

For the Commission by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Jonathan G. Katz,
Secretary.

[FR Doc. 95-30222 Filed 12-11-95; 8:45 am]

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[Investment Company Act Release No. 21570; 812-9820]

EAI Select Managers Equity Fund, et al.; Notice of Application

December 6, 1995.

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

ACTION: Notice of application for an Order under the Investment Company Act of 1940 (the "Act").

APPLICANTS: EAI Select Managers Equity Fund ("Fund"), Evaluation Associates Capital Markets, Incorporated ("Manager"), EAI Partners, L.P. ("EAI"), Evaluation Associates, Incorporated 401(K) Plan and Trust ("EAI Plan"), Harding Service Corporation, et al. Profit Sharing Plan and Trust ("Harding Plan"), and Stockwood VII, Inc. 401K Plan ("Stockwood Plan", and, together with the EAI Plan and the Harding Plan, the "Affiliated Plans").

RELEVANT ACT SECTIONS: Order requested under section 17(b) of the Act exempting applicants from section 17(a) of the Act and pursuant to section 17(d) of the Act and rule 17d-1 thereunder.

SUMMARY OF APPLICATION: The requested order would permit a collective investment account sponsored by EAI to transfer its securities to the Fund.

FILING DATES: The application was filed on October 16, 1995 and amended on December 1, 1995. Applicants agree to file an additional amendment, the substance of which is incorporated herein, during the notice period.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 28, 1995 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 may request notification of a

hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Applicants: EAI, 200 Connecticut Avenue, Suite 700, Norwalk, Connecticut 06854-1958; Harding Plan and Stockwood Plan, 300 South Street, P.O. Box 1975, Morriston, New Jersey 07962-1975.

FOR FURTHER INFORMATION CONTACT: Sarah A. Buescher, Staff Attorney, at (202) 942-0573, or Alison E. Baur, Branch Chief, at (202) 942-0564 (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 from the SEC's Public Reference Branch.

Applicants' Representations

1. The Fund is an open-end management investment company organized as a Massachusetts business trust. The Fund has filed a registration statement under the Securities Act of 1933 which will become effective prior to the consummation of the transactions described in this application. The Manager is the investment adviser of the Fund and presently owns all of the Fund's outstanding shares. EAI is the parent of the Manager and is the sponsor of the EAI Plan, an in-house employee benefit plan for employees of EAI, the Manager, and their affiliates.

2. The Harding Plan is an employee benefit plan for employees of Harding Service Corporation ("Harding"). The Stockwood Plan is an employee benefit plan for employees of Stockwood VII, Inc. ("Stockwood"). Certain trustees of the Harding Plan and the Stockwood Plan have a greater than five percent direct or indirect equity interest in EAI. In addition, certain officers, employees and/or affiliates of Harding and Stockwood have a greater than five percent direct or indirect equity interest in EAI.

3. The Affiliated Plans and certain other participant-directed employee benefit plans (collectively, the "Plans") currently invest in The EAI Small Managers Equity Fund Trust, a collective investment account ("Account"). EAI is the investment adviser of the Account. The Account has not registered under the Act in reliance on the exception from the definition of "investment company" under section 3(c)(1) of the Act. Section 3(c)(1) provides that an issuer whose outstanding securities are beneficially owned by not more than one hundred

persons and which is not making and does not propose to make a public offering of its securities is not an investment company. In The PanAgora Group Trust (pub. avail. April 29, 1994), the staff stated that, for purposes of section 3(c)(1), the staff would consider a defined contribution plan participant who decides whether or how much to invest in a private investment company to be a beneficial owner of the company's securities. Participants in the Plans have discretion to direct investment of their assets, and there are more than 100 such participants. Therefore, the Account may no longer rely on the exception in section 3(c)(1) unless the Plans' investment in the Account is terminated by December 31, 1995.¹

4. EAI believes that the Fund is a suitable alternative investment vehicle for the Plans. Applicants contemplate that the Account would make an in-kind distribution of securities held in the Account's portfolio to the Plans and that those Plans choosing to invest in the Fund would purchase shares of the Fund by contributing the distributed securities to the Fund in exchange for Fund shares. The Account would remain available to employee benefit plans whose participants cannot direct asset investment.

5. Upon its withdrawal from the Account, each Plan would receive securities equal in value to its *pro rata* beneficial interest in the Account. Each Plan purchasing shares of the Fund by contribution of the securities distributed to it would receive shares of the Fund having a net asset value equal to the value of the securities contributed. Assets of the Plans used to purchase Fund shares would be valued at "current market value" as defined in rule 17a-7(b). The assets of the Fund would be invested with the same objectives and in the same manner as the assets of the Account are presently invested.

6. Each Plan choosing to purchase Fund shares by an in-kind contribution of securities would do so only upon written direction of the Plan fiduciaries. A party independent of EAI would provide such direction for the Affiliated Plans. EAI and/or the Manager would provide each Plan fiduciary with the Fund's current prospectus and a written statement disclosing the fee structure under which the Manager would be paid. Because the total expenses to be paid by the Fund will be higher than those paid by the Account, a Plan purchasing shares of the Fund would

¹ See Latham & Watkins (pub. avail. Dec. 28, 1994).

¹⁰ 17 CFR 200.30-3(a)(12) (1994).

incur greater total expenses, and this would be disclosed in a written statement to the Funds.

7. Applicants represent that investments in the Fund by the Plans would provide the plans with several benefits that are not presently available with the Account. The Plan participants would enjoy the protections of the Securities Act and the Act. In addition, investment of Plan assets in the Fund allows the Plan's participants and sponsors to monitor more easily the performance of their investments, as information concerning the investment performance of the Fund generally would be available in daily newspapers.

Applicants' Legal Analysis

1. Section 17(a) of the Act, in relevant part, prohibits an affiliated person of a registered investment company, or an affiliated person of such person, acting as principal, from selling to or purchasing from such investment company any security or other property. Section 2(a)(3) of the Act, in relevant part, defines "affiliated person" to include: (a) Any person directly or indirectly owning, controlling, or holding with the power to vote, 5% or more of the outstanding voting securities of such other person; (b) any person directly or indirectly controlling, controlled by, or under common control with, such other person; and (c) if such other person is an investment company, any investment adviser thereof.

2. Although the SEC has taken a no-action position with respect to certain collective investment fund conversions, that position is conditioned on affiliated persons, or second-tier affiliates, of the Fund having no beneficial interest in the proposed transactions. Federated Investors (pub. avail. April 21, 1994). In the case of the EAI Plan, the transaction involves assets belonging to an employee benefit plan established for employees of EAI or other affiliated persons that could be considered second-tier affiliates of the Fund. In the case of the Harding Plan and Stockwood Plan, the transactions involve assets belonging to employee benefit plans with trustees, officers, employees, and/or affiliates of the sponsoring entities having a greater than five percent ownership interest in EAI. Applicants request an exemptive order to permit the Fund to accept in-kind transfers of the assets of the Affiliated Plans.

3. Section 17(b) provides that the SEC shall exempt a proposed transaction from section 17(a) if evidence establishes that: (a) The terms of the proposed transaction are reasonable and fair and do not involve overreaching; (b) the proposed transaction is consistent

with the policies of the registered investment company involved; and (c) the proposed transaction is consistent with the general provisions of the Act.

4. Applicants represent that the proposed transactions meet the requirements of section 17(b). Because the value of the shares each Plan receives in the Fund would be equal to fair market value of that Plan's *pro rata* share of assets in the Account, applicants represent that the transactions are fair to all involved and do not involve overreaching on the part of any person. In addition, applicants represent that because the investment policies and objectives of the Fund are identical to those of the Account, the transactions would be consistent with the portfolio objectives and policy of the Fund. Because the transactions would bring the Plans' investments under the supervision of the SEC, applicants represent that the transactions would be consistent with the provisions of the Act.

5. Applicants represent that the proposed transactions would comply with rule 17a-7 under the Act in most respects. Rule 17a-7 exempts certain purchase and sale transactions otherwise prohibited by section 17(a) if, among other requirements, the transactions are affected at an "independent market price" and the investment company's board of directors reviews the transactions for fairness. Applicants would comply with rule 17a-7 to the extent possible, as stated in the conditions to the requested order.

6. Section 17(d) prohibits an affiliated person of a registered investment company, or an affiliated person of such person, acting as principal, from effecting any transaction in which such investment company is a joint, or joint and several, participant with such person in contravention of SEC rules and regulations. Rule 17d-1 under the Act provides that no joint transaction covered by the rule may be consummated unless the SEC issues an order upon application. In passing upon such applications, the SEC considers whether participation by a registered investment company is consistent with the provisions, policies, and purposes of the Act, and is not on a basis less advantageous than that of other participants.

7. Because EAI, as sponsor of the EAI Plan, may have legal title to the EAI Plan's assets invested in the Account, EAI may be viewed as acting as a principal in the proposed transactions. Applicants represent that, since the fiduciaries of each Plan would make an independent determination as to

whether to invest in the Fund and assets used to purchase shares of the Fund would be valued at current market prices, the terms received by the Affiliated Plans would not be more or less advantageous than those available to other investors. In addition, as discussed previously, applicants represent that the transactions would be consistent with the Act and the rules thereunder.

Applicants' Conditions

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

1. The purchase transactions will comply with the provisions of rule 17a-7(b)-(f).

2. The purchase transactions will not occur unless and until the Board of Trustees of the Fund (including a majority of Trustees that are not interested persons of the Fund) and the Plans' fiduciaries (or, in the case of the Affiliated Plans, parties independent of EAI) find that the transactions are in the best interest of the Fund and the Plans, respectively. In the case of the Fund, this determination and the basis on which it is made will be recorded fully in the records of the Fund.

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

Margaret H. McFarland,
Deputy Secretary.

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[Rel. No. IC-21569; 812-9842]

PCS Cash Fund, Inc., et al.; Notice of Application December 5, 1995

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

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: PCS Cash Fund, Inc., Morgan Stanley Fund, Inc., and Morgan Stanley Institutional Fund, Inc. (with their successors in interest,¹ the "Funds").

RELEVANT ACT SECTIONS: Order request under section 6(c) of the Act for an exemption from sections 13(a)(2), 13(a)(3), 18(f)(1), 22(f), and 22(g) and rule 2a-7 thereunder, under sections 6(c) and 17(b) of the Act for an exemption from section 17(a)(1), and under section 17(d) of the Act and rule

¹ "Successors in interest" is herein limited to entities that result from a reorganization into another jurisdiction or a change in the type of business organization.