

the Exchange Act,⁷ the Commission may summarily abrogate the change in the rules of the self-regulatory organization and require that the proposed rule change be re-filed in accordance with the provisions of Section 19(b)(1) of the Exchange Act⁸ and reviewed in accordance with Section 19(b)(2) of the Exchange Act,⁹ if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of the Exchange Act.

The Commission has received three comment letters in response to the proposed rule change.¹⁰ The substance of the comment letters calls into question the “non-controversial” designation of the proposal.

Accordingly, the Commission believes that the procedures provided by Section 19(b)(2) of the Exchange Act¹¹ will provide a more appropriate mechanism for determining whether the proposed rule change is consistent with the Exchange Act. Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Exchange Act, to abrogate the proposed rule change.

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Exchange Act,¹² that File No. SR-NASD-2005-093 be, and it hereby is, summarily abrogated. If the NASD chooses to re-file the proposed rule change, it must do so pursuant to Sections 19(b)(1)¹³ and 19(b)(2) of the Exchange Act.¹⁴

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

Jonathan G. Katz,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 27064; 812-12868]

Applied Materials, Inc.; Notice of Application

September 13, 2005.

AGENCY: Securities and Exchange Commission (“Commission”).

ACTION: Notice of application under section 3(b)(2) of the Investment Company Act of 1940 (the “Act”).

SUMMARY OF APPLICATION: Applied Materials, Inc. (“Applied”) seeks an order under section 3(b)(2) of the Act declaring it to be primarily engaged in a business other than that of investing, reinvesting, owning, holding or trading in securities. Applied, directly and through its wholly-owned subsidiaries, develops, manufactures, markets and services integrated circuit fabrication equipment.

FILING DATES: The application was filed on August 14, 2002, and amended on February 28, 2005, May 31, 2005 and September 6, 2005.

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 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, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303. Applicant, 3050 Bowers Ave., P.O. Box 58039, Santa Clara, CA 95054.

FOR FURTHER INFORMATION CONTACT: Julia Kim Gilmer, Senior Counsel, at (202) 551-6871, 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).

Applicant’s Representations

1. Applied, a Delaware corporation, is in the business of developing, manufacturing, marketing and servicing integrated circuit fabrication equipment. Customers for Applied’s products include semiconductor wafer manufacturers and semiconductor integrated circuit, or “chip” manufacturers such as Intel, Texas Instruments and IBM. Applied represents that these chips are key components in most advanced electronic devices and that the push to make these devices more powerful, portable and affordable spurs a rapid pace of technological change in the semiconductor industry. Applied states that in the past 23 years, it has introduced over 100 major products.

2. Applied states that it requires substantial liquid capital to fund its global infrastructure, manufacturing and service activities, and to continue its research, development and engineering programs. Applied also intends to use its liquid capital to support other business and strategic objectives by acquiring and investing in businesses with complementary products, services and/or technologies. In addition to being capital intensive, Applied states that the integrated circuit fabrication equipment industry is subject to volatile business cycles due to the rapid pace of technological developments and changes in global and regional economic conditions. Applied seeks to preserve its capital and maintain liquidity, pending the use of such capital for its current and future operations, by investing in short-term investment grade and liquid fixed income and money market investments that earn competitive market returns and provide a low level of credit risk (“Capital Preservation Investments”). Applied’s board of directors oversees Applied’s investment practices and defines the parameters for investment activities. Applied states that it does not invest in securities for short-term speculative purposes.

Applicant’s Legal Analysis

1. Applied seeks an order under section 3(b)(2) of the Act declaring that it is primarily engaged in a business other than that of investing, reinvesting, owning, holding or trading in securities, and therefore not an investment company as defined in the Act.

2. Under section 3(a)(1)(C) of the Act, an issuer is an investment company if it is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in

⁷ 15 U.S.C. 78s(b)(1).

⁸ *Id.*

⁹ 15 U.S.C. 78s(b)(2).

¹⁰ See letter from Ira D. Hammerman, Senior Vice President and General Counsel, Securities Industry Association, to Jonathan G. Katz, Secretary, Commission, dated Aug. 24, 2005; letter from Julian Rainero, Bingham McCutchen LLP, to Jonathan G. Katz, Secretary, Commission, dated Aug. 24, 2005; letter from Shane E. Swanson, General Counsel, Automated Trading Desk, LLC, to Jonathan Katz, Secretary, Commission, dated Aug. 24, 2005.

¹¹ *Id.*

¹² 15 U.S.C. 78s(b)(3)(C).

¹³ 15 U.S.C. 78s(b)(1).

¹⁴ 15 U.S.C. 78s(b)(2).

¹⁵ 17 CFR 200.30-3(a)(58).

securities, and owns or proposes to acquire investment securities having a value in excess of 40 percent of the value of the issuer's total assets (exclusive of government securities and cash items) on an unconsolidated basis. Section 3(a)(2) of the Act defines "investment securities" to include all securities except government securities, securities issued by employees' securities companies, and securities issued by majority-owned subsidiaries of the owner which (a) are not investment companies, and (b) are not relying on the exclusions from the definition of investment company in section 3(c)(1) or 3(c)(7) of the Act. Applied states that as of January 30, 2005, approximately 50% of its total assets (exclusive of government securities and cash items), on an unconsolidated basis, consisted of investment securities as defined in section 3(a)(2) of the Act.

3. Rule 3a-1 provides an exemption from the definition of investment company if no more than 45% of a company's total assets consist of, and not more than 45% of its net income over the last four quarters is derived from, securities other than government securities, securities of majority-owned subsidiaries and primarily controlled companies. Applied states that it cannot rely upon rule 3a-1 under the Act because as of January 30, 2005, such other securities exceeded 45% of its total assets. Applied further states that it cannot rely on rule 3a-1 because the percentage of its net income derived from investment securities fluctuates unpredictably with the cycles of the semiconductor industry. The cyclical nature of the industry, rather than any change in Applied's business or financial management policies, has led to significant variations in the ratio of Applied's income from investment securities relative to net operating income.

4. Rule 3a-8 under the Act provides an exemption from the definition of investment company if, among other factors, a company's research and development expenses are a substantial percentage of its total expenses for the last four fiscal quarters combined. While Applied believes it could satisfy the other factors in the rule, Applied's research and development expenses have fluctuated from year to year due to the cyclical nature of the industry. During the 2000 through 2004 fiscal years, Applied's research and development expenses have varied, ranging from approximately 16% to 22% of its total expenses, including cost of goods sold. Applied's ratio of research and development expenses to

total expenses thus may be deemed a "substantial percentage" in certain years, but not others. Applied presently cannot rely on rule 3a-8 because its research and development expenses for the last four fiscal quarters ended on January 30, 2005 represented approximately 16% of its total expenses, including cost of goods sold.

5. Section 3(b)(2) of the Act provides that, notwithstanding section 3(a)(1)(C) of the Act, the Commission may issue an order declaring an issuer to be primarily engaged in a business or businesses other than that of investing, reinvesting, owning, holding, or trading in securities either directly, through majority-owned subsidiaries. Applied requests an order under section 3(b)(2) of the Act declaring that it is primarily engaged in a business other than that of investing, reinvesting, owning, holding, or trading in securities, and therefore not an investment company as defined in the Act.

6. In determining whether a company is primarily engaged in a non-investment company business under section 3(b)(2), the Commission considers: (a) the issuer's historical development; (b) its public representations of policy; (c) the activities of its officers and directors; (d) the nature of its present assets; and (e) the sources of its present income.¹

a. *Historical Development.* Applied states that since its inception in 1967 it has, directly and through its wholly-owned subsidiaries, developed into the largest supplier of products and services to the global semiconductor industry. Applied states that it currently manufactures systems that perform a majority of the steps in the semiconductor integrated circuit fabrication process and also provides products and services that enhance manufacturing yields. Customers for Applied's products include semiconductor wafer manufacturers and semiconductor integrated circuit, or "chip" manufacturers such as Intel, Texas Instruments and IBM. Applied further states that in the past 23 years, it has introduced over 100 major products. Applied states that it has not sold any of its subsidiaries in over 20 years and that these sales were conducted for reasons related to its business as a supplier of integrated circuit fabrication equipment and services.

b. *Public Representations of Policy.* Applied states that it has never represented that it is involved in any business other than developing,

manufacturing, marketing and servicing integrated circuit fabrication equipment. Applied asserts that it has consistently stated in its annual reports, stockholder letter, prospectuses, filings with the Commission, press releases, marketing materials and website that it is the largest supplier of products and services to the global semiconductor industry. Applied states that it generally does not make public representations regarding its investment securities except as required by its obligation to file periodic reports to comply with federal securities laws. Applied further states that it has emphasized operating results and has never emphasized either its investment income or the possibility of significant appreciation from its cash management investment strategies as a material factor in its business or future growth.

c. *Activities of Officers and Directors.* Applied states that its directors and officers spend substantially all of their time managing Applied's business of developing, manufacturing, marketing and servicing integrated circuit fabrication equipment. Nine out of Applied's ten directors have extensive experience in the semiconductor or electronics industries. The remaining director is experienced in government and academia. Applied's directors spend less than 1% of their time on investment-related matters. Applied's chief financial officer spends less than 10% of her time monitoring Applied's cash balances and managing short-term investment securities in accordance with Applied's investment policies. Out of Applied's approximately thirty senior officers, only two (other than the chief financial officer) spend time monitoring cash balances and managing short-term investment securities; the treasurer spends less than 30% of his time and the corporate controller spends less than 5% of her time on such activities. Applied has approximately 13,000 full-time employees in approximately 80 locations throughout the world. In addition to the officers discussed above, only three other employees spend their time on matters relating to the management of Applied's investment securities; the rest of Applied's employees are involved in product design and engineering, manufacturing, customer technical support, supplier and materials management, sales and marketing, finance and corporate services, human resources, environmental, health and safety issues, global security, information technology, transactional and corporate legal services and protection and enforcement of intellectual property rights.

d. *Nature of Assets.* Applied states that as of January 30, 2005 its

¹ Tonopah Mining Company of Nevada, 26 SEC 426, 427 (1947).

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.² 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 operations³ 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")

² 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.

³ 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.