

investment securities (as defined in Section 3(a)(2) of the Act) of \$5.1 billion constituted approximately 48% of Applied's total assets (excluding Government securities and cash items), consolidated with its wholly-owned subsidiaries.<sup>2</sup> More than 99% of Applied's investment securities consisted of Capital Preservation Investments. Applied's remaining investment securities consisted of investments in businesses with complementary products, services and/or technologies and an interest in a limited partnership that invests in early-stage companies involving nanotechnology and/or communications technology. Applied anticipates that its investment securities other than Capital Preservation Investments will not exceed 10% of Applied's total consolidated assets (excluding Government securities and cash items) in the future. Applied further states that a significant portion of its assets consist of intangible assets such as internally-developed intellectual property that are not included in the value of Applied's total assets for purposes of determining Applied's status under the Act. Applied states that the asset tests used in connection with sections 3(a)(1)(c) and 3(b) of the Act therefore significantly understate the relative value of Applied's non-investment security assets.

e. Sources of Income and Revenue. Applied states that for the four quarters ended January 30, 2005, its operating activities produced 94% of its net income after taxes, while its investment securities produced 6% of its net income on a tax-equivalent basis. However, for the fiscal year ended October 26, 2003, Applied had operating losses while deriving net income from its investment securities. Applied states that its net income does not always accurately reflect its operating activities since its net income fluctuates unpredictably with the cycles of the semiconductor industry. Applied thus believes that its activities as an

operating company are more appropriately analyzed by looking at its revenues. Applied states that, for the four quarters ending January 30, 2005, its revenues from operations<sup>3</sup> represented approximately 99% of its total revenues, and its revenues from investments, or net investment income, represented approximately 1% of its total revenues. Applied expects that as its business continues in the future, the percentage of its total revenues derived from operating activities will ordinarily be over 90% and the percentage derived from investments will ordinarily be under 10%.

7. Applied thus asserts that it satisfies the standards for an order under section 3(b)(2) of the Act.

#### **Applicant's Conditions**

1. Applied will continue to allocate and use its accumulated cash and investment securities for bona fide business purposes.

2. Applied will refrain from investing or trading in securities for short-term speculative purposes.

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

**Jonathan G. Katz,**  
*Secretary.*

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### **SECURITIES AND EXCHANGE COMMISSION**

[Investment Company Act Release No. 27066; 813-357]

#### **Peter Kiewit Sons', Inc. and Kiewit Investment Fund LLLP; Notice of Application**

September 14, 2005.

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

**ACTION:** Notice of an application for an order under section 6(b) of the Investment Company Act of 1940 (the "Act") granting an exemption from section 15(a) of the Act and the rules and regulations thereunder.

#### **SUMMARY OF THE APPLICATION:**

Applicants request an order to permit the board of directors of an "employees' securities company" as defined in section 2(a)(13) of the Act to enter into and materially amend investment

advisory contracts without the approval of holders of the company's outstanding voting securities.

**APPLICANTS:** Peter Kiewit Sons', Inc. ("Kiewit") and Kiewit Investment Fund LLLP (the "Fund").

**FILING DATES:** The application was filed on July 25, 2005 and amended on August 29, 2005 and September 13, 2005.

**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 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 October 11, 2005, 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:** Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303. Applicants, Tobin A. Schropp, Peter Kiewit Sons', Inc., Kiewit Plaza, Omaha, Nebraska, 68131 and Robert A. Giles, Jr., Kiewit Investment Fund LLLP, 73 Tremont Street, Boston Massachusetts 02108.

**FOR FURTHER INFORMATION CONTACT:** Shannon Conaty, Senior Counsel, at (202) 551-6827 or Janet M. Grossnickle, 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, 20549-0102 (tel. (202) 551-5850).

#### **Applicants' Representations**

1. Kiewit, a Delaware corporation, is a large construction contractor operating primarily in the North American market. Through various subsidiaries, joint ventures and partnerships, Kiewit provides construction services to a broad range of public and private customers. It also owns and operates several coal mining operations. Pursuant to the terms of its organizational documents, Kiewit's common stock ("Kiewit Stock")

<sup>2</sup> Applied states that consolidation provides a more accurate picture of its primary business of developing, manufacturing, marketing and servicing integrated circuit fabrication equipment because Applied does not have any independent business operations separate from the activities of its wholly-owned subsidiaries. Applied has not sold any subsidiaries in over 20 years, and those sales were related to its business as a supplier of integrated circuit fabrication equipment and services. Since the subsidiaries being consolidated are all wholly-owned, consolidation will not result in the type of distortions that could result from consolidating other types of subsidiaries. Applied also has a 50% owned subsidiary that is dormant, has no operations and has not been consolidated for purposes of determining Applied's status under the Act.

<sup>3</sup> For the reasons stated above, revenues of Applied's wholly-owned subsidiaries were consolidated for purposes of this discussion. Applied consolidates its wholly-owned subsidiaries when preparing its financial statements in accordance with Generally Accepted Accounting Principles.

generally may only be owned by directors and full-time employees of Kiewit and its current or former subsidiaries, joint ventures and partnerships.

2. The Fund, a Delaware limited liability limited partnership, is registered under the Act as a non-diversified, closed-end management investment company, and will at all times operate as an "employees" securities company" within the meaning of section 2(a)(13) of the Act. Kiewit, or a wholly-owned subsidiary, will be the general partner of the Fund (the "General Partner"). To the fullest extent permitted under the Delaware Revised Uniform Limited Partnership Act ("DRULPA"), the General Partner pursuant to the Fund's amended and restated limited partnership agreement ("Partnership Agreement") will irrevocably delegate management, control and operation of the Fund and its business and affairs to the Fund's Board of Directors ("Fund Board", and each member thereof a "Director") pursuant to section 17-403 of the DRULPA.<sup>1</sup> All but two of the five current Directors are directors, officers or employees of Kiewit and Directors that are officers, directors or employees of Kiewit will comprise a majority of the Fund Board in the future.

3. The Fund is designed as a long-term investment vehicle for key employees and former key employees of Kiewit and its affiliated companies and their immediate family members. Units of limited partnership interests of the Fund ("Units") will be offered pursuant to offerings registered under the Securities Act of 1933, as amended ("Securities Act") and will be sold only to Eligible Holders.<sup>2</sup> Eligible Holders consist of (i) current and former employees or persons on retainer of the Kiewit Group,<sup>3</sup> within the meaning of section 2(a)(13) of the Act ("Eligible Employees"); (ii) Directors retained by the Fund; (iii) immediate family members, within the meaning of section 2(a)(13) of the Act, of such Directors or Eligible Employees; or (iv) members of the Kiewit Group.<sup>4</sup> After the initial

offering, the Fund intends to offer Units continuously and accept applications to purchase Units at the end of the second and fourth calendar quarters of each year. Units will not be transferable except with the prior written consent of the Fund and then only to Eligible Holders. Units are not redeemable at the option of a holder of Units ("Unitholder").<sup>5</sup>

4. Applicants believe that the Fund will provide a cost-effective opportunity to access types of investments and professional investment management that otherwise may not be available to key employees of the Kiewit Group on an individual basis. The Fund's investment objective is long-term capital growth with consideration given to consistency of returns. Under normal market conditions, the Fund's assets will be invested in a variety of securities, including U.S. and non-U.S. equities and fixed-income instruments and other investment funds that are registered investment companies or private investment funds excepted from the definition of "investment company" pursuant to section 3(c)(1) or 3(c)(7) of the Act ("Private Portfolio Funds"), including Private Portfolio Funds that are commonly referred to as hedge funds.<sup>6</sup>

5. The Fund will retain a primary investment adviser and it may determine to retain other investment advisers in the future (each, a "Fund Adviser"). Any Fund Adviser will be registered under the Advisers Act. The Fund's primary Fund Adviser will make recommendations to the Fund Board regarding the allocation of portions of the Fund's assets to the management of

any particular person (or group of persons) would be considered an "employee" or "person on retainer" within the meaning of section 2(a)(13) of the Act.

<sup>5</sup> The Fund, subject to approval by the Fund Board, will conduct tender offers for 5% to 25% of the Fund's outstanding Units at least semi-annually commencing in January 2006. No repurchase, redemption or other fee will be assessed by the Fund on any repurchase of Units.

<sup>6</sup> As discussed more fully in the application, the Fund, at Kiewit's expense, will make available to each offeree that does not meet the standard of an "accredited investor" as set forth in rule 501(a) under the Securities Act (a "Non-Accredited Offeree") an investment adviser registered under the Investment Advisers Act of 1940, as amended ("Advisers Act") that meets the requirements set forth in rule 501(h) under the Securities Act and is independent from Kiewit, the Fund and the Fund Advisers (the "Investment Professional"). Prior to an investment in the Fund whether during the initial sale of Units or any subsequent sale of Units, each Non-Accredited Offeree will be given the opportunity to consult on a one-on-one basis with such Investment Professional for the purpose of assisting the Non-Accredited Offeree in evaluating the merits and risks of a prospective investment in the Fund and the appropriateness of an investment in the Fund in light of his or her particular circumstances.

other Fund Advisers. Within the framework of the investment policies set forth in the Fund's registration statement, and subject to supervision and oversight by the Fund Board, a Fund Adviser will develop an investment program with respect to its allocated assets. Each investment advisory contract or material amendment to such a contract will be approved by the Fund Board, including a majority of the Directors that are not interested persons of the Fund within the meaning of section 2(a)(19) of the Act.<sup>7</sup> All Fund Advisers will be subject to removal by the Fund Board at any time, without penalty, on not more than sixty days' written notice.

6. There will be no sales load or any other distribution fee charged to Eligible Holders during the initial sale of Units or any subsequent sale of Units. The Fund will not issue senior securities or borrow money for investment purposes. The Fund also will not invest in securities issued by Kiewit, any affiliated person of Kiewit or any investment company, Private Portfolio Fund or alternative investment vehicle sponsored by or affiliated with Kiewit or any of its affiliated persons; provided that the Fund may invest in an investment company, Private Portfolio Fund or alternative investment vehicle that is an affiliated person of an employee or former employee of Kiewit or its affiliated companies (that is not a current or former director or officer of Kiewit or its affiliated companies) solely by virtue of such person holding a limited partnership interest in such entity.

### Applicants' Legal Analysis

1. Section 6(b) of the Act provides, in part, that the Commission will exempt employees' securities companies from the provisions of the Act to the extent that the exemption is consistent with the protection of investors. Section 6(b) provides that the Commission will consider, in determining the provisions of the Act from which the company should be exempt, the company's form of organization and capital structure, the persons owning and controlling its securities, the price of the company's securities and the amount of any sales load, the disposition of the proceeds of any sales of the company's securities,

<sup>7</sup> The Fund Board will consider the following factors, among others, prior to any such approval: the nature and quality of services to be rendered, the expected total revenue and profit of a Fund Adviser as a result of its relationship with the Fund, any economies of scale that a Fund Adviser may experience as the Fund grows, and the competitiveness of fees, costs and expense ratios.

<sup>1</sup> Applicants represent that the delegation of duties by the General Partner to the Fund Board will be substantially identical to the delegation described in Federated Core Trust II, SEC No-Action Letter (Feb. 6, 2002).

<sup>2</sup> The Fund has filed a registration statement in connection with a proposed public offering of Units. The registration statement was declared effective and the Fund commenced a public offering on July 26, 2005.

<sup>3</sup> The term "Kiewit Group" refers to Kiewit and any affiliated company of Kiewit of which Kiewit is an affiliated company, as defined in section 2(a)(2) of the Act.

<sup>4</sup> Applicants are not asking the Commission to decide, nor is the Commission deciding, whether

how the company's funds are invested, and the relationship between the company and the issuers of the securities in which it invests. Section 2(a)(13) defines an employees' securities company as any investment company all of whose securities (other than short-term paper) are beneficially owned (a) by current or former employees, or persons on retainer, of one or more affiliated employers, (b) by immediate family members of such persons, or (c) by such employer or employers together with any of the persons in (a) or (b).

2. Section 15(a) of the Act provides, in relevant part, that it is unlawful for any person to act as an investment adviser to a registered investment company except pursuant to a written contract that has been approved by the vote of a majority of the company's outstanding voting securities.

Applicants request an order under section 6(b) of the Act exempting the Fund from section 15(a) of the Act and the rules and regulations thereunder solely to the extent necessary to permit the Fund to enter into and materially amend investment advisory contracts with Fund Advisers without approval by Unitholders holding a majority of the outstanding voting securities of the Fund. Each investment advisory contract with any Fund Adviser will comply with all other requirements of the Act and the Advisers Act, including that the renewal of the contract is subject to annual review by the Fund Board after its initial term. For the reasons discussed below, applicants believe that the requested exemption from section 15(a) is consistent with the protection of investors and the purposes of the Act.

3. Applicants state that, because the Fund may engage multiple Fund Advisers, it is important that the Fund Board have the capability to quickly reallocate assets among Fund Advisers and retain a new Fund Adviser in the event that any such Fund Adviser performs poorly or the Fund Board determines that Fund assets should be reallocated to asset classes, strategies or styles for which existing Fund Advisers are not able to manage most efficiently. Unitholder approval each time that a new Fund Adviser is retained or an existing contract with a Fund Adviser is materially amended or assigned would impose a substantial burden on the Fund. Applicants assert that the requested relief will result in substantial cost-savings to the Fund and other efficiencies.

4. Applicants state that Kiewit (not any Fund Adviser or any affiliated person of any Fund Adviser) is the sponsor of the Fund and no member of

the Kiewit Group will receive any compensation from the Fund. No Director will be an interested person of any Fund Adviser within the meaning of section 2(a)(19) of the Act and it is expected that all Directors will be Unitholders in the Fund.<sup>8</sup> Further, applicants state that most of the Directors are directors, officers and employees of Kiewit who share an essential community of interest with key employees and their immediate family members and have a considerable interest in seeing that the Fund is managed consistent with the interests of such key employees and their immediate family members. Applicants believe that the arms-length relationship between the Fund Board and any Fund Adviser, the community of interest that will exist among Unitholders and Directors and the Directors' fiduciary duties will reduce the risk of abuses that section 15(a) of the Act is designed to prevent.<sup>9</sup>

5. Applicants further believe that Unitholders will expect the Fund Board to select and monitor Fund Advisers. The Fund will disclose in its prospectus the existence, substance, and effect of the relief requested in the application and it will hold itself out to Eligible Holders as employing the management structure described in the application. The prospectus also will prominently disclose that the Fund Board has ultimate responsibility to oversee Fund Advisers and recommend their hiring, termination, and replacement.

6. Key employees of the Kiewit Group have historically invested significant portions of their personal financial assets in Kiewit Stock, which effectively results in Kiewit directors, officers and other senior management being responsible for such employees' financial well being through their management of Kiewit. Because of this historical and ongoing relationship between Kiewit's stockholders and senior management of Kiewit and the disclosure discussed above,<sup>10</sup>

<sup>8</sup> Applicants state that the Fund Board's sole obligation with respect to the Fund is managing the Fund in the Fund's and Unitholders' best interests and that the Fund Board and the Directors will not have any obligation to any person or entity that benefits from the Fund.

<sup>9</sup> Unitholders also will be able to elect Directors in accordance with section 16(a) of the Act and, under the Partnership Agreement, Unitholders that own, in the aggregate, 10% of outstanding Units may call a special meeting of Unitholders for the purpose of electing Directors. As a result, Unitholders have the ability to replace the Fund Board if a sufficient amount of Unitholders so desire.

<sup>10</sup> Applicants also note that the Fund's method of operation, including its proposed investment strategy, is analogous to the operation of certain employee benefit plans, where employers or their

Applicants believe that key employees of the Kiewit Group that invest in the Fund would expect the Fund Board to exercise overall supervisory responsibility for the management and investment of the Fund's assets on an ongoing basis.<sup>11</sup>

7. Applicants further represent that the following additional safeguards exist to protect Unitholders: (i) The Fund's financial statements will be audited by a nationally recognized independent certified public accounting firm; (ii) each Fund Adviser will be registered with the Commission and will be retained pursuant to an arms-length negotiation; (iii) participation in the Fund is entirely voluntary; (iv) Unitholders will not be charged a sales load or any other distribution fee; and (v) the Fund will not invest, directly or indirectly, in securities issued by any member of the Kiewit Group.

#### **Applicants' Condition**

The applicants agree that any order granting the requested relief will be subject to the following condition:

The Fund will operate in compliance with the Act pending final determination of the application, provided that the Fund may rely on rule 6b-1 under the Act solely to implement the relief specifically requested in the application from section 15(a) of the Act.

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

**Jonathan G. Katz,**  
*Secretary.*

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delegates have the discretion to replace and retain advisers or terminate investment options and reinvest the assets without employee consent.

<sup>11</sup> This overall supervisory responsibility includes: (i) Evaluating and selecting Fund Advisers to manage all or a part of the Fund's assets; (ii) negotiating and approving contracts with Fund Advisers; (iii) when appropriate, approving the allocation and reallocation of the Fund's assets among multiple Fund Advisers; (iv) monitoring and evaluating the performance of the Fund Advisers; and (v) approving and monitoring the implementation of procedures reasonably designed to ensure that the Fund Advisers comply with the Fund's investment objective, policies and restrictions and with the Act.