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May 19, 2008

U.S. Securities and Exchange Commission
100 F. Street, NE
Washington DC 20549-1090
Attn: Nancy M. Morris, Secretary

Re: Comments to Proposed Rule for Exchange-Traded Funds, File No, S7-07-08

Ladies and Gentlemen:

We are responding to the request of the Securities and Exchange Commission (the *"Commission"*) for comments on Investment Company Act Release No. 28193 (March 11, 2008) (the *"Release"*) which proposes new rules that would exempt exchange-traded funds (*"ETFs"*) from certain provisions of the Investment Company Act of 1940 (the *"1940 Act"*) and allow mutual funds (and other types of investment companies) to invest in ETFs to a greater extent than currently permitted under the 1940 Act. Our comments are as follows:

1. In the Release, proposed Rule 12d1-4, in relevant part, will exempt an acquiring fund from the limitations of Section 12(d)(1)(A) of the 1940 Act. Certain of our investment company clients rely on Section 12(d)(1)(F) of the 1940 Act (a *"12(d)(1)(F) fund"*) to invest in unaffiliated investment companies, including ETFs. Section 12(d)(1)(F) exempts registered investment companies from the provisions of Section 12(d)(1) provided certain conditions are met. One of the conditions limits the amount of investment company securities that may be acquired. More specifically, Section 12(d)(1)(F)(i) provides that immediately after such purchase or acquisition not more than 3% of the total outstanding stock of such issuer is owned by such registered investment company and all affiliated persons of such registered investment company. Accordingly, the 3% limitation essentially is measured across a fund complex. This differs somewhat from the 3% limit in Section 12(d)(1)(A). Section 12(d)(1)(A)(i), in general terms, limits a registered investment company and any company or companies controlled by such acquiring company from acquiring in the aggregate more than 3% of the acquired company. Because Rule 12d1-4 only provides an exemption from Section 12(d)(1)(A), it would appear that a 12(d)(1)(F) fund may not be able to rely on the rule as it is still subject to the 3% limitation of Section 12(d)(1)(F). For example, if a fund in the fund complex has already invested 3% in a particular ETF, the 12(d)(1)(F) fund, an affiliate of the acquiring fund, presumably would not be able to invest in that ETF. The 3% limit in Section 12(d)(1)(F) limits the control or influence an acquiring fund may have on the acquired fund and therefore restricts the amount of securities that a fund and its affiliates could acquire. This is analogous to the restriction proposed in

paragraph (a)(1) of proposed Rule 12dl-4 which, in relevant part, provides that no acquiring fund or any of its investment advisers or depositors, and any company controlling, controlled by or under common control with the acquiring fund, or any of its investment advisers or depositors, each individually or together in the aggregate, controls the exchange-traded fund. Similar to the 3% restriction in Section 12(d)(1)(F), this restriction essentially looks at the holdings across the fund complex. We believe the 12(d)(1)(F) fund should also be able to rely on Rule 12d1-4 and be exempted from the 3% limitation in Section 12(d)(1)(F). The conditions of Rule 12d1-4 would be equally applicable to the 12(d)(1)(F) fund's investments in ETFs. If relief is not provided, all the funds in a complex could essentially invest, individually or in the aggregate, in up to 25% of the voting securities of a particular ETF except for the 12(d)(1)(F) fund. We also note the Commission is proposing to amend rule 12dl-2 to permit funds relying on exemptive relief in Section 12(d)(1)(G) to be able to invest in unaffiliated ETFs beyond the statutory limitations as long as funds comply with the conditions of proposed rule 12dl-4. We believe similar relief should be provided to 12(d)(1)(F) funds with respect to their investments in ETFs.

In addition to the foregoing, proposed Rule 12d1-4 provides, in relevant part, that an acquiring fund that relies on paragraph (a) of this section to acquire exchange-traded fund shares in excess of the limits of Section 12(d)(1)(A)(i) of the Act may not redeem any of those shares. An acquiring fund is defined as an investment company. The rule should be clarified as to how this applies to series funds. Does the limitation apply to a series that has exceeded the 3% limitation or does it apply to the aggregate holdings of all series within the investment company? If a subsequent series in an investment company acquires ETF shares that cause the aggregate holdings of the investment company to be above the 3% limitation, is it only that last series that is subject to the redemption restriction?

2. Rule 487 under the Securities Act of 1933 provides the procedures in which registration statements for unit investment trusts (*"UITS"*) may become automatically effective. To rely on the rule, the UIT must comply with several conditions including, in relevant part, that the registrant is not engaged in the business of investing in securities issued by one or more open-end management investment companies. Accordingly, if a UIT is investing in ETFs organized as open-end investment companies, such UIT is precluded from relying on the rule. The Commission originally proposed the rule in recognition of the similarity in the disclosure in the registration statements of UITs and their follow-on series. As proposed, the rule was limited to UITS that invested in "eligible trust securities" as defined in Rule 14a-3 under the 1940 Act. (See Securities Act Rel. No. 33-6356 (October 27, 1981)). However, in recognition of comments that UITs no longer invested only in eligible trust securities and the restriction was not necessary because registrants must represent that the portfolio securities deposited in the new or "follow on" series did not differ materially in type or quality from those deposited in a specifically identified series of the trust which had been reviewed by the staff, the requirement was amended. See Securities Act Rel. No, 6401 (May 7, 1982) (the *"Adopting Release"*). The Commission, however, noted in the Adopting Release that Rule 487 does not apply to

registration statements filed by unit investment trusts of the type that invest in securities issued by open-end investment companies and therefore retained such a restriction. The Commission did not explain its rationale in the Adopting Release for precluding UITs that invest in open-end funds from the rule. We further have been unable to find guidance as to the Commission's reasoning in this regard. Presumably, the Commission was concerned about the layering of fees and UITs exercising control over the open-end funds through redemptions as there is no similar restriction for a UIT investing in closed-end funds. Given the particular nature of ETFs which only redeem creation units and the protections provided in proposed Rule 12d1-4, including prohibiting redemptions if the acquiring fund invested in excess of 12(d)(A)(i) and the limitation on fees, we believe that Rule 487 should be amended to permit the registration statements of UITs investing in ETFs to become automatically effective in reliance on the rule.

3. In the Release, for purposes of determining ETF returns in Form N-1A, market price is defined as the last price at which the ETF shares trade on the principal U.S. market on which the Fund's shares are traded during a regular trading session. In addition, with respect to determining the premium and discount information, proposed Rule 6c-11 also requires the ETF to disclose on its website, among other things, the closing market price of its shares and the premium/discount of the closing market price to net asset value (*"NAV"*). We note that market price is not defined in proposed Rule 6c-11 but presumably funds would look to the definition included in Form N-1A. The Release notes that this disclosure is designed to alert investors to the current relationship between NAV and the market price of the ETF's shares and that they may sell or purchase ETF shares at prices that do not correspond to the NAV of the fund. In this regard, we do not agree that market price should be defined as the last price at which the ETF shares trade on the principal U.S. market for purposes of calculating ETF returns or premiums and discounts. As drafted, the proposal does not contemplate that shares of some smaller ETFs may not trade often or at all on a particular day. Accordingly, the last price at which such shares traded may be stale at the time the ETF determines its NAV. In light of the foregoing, we believe the better approach would be to define market price with respect to the mid-point price between the highest bid and lowest offer for the shares.

In addition, the proposed definition refers to the last price on "the" principal U.S. market. We understand, however, that the principal market for the shares may shift from day to day as well as during the day. For example, the shares of an ETF may be listed on AMEX but trade heavily on ARCA one day and then NASDAQ on another day. Accordingly, the best bid or offer available may be on different exchanges on different days. Further, shares may trade heavily in the morning at a particular exchange but more sporadically in the afternoon. In such case, we understand the best available bid and offer available at the close of trading may actually be on a different exchange from that which had the most volume that day. To more accurately reflect the market price for purposes of total return calculations and determining premiums and discounts, the definition should look to the mid-point of the highest bid and the lowest offer

available from the various principal U.S. markets on which the ETF shares are traded on the respective day.

4. Proposed Rule 6c-11 defines an ETF, in relevant part, as a registered open-end investment company that issues (or redeems) "creation units." Creation units, in turn, are defined as a specified number of exchange-traded fund shares disclosed in the exchange-traded fund's prospectus that the fund will issue (or redeem) in exchange for the deposit (or deliver) of basket assets. As defined, the ETF only issues and redeems creation unit aggregations. The Commission, however, may want to consider limited exceptions to the requirement. For instance, in connection with the organization of an ETF, the rule may want to make clear that an ETF can issue and redeem a share to its initial shareholder to vote for the advisory agreement. In addition, if an ETF is involved in a reorganization, merger or acquisition, the ETF may need some flexibility in the number of shares to be issued in exchange for the shares or assets received. Accordingly, we believe it is appropriate to permit the ETF to issue shares and redeem shares in less than creation unit aggregations in such special circumstances.

5. Finally, we note that in offering ETFs, ETFs also generally obtain relief from Section 11(d)(1) of the Securities Exchange Act of 1934, as amended (the "*Exchange Act*"), Rules 10b-10, 10b-17, 11d1-2, 14e-5, 15c1-5 and 15c1-6 under the Exchange Act and Rules 101 and 102 of Regulation M. See with respect to actively-managed ETFs, Letter from James A. Brigaglinao, Associate Director, Division of Trading and Markets to Stuart M. Strauss regarding PowerShares Actively Managed Exchange Traded Fund Trust dated April 4, 2008; and Letter from Josephine J. Tao, Assistant Director, Division of Trading and Markets regarding Bear Stearns Active ETF Trust dated March 24, 2008. In the past, the Commission has granted class relief for index-based ETFs that meet certain conditions. See e.g., Letter from James A. Brigagliano regarding Class Relief for Fixed Income Exchange Traded Index Funds, dated April 9, 2007; Letter from James A. Brigagliano to a Powershares Exchange Traded Fund Trust regarding Class Relief for Exchange Traded Index Funds dated October 24, 2006; Letter from Catherine McGuire, Esq., Chief Counsel Division of Market Regulation to the Securities Industry Association Derivative Products Committee, dated November 21, 2005; Letter from James A. Brigagliano, Assistant Director, Division of Market Regulation to Claire P. McGrath, Vice President and Special Counsel, American Stock Exchange LLC, dated August 17, 2001. We encourage the Commission to develop similar class relief for actively-managed ETFs. Otherwise, while ETFs may no longer need to seek exemptive relief under the 1940 Act, the ETFs will still be required to seek individual relief from the Exchange Act.

We thank you for the opportunity to comment on the proposed rule. If you have any questions, please do not hesitate to contact Felice R. Foundos at (312) 845-3864.

Very truly yours,

CHAPMAN AND CUTLER LLP

By
Felice R. Foundos