

Preliminary Injunction enjoined BHAM, directly or through its officers, directors, agents and employees, from violating section 206(2).

#### Applicants' Legal Analysis

1. Section 9(a)(2) of the Act, in relevant part, prohibits a person who has been enjoined from engaging in or continuing any conduct or practice in connection with the purchase or sale of a security from acting, among other things, as an investment adviser or depositor of any registered investment company or a principal underwriter for any registered open-end investment company, registered unit investment trust, or registered face-amount certificate company. Section 9(a)(3) of the Act makes the prohibition in section 9(a)(2) applicable to a company any affiliated person of which has been disqualified under the provisions of section 9(a)(2). Section 2(a)(3) of the Act defines "affiliated person" to include any person directly or indirectly controlling, controlled by, or under common control, with the other person. Applicants state that BHAM is an affiliated person of the applicants because BHAM and the applicants are under the common control of AAC. Applicants state that, as a result of the Preliminary Injunction, applicants may be subject to the prohibitions of section 9(a).

2. Section 9(c) of the Act provides that the Commission shall grant an application for an exemption from the disqualification provisions of section 9(a) if it is established that these provisions, as applied to the applicants, are unduly or disproportionately severe or that the applicants' conduct has been such as not to make it against the public interest or the protection of investors to grant the application. Applicants have filed an application pursuant to section 9(c) of the Act seeking temporary and permanent orders exempting them from the provisions of section 9(a) of the Act that might otherwise be operative with respect to their provision of investment advisory services to the Fund as a result of the Preliminary Injunction.

3. Applicants state that the prohibitions of section 9(a) as applied to them would be unduly and disproportionately severe and that the conduct of applicants has been such as not to make it against the public interest or the protection of investors to grant the exemption from section 9(a). Applicants state that none of the current or former officers or employees of either of the applicants participated in or had any knowledge of the conduct alleged to have constituted the violations that resulted in the Action. In addition,

neither applicant has been the subject of any federal or state enforcement or other administrative or judicial disciplinary proceeding, nor has either been named as a defendant in any other action relating to the securities laws.

Applicants state that neither has ever previously applied for an exemption pursuant to section 9(c) of the Act.

4. Applicants state that their inability to continue providing advisory services to the Fund would result in the Fund and its shareholders facing potentially severe hardships. Additionally, applicants assert that if they were barred from providing investment advisory services to the Fund, the effect on their businesses and employees would be severe.

5. AIP and TA will distribute written materials, including an offer to meet in person to discuss the materials, to the board of directors of the Fund regarding the Action and the reasons they believe relief pursuant to section 9(c) is appropriate. AIP and TA will provide the Fund with all information concerning the Action and the exemptive application necessary for the Fund to fulfill its disclosure and other obligations under the federal securities laws.

#### Applicants' Condition

Applicants agree that the order granting the requested relief will be subject to the following condition:

1. Any temporary exemption granted pursuant to the application shall be without prejudice to, and shall not limit the Commission's rights in any manner with respect to, any Commission investigation of, or administrative proceedings involving or against, applicants or their affiliated persons, including without limitation, the consideration by the Commission of a permanent exemption from section 9(a) of the Act requested pursuant to the application or the revocation or removal of any temporary exemptions granted under the Act in connection with the application.

#### Temporary Order

The Commission has considered the matter and finds that applicants have made the necessary showing to justify granting of a temporary exemption.

Accordingly, *it is hereby ordered*, pursuant to section 9(c) of the Act, on the basis of the representations contained in the application, that applicants be and hereby are temporarily exempted from the provisions of section 9(a) of the Act with respect to their investment advisory services to the Fund to the extent the provisions are operative

solely as a result of the Preliminary Injunction, subject to the condition in the application, until the Commission takes final action on an application for a permanent order.

By the Commission.

**Jill M. Peterson,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 25805 /812-12562]

### AB Funds Trust and SBC Financial Services, Inc.; Notice of Application

November 19, 2002.

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

**ACTION:** Notice of an application under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from section 15(a) of the Act and rule 18f-2 under the Act, as well as from certain disclosure requirements.

**APPLICANTS:** AB Funds Trust (the "Trust") and SBC Financial Services, Inc. (the "Adviser").

**SUMMARY OF APPLICATION:** Applicants request an order that would permit applicants to enter into and materially amend sub-advisory agreements without shareholder approval and would grant relief from certain disclosure requirements.

**FILING DATES:** The application was filed on June 22, 2001, and amended on November, 8, 2002.

**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 December 16, 2002, and should be accompanied by proof of service on the 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, 450 Fifth Street, NW., Washington, DC 20549-0609. Applicants, c/o Rodney R. Miller, Esq.,

AB Funds Trust, 2401 Cedar Springs Road, Dallas, Texas 75201-1407.

**FOR FURTHER INFORMATION CONTACT:**

Karen L. Goldstein, Senior Counsel, at (202) 942-0646, 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 at the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549-0102 (telephone (202) 942-8090).

**Applicants' Representations**

1. The Trust is a Delaware business trust registered under the Act as an open-end management investment company. The Trust is organized as a series investment company and has thirteen series (each a "Fund" and collectively, the "Funds"). Each Fund has its own investment objective, policies and restrictions. Four of the Funds will operate as funds of funds pursuant to section 12(d)(1)(G) under the Act (the "Blended Funds") and will allocate their investments among the nine other series of the Trust (the "Select Funds"). Investors may also purchase shares of the Select Funds directly. The Adviser, a Texas non-profit, non-stock corporation, serves as investment adviser to the Trust, and is registered as an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act").<sup>1</sup>

2. The Trust, on behalf of each Fund, has entered into an investment advisory agreement with the Adviser ("Advisory Agreement"). The Advisory Agreement has been approved by the Trust's board of trustees (the "Board"), including a majority of the trustees who are not "interested persons," as defined in section 2(a)(19) of the Act, of the Trust ("Disinterested Trustees"), as well as by each Fund's initial shareholder. Under the terms of the Advisory Agreement, the Adviser manages the investment of

assets of each Fund and, subject to oversight by the Board, may delegate its investment advisory responsibilities to one or more subadvisers ("Subadvisers"). The Trust and the Adviser have entered into investment subadvisory agreements ("Subadvisory Agreements") with Subadvisers for all but two of the Select Funds. Under the Subadvisory Agreements, each Subadviser has discretionary authority to invest a portion of a Select Fund's assets subject to supervision by the Adviser, the Fund's investment objectives, policies and restrictions, and instructions of the Board. Each of the Subadvisers is, or will be, an investment adviser registered or exempt from registration under the Advisers Act. The Trust pays the Adviser a fee computed separately for each Select Fund based on the Fund's net asset value.

3. The Adviser monitors the Funds and the Subadvisers and makes recommendations to the Board regarding allocation of assets between Subadvisers and is responsible for recommending the hiring, termination and replacement of Subadvisers. The Adviser recommends Subadvisers based on a number of factors listed in the application used to evaluate their skills in managing assets pursuant to particular investment objectives. Each Subadviser will be paid by the Select Fund at a rate that has been negotiated with each Subadviser by the Adviser and approved by the Board.

4. Applicants request an order to permit the Adviser, subject to the oversight of the Board, to enter into and materially amend Subadvisory Agreements without obtaining shareholder approval. The requested relief will not extend to a Subadviser that is an affiliated person, as defined in section 2(a)(3) of the Act, of the Trust or the Adviser, other than by reason of serving as a Subadviser to one or more of the Funds ("Affiliated Subadviser").

5. Applicants also request an exemption from the various disclosure provisions described below that may require each Fund to disclose fees paid to the Subadvisers. The Trust will disclose for each Fund (both as a dollar amount and as a percentage of a Select Fund's net assets): (i) The aggregate fees paid to the Adviser and Affiliated Subadvisers; and (ii) aggregate fees paid to Subadvisers other than Affiliated Subadvisers ("Aggregate Fee Disclosure"). For any Fund that employs an Affiliated Subadviser, the Fund will provide separate disclosure of any fees paid to the Affiliated Subadviser.

**Applicants' Legal Analysis**

1. 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 under a written contract that has been approved by the vote of the company's outstanding voting securities. Rule 18f-2 under the Act provides that each series or class of stock in a series company affected by a matter must approve such matter if the Act requires shareholder approval.

2. Form N-1A is the registration statement used by open-end investment companies. Item 15(a)(3) of Form N-1A requires disclosure of the method and amount of the investment adviser's compensation.

3. Rule 20a-1 under the Act requires proxies solicited with respect to an investment company to comply with Schedule 14A under the Securities Exchange Act of 1934 ("Exchange Act"). Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A, taken together, require a proxy statement for a shareholder meeting at which the advisory contract will be voted upon to include the "rate of compensation of the investment adviser," the "aggregate amount of the investment adviser's fees," a description of the "terms of the contract to be acted upon," and, if a change in the advisory fee is proposed, the existing and proposed fees and the difference between the two fees.

4. Form N-SAR is the semi-annual report filed with the Commission by registered investment companies. Item 48 of Form N-SAR requires investment companies to disclose the rate schedule for fees paid to their investment advisers, including the Subadvisers.

5. Regulation S-X sets forth the requirements for financial statements required to be included as part of investment company registration statements and shareholder reports filed with the Commission. Sections 6-07(2)(a), (b), and (c) of Regulation S-X require that investment companies include in their financial statements information about investment advisory fees.

6. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities, or transactions from any provision of the Act, or from any rule thereunder, if such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Applicants state that their requested relief meets

<sup>1</sup> The Applicants request that any relief granted pursuant to the application also apply to any future series of the Trust and any other registered open-end management investment companies and their series that: (1) Are advised by the Adviser or any entity controlling, controlled by, or under common control with the Adviser; (ii) use the multi-manager structure described in the application, and (iii) comply with the terms and conditions in the application (together "Future Funds," included in the term "Funds"). The Trust is the only existing investment company that currently intends to rely on the order. The Blended Funds do not currently intend to rely on the requested relief. If the name of any Fund should, at any time, contain the name of a Subadviser, it will also contain the name of the Adviser, which will appear before the name of the Subadviser.

this standard for the reasons discussed below.

7. Applicants assert that the shareholders will rely on the Adviser's expertise to select one or more Subadvisers best suited to achieve a Fund's investment objectives. Applicants assert that, from the perspective of the shareholder, the role of the Subadvisers is comparable to that of individual portfolio managers employed by traditional investment advisory firms. Applicants contend that requiring shareholder approval of each Subadvisory Agreement would impose costs and unnecessary delays on the Select Funds, and may preclude the Adviser from acting promptly in a manner considered advisable by the Board. Applicants note that the Advisory Agreement will remain fully subject to section 15(a) of the Act and rule 18f-2 under the Act.

8. Applicants assert that some Subadvisers use a "posted" rate schedule to set their fees. Applicants state that the Adviser may not be able to negotiate below the "posted" fee rates with Subadvisers if each Subadviser's fees are required to be disclosed. Applicants submit that the nondisclosure of the individual Subadvisers' fees is in the best interest of the Select Funds and their shareholders, where the disclosure of such fees would increase costs to shareholders without an offsetting benefit to the Select Funds and their shareholders.

#### Applicants' Conditions

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

1. Before any Fund may rely on the requested order, the operation of the Fund in the manner described in the application will be approved by a majority of the outstanding voting securities of the Fund, as defined in the Act, or, in the case of a Fund whose public shareholders purchased shares on the basis of a prospectus containing the disclosure contemplated by condition 2 below, by the sole initial shareholder before offering shares of the Fund to the public.

2. The Trust will disclose in its prospectus(es) the existence, substance and effect of any order granted pursuant to the application. In addition, each Fund relying on the requested order will hold itself out to the public as employing the management structure described in the application. The prospectus will prominently disclose that the Adviser has the ultimate responsibility (subject to oversight by the Board) to oversee the Subadvisers

and to recommend their hiring, termination, and replacement.

3. At all times, a majority of the Board will be Disinterested Trustees, and the nomination of new or additional Disinterested Trustees will be at the discretion of the then existing Disinterested Trustees.

4. The Adviser and the Funds will not enter into a Subadvisory Agreement with any Affiliated Subadviser without that agreement, including the compensation to be paid thereunder, being approved by the shareholders of the applicable Fund.

5. When a Subadviser change is proposed for a Fund with an Affiliated Subadviser, the Board, including a majority of the Disinterested Trustees, will make a separate finding, reflected in the Board minutes, that the change is in the best interests of the Fund and its shareholders and does not involve a conflict of interest from which the Adviser or the Affiliated Subadviser derives an inappropriate advantage.

6. Within 90 days of the hiring of any new Subadviser, shareholders will be furnished all information about the new Subadviser that would be contained in a proxy statement, except as modified to permit Aggregate Fee Disclosure. This information will include Aggregate Fee Disclosure and any change in such disclosure caused by the addition of the new Subadviser. The Trust or the Adviser will meet this condition by providing shareholders, within 90 days of the hiring of a Subadviser, an information statement meeting the requirements of Regulation 14C, Schedule 14C and Item 22 of Schedule 14A under the Exchange Act, except as modified to permit Aggregate Fee Disclosure.

7. The Adviser will provide general investment advisory services to the Funds, including overall supervisory responsibility for the general management and investment of each Funds' assets, and, subject to review and approval by the Board, will: (i) Set each Fund's overall investment strategies, (ii) evaluate, select and recommend Subadvisers to manage all or a part of each Fund's assets, (iii) when appropriate, allocate and reallocate each Fund's assets among multiple Subadvisers; (iv) monitor and evaluate the performance of the Subadvisers, and (v) ensure that the Subadvisers comply with each Fund's investment objectives, policies and restrictions by, among other things, implementing procedures reasonably designed to ensure compliance.

8. No Trustee or officer of the Trust, or director or officer of the Adviser will own, directly or indirectly (other than

through a pooled investment vehicle that is not controlled by such person), any interest in a Subadviser, except for: (i) Ownership of interests in the Adviser or any entity that controls, is controlled by, or is under common control with the Adviser, or (ii) ownership of less than 1% of the outstanding securities of any class of equity or debt of a publicly traded company that is either a Subadviser or an entity that controls, is controlled by, or is under common control with a Subadviser.

9. The Trust will include in its registration statement the Aggregate Fee Disclosure.

10. Independent counsel knowledgeable about the Act and the duties of Disinterested Trustees will be engaged to represent the Disinterested Trustees of the Trust. The selection of such counsel will remain within the discretion of the Disinterested Trustees.

11. Shareholders of a Fund will approve any change to a Subadvisory Agreement if such change would result in an increase in the overall management and advisory fees payable by the Fund that have been approved by the shareholders of the Fund.

12. The Adviser will provide the Board, no less frequently than quarterly, with information about the Adviser's profitability on a per-Fund basis. The information will reflect the impact on profitability of the hiring or termination of any Subadviser during the applicable quarter.

13. Whenever a Subadviser is hired or terminated, the Adviser will provide the Board with information showing the expected impact on the Adviser's profitability.

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

**Jill M. Peterson,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. IC-25807; File No. 812-12788]

### Kemper Investors Life Insurance Company, et al.; Notice of Application

November 20, 2002.

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

**ACTION:** Notice of application for an order pursuant to Section 26(c) of the Investment Company Act of 1940 ("1940 Act") approving certain substitutions of securities.