

## SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 24503; 812-11978]

### Ark Funds, et al.; Notice of Application

June 19, 2000.

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

**ACTION:** Notice of an application under section 17(b) of the Investment Company Act of 1940 (the "Act") for an exemption from section 17(a) of the Act.

#### SUMMARY OF THE APPLICATION:

Applicants request an order to permit the proposed reorganizations of four series (the "Acquired Funds") of The Govett Funds, Inc. ("Govett Funds") with and into four series of ARK Funds (the "Acquiring Funds," and together with the Acquired Funds, the "Funds"). Because of certain affiliations, applicants may not rely on rule 17a-8 under the Act.

**APPLICANTS:** ARK Funds, Govett Funds, Allied Investment Advisers, Inc. ("AIA"), and AIB Govett, Inc. ("AIB Govett").

**FILING DATES:** The application was filed on February 14, 2000. Applicants have agreed to file an amendment to the application during the notice period, the substance of which is reflected in this notice.

**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 July 10, 2000, 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, Commission, 450 Fifth Street, N.W., Washington, D.C. 20549-0609. Applicants, c/o Allfirst Trust Company, N.A., 25 S. Charles Street, Baltimore, Maryland 21201.

**FOR FURTHER INFORMATION CONTACT:** Emerson S. Davis, Sr., Senior Counsel, at (202) 942-0714, or Janet M. Grossnickle, 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 Commission's Public Reference Branch, 450 Fifth Street, N.W., Washington, D.C. 20549-0102 (telephone (202) 942-8090).

#### Applicants' Representations

1. Ark Funds, a Massachusetts business trust, is registered under the Act as an open-end management investment company and currently offers twenty-four series (the "Ark Portfolios"). Three of the ARK Portfolios, the ARK Income Portfolio, ARK Small-Cap Equity Portfolio ("Ark Small-Cap Portfolio"), and ARK International Equity Selection Portfolio ("ARK International Selection Portfolio"), are Acquiring Funds. ARK Funds is organizing two new ARK Portfolios, the ARK International Equity Portfolio and ARK Emerging Markets Equity Portfolio, which also will be Acquiring Funds. AIA, a Maryland corporation, is an investment adviser registered under the Investment Advisers Act of 1940 ("Advisers Act") and serves as investment adviser to each Ark Portfolio. AIA is a wholly owned subsidiary of Allfirst Bank, which is a wholly-owned subsidiary of Allfirst Financial Inc. ("Allfirst Financial"), a bank holding company, which is a wholly-owned subsidiary of Allied Irish Banks, p.l.c. ("Allied Irish"). The Allfirst Financial Inc. Pension Plan (the "Allfirst Plan"), which is a defined benefit plan maintained for the benefit of the employees of Allfirst Financial and its subsidiaries, is the beneficial owner of more than 5% of the outstanding voting securities of two Acquiring Funds. Moreover, Allfirst Trust Company, N.A. ("Allfirst Trust"), an indirect wholly-owned subsidiary of Allfirst Financial, owns, in a fiduciary capacity, more than 25% of the outstanding voting shares of each Acquiring Fund.

2. Govett Funds, a Maryland corporation, is registered under the Act as an open-end management investment company and currently offers five series (each a "Govett Fund"), four of which are Acquired Funds: the Govett Global Income Fund, Govett Smaller Companies Fund, Govett International Equity Fund, and Govett Emerging Markets Equity Fund. AIB Govett, a Maryland corporation, is an investment adviser registered under the Advisers Act and serves as investment adviser to each of the Govett Funds. AIB Govett Asset Management Limited ("AIB Govett London"), is an investment adviser registered under the Advisers Act and serves as sub-adviser to each of

the Govett Funds. AIB Govett is a wholly-owned subsidiary of, and AIB Govett London is a majority-owned subsidiary of AIB Asset Management Holding Limited, which is an indirect majority-owned subsidiary of Allied Irish.

3. On December 10, 1999 and January 5, 2000, the board of trustees of the Acquiring Funds and the board of directors of the Acquired Funds (together, the "Boards"), respectively, including all the trustees and directors who are not "interested persons," as defined in section 2(a)(19) of the Act ("Independent Directors"), unanimously approved an agreement and plan of reorganization between the Funds (the "Reorganization Agreement"). Under the Reorganization Agreement, each Acquiring Fund will acquire all the assets and stated liabilities of the corresponding Acquired Fund in exchange for shares of the Acquiring Fund (the "Reorganizations").<sup>1</sup> The shares of each Acquiring Fund exchanged will have an aggregate net asset value equal to the aggregate net asset value of the Acquired Fund's shares determined as of the close of business on the business day immediately preceding the day of the closing of each Reorganization ("Closing Date"). The value of the assets of the Funds will be determined according to the Funds' then-current prospectuses and statements of additional information. As soon as reasonably practical after the Closing Date, each Acquired Fund will be liquidated by the distribution of the Acquiring Fund shares *pro rata* to the shareholders of the Acquired Fund.

4. Applicants state that the investment objectives, policies and restrictions of each Acquired Fund are generally similar (and in the case of the Govett International Equity Fund and

<sup>1</sup> Under the Reorganization Agreement, the Acquired Funds will merge into the Acquiring Funds as follows: Govett Global Income Fund will merge into ARK Income Portfolio, Govett Smaller Companies Fund into ARK Small-Cap Portfolio, Govett Emerging Markets Equity Fund into ARK Emerging Markets Equity Portfolio and Govett International Equity Fund into ARK International Selection Portfolio. The Govett International Equity Fund merger into the ARK International Selection Portfolio is contingent upon proposed changes being approved by shareholders of the ARK International Selection Portfolio at a meeting on July 10, 2000. The proposals include increasing the investment advisory fees payable by the ARK International Selection Portfolio from 0.65% to 1.00% and revising its principal investment strategy so that it is substantially identical to that of the Govett International Equity Fund. In the event these proposals are not approved, Govett International Equity Fund would be reorganized into the ARK International Equity Portfolio, which has investment objectives, policies and restrictions substantially identical to those of the Govett International Equity Fund.

Govett Emerging Markets Funds, substantially identical) to those of the corresponding Acquiring Fund. Each Fund offer Institutional Class Shares which are not subject to any sales charge or a distribution fee adopted under rule 12b-1 under the Act. The Acquired Fund's Institutional Class Shares are subject to redemption and exchange fees (as permitted by rule 11a-3 under the Act). The Acquired Funds offer Class A Retail Class Shares, which are not subject to a front-end sales load but are subject to rule 12b-1 distribution, redemption and exchange fees (as permitted by rule 11a-3 under the Act). The Acquiring Funds offer Retail Class A Shares, which are subject to a front-end sales load and rule 12b-1 distribution fee, but not a redemption or exchange fee. Shareholders of Institutional Class and Retail Shares of the Acquired Funds will receive Institutional and Retail Shares, respectively, of the corresponding Acquiring Fund. No sales charges will be imposed in connection with the Reorganizations. AIB Govett will bear the costs associated with the Reorganizations.

5. The Boards, including all of the Independent Directors, determined that the participation of each Acquiring and Acquired Fund in a Reorganization was in the best interests of the shareholders of each Fund, and that the interests of the shareholders of each Fund would not be diluted as a result of the Reorganization. In assessing the Reorganizations, the Boards considered various factors, including: (a) The investment objectives, policies and limitations of each of the Acquired Funds and their compatibility with those of the corresponding Acquiring Funds; (b) the investment advisory and other fees paid by each of the Acquiring Funds and the historical and projected expenses of each of the Acquiring Funds; (c) the terms and conditions of the Reorganization Agreement; and (d) the anticipated tax consequences of the Reorganizations for the Funds and their shareholders. In addition, the board of directors of the Govett Funds considered: (a) The historical investment performance records of the Funds; (b) the capabilities, practices and resources of AIA and ARK Funds' other service providers; and (c) the shareholders services offered by ARK Funds.

6. The Reorganizations are subject to a number of conditions precedent, including that: (a) The shareholders of each Acquired Fund will have approved the Reorganization; (b) the Funds will have received opinions of counsel that the Reorganizations will be tax-free for

the Funds and their shareholders; and (c) applicants will have received from the Commission an exemption from section 17(a) of the Act for the Reorganizations. The Reorganization Agreement may be terminated and the Reorganizations abandoned at any time prior to the Closing Date by the Boards. Applicants agree not to make any material changes to the Reorganization Agreement without prior Commission approval.

7. A registration statement on Form N-14 with respect to the Reorganizations, containing a proxy statement/prospectus, was filed with the Commission on May 18, 2000 and will be mailed to shareholders of the Acquired Funds during the week of June 19, 2000. A shareholders meeting of the Acquired Funds is scheduled for July 10, 2000.

#### 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 a person, acting as principal, from selling any security to, or purchasing any security from, the company. Section 2(a)(3) of the Act defines an "affiliated person" of another person to include: (a) Any person directly or indirectly owning, controlling, or holding with power to vote 5% or more of the outstanding voting securities of the other person; (b) any person 5% or more of whose securities are directly or indirectly owned, controlled, or held with power to vote by the other person; (c) any person directly or indirectly controlling, controlled by, or under common control with the other person; and (d) if the other person is an investment company, any investment adviser of that company.

2. Rule 17a-8 under the Act exempts certain mergers, consolidations, and sales of substantially all of the assets of registered investment companies that are affiliated persons, or affiliated persons of an affiliated person, solely by reason of having a common investment adviser, common directors, and/or common officers, provided that certain conditions are satisfied. Applicants believe that rule 17a-8 may not be available to exempt the Reorganizations because the Funds may be deemed to be affiliated by reasons other than having a common investment adviser, common directors, and/or common officers. Applicants state that because Allfirst Plan owns in the aggregate 5% of certain Acquiring Funds and Allfirst Financial has an indirect pecuniary interest in the performance of the assets held by the Allfirst Plan. Allfirst Financial may be deemed to be an affiliated person of

these Acquiring Funds. In addition, applicants state that because Allfirst Trust owns in the aggregate, as a fiduciary, more than 25% of the outstanding voting securities of the Acquiring Funds, it may be deemed to be an affiliated person of the Acquiring Funds. Because of the common ownership of Allfirst Financial and AIB Govett, each Acquiring Fund might be deemed to be an affiliated person of an affiliated person of the corresponding Acquired Fund.

3. Section 17(b) of the Act provides, in relevant part, that the Commission may exempt a transaction from the provisions of section 17(a) if evidence establishes that the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and that the proposed transaction is consistent with the policy of each registered investment company concerned and with the general purposes of the Act.

4. Applicants request an order under section 17(b) of the Act exempting them from section 17(a) to the extent necessary to complete the Reorganizations. Applicants submit that the Reorganizations satisfy the standards of section 17(b) of the Act. Applicants state that the terms of the Reorganizations are reasonable and fair and do not involve overreaching. Applicants state that the investment objectives and policies of each Acquired Fund are generally similar (and in the case of the Govett International Equity Fund and Govett Emerging Markets Funds, substantially identical) to those of its corresponding Acquiring Fund. Applicants also state that the Boards, including all of the Independent Directors, have made the requisite determinations that the participation of the Acquired and Acquiring Funds in the Reorganizations is in the best interests of each Fund and that such participation will not dilute the interests of the existing shareholders of each Fund. In addition, applicants state that the Reorganizations will be on the basis of relative net asset value.

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

**Margaret H. McFarland,**

*Deputy Secretary.*

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