

Dear _____ :

This is in response to a letter dated July 13, 2010, and subsequent correspondence, requesting rulings that (1) income from the commodity-linked note described in this letter constitutes qualifying income under section 851(b)(2) of the Internal Revenue Code of 1986, as amended (“the Code”), and (2) income earned by Taxpayer from an investment in its wholly-owned subsidiary that qualifies as a controlled foreign corporation (“CFC”) constitutes qualifying income under section 851(b)(2) of the Code.

Facts:

Taxpayer is a series of Corporation. Corporation 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 its securities are registered under the Securities Act of 1933. Taxpayer intends to elect and qualify as a regulated investment company (“RIC”) under Subchapter M of the Code. Taxpayer uses an accrual method of accounting and a fiscal year ending Date 1.

Commodities-linked Note

Taxpayer intends to invest in a commodities-linked note having the following terms and conditions (the “Note”). The Note will be issued at its par value of \$a. Its payout formula will be determined with reference to Index. The term of the Note will be b. Taxpayer, as holder of the Note, will have the right to put the Note to the issuer at the calculated redemption price based upon the closing Index value as of the end of the next business day after notification to the issuer, or as of the same day closing value if notice is made by ten o’clock in the morning, Eastern Standard time. In addition, if the Index value falls to a level that is equal to or less than c% of the initial Index value on any day, the Note will “knockout” and automatically redeem at the calculated redemption price based upon the closing Index level on the following trading day. A trading day is a day on which the relevant exchanges for all Index constituents are open for trading during their regular trading sessions.

The Note will pay a monthly coupon in arrears. The coupon for each coupon period will be based on d. In the case of a mandatory prepayment event or an early redemption at the option of the holder or issuer (each, an early redemption event), Taxpayer will receive the accrued coupon on the applicable early redemption event maturity date.

The repayment obligation upon early redemption, knockout, or at maturity is calculated under a formula that provides for an amount equal to the face amount of the Note, plus or minus an adjustment. The adjustment is calculated by multiplying the face amount of the Note by a leverage factor of \underline{e} times the Index return. The Index return is the percentage of the increase or decrease of the initial Index level compared to the closing Index level for the applicable period decreased by an adjustment factor (greater of \underline{f} or \underline{g}) based on the number of days the Note is outstanding. The Index return will also include an adjustment for the reversal of the interest rate factor included in the total return computation.

Taxpayer makes the following representations with respect to the Note:

(1) The issuer of the Note will receive payment for the Note substantially contemporaneously with the delivery of the Note;

(2) While holding the Note, Taxpayer will not be required to make any additional payments to the issuer of the Note in addition to the purchase price paid for the Note, whether as margin, settlement payment, or otherwise, during the life of the Note or at maturity;

(3) The issuer of the Note is not subject by the terms of the Note to mark-to-market margining requirements of the Commodities Exchange Act, 7 U.S.C. 2, as amended (the "CEA"); and

(4) The Note is 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

Corporation intends to form a wholly-owned subsidiary of Taxpayer ("Subsidiary") incorporated as a Type X Company under the laws of Country. Under the laws of Country, a Type X 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 an election on Form 8832, Entity Classification Election, to be taxed as a corporation pursuant to § 301.7701-3 of the Procedure and Administration Regulations.

Taxpayer represents that, although Subsidiary will not be registered as an investment company under the 1940 Act, Subsidiary will comply with the requirements of section 18(f) of the 1940 Act, Investment Company Act Release No. 10666, and related SEC guidance pertaining to asset coverage with respect to commodity futures and other transactions in derivatives.

Taxpayer may invest up to h% of its total assets in Subsidiary, subject to the diversification limitations set forth in section 851(b)(3) of the Code. Subsidiary is expected to invest primarily in commodity-linked derivative instruments, including swap agreements, commodity options, futures, and options on futures. Subsidiary will also invest in fixed income instruments, some of which are intended to serve as margin or collateral for its derivatives positions.

Subsidiary may invest in derivative instruments linked to the value of a particular commodity or commodity futures contracts, or a subset of commodities or commodity futures contracts, including swaps on commodity futures. Subsidiary's investments in commodity-linked derivative instruments may specify exposure to commodity futures with different roll dates, reset dates, or contract months than those specified by a particular commodity index.

Taxpayer represents that Subsidiary will be a CFC within the meaning of section 957 of the Code. It is expected that all of the income of Subsidiary will be "subpart F income" within the meaning of section 952.

Law and Analysis

Section 851(b)(2) of the Code 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. A corporation that is a partner in a partnership (other than a qualified publicly traded partnership) must look through such partnership for purposes of meeting the qualifying income requirement. 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, the flush language of 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 of the Code defines a 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

combined voting power of all classes of voting stock of a foreign corporation. Taxpayer represents that 100 percent of the voting power of the stock of Subsidiary will be owned by Taxpayer and that Taxpayer is a United States person. Taxpayer therefore represents that Subsidiary will qualify as a CFC under these provisions.

Section 951(a)(1) of the Code 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 shareholder's pro rata share of the CFC's subpart F income for the taxable year.

Section 952(a)(2) of the Code 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). Under section 954(c)(1), foreign personal holding company income includes (among other things): dividends, interest, royalties, rents, and annuities; gains in excess of losses from transactions in commodities (including futures, forward, and similar transactions but excluding certain hedging transactions and certain active business gains and losses); and, subject to certain exceptions, net income from notional principal contracts.

Subsidiary's investments may generate foreign personal holding company income under section 954(c), which is subpart F income. Taxpayer will therefore include in income its pro rata share of 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 Note constitutes qualifying income to Taxpayer under section 851(b)(2) of the Code. We further rule that subpart F income of Subsidiary attributable to Taxpayer is income derived with respect to Taxpayer's businesses of investing in the stock of Subsidiary and thus constitutes qualifying income to Taxpayer under section 851(b)(2).

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed with regard to whether Taxpayer qualifies as a RIC under subchapter M of the Code.

This ruling is directed only to the taxpayer requesting it, and is limited to the facts as represented by the taxpayer. Section 6110(k)(3) of the Code provides that it 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,

David B. Silber

David B. Silber
Chief, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)