

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact: _____, ID No.

Telephone Number:

Refer Reply To:
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PLR-101962-10
Date:
February 4, 2010

Legend:

- Fund =
- Trust =
- Date =
- State =
- Country =
- Type A Company =

Dear _____ :

This responds to your letter dated January 4, 2010 submitted by your authorized representative on behalf of Fund. Fund requests that the Internal Revenue Service rule that income derived from its investments in a wholly-owned subsidiary that is a controlled foreign corporation (CFC) constitutes qualifying income under section 851(b)(2) of the Internal Revenue Code of 1986, as amended (the Code).

Facts:

Trust is a statutory trust of State registered with the Securities and Exchange Commission (SEC) under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., as amended (1940 Act) as an open-end series investment company.

Fund is a series of Trust and will be treated as a separate corporation under section 851(g). Fund intends to operate as an exchange traded fund (ETF) and to qualify as a regulated investment company (RIC) under subchapter M of the Code. Fund is an accrual method taxpayer whose annual accounting period ends on Date.

Fund has formed a wholly-owned foreign subsidiary (Subsidiary) incorporated as a Type A Company under the laws of Country. Under the laws of Country, a Type A Company provides 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. As a result, Subsidiary will be treated as a corporation for federal income tax purposes under default entity classification rules, but intends to ensure such classification by filing a protective election on Form 8832.

Fund 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 investments that would apply if Subsidiary were registered under the 1940 Act.

Fund will invest a portion of its assets in Subsidiary, subject to the limitations set forth in section 851(b)(3) of the Code. Subsidiary will invest primarily in one or more of the following types of instruments: swaps on commodities or commodity indexes, commodity-linked notes, commodity and financial futures and options contracts (and fixed income securities that serve as collateral for these contracts), deliverable forward contracts, and cash-settled non-deliverable forward contracts. Each of these contracts may be linked to the performance of one or multiple commodities (including a commodity index). Subsidiary may also invest directly in commodities.

Subsidiary will be wholly-owned by Fund, and is thus expected to be classified as a CFC, as defined in section 957. 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) 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. 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 Investment Company

Act of 1940, as amended) 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

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 sections 951(a)(1)(A)(i) or 1293(a) for the taxable year to the extent that, under sections 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 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 combined voting power of all classes of voting stock of a foreign corporation. Fund represents that it will own 100 percent of the voting power of the stock of Subsidiary. Fund is a United States person. Fund 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 sum of 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). Section 954(c)(1)(A) defines foreign personal holding company income to include dividends, interest, royalties, rents, and annuities. Section 954(c)(1)(C) also defines personal holding company income to include the excess of gains over losses from transactions (including futures, forward, and similar transactions) in any commodities. Section 954(c)(1)(C) does not apply to gains and losses which (i) arise out of commodity hedging transactions (as defined in section 954(c)(5)(A)), (ii) are active business gains or losses from the sale of commodities, or (iii) are foreign currency gains or losses (as defined in section 988(b)) attributable to any section 988 transactions.

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 subpart F income of the Subsidiary attributable to the Fund is income derived with respect to Fund's business of investing in the stock of Subsidiary and thus constitutes qualifying income to Fund 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 regarding whether Fund qualifies as a RIC under Subchapter M of the Code.

This ruling is directed only to the taxpayer requesting it. 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 representatives.

Sincerely,

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