

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

Number: **200946036**  
Release Date: 11/13/2009  
Index Number: 851.02-00

Person To Contact: \_\_\_\_\_, ID No.

Telephone Number:

Refer Reply To:  
CC:FIP:B02  
PLR-151736-08

July 08, 2009

Legend:

Fund 1 =

Fund 2 =

Fund 3 =

Fund 4 =

Fund 5 =

Fund 6 =

Fund 7 =

PLR-151736-08

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Fund 8 =

Fund 9 =

Fund 10 =

Fund 11 =

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Fund 18 =

PLR-151736-08

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Fund 29 =

PLR-151736-08

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Fund 91 =

Fund 92 =

Fund 93 =

Fund 94 =

Fund 95 =

Fund 96 =

Management Company =

State A =

Broad-Based Total  
Return Index =

Broad-Based Excess  
Return Index =

Total Return Sub-Index =



Excess Return Sub-Index =

a =  
b =  
c =

d =

f =

g =

h =

i =

i =

k =

Country =

Type A Company =

Dear :

This responds to the request for a ruling dated December 9, 2008, and supplemental correspondence dated April 2, 2009, May 28, 2009, and June 29, 2009, submitted by your authorized representative on behalf of Funds 1 through 96 (each a “Fund” and, collectively, the “Funds”). The requested rulings are as follows: (1) that income earned from investments in the commodity-linked notes described in this letter constitutes qualifying income to the Funds under section 851(b)(2) of the Internal Revenue Code of 1986, as amended (the Code), and (2) that income earned from Fund 1’s investment in a foreign corporation subsidiary of Fund 1 constitutes qualifying income to Fund 1 under section 851(b)(2).

**Facts:**

The Funds are managed by Management Company. Each Fund is organized as a business trust (or series thereof) under the laws of State A. Each Fund is, or in the case of Funds 1 and 4 intends to be, registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., as amended (the “1940 Act”), as an open-end or closed-end management investment company or as a series of an open-end management investment company. Each Fund qualifies, or in the case of Funds 1 and 4 intends to qualify, as a regulated investment company (“RIC”) under section 851(a).

Commodity-Linked Notes:

Each Fund intends to invest in one or more commodity-linked notes (“Notes”) having the terms and conditions set forth in the Appendix and described as follows.

Each note will be for a term of thirteen months and will be issued at a par value of a or b as specified in the Appendix. Each note’s payout will be determined with reference to a single Broad-Based Excess Return Index, Broad-Based Total Return Index, Excess Return Sub-Index, or Total Return Sub-Index (each an “Index”). As holder of a note, a Fund will have the right to put the note to the issuer at the calculated redemption price based on the closing Index value as of the end of the next business day after notification to the issuer, or the same day closing Index value if notice is made on such day by the time specified in the terms of the note (“Optional Early Redemption”). In addition, if the closing price of the Index falls f, g, h, or i percent or more, as specified for each note in the Appendix, from the value of the Index at the time the note is acquired by the Fund, the note will “knockout” and automatically redeem at the calculated early redemption price based upon the closing price of the Index on the next business day.<sup>1</sup>

The repayment obligation upon early redemption, automatic redemption, or at maturity is calculated under a formula that provides for the face amount of the note plus the product of the face amount of the note, the “leverage factor” of c or d as specified in the Appendix, and the percentage point change in the Index from the trade date to the end of the applicable period less the fee charge of j or k as specified in the Appendix. Added to this amount is any accrued, but unpaid interest payable on the note. In addition, if the repayment obligation is based on a Broad-Based Total Return Index or a Total Return Sub-Index, the amount will be adjusted for the reversal of the interest rate factor included in the Index.

The Funds make the following representations with respect to these 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 Funds, 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.

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<sup>1</sup> After taking into account the leverage factor of each note, the maximum amount that any note may drop from its initial value before “knocking out” is i percent.

### Investment in Foreign Subsidiary:

Fund 1 also intends to form a wholly-owned foreign corporation subsidiary (the "Subsidiary"). 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 an election on Form 8832 to be taxed as a corporation pursuant to section 301.7701-3 of the Procedure and Administration Regulations.

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 Act Release No. 10666, and related SEC guidance pertaining to asset coverage with respect to transactions in commodity index swap agreements and other transactions in derivatives.

Fund 1 may invest a portion of its assets in Subsidiary, subject to the diversification limitation of section 851(b)(3). Subsidiary will invest primarily in one or more of the following types of instruments: commodity and financial futures and options contracts, forward, swap or spot contracts, commodity-linked notes (including exchange-traded commodity-linked notes), and fixed income securities that serve as collateral for these contracts. The commodity-linked instruments will be linked to the performance of one or multiple commodities (including one or more commodity indices) or a commodity future or option contract. Subsidiary may also invest directly in commodities.

It is expected that Subsidiary will be wholly owned by Fund 1 and, as such, Fund 1 represents that so long as Subsidiary is wholly owned, it will be classified as a controlled foreign corporation (CFC). Fund 1 will include its pro rata share of the "subpart F" income attributable to the Subsidiary in accordance with section 951.

It is possible that one or more other RICs advised by Management Company will invest in Subsidiary in varying degrees over time. If a sufficient number of other RICs invest in Subsidiary, Fund 1 may become a less than 10 percent owner of Subsidiary. Fund 1 represents that if it becomes a less than ten percent owner of Subsidiary, Subsidiary will qualify as a passive foreign investment company ("PFIC") under section 1297, and Fund 1 will elect to treat Subsidiary as a qualified electing fund ("QEF") under section 1295 for the first taxable year of Fund 1 for which Subsidiary is a PFIC. Fund 1 further represents that it will not revoke this election unless and until Subsidiary is no longer a PFIC. Fund 1 will take income from Subsidiary into account under the PFIC rules of section 1291 *et. seq.*; specifically, Fund 1 will include its pro rata share of the



QEF inclusions attributable to Subsidiary in income in accordance with section 1293(a) for each taxable year a QEF election is in place.

### **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. Except as described earlier, Fund 1 will own 100 percent of the voting power of the stock of Subsidiary. Fund 1 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 1 therefore represents that it will include in income Subsidiary's subpart F income for the taxable year in accordance with section 951.

Section 1297(a) defines a PFIC as a foreign corporation with either (1) seventy-five percent or more of the gross income of such corporation for the taxable year is passive income, or (2) the average percentage of assets held by the corporation during the taxable year which produce passive income or which are held for the production of passive income is at least fifty percent. Section 1297(b) defines passive income as any income which is of a kind that would be foreign personal holding company income as defined in section 954(c), with exceptions for certain active business income.

Section 1295(a) provides that a PFIC shall be treated as a QEF with respect to the taxpayer if the taxpayer makes an election with respect to the PFIC and the PFIC complies with such requirements as the Secretary of the Treasury may prescribe for the purpose of determining the ordinary earnings and net capital gain or such company. Section 1295(b) provides that once a taxpayer makes such an election for any taxable year, the election applies to all subsequent taxable years unless revoked by the taxpayer with the consent of the Secretary.

Section 1293(a) provides that every United States person who owns (or is treated as owning under section 1298(a)) stock of a QEF at any time during the taxable year of such fund shall include in gross income (A) as ordinary income, such shareholder's pro rata share of the ordinary earnings of the QEF for such year, and (B) as long-term capital gain, such shareholder's pro rata share of the net capital gain of the QEF for such year. Any such QEF inclusion shall be for the taxable year of the shareholder in which or with which the taxable year of the QEF ends.

Over time, it is possible that other RICs will invest the CFC. If other RICs invest in the foreign corporation so that Fund 1 owns less than ten percent of the Subsidiary, Fund 1 represents that it will elect to treat the PFIC as a QEF and will include in income Subsidiary's QEF income for the taxable year in accordance with section 1293.

### **Conclusion:**

Based on the facts as represented, we rule that income and gain arising from the Notes constitutes qualifying income to the Funds under section 851(b)(2) of the Code. We further rule that subpart F income or QEF inclusions of the Subsidiary attributable to Fund 1, without regard to whether the income has been distributed, is income derived with respect to Fund 1's business of investing in the stock of Subsidiary and thus constitutes qualifying income 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 the Funds qualify as RICs under subchapter M of the Code.

This ruling is directed only to the taxpayers who requested it, and is limited to the facts as represented by the taxpayers. 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 representatives.

Sincerely,

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

**APPENDIX – TERMS AND CONDITIONS OF COMMODITY-LINKED NOTES**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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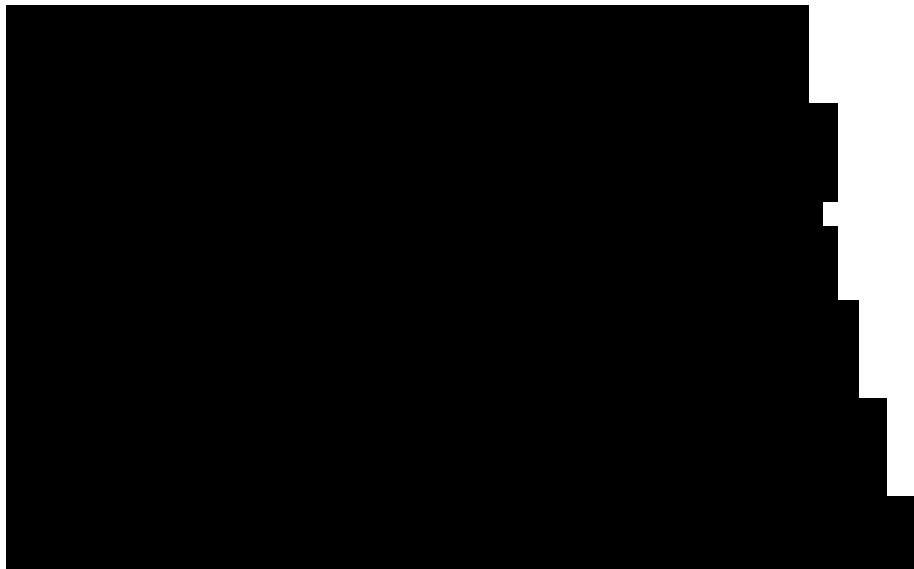
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