

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

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PLR-143452-08  
Date:  
April 16, 2009

**Legend:**

Fund =

Trust =

Total Return Index =

PLR-143452-08

2

Excess Return Index =

Total Return Sub Index =

Excess Return Sub Index =



a =  
b =  
c =  
d =  
e =  
State A =  
Country =  
Type A Company =

Dear :

This responds to the request dated September 25, 2008, and supplemental correspondence dated February 25, 2009, and March 16, 2009, submitted by your authorized representative on behalf of Fund. Fund requests that the Internal Revenue Service rule: (1) that income earned from investments in the commodity-linked notes described in this letter constitutes qualifying income to the Fund under section 851(b)(2) of the Internal Revenue Code of 1986, as amended (the Code), and (2) that income earned from an investment in a foreign corporation subsidiary of the Fund constitutes qualifying income to the Fund under section 851(b)(2).

**Facts:**

The Fund is a series fund of Trust, a State A statutory trust. Fund is registered as an open-end management investment company under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., as amended (the 1940 Act) and will elect to be taxed as a regulated investment company (RIC) under subchapter M of the Code.

Commodities-Linked Notes:

The Fund intends to invest in commodities-linked notes having the terms and conditions of the following four notes (the Notes):

*Note A:*

The first note will be issued at a par value of \$a. Its payout formula will be determined with reference to the index value of a Total Return Index. The term of the Note will be fourteen months. The Fund, as holder of the Note, will have the right to put Note A to the issuer at the calculated redemption price based on the closing Total Return Index value as of the end of the next day after notification to the issuer. In addition, if the Total Return Index value falls b% from the value at the time Note A is acquired, Note A will “knock-out” and automatically redeem based on a redemption price calculated using the closing Total Return Index value of the next day.

The repayment obligation upon early redemption, automatic redemption, or at maturity is calculated under a formula that provides for repayment of the face amount of Note A increased or decreased by an amount equal to the face amount of Note A multiplied by a leverage factor of c multiplied by the percentage of the increase or decrease of the beginning Total Return Index value level compared to the ending Total Return Index value level for the applicable period. To this amount is added an amount that reflects interest on Note A at a coupon rate of d. From this amount is subtracted an annual fee amount of e basis points of the notional value (leveraged face amount) of Note A. The redemption price formula under this Note will also include an adjustment for the reversal of the interest rate factor included in the total return computation.

*Note B:*

Note B will be issued at a par value of \$a. Its payout formula will be determined with reference to the index value of an Excess Return Index. The term of the Note will be fourteen months. The Fund, as holder of the Note, will have the right to put Note B to the issuer at the calculated redemption price based on the closing Excess Return Index value as of the end of the next day after notification to the issuer. In addition, if the Excess Return Index value falls b% from the value at the time Note B is acquired, Note B will “knock-out” and automatically redeem based on a redemption price calculated using the closing Excess Return Index value of the next day.

The repayment obligation upon early redemption, automatic redemption, or at maturity is calculated under a formula that provides for repayment of the face amount of Note B increased or decreased by an amount equal to the face amount of Note B multiplied by a leverage factor of c multiplied by the percentage of the increase or decrease of the beginning Excess Return Index value level compared to the ending Excess Return Index value level for the applicable period. To this amount is added an amount that reflects interest on Note B at a coupon rate of d. From this amount is subtracted an annual fee amount of e basis points of the notional value (leveraged face amount) of Note B.

*Note C:*

Note C will be issued at a par value of \$a. Its payout formula will be determined with reference to the index value of a Total Return Sub Index. The term of the Note will

be fourteen months. The Fund, as holder of the Note, will have the right to put Note C to the issuer at the calculated redemption price based on the closing Total Return Sub Index value as of the end of the next day after notification to the issuer. In addition, if the Total Return Sub Index value falls b% from the value at the time Note C is acquired, Note C will “knock-out” and automatically redeem based on a redemption price calculated using the closing Total Return Sub Index value on the next day.

The repayment obligation upon early redemption, automatic redemption, or at maturity is calculated under a formula that provides for the repayment of the face amount of Note C increased or decreased by an amount equal to the face amount of Note C multiplied by a leverage factor of c multiplied by the percentage of the increase or decrease of the beginning Total Return Sub Index value level compared to the ending Total Return Sub Index value level for the applicable period. To this amount is added an amount that reflects interest on Note C at the coupon rate of d. From this amount is subtracted an annual fee amount of e basis points of the notional value (leveraged face amount) of Note C. The redemption price formula will also include an adjustment for the reversal of the interest rate factor included in the total return computation.

*Note D:*

Note D will be issued at a par value of \$a. Its payout formula will be determined with reference to the index value of an Excess Return Sub Index. The term of the Note will be fourteen months. The Fund, as holder of Note D, will have the right to put Note D to the issuer at the calculated redemption price based on the closing Excess Return Sub Index value as of the end of the next day after notification to the issuer. In addition, if the Excess Return Sub Index value falls b% from the value at the time Note D is acquired, Note D will “knock-out” and automatically redeem based on a redemption price calculated using the closing Excess Return Sub Index calculated on the next day.

The repayment obligation upon early redemption, automatic redemption, or at maturity is calculated under a formula that provides for repayment of the face amount of Note D increased or decreased by an amount equal to the face amount of Note D multiplied by a leverage factor of c multiplied by the percentage of the increase or decrease of the beginning Excess Return Sub Index value compared to the ending Excess Return Sub Index value level for the applicable period. To this amount is added an amount that reflects interest on Note D at the coupon rate of d. From this amount is subtracted an annual fee amount of e basis points of the notional value (leveraged face amount) of Note D.

The Fund makes the following representations with respect to these four Notes:

- (1) The issuer of the Notes will receive payment in full of the purchase price of the Notes substantially contemporaneously with the delivery of the Notes;

- (2) The Fund, while holding the Notes, will not be required to make any payment to the issuer of the Notes in addition to the purchase price paid for the Notes, whether as margin, settlement payment, or otherwise, during the life of the Notes or at maturity;
- (3) The issuer of the Notes is not subject by the terms of the instrument to mark-to-market margining requirements of the Commodities Exchange Act, 7 U.S.C. 2, as amended (CEA); and
- (4) The Notes are not marketed as a contract of sale of a commodity for future delivery (or option on such a contract) subject to the CEA.

#### Controlled Foreign Corporation:

The Fund also plans to form a wholly-owned foreign corporation subsidiary (the Subsidiary). The Subsidiary will be incorporated as a Type A Company under the laws of Country. Under the laws of Country, a Type A Company provides for limited liability for all holders of shares. A shareholder's liability is limited to the amount, if any, unpaid with respect to the shares acquired by the shareholder. Subsidiary will file a protective election on Form 8832 to be taxed as a corporation pursuant to section 301.7701-3 of the Procedure and Administration Regulations.

Fund represents that although Subsidiary will not be registered as an investment company under the 1940 Act, the Subsidiary will comply with the requirements of section 18(f) of the 1940 Act, Investment Company Release No. 10666, and related SEC guidance pertaining to asset coverage with respect to investments that would apply if the Subsidiary were registered under the 1940 Act.

Fund may invest a portion of its assets in the Subsidiary, subject to the diversification limitations of section 851(b)(3). The Subsidiary will invest primarily in commodity and financial futures, commodity-linked option and swap contracts, commodities, hedge fund-linked notes, swaps on hedge fund indices, and other investments intended to serve as margin or collateral for the Subsidiary's derivatives positions.

Subsidiary will be wholly owned by the Fund and, as such, Fund represents that the Subsidiary will be classified as a controlled foreign corporation. Fund will include its "Subpart F" income attributable to its subsidiary under the rules applicable to CFCs under the Code.

#### **Law and Analysis:**

Section 851(b)(2) provides that a corporation shall not be considered a RIC for any taxable year unless it meets an income test (the Qualifying Income Requirement).

Under this test, at least 90 percent of its gross income must be derived from certain enumerated sources. Section 851(b)(2) defines qualifying income, in relevant part, as –

dividends, interest, payments with respect to securities loans (as defined in section 512(a)(5)), and gains from the sale or other disposition of stock or securities (as defined in section 2(a)(36) of the 1940 Act) or foreign currencies, or other income (including but not limited to gains from options, futures or forward contracts) derived with respect to [the RIC's] business of investing in such stock, securities, or currencies . . . .

Section 2(a)(36) of the 1940 Act defines the term “security” as –

any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Section 2(f)(1) of the CEA provides that the CEA is not applicable to a hybrid instrument that is predominantly a security. Section 2(f)(2) of the CEA provides that a hybrid instrument shall be considered to be predominantly a security if –

(A) the issuer of the hybrid instrument receives payment in full of the purchase price of the hybrid instrument, substantially contemporaneously with the delivery of the hybrid instrument;

(B) the purchaser or holder of the hybrid instrument is not required to make any payment to the issuer in addition to the purchase price paid under subparagraph (A), whether as margin, settlement payment, or otherwise, during the life of the hybrid instrument or at maturity;

(C) the issuer of the hybrid instrument is not subject by the terms of the instrument to mark-to-market margining requirements; and

(D) the hybrid instrument is not marketed as a contract of sale of a commodity for future delivery (or option on such a contract) subject to the CEA.

Section 2(f)(3) of the CEA provides, in part, that for purposes of section 2(f)(2)(C) of the CEA, mark-to-market margining requirements do not include the obligation of an issuer of a secured debt instrument to increase the amount of collateral held in pledge for the benefit of the purchaser of the secured debt instrument to secure the repayment obligations of the issuer under the secured debt instrument.

In addition, section 851(b) of the Code provides that, for purposes of section 851(b)(2), there shall be treated as dividends amounts included in gross income under section 951(a)(1)(A)(i) or 1293(a) for the taxable year to the extent that, under section 959(a)(1) or 1293(c) (as the case may be), there is a distribution out of the earnings and profits of the taxable year which are attributable to the amounts so included.

Section 957 defines a controlled foreign corporation (CFC) as any foreign corporation in which more than 50 percent of (1) the total combined voting power of all classes of stock entitled to vote, or (2) the total value of the stock is owned by United States shareholders on any day during the corporation's taxable year. A United States shareholder is defined in section 951(b) as a United States person who owns 10 percent or more of the total voting power of a foreign corporation. Fund will own 100 percent of the voting power of the stock of Subsidiary. Fund is a United States person. Subsidiary therefore will qualify as a CFC under these provisions.

Section 951(a)(1) provides that, if a foreign corporation is a CFC for an uninterrupted period of 30 days or more during any taxable year, every person who is a United States shareholder of this corporation and who owns stock in this corporation on the last day of the taxable year in which the corporation is a CFC shall include in gross income the sum of the shareholder's pro rata share of the CFC's subpart F income for the taxable year.

Section 952 defines subpart F income to include foreign base company income determined under section 954. Under section 954(a)(1), foreign base company income includes foreign personal holding company income determined under section 954(c). Section 954(c)(1)(A) defines foreign personal holding company income to include dividends, interest, royalties, rents, and annuities.

Subsidiary's income from its investments in commodities and commodity-linked instruments may generate subpart F income. Fund therefore represents that it will include in income Subsidiary's subpart F income for the taxable year in accordance with section 951.

**Conclusion:**

Based on the facts as represented, we rule that income and gain arising from the Notes constitutes qualifying income to Fund under section 851(b)(2) of the Code. We further rule that subpart F income of the Subsidiary attributable to the Fund is income derived with respect to the Fund's business of investing in the stock of Subsidiary and thus constitutes qualifying income under section 851(b)(2).

This ruling is directed only to the taxpayer who requested it, and is limited to the facts as represented by the taxpayer. Section 6110(k)(3) provides that this letter may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Susan Thompson Baker  
Susan Thompson Baker  
Assistant to the Branch Chief, Branch 2  
Office of Associate Chief Counsel  
(Financial Institutions and Products)