ALLIED CAPITAL CORP
Form S-8
May 28, 2004

As filed with the Securities and Exchange Commission on May 28, 2004

Registration No. 333-____

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM S-8

REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

ALLIED CAPITAL CORPORATION

(Exact name of registrant as specified in its charter)

Maryland	**52-1081052**
(State or other jurisdiction of incorporation or organization)	**(I.R.S. Employer Identification No.)**

1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 331-1112
(Address and telephone number of registrant s principal executive offices)

THE ALLIED CAPITAL CORPORATION

NON-QUALIFIED DEFERRED COMPENSATION PLAN II
(Full title of the plan)

William L. Walton	**Copy to:**
Chairman and Chief Executive Officer	**Cynthia M. Krus, Esq.**
Allied Capital Corporation	**Sutherland Asbill & Brennan LLP**
1919 Pennsylvania Avenue, N.W.	**1275 Pennsylvania Avenue, N.W.**
Washington, D.C. 20006	**Washington, D.C. 20004**
(202) 331-1112	**(202) 383-0100**
(Name, address and telephone number of agent for service)	

CALCULATION OF REGISTRATION FEE

	Proposed	**Proposed**

Title of Securities to be Registered	Amount to be Registered (1)	Maximum Offering Price Per Share	Maximum Aggregate Offering Price	Amount of Registration Fee
Deferred Compensation Obligations	**$40,000,000**	**100%**	**$40,000,000**	**$ 5,068**

(1) The Deferred Compensation Obligations being registered represent general unsecured obligations of Allied Capital Corporation to pay deferred compensation in the future in accordance with the terms of The Allied Capital Corporation Non-Qualified Deferred Compensation Plan II.

EXPLANATORY NOTE REGARDING CERTAIN FINANCIAL STATEMENTS INCORPORATED BY REFERENCE INTO THIS REGISTRATION STATEMENT

Section 11(a) of the Securities Act of 1933 provides that if any part of a registration statement at the time it becomes effective contains an untrue statement of a material fact or an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring a security pursuant to the registration statement (unless it is proved that at the time of the acquisition the person knew of the untruth or omission) may sue, among others, every accountant who has consented to be named as having prepared or certified any part of the registration statement or as having prepared or certified any report or valuation which is used in connection with the registration statement with respect to the statement in the registration statement, report or valuation which purports to have been prepared or certified by the accountant.

Our consolidated financial statements as of December 31, 2001, and for the year ended December 31, 2001, incorporated by reference into this registration statement, were audited by our former independent auditor, Arthur Andersen LLP. However, we have not been able to obtain, after reasonable efforts, the written consent of Arthur Andersen LLP with respect to the inclusion of such consolidated financial statements in this registration statement.

Under these circumstances, Rule 437a under the Securities Act of 1933 permits us to file this registration statement without a written consent from Arthur Andersen LLP. Accordingly, Arthur Andersen LLP will not be liable under Section 11(a) of the Securities Act of 1933 because it has not consented to being named as an expert in the registration statement.

PART I

INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

The documents containing the information specified in Part I of Form S-8 will be sent or given to the participants in The Allied Capital Corporation Non-Qualified Deferred Compensation Plan II as specified by Rule 428(b)(1) under the Securities Act of 1933. Such documents are not being filed with the SEC in accordance with the requirements of Part I of Form S-8, but constitute (along with the documents incorporated by reference into this registration statement pursuant to Part II hereof) a prospectus that meets the requirements of Section 10(a) of the Securities Act of 1933.

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. *Incorporation of Certain Documents by Reference.*

We hereby incorporate, or will be deemed to have incorporated, herein by reference the following documents:

Our Annual Report on Form 10-K for the year ended December 31, 2003;

Our Quarterly Report on Form 10-Q for the quarter ended March 31, 2004; and

The description of our common stock contained in our registration statement on Form 8-A filed with the SEC on June 1, 2001.

Each document filed subsequent to the date of this registration statement pursuant to Sections 13(a), 13(c), 14 and 15(d) of the Securities Exchange Act of 1934, prior to the filing of a post-effective amendment which indicates that all securities offered have been sold or which deregisters all securities then remaining unsold, shall be deemed to be incorporated in this registration statement by reference and to be a part hereof from the date of the filing of such documents. Any statement contained in a document incorporated or deemed to be incorporated herein by reference shall be deemed to be modified or superseded for purposes of this registration statement to the extent that a statement contained herein or in any other subsequently filed document which also is or is deemed to be incorporated by reference herein modifies or supersedes such statement.

Item 4. *Description of Securities.*

This registration statement covers the registration of Deferred Compensation Obligations (as defined below) to be offered under The Allied Capital Corporation Non-Qualified Deferred Compensation Plan II (the DCP II) to certain senior officers of Allied Capital Corporation (the Company) who are designated as eligible to participate in the DCP II by the Compensation Committee of the Board of Directors of the Company (the Compensation Committee).

The Company s obligations to pay participants in the DCP II, upon their retirement, termination of employment with the Company or in such other circumstances specified under the DCP II, certain cash performance awards (which are referred to herein as individual performance awards) granted to the participant by the Compensation Committee, the receipt of which has been deferred under the DCP II, are referred to as the Deferred Compensation Obligations. The Deferred Compensation Obligations are general unsecured obligations of the Company to pay deferred compensation in the future in accordance with the terms of the DCP II from the general assets of the Company. The deferred compensation shall be paid in the form of cash or, to the extent the participant s deferred compensation is invested in the common stock of the Company, in the form of the Company s common stock. The Company s obligation to pay such deferred compensation at a later date is not guaranteed and is subject to the Company s ability to pay.

The following is a brief description of the material features of the DCP II. Such description is qualified in its entirety by reference to the full text of the DCP II, which is incorporated by reference into this registration statement.

Individual performance awards will be determined by the Compensation Committee annually at the beginning of the year. Then, on a quarterly basis, one quarter of the award will be contributed in cash to a deferred compensation trust. A trustee appointed to oversee the trust will use the cash to purchase shares of the Company s common stock on the New York Stock Exchange or any other exchange on which the Company s shares are subsequently traded. The shares purchased by the trustee will then be credited to each senior officer s deferral account based on the amount of the individual performance award received by such officer.

All of the Company s senior officers are eligible to receive individual performance awards and participate in the DCP II. The Compensation Committee, in its sole discretion, shall designate the senior officers who will participate in the DCP II.

In the event of termination of employment, one-third of the participant s deferral account will be immediately distributed, one half of the then current remaining balance will be distributed on the first anniversary of his or her employment termination date and the remainder of the account balance will be distributed on the second anniversary of the employment termination date. In the event of a change of control, all amounts in a participant s deferral account will be immediately distributed to the participant. Change of control is defined in the DCP II to include a variety of events, including significant changes in the Company s stock ownership, changes in the Board of Directors of the Company, a merger and consolidation of the Company, and the sale or disposition of all or substantially all of the Company s assets. The Compensation Committee, acting as the administrator of the DCP II, may also determine other distributable events and the timing of such distributions. All amounts paid to the DCP II will be fully vested at all times. Sixty days following a distributable event, the Company and each participant may, at the discretion of the Company, and subject to the Company s trading window during that time, redirect the participant s account to other investment elections.

During any period of time in which a participant has a deferral account in the DCP II, any dividends declared and paid on shares of common stock allocated to the participant s account shall be reinvested by the trustee as soon as practicable in shares of the Company s common stock purchased in the open market.

A participant who violates certain non-solicitation covenants contained in the DCP II during the two years after the termination of his or her employment will forfeit back to the Company the remaining value of his or her deferral account.

The DCP II will be administered by the Compensation Committee. The Compensation Committee will have full power and authority, subject to the provisions of the DCP II, to promulgate such rules and regulations as it deems necessary for the proper administration of the DCP II, to interpret the provisions and supervise the administration of the DCP II, and to take all actions in connection therewith or in relation thereto as it deems necessary or advisable.

The DCP II is a non-qualified plan, and no participant or other person will own any interest in particular assets of the Company or any of the Company s subsidiaries by reason of the right to receive any payment under the DCP II.

The Board of Directors of the Company reserves the right to amend, terminate, or discontinue the DCP II, provided that no such action will adversely affect a participant s rights under the DCP II with respect to the amounts paid to his or her deferral account. No amendment will be effective unless approved by the Company s stockholders if stockholder approval of such amendment is required to comply with any applicable law, regulation or stock exchange rule. Upon termination of the DCP II, any amounts credited to the deferral account of a participant will be distributed in full to such participant.

Item 5. *Interests of Named Experts and Counsel.*

Not Applicable.

Item 6. *Indemnification of Directors and Officers.*

Section 2-418 of the Maryland General Corporation Law provides that a Maryland corporation may indemnify any director of the corporation and any person who, while a director of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, other enterprise or employee benefit plan, made a party to any proceeding by reason of service in that capacity unless it is established that the act or omission of the director was material to the matter giving rise to the proceeding and was committed in bad faith or was the result of active and deliberate dishonesty; or the director actually received an improper personal benefit in money, property or services; or, in the case of any criminal proceeding, the director had reasonable cause to believe that the act or omission was unlawful. Indemnification may be made against judgments, penalties, fines, settlements, and reasonable expenses actually incurred by the director in connection with the proceeding, but if the proceeding was one by or in the right of the corporation, indemnification may not be made in respect of any proceeding in which the director shall have been adjudged to be liable to the corporation. Such indemnification may not be made unless authorized for a specific proceeding after a determination has been made, in the manner prescribed by the law, that indemnification is permissible in the circumstances because the director has met the applicable standard of conduct. On the other hand, the director must be indemnified for expenses if he or she has been successful in the defense of the proceeding or as otherwise ordered by a court. The law also prescribes the circumstances under which the corporation may advance expenses to, or obtain insurance or similar cover for, directors.

The law also provides for comparable indemnification for corporate officers and agents.

The Restated Articles of Incorporation of Allied Capital Corporation provide that its directors and officers shall, and its agents in the discretion of the board of directors may be indemnified to the fullest extent permitted from time to time by the laws of Maryland (with such power to indemnify officers and directors limited to the scope provided for in Section 2-418 as

currently in force), provided, however, that such indemnification is limited by the Investment Company Act of 1940 or by any valid rule, regulation or order of the Securities and Exchange Commission thereunder. Allied Capital Corporation s bylaws, however, provide that Allied Capital Corporation may not indemnify any director or officer against liability to Allied Capital Corporation or its security holders to which he or she might otherwise be subject by reason of such person s willful misfeasance, bad faith, gross negligence or reckless disregard of the duties involved in the conduct of his or her office unless a determination is made by final decision of a court, by vote of a majority of a quorum of directors who are disinterested, non-party directors or by independent legal counsel that the liability for which indemnification is sought did not arise out of such disabling conduct.

Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of Allied Capital Corporation pursuant to the provisions described above, or otherwise, Allied Capital Corporation has been advised that in the opinion of the SEC such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by Allied Capital Corporation of expenses incurred or paid by a director, officer or controlling person in the successful defense of an action, suit or proceeding) is asserted by a director, officer or controlling person in connection with the securities being registered, Allied Capital Corporation will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of the court of the issue.

Allied Capital Corporation carries liability insurance for the benefit of its directors and officers on a claims-made basis of up to $50,000,000, subject to a $1,000,000 retention and the other terms thereof. Allied Capital Corporation also maintains an additional $10 million of insurance coverage for the benefit of its directors and officers.

In February 2004, Allied Capital Corporation entered into indemnification agreements with its directors and 12 senior officers. The indemnification agreements attempt to provide these directors and senior officers the maximum indemnification permitted under Maryland law and the Investment Company Act of 1940. Each indemnification agreement provides that Allied Capital Corporation shall indemnify the director or senior officer who is a party to the agreement (an Indemnitee) if, by reason of his or her corporate status, the Indemnitee is, or is threatened to be, made a party to or a witness in any threatened, pending, or completed proceeding, other than a proceeding by or in the right of Allied Capital Corporation.

At present, these is no pending litigation or proceeding involving an Indemnitee where indemnification would be required or permitted under the indemnification agreement.

Item 7. *Exemption from Registration Claimed.*

Not applicable.

Item 8. Exhibits.

Exhibit Number	Description of Exhibit
4.1	The Allied Capital Corporation Non-Qualified Deferred Compensation Plan II (incorporated by reference to Exhibit A of Schedule 14A of Allied Capital Corporation filed with the SEC on March 30, 2004).
5.1	Opinion of Sutherland Asbill & Brennan LLP
15.1	Letter regarding Unaudited Interim Financial Information
23.1	Consent of KPMG LLP
23.2	Consent of Sutherland Asbill & Brennan LLP (contained in the opinion in Exhibit 5.1)
24.1	Power of Attorney (included in the signature page)

Item 9. *Undertakings.*

(a) The undersigned registrant hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:

(i) To include any prospectus required by Section 10(a)(3) of the Securities Act of 1933, as amended (the Securities Act);

(ii) To reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of a prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than 20 percent change in the maximum aggregate offering price set forth in the Calculation of Registration Fee table in the effective registration statement;

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

provided, however, that paragraphs (a)(1)(i) and (a)(1)(ii) above shall not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in periodic reports filed with or furnished to the Securities and Exchange Commission by the registrant pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (the Exchange Act) that are incorporated by reference in the registration statement.

(b) The undersigned registrant hereby undertakes that, for purposes of determining any liability under the Securities Act, each filing of the registrant s annual report pursuant to Section 13(a) or Section 15(d) of the Exchange Act (and, where applicable, each filing of an employee benefit plan s annual report pursuant to Section 15(d) of the Exchange Act) that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(c) Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized, in Washington, D.C., on this 27th day of May, 2004.

ALLIED CAPITAL CORPORATION

By: /s/ William L. Walton
Name: William L. Walton
Title: Chairman, Chief Executive Officer and President

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints William L. Walton and Joan M. Sweeney as his/her true and lawful attorney-in-fact and agent, with full power of substitution and resubstitution, for him/her and in his/her name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this Registration Statement, and to file the same, with all exhibits thereto, and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorney-in-fact and agent, full power and authority to do and perform each and every act and thing required and necessary to be done in and about the premises, as fully to all intents and purposes as he/she might or could do in person, hereby ratifying and confirming all that said attorney-in-fact and agent, or his/her substitute or substitutes, could lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this Registration Statement has been signed below by the following persons in the capacities and on the dates indicated.

Signature	Title	Date
/s/ William L. Walton William L. Walton	Chairman, Chief Executive Officer and President (Principal Executive Officer)	May 27, 2004
/s/ Penni F. Roll Penni F. Roll	Chief Financial Officer (Principal Financial and Accounting Officer)	May 27, 2004
/s/ Brooks H. Browne Brooks H. Browne	Director	May 27, 2004

Signature	Title	Date
/s/ John D. Firestone	Director	May 27, 2004
John D. Firestone /s/ Anthony T. Garcia	Director	May 27, 2004
Anthony T. Garcia /s/ Lawrence I. Herbert	Director	May 27, 2004
Lawrence I. Herbert /s/ John I. Leahy	Director	May 27, 2004
John I. Leahy /s/ Robert E. Long	Director	May 27, 2004
Robert E. Long /s/ Ann Torre Grant	Director	May 27, 2004
Ann Torre Grant /s/ Guy T. Steuart III	Director	May 27, 2004
Guy T. Steuart III /s/ Alex J. Pollock	Director	May 27, 2004
Alex J. Pollock /s/ Laura W. van Roijen	Director	May 27, 2004
Laura W. van Roijen /s/ Joan M. Sweeney	Director	May 27, 2004
Joan M. Sweeney		

EXHIBIT INDEX

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