

Dated: November 4, 2004.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E4-3168 Filed 11-15-04; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 26653; 812-12980]

### Pacific Capital Funds and the Asset Management Group of Bank of Hawaii; Notice of Application

November 9, 2004.

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

**SUMMARY OF THE APPLICATION:** The requested order would permit certain registered open-end management investment companies to enter into and materially amend subadvisory agreements without shareholder approval.

**APPLICANTS:** Pacific Capital Funds (the "Trust") and The Asset Management Group of Bank of Hawaii (the "Adviser").

**FILING DATE:** The application was filed on May 29, 2003, and amended on September 17, 2004, and October 28, 2004.

**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 6, 2004, 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, NW., Washington, DC 20549-0609. Applicants, c/o Wendell M. Faria, Esq., Paul, Hastings, Janofsky

& Walker LLP, 1299 Pennsylvania Avenue, NW., Tenth Floor, Washington, DC 20004-2400.

**FOR FURTHER INFORMATION CONTACT:**

Emerson S. Davis, Sr., Senior Counsel, at (202) 942-0714, or Annette Capretta, 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, NW., Washington, DC 20549-0102 (telephone (202) 942-8090).

#### Applicants' Representations

1. The Trust, a Massachusetts business trust, is registered under the Act as an open-end management investment company. The Trust currently offers multiple series (each a "Fund," and collectively, the "Funds"), each of which has its own investment objectives, policies and restrictions.<sup>1</sup>

2. The Adviser, registered under the Investment Advisers Act of 1940 ("Advisers Act"), serves as investment adviser to each Fund pursuant to an investment advisory agreement with the Trust ("Advisory Agreement"), that was approved by the board of trustees of the Trust (the "Board"), including a majority of the trustees who are not "interested persons," as defined in section 2(a)(19) of the Act ("Independent Trustees"), and the shareholders of each Fund. Under the terms of the Advisory Agreement, the Adviser provides each Fund with investment research, advice and supervision, and furnishes an investment program for each Fund consistent with the investment objectives and policies of the Fund. For its services, the Adviser receives a fee from each Fund based on the average daily net assets of the Fund. Under the Advisory Agreement, the Adviser may delegate investment advisory responsibilities to one or more

<sup>1</sup> Applicants also request relief with respect to future series of the Trust and any other existing or future registered open-end management investment company or series thereof that: (a) Is advised by the Adviser or a person controlling, controlled by or under common control with the Adviser; (b) uses the management structure described in this application; and (c) complies with the terms and conditions of this application (included in the term "Funds"). The only existing registered open-end management investment company that currently intends to rely on the requested order is named as an applicant. If the name of any Fund contains the name of a Subadviser (as defined below), the name of the Adviser or the name of the entity controlling, controlled by, or under common control with the Adviser that serves as the primary adviser to the Fund will precede the name of the Subadviser.

subadvisers ("Subadvisers") who have discretionary authority to invest all or a portion of the Fund's assets pursuant to a separate subadvisory agreement ("Subadvisory Agreement"). Each Subadviser is or will be an investment adviser registered under the Advisers Act. For its services to a Fund, the Fund pays a Subadviser a quarterly or monthly fee at an annual rate based on the average daily net assets of the Fund.

3. Applicants request relief to permit the Adviser, subject to Board approval, to enter into and materially amend Subadvisory Agreements without 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 a Fund or the Adviser, other than by reason of serving as a Subadviser to one or more of the Funds (an "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 pursuant to a written contract that has been approved by the vote of a majority 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. 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 and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policies and provisions of the Act. Applicants believe that their requested relief meets this standard for the reasons discussed below.

3. Applicants state that the Funds' shareholders will rely on the Adviser, subject to oversight by the Board, to select the Subadvisers best suited to achieve a Fund's investment objectives. Applicants assert that, from the perspective of the investor, 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 Subadvisory Agreements would impose costs and unnecessary delays on the Funds and may preclude the Adviser from acting promptly in a manner considered

advisable by the Board. Applicants also note that the Advisory Agreement will remain subject to the shareholder approval requirements in section 15(a) of the Act and rule 18f-2 under the Act.

4. Applicants note that the Commission recently adopted certain fund governance standards,<sup>2</sup> and applicants agree that each Fund will comply with the fund governance standards set forth in rule 0-1(a)(7) under the Act by the compliance date set forth in the Adopting Release. Applicants also note that the Commission has proposed rule 15a-5 under the Act and agree that the requested order will expire on the effective date of rule 15a-5 under the Act, if adopted.<sup>3</sup>

#### Applicants' Conditions

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

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

2. Each Fund will disclose in its prospectus the existence, substance, and effect of any order granted pursuant to the application. In addition, each Fund 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 ultimate responsibility, subject to oversight by the Board, to oversee the Subadvisers and recommend their hiring, termination, and replacement.

3. Each Fund will comply with the fund governance standards set forth in rule 0-1(a)(7) under the Act by the compliance date set forth in the Adopting Release ("Compliance Date"). Prior to the Compliance Date, a majority of the Board will be Independent Trustees, and the nomination of new or additional Independent Trustees will be at the discretion of the then-existing Independent Trustees. Any person who acts as legal counsel for the Independent Trustees will be an independent legal counsel, as defined in rule 0-1(a)(6) under the Act.

4. The Adviser 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 Independent 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. 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.

7. Within 90 days of the hiring of a new Subadviser, the Adviser will furnish shareholders of the affected Fund with all information about the new Subadviser that would be included in a proxy statement. The Adviser will meet this condition by providing shareholders of the applicable Fund with an information statement meeting the requirements of Regulation 14C, Schedule 14C and Item 22 of Schedule 14A under the Securities Exchange Act of 1934.

8. The Adviser will provide general management services to each Fund, including overall supervisory responsibility for the general management and investment of the Fund's 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 a Fund's assets; (iii) allocate and, when appropriate, reallocate a Fund's assets among multiple Subadvisers; (iv) monitor and evaluate the performance of the Subadvisers; and (v) implement procedures reasonably designed to ensure that the Subadvisers comply with each Fund's investment objective, policies, and restrictions.

9. No trustee or officer of the Funds, 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 (a) ownership of interests in the Adviser or any entity that controls, is controlled by, or is under common control with the Adviser; or (b) ownership of less than 1% of the outstanding securities of any class of equity or debt of any publicly-

traded company that is either a Subadviser or an entity that controls, is controlled by or is under common control with a Subadviser.

10. The requested order will expire on the effective date of rule 15a-5 under the Act, if adopted.

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. 35-27909]

### Filings Under the Public Utility Holding Company Act of 1935, as Amended ("Act")

November 9, 2004.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by December 6, 2004, to the Secretary, Securities and Exchange Commission, Washington, DC 20549-0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After December 6, 2004, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

#### Harbert Distressed Investment Master Fund, Ltd. (70-10259)

Harbert Distressed Investment Master Fund, Ltd., c/o 555 Madison Avenue, 16th Floor, New York, NY 10022, on its own behalf and on behalf of funds and

<sup>2</sup>Investment Company Act Release No. 16520 (July 27, 2004) ("Adopting Release").

<sup>3</sup>Investment Company Act Release No. 26230 (Oct. 23, 2003).