STATE STREET
GLOBAL ADVISORS | SSgA.

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Boston, MA 02111-2900

May 19, 2008

VIA ELECTRONIC MAIL AND U.S. MAIL

Ms. Nancy Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Exchange-Traded Funds, File No. S7-07-08

Dear Ms. Morris:

State Street Global Advisors[1] welcomes this opportunity to comment on the Commission's recent proposal regarding exchange-traded funds ("ETFs").[2] SSgA commends the Commission for proposing rules that would ease the burdens associated with bringing new ETF products to market and allow funds to invest in ETFs to a greater extent than currently permitted under the Investment Company Act of 1940 (the "Act"). State Street has been a leader in the ETF marketplace since it partnered with the American Stock Exchange to launch the SPDR Trust, Series 1 in 1993, and we strongly support the Commission's proposal.

We have had the opportunity to review the comment letter submitted by the Investment Company Institute (the "ICI"), dated May 19, 2008, and strongly concur with many of the ICI's positions on the issues discussed in that letter. These positions are summarized, in part, below:

- We support of the inclusion in the rule of both index-based and fully-transparent actively managed funds;

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1 SSgA Funds Management Inc., a U.S. registered investment adviser and investment adviser to the SPDRs family of exchange-traded funds, and other affiliates of State Street Corporation, make up State Street Global Advisors ("SSgA"), the investment management arm of State Street Corporation.

2 *See* Exchange-Traded Funds, Proposed Rule, SEC Release Nos. 33-8901 and IC-28193 (March 11, 2008), 73 Fed. Reg. 14618 (March 18, 2007) ("Proposing Release").

- We recommend that, to satisfy transparency requirements, the rule permit an ETF to disclose either its entire portfolio or, for an ETF that tracks the performance of an index, its creation basket, provided the basket is an optimized sample of the portfolio;

- We agree with the proposal not to require either disclosure of intra-day changes in an ETF portfolio or advance disclosure of portfolio trades;

- We support the requirement that ETFs be listed on a national securities exchange, but recommend requiring that an ETF's intraday value be disseminated by a major market data vendor (which could be an exchange), rather than requiring such dissemination by an exchange;

- We support the proposed flexibility in the size of a creation unit with the ICI's recommended changes to the definition of creation unit;

- We recommend that the proposed relief from Section 17(a)(1) and (2), which would permit those persons that are affiliated with an ETF solely by reason of holding five percent or more of the ETF's outstanding voting securities to transact with the fund, be expanded to include those persons that are affiliated with the ETF for other reasons;[3]

- We do not object to the elimination of the product description; and

- We concur with the ICI's suggested certain changes to the proposed revisions to Form N-1A for ETFs.

In addition to the foregoing positions, there are two issues we would like to call specifically to the Commission's attention. They relate to (i) the scope of rule 6c-11 as it relates to the treatment of ETFs structured as unit investment trusts ("UITs") and (ii) the scope of the exemptions provided by rule 12d1-4 as they relate to funds that rely on section 3(c)(1) or 3(c)(7) of the Act ("Private Funds").

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[3] We also concur with the letter submitted by Barclays Capital Inc. dated May 8, 2008. We believe that other types of affiliates, if permitted to act as Authorized Participants, would be treated identically to non-affiliates acting as Authorized Participants and would be equally unable to disadvantage the ETF and its shareholders. An Authorized Participant that is an affiliated person of the ETF's adviser would have nether the "ability nor the pecuniary incentive" to influence the actions of the ETF in connection with the purchase and redemption of shares. More importantly, ETFs and their shareholders stand to benefit from permitting affiliated broker-dealers to act as Authorized Participants because the arbitrage mechanism that is so critical to the success of ETFs would be more widely available.

I. The Commission Should Include UITs in the Definition of ETF in Rule 6c-11

As proposed, rule 6c–11 would codify many aspects of the exemptive orders issued by the Commission to index-based ETFs, thus allowing new ETFs to enter the market more easily. The rule would apply to ETFs structured only as open-end management companies, thereby excluding ETFs organized as UITs ("UIT ETFs") from the rule and its conditions.

We believe that the Commission should include UIT ETFs in the definition of "exchange-traded fund" in rule 6c-11 and that UIT ETFs should be subject to the same conditions set forth in the proposed rule. We agree with the Commission that there are very few UIT ETFs and that ETF sponsors currently prefer the open-end fund structure.[4] However, extending the rule only to open-end funds would unfairly exclude those *existing* UIT ETFs and their shareholders from the benefits of the Commission's proposal. Additionally, because proposed rule 6c-11's exemptions, as ultimately adopted, may be more expansive than certain current exemptive orders, including those issued to existing UIT ETFs, we are concerned that existing UIT ETFs, if excluded from the rule, may be subject to additional restrictions than newer ETFs. This would result in UIT ETFs, some of which are, in terms of assets, among the largest and most successful ETFs,[5] being placed at a competitive disadvantage solely because of the fact that they are organized as UITs.

Other than the fact that sponsors appear to prefer the open-end fund structure for organizing new ETFs, UIT ETFs do not present any additional concerns or risks that justify their exclusion from the exemptions provided in the proposed rule. Although we recognize the Commission's goal to "allow new competitors . . . to enter the market more easily," we do not believe that the Commission's intention is to do so to the disadvantage of existing UIT ETFs.[6] We therefore propose that the Commission and its staff consider including UIT ETFs in rule 6c-11(e) or, at the very least, *existing* UIT ETFs.

II. The Commission Should Extend Rule 12d1-4 to Private Funds

Proposed rule 12d1-4 provides an exemption to permit funds that meet the definition of "investment companies" under the Act to invest in ETFs in excess of the limits of section 12(d)(1) of the Act, subject to four conditions; however this exemption does not extend to Private Funds, because Private Funds are not "investment companies" under the Act, except for purposes of the limitations set forth in subparagraphs (A)(i) and (B)(i) of section 12(d)(1). The Proposing Release is silent as to whether Private Funds were intentionally excluded from proposed rule 12d1-4. We believe that Private Funds should be treated comparably to other

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4 *Id.* at 14619.

5 As of May 15, 2008, the SPDR Trust, Series 1 held approximately $78 Billion in net assets.

6 Proposing Release, *supra* note 2, at 14619.

investment companies for purposes of the rule 12d1-4 because the conditions of the rule that address the concerns that underlie section 12(d)(1) are equally applicable to Private Funds as they are to all types of investment companies. This position is consistent with Congress' view that Private Funds should be treated as investment companies for purposes of the section 12(d)(1) limitations cited above. It is also consistent with the position taken by the Commission in rule 12d1-1, where Private Funds, for purposes of rule 12d1-1, are treated identically to other investment companies and are able to invest in shares of registered money market funds in excess of the limits of section 12(d)(1).[7]

We believe that the conditions to proposed rule 12d1-4, if applied to Private Funds, equally address the concerns identified by Congress when adopting the section 12(d)(1) limitations.[8] First, we believe that the "control" limitations contained in the conditions of the proposed rule would fully protect ETFs and other shareholders of ETFs from a Private Fund that owns more than 3% of the outstanding voting stock of the ETF, and prevent a Private Fund from controlling or taking advantage of an ETF.

The second condition of the Proposed Rule precludes an acquiring fund from redeeming from the ETF shares it acquired above the 3% limitations contained in subparagraphs (A)(i) and (B)(i) of section 12(d)(1) of the Act. This condition, when applied to a Private Fund (just like to any other investment company), would prevent it from being able to threaten large-scale redemptions as a means of coercing an ETF or exercising undue influence.[9] With respect to fees, we do not believe that the possible layering of fees should be viewed as a greater concern for investors in Private Funds than for the shareholders of the other types of investment companies. In fact, we believe that this is less of a concern with respect to Private Funds because only sophisticated investors are generally able to invest directly in Private Funds.[10] Also, advisers to Private Funds are subject to recently adopted rule 206(4)-8 under the Investment Advisers Act of 1940, which subjects disclosures made by an investment adviser to a Private Fund to investors and prospective investors in the fund to an anti-fraud standard.

Finally, we do not believe that the risk of an overly complex structure is any greater for a Private Fund investing in an ETF under proposed rule 12d1-4 than for any other type of investment company. To the contrary, we believe that the risk of investor confusion in a Private

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[7] 71 Fed. Reg. 36640, 36643 (June 27, 2006). Such investments by Private Funds and registered investment companies have not implicated the concerns that underlie section 12(d)(1). *Id.*

[8] *See* SEC, Public Policy Implications of Investment Company Growth, H.R. Rep. No. 2337, 89th Cong., 2d Sess. at 315–16 (1966)..

[9] To our knowledge, most Private Funds purchase and sell ETF shares in secondary market transactions.

[10] With respect to Private Funds relying on section 3(c)(1), investors are generally accredited investors within the meaning of the Securities Act of 1933 and Regulation D thereunder. Investors in Private Funds relying on Section 3(c)(7) must generally be qualified purchasers as defined in section 2(a)(51) of the Act.

Fund fund-of-funds is far less likely to occur than for a shareholder of other types of investment companies. For example, we understand that Private Funds frequently engage in complex, structured transactions, compared to which an investment in an ETF in excess of the 3% limit seems fairly simple. Accordingly, we believe that the risk of an overly complex structure is not compelling with respect to Private Funds and the protection of their investors.

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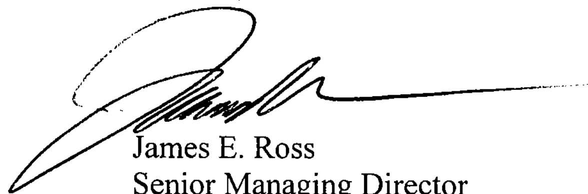
SSgA appreciates the opportunity to provide comments on the Proposing Release. If you have any questions about our comments, please contact the undersigned at (617) 664-2043 or Scott M. Zoltowski at (617) 664-7037.

Sincerely,



James E. Ross
Senior Managing Director
State Street Global Advisors

cc: Hon. Christopher Cox, Chairman, Securities and Exchange Commission
Hon. Paul S. Atkins, Commissioner, Securities and Exchange Commission
Hon. Kathleen L. Casey, Commissioner, Securities and Exchange Commission
Andrew J. Donahue, Director Division of Investment Management

Anthony Rochte, State Street Global Advisors
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