department monitors Information Sharing and has implemented controls to ensure that information is not shared where it would be inappropriate. There is no compensation involved in the information sharing process.

Protection Act<sup>6</sup> eliminated this exemption, and based on the amount of its committed capital under management, Ivy Hill will be required to register with the Commission as an investment adviser.

10. Applicants believe it would cause economic harm to the Company and, thus, the Company's shareholders, for the Company to prematurely be forced to divest its investment in Ivy Hill prior to Ivy Hill achieving its maximum potential value, which, absent the relief requested, the Company believes that it would be required to do.

#### Applicants' Legal Analysis

1. Section 12(d)(3) of the Act makes it unlawful for any registered investment company, and any company controlled by a registered investment company, to purchase or otherwise acquire any security issued by or any other interest in certain securities-related businesses, including the business of any person who is an investment adviser registered under the Advisers Act, unless (a) such person is a corporation all the outstanding securities of which are owned by one or more registered investment companies; and (b) such person is primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, or any one or more of such or related activities, and the gross income of such person normally is derived principally from such business or related activities. Section 60 of the Act states that section 12 applies to a BDC to the same extent as if it were a registered closed-end investment company. Applicants state that Ivy Hill will not be primarily engaged in the business of underwriting and distributing securities issued by other persons.<sup>7</sup>

2. Section 6(c) of the Act provides that the Commission may conditionally or unconditionally exempt any person, security or transaction from any provision of the Act or any rule thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and

<sup>6</sup> Private Fund Investment Advisers Registration Act of 2010, Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).

<sup>7</sup> Rule 12d3-1 under the Act provides certain limited relief from the restrictions of section 12(d)(3). Since the Company expects that a significant portion of Ivy Hill's gross revenues will be derived from "securities related activities" as defined in rule 12d3-1, and since the Company will own no less than 50% of the outstanding equity securities of Ivy Hill, the requirements of rule 12d3-1 would not be satisfied.

<sup>2</sup> Each of the Funds relies on section 3(c)(7) for an exclusion from the definition of investment company under the Act.

<sup>3</sup> Ivy Hill GP has no other business other than serving as the general partner of Ivy Hill and will not have any other business so long as Applicants rely on the Order.

consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

3. Applicants request an order pursuant to section 6(c) of the Act granting an exemption from the provisions of section 12(d)(3) of the Act to the extent necessary to permit the Company to (a) continue to own (directly or indirectly) up to 100% of the outstanding equity interests of Ivy Hill and (b) make additional investments in Ivy Hill, in each case, following such time as Ivy Hill is required to become an investment adviser registered under the Advisers Act.

4. Applicants state that section 12(d)(3) was intended to safeguard investment companies from (a) entrepreneurial risks of securities related businesses, and (b) conflicts of interest and reciprocal practices between investment companies and securities related businesses.

5. Applicants submit that its investment in Ivy Hill does not raise the same type of entrepreneurial risks that may have concerned Congress in enacting section 12(d)(3). Applicants note that the ownership structure of most securities related businesses has changed since the time of enactment of the Act from privately held general partnerships, which exposed an investment company to the unlimited liability of a general partner, to structures characterized by limited liability. Applicants point out that the Company's shareholders are not exposed to the risk of unlimited liability associated with an interest in Ivy Hill because Ivy Hill GP, through which the Company holds its equity investment in Ivy Hill, is structured as a limited liability company. Therefore, if Ivy Hill were to experience a total loss of capital, the Company would lose only the capital invested in Ivy Hill (and in Ivy Hill GP), but would be protected from any additional monetary or legal liability.

6. Applicants also submit that the continued ownership of, and making additional investments in, Ivy Hill will not present potential conflicts of interest and reciprocal practices. The Company owns 100% of the voting and equity interests in Ivy Hill and, if the requested relief is granted, will maintain at least a majority ownership of the voting and equity interests in Ivy Hill in order to continue to exercise oversight for the strategic direction of Ivy Hill, including the power to control the policies that affect the Company and to protect the Company from potential conflicts of interest and reciprocal practices. Ivy

Hill, moreover, will not serve as an investment adviser to the Company or otherwise be in a position to exercise influence over the Company. As a result, Applicants believe that ultimately the interests of the two companies are generally aligned and that the likelihood of conflicts arising between them is low.<sup>8</sup>

7. In certain limited circumstances, Information Sharing and certain downstream affiliate transactions may raise the potential for conflicts of interests. Applicants acknowledge that section 57(a) makes it unlawful for certain persons acting as principal to purchase property from, or sell property to, a BDC or any company controlled by such BDC, or enter into certain joint transactions with the BDC or a company controlled by such BDC. Applicants further acknowledge that the sharing of Covered Information (defined in condition 3) by Ivy Hill and persons controlled by Ivy Hill (collectively, "Information Providers") with ACM or persons affiliated with ACM (other than the Company and persons controlled by the Company and other than as necessary to be provided to ACM and the Administrator to provide advisory and administrative services to the Company and Ivy Hill) could be deemed by the Commission to be prohibited under section 57(a) or rule 17d-1. Applicants agree to comply with condition 3 and are not seeking any relief from those provisions in the application.

8. Principal or side-by-side transactions involving the Company or Ivy Hill or any entity controlled by Ivy Hill, on the one hand, and any Fund, on the other hand, would not trigger the application of section 57(a) because the participating Funds are "downstream" affiliates of the Company and rule 57b-1 would apply. In some transactions, however, entities managed by certain persons associated with ACM, who are not "downstream" affiliates of the Company, may be invested in the Fund that participates in the transaction. Because such persons would have an interest in such transaction, even if an indirect one, ACM or the Administrator might face a

<sup>8</sup> Applicants state that they will adopt and implement policies and procedures reasonably designed to ensure compliance with the conditions of the Order. Applicants further note that at such time as Ivy Hill is required to register as an investment adviser under the Advisers Act, it will maintain formal policies and procedures related to its operations, including appointing a chief compliance officer, which are designed to ensure that management of Ivy Hill is conducted in the best interests of the Funds, as well as the Company (as the indirect equity owner of Ivy Hill) and the shareholders of the Company.

conflict of interest when evaluating such transaction between the Company and the Fund. Accordingly, under condition 4, a majority of the Independent Directors who have no financial interest in such transaction will approve any transaction involving the Company, Ivy Hill or any entity controlled by Ivy Hill other than the Funds, on the one hand, and any Fund in which ACM, any person affiliated with ACM (other than the Company or any entity controlled by the Company), any of their clients, or the Administrator, is invested, on the other hand, where such transaction would violate section 57(a) but for rule 57b-1.

9. Applicants submit that their request is necessary and appropriate in the public interest and consistent with the protection of investors. Applicants assert that to continue its ownership of, and ability to make additional investments in, Ivy Hill, its portfolio company, does not present the concerns that section 12(d)(3) was intended to safeguard against and that the exemption would otherwise be consistent with the purposes fairly intended by the policy and provisions of the Act. Applicants believe that the Company's ownership of and continued investment in Ivy Hill will permit the Company to continue to realize the increase in value of Ivy Hill, in which it has invested considerable resources. Moreover, if the requested relief is not granted, and Ivy Hill is required to become a registered adviser, the Company will be forced to dispose of its interests in Ivy Hill, thus causing economic harm to the Company and its shareholders by preventing the Company from preserving the value of its existing investment in Ivy Hill and losing the value of expected continued growth and development potential of Ivy Hill and by potentially incurring a loss on its investment in Ivy Hill in connection with such sale.

10. For the foregoing reasons, applicants believe that permitting the Company to continue to own, and make further investments in, Ivy Hill is in the best interests of the Company and its shareholders and that the standards set forth in section 6(c) have been met.

#### Applicants' Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. The Company will not dispose of the voting or equity interests of Ivy Hill if, as a result, the Company would own, directly or indirectly, less than 50 percent of the outstanding voting and equity interests of Ivy Hill unless the

Company disposes of all of its interests in Ivy Hill.

2. The Board will review at least annually the investment management business of the Company and Ivy Hill (including a review of transactions between the Company and any company controlled by the Company, on the one hand, and Ivy Hill and any company controlled by Ivy Hill, on the other hand) in order to determine whether the benefits derived by the Company warrant the continuation of the ownership by the Company of Ivy Hill and, if appropriate, will approve (by at least a majority of the Independent Directors) at least annually, such continuation.

3. Except to the extent permitted pursuant to exemptive relief from the Commission, neither Ivy Hill (including members of its investment committee with respect to Covered Information (as defined below) received in their capacities as such) nor any persons controlled by Ivy Hill ("Information Providers") will directly or indirectly provide Covered Information to ACM or any person affiliated with ACM (other than the Company and persons controlled by the Company and as necessary to be provided to ACM and the Administrator to provide advisory and administrative services to the Company and Ivy Hill).

Covered Information means all information except information that:

- (i) Is generally available to the public;
- (ii) Is of the nature that Information Providers share with unaffiliated market participants at no cost and is not proprietary to the Information Providers;
- (iii) Information Providers have obtained from unaffiliated third parties, including but not limited to general market opinions and analyses, analyst reports and diligence reports, and that such third parties generally make available to others, including market participants in the ordinary course, at no cost; or
- (iv) Information Providers have obtained from, or are providing on behalf of, borrowers or potential borrowers or their advisors, and that such borrowers or advisors generally make available to unaffiliated market participants at no cost upon request.

4. None of the Company, Ivy Hill or any entity controlled by Ivy Hill, will enter into any Covered Transaction, as defined below, unless a majority of the Independent Directors who have no financial interest in such Covered Transaction has approved it. A "Covered Transaction" is any transaction involving the Company, Ivy Hill or any entity controlled by Ivy Hill

other than the Funds, on the one hand, and any Fund in which ACM, any person affiliated with ACM (other than the Company or any entity controlled by the Company), any of their clients, or the Administrator, is invested, on the other hand, where such transaction would violate section 57(a) of the Act but for rule 57b-1 under the Act.

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

**Kevin M. O'Neill,**  
*Deputy Secretary.*

[FR Doc. 2012-6190 Filed 3-13-12; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66541; File No. 81-937]

### Order Granting an Application of BF Enterprises, Inc. Under the Securities Exchange Act of 1934

March 8, 2012.

#### I

BF Enterprises, Inc. ("BF Enterprises" or the "company") has filed an application under Section 12(h) of the Securities Exchange Act of 1934 (the "Exchange Act")<sup>1</sup> for a Commission order exempting the company from the requirement to register its common stock under Section 12(g) of the Exchange Act.<sup>2</sup> Section 12(h) grants the Commission the authority to exempt by order, upon application of an interested person and after notice and opportunity for a hearing, any issuer from Section 12(g) "if the Commission finds, by reason of the number of public investors, amount of trading interest in the securities, the nature and extent of the activities of the issuer, income or assets of the issuer, or otherwise, that such action is not inconsistent with the public interest or the protection of investors."

In its application, BF Enterprises states that it "was a reporting company under the Exchange Act until 2005 and terminated its Exchange Act registration pursuant to a Form 15 filed with the Commission on August 30, 2005 in connection with a reverse/forward stock split transaction," which the company's shareholders "approved \* \* \* on July 21, 2005 based upon a Schedule 13E-3 filed with the Commission on March 31, 2005 and as subsequently amended by the Company." According to the application, a shareholder commenced litigation against the company in the

Delaware Chancery Court in 2010 that ultimately resulted in that shareholder transferring its shares of the company's common stock to 500 identical trusts before December 31, 2010, the last day of the company's fiscal year.

Under Section 12(g) of the Exchange Act and the Commission's rules thereunder, an issuer is required to register a class of its equity securities if, at the end of the issuer's fiscal year, the securities are "held of record"<sup>3</sup> by 500 or more persons and the issuer has total assets exceeding \$10 million.<sup>4</sup> According to the application, BF Enterprises had total assets of \$13.3 million as of December 31, 2010. In addition, each of the 500 trust entities was identified as an owner of common stock on the records of security holders maintained by or on behalf of BF Enterprises. However, BF Enterprises contends that it should not be required to register its common stock under Section 12(g) and is seeking an exemptive order to that effect. Specifically, BF Enterprises asserts that exemptive relief would be consistent with the standards articulated in Section 12(h) because: (1) BF Enterprises has fewer than 85 total beneficial owners of its common stock, one of which has expressly stated that its shares are held indirectly through 500 trust entities formed solely for the purpose of attempting to cause the company to register its common stock under Section 12(g) (the "BFE Trusts"); (2) as of December 31, 2010, BF Enterprises had total assets of approximately \$13.3 million and 2010 annual net income of approximately \$103,000; (3) BF Enterprises has a total of seven employees and its primary business comprises two parcels of real estate; and (4) there is no trading activity in, and an absence of any regular market for, BF Enterprises' common stock.

On May 12, 2011, the Commission issued a notice of the filing of the application to give any interested person an opportunity to "submit to the Commission in writing its views on any substantial facts bearing on the

<sup>3</sup> 17 CFR 240.12g5-1. Exchange Act Rule 12g-5 states that: "For purposes of determining whether an issuer is subject to the provisions of sections 12(g) and 15(d) of the Act, securities shall be deemed to be 'held of record' by each person who is identified as the owner of such securities on records of security holders maintained by or on behalf of the issuer," which is subject to certain conditions set forth in Rule 12g-5.

<sup>4</sup> 15 U.S.C. 78j(g)(1) and 17 CFR 240.12g-1. When Section 12(g) was enacted, the asset threshold was set at \$1 million. The asset threshold has been increased on several occasions, most recently to \$10 million in 1996. See *Relief From Reporting by Small Issuers*, Release No. 34-37157 (May 1, 1996) [61 FR 21353].

<sup>1</sup> 15 U.S.C. 78j(h).

<sup>2</sup> 15 U.S.C. 78j(g).