August 16, 2015

Brent J. Fields

Secretary

U.S. Securities and Exchange Commission

100 F Street, NE

Washington, DC 20549

Dear Mr. Fields:

Re: Release No. 34-75165, File No. S7-11-15

Request for Comment on Exchange-Traded Products

I am writing in response to the request by the U.S. Securities and Exchange Commission (the "Commission") for comments regarding exchange-traded products ("ETPs"), Release No. 34-75165, Request for Comment on Exchange-Traded Products (the "Release").

Currently, I am Co-Founder and Editor of www.40Act.com, a website providing reference services to investment management legal and compliance professionals. I also teach a class on Investment Management Regulation at Suffolk Law School in Boston, serve as an independent trustee on two exchange-traded fund ("ETF") boards of trustees, and have worked in various other capacities in the investment management industry since 1978.

In the early 1990s, I served as General Counsel and Chief Compliance Officer of Leland O'Brien Rubinstein Associates and its affiliates ("LOR") which conceptualized and launched the first ETFs as part of The SuperTrust Trust for Capital Market Fund, Inc. Shares ("SuperTrust"). This background allows me to offer a first hand account of the beginning of ETFs and ETPs and correct some inaccuracies in the Release.

Most notably the Release states that the SPDR S&P 500 ETF ("SPY") was the first ETP. The SuperTrust's ETF units, not SPY, were the original ETPs. SPY was based squarely on the exemptive relief and registration precedents set by LOR with the

SuperTrust. I'd like to share with you the early history of ETFs, because many of the issues LOR faced are similar to the ones with which the Commission is currently grappling, including the need for exemptive relief, exchange listing standards, liquity, arbitrage, market impact, index tracking efficiency, broker-dealer sales practices and public/professional understanding of product features. In addition, the history of ETFs is much more complex and nuanced than presented in the Release.

The SuperTrust and SPY represented an enormous amount of intellectual and financial investment by LOR, the Commission and its Staff, FINRA (then NASDR), the American Stock Exchange ("Amex") and their lawyers. LOR alone spent over *five* years and millions of dollars in developing the ETF concept.

The SuperTrust's intellectual foundation is an article by Professor Nils Hakansson proposing the development of a radical innovation he called a "superfund,"[1] which could be structured to resemble options or futures based on security indices. LOR was a firm which built its business on developing and implementing portfolio insurance and allocation strategies in the 1980s. After the 1987 stock market crash, the superfund structure appealed to LOR as a way of developing collateralized index trading strategies. Combining index fund concepts with the superfund concept led to the development of a market basket or exchange traded fund ("ETF") structure which became the core component of the SuperTrust.

To develop an exchange tradeable fund, LOR and its counsel drew heavily on the precedent set by the Americus Trusts which developed unit investment trusts to hold shares in specific companies such as AT&T and then split such interests into two units[2]. The first, called "PRIMEs", represented rights to all dividends on the underlying stock until expiration of the unit trust, plus an amount of capital appreciation up to a preset limit. The second, called SCOREs, entitled holders to all capital appreciation, above a preset limit, of the underlying shares until expiration of the UIT.

Combining Professor Hakansson's superfunds idea with the UIT structure of the Americus Trusts resulted in the SuperTrust structure for which LOR through its affiliates applied for exemptive relief in March of 1989. The exemptive process was controversial at the time and resulted in five amended applications and a hearing before the full Commission before approval was granted.[3]

The SuperTrust consisted of six securities, two of which traded on the American Stock Exchange and four of which traded on the Chicago Board of Options Exchange. At the core of the SuperTrust were two ETFs, a S&P 500 index ETF (the "Index SuperUnit") and a U.S. Treasury Money Market Trust ETF (the "Money Market SuperUnit"). Because of the Staff's concern that the Commission lacked the authority to grant exchange trading privileges for mutual fund shares, a two tier structure was devised:

each SuperUnit ETF invested exclusively in, and held all shares issued by, the underlying index mutual funds.

The Index and Money Market SuperUnit ETF interests were divisible into risk management securities called SuperShares and similar in ways to PRIMEs and SCOREs. Hence the six security structure. Please see the attached Summary Graphics brochure which explains the design in greater detail.

LOR worked closely with Standard & Poors to license the S&P 500 Composite Stock Price name and index composition and with Amex to develop the trading processes, including in-kind creations and redemptions. When first introduced to major underwriters and investment bankers, LOR's ETF and market risk securities concepts found major appeal on Wall Street. A $2 billion offering was planned. However, the complexity of the product design and low underwriting fee structure doomed the sales and marketing effort:. LOR made little headway in 1990 and 1991 after being granted the exemptive relief it requested.

LOR's partner, Amex, apparently became impatient with the marketing challenges and implemented its "Plan B." It quietly simplified the SuperTrust structure focusing solely on the S&P 500 index ETF (SuperUnit) component and filed for its own exemptive relief using the SuperTrust application as the basis for its application.[4] It also simplified the two tier structure resulting in SPY's UIT format. Amex received its SPDR Order almost two years *after* LOR was granted its SuperTrust Order and launched SPY three months *after* the SuperTrust launched.

SuperTrust launched on November 5, 1992 with initial subscriptions of $1 billion. SPY launched on January 29, 1993 with initial subscriptions of $6.5 million. However, with the full support of the Amex and market makers, SPY was able to develop sufficient trading liquidity, which SuperTrust failed to do. In accordance with The SuperTrust's charter, the initial SuperUnits were terminated three years after launch in 1995. No additional SuperTrust tranches were created. SPY lives on today.

Thus, as a matter of intellectual, design and actual reality, the SuperTrust's SuperUnits were the first ETFs successfully developed and launched in the U.S.

Indeed, LOR and the SuperTrust are the subject of two Harvard Business School case studies. The first studies LOR's portfolio insurance product challenges after the 1987 market crash and initial foray into developing the SuperTrust.[5] The second case study delves into the challenges faced by LOR when its original underwriting syndicate fell apart. The study contains an excellent recitation of the background of LOR and the SuperTrust.[6]

To help the Staff and public better understand the complexities and issues with which LOR, the Commission and others grappled, I have posted on my website's free (i.e., open to the public) Community pages the following documents. See: http://www.40act.com/community/etf-supertrust-history-files/

- SuperTrust Marketing Video 1990—the video is a great introduction to The SuperTrust and its component securities. It clearly depicts the use of the two SuperUnits as ETFs and how they can be divided into market risk management components.
- "The SuperTrust™," December 12, 1988, unpublished concept brochure illustrating the ETF concept for the first time plus its SuperTrust derivative securities based on the Hakansson superfund concept.
- Speech by Joseph A. Grundfest, Commissioner, SEC, "'Perestroika' on Wall Street: The Future of Securities Trading," October 12, 1988, in which Commissioner Grundfest lays out why the development of "basket" trading of securities had become an important priority for U.S. securities markets at that time.
- "Justification of SuperTrust 4(2) and 22(d) Exemptions sought under Section 6(c) of the Investment Company Act," Hayne Leland and Mark Rubinstein, August 10, 1989: lays out the case to be made for the then unprecedented exemptive relief being sought by LOR.
- "The SuperTrust," Mark Rubinstein, unpublished article describing the SuperTrust concept, its origins and its justifications, December 20, 1990 with a historical note added September 11, 2000.
- "Supershares," Mark Rubinstein, chapter published in *Handbook of Equity Derivatives*, Irwin, 1994, manuscript dated March 15, 1993, describing how the SuperTrust integrates the Hakansson superfund and supershare innovations.
- SEC comment letter dated May 30, 1989 regarding the initial application for the SuperTrust Order—lays out the Staff's initial concerns nicely.
- First Amended and Restated Application (for the SuperTrust Order), marked copy September 1, 1989; File No. 812-7283.
- Proposed Notice of Application, Exhibit C to the Fifth Amended and Restated Application for the SuperTrust Order, filed July 6, 1990.
- SEC News Digest, Issue 90-204, October 22, 1990, containing the notice of the granting of the SuperTrust Order.
- Final effective prospectus for The SuperTrust™ Trust for Capital Market Fund, Inc. Shares, May 29, 1992.
- Summary Graphics marketing brochure for the SuperTrust, 1992—explains in fairly simple terms the SuperTrust's complex of securities and their potential use. (Also attached to this letter.)

As I receive other pertinent documents regarding this history, I will add them to the website page.

If you have any questions or would like further information, please do not hesitate to contact me at [redacted].

Sincerely yours,

Karl-Otto Hartmann

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[1] Nils Hakansson, "The Purchasing Power Fund: A New Kind of Financial Intermediary," *Financial Analysts Journal,* 32 (November-December, 1976), pp. 49-59. Professor Hakansson was at the time Professor of Accounting and Finance at the University of California, Berkeley.

[2] No-Action Letter, Americus Shareowner Service Corp. (pub. avail. Feb. 12, 1977).

[3] *In the Matter of the SuperTrust Trust for Capital Market Fund, Inc.,* ("SuperTrust"), Investment Company Rel. Nos. 17613 (Jul. 25, 1990) (notice) and 17809 (Oct. 19, 1990) (the "SuperTrust Order"), granting exemptions under Section 6(c) from Sections 4(2), 22(c) and Rule 22c-1 thereunder, and 22(d) of the Act and an order under Sections 11(a) and 11(c) of the Act approving the exchange of shares of Capital Market Fund, Inc. for units of beneficial interest ("SuperUnits") of the SuperTrust, each separable at the option of the holder into two complementary components of interest ("SuperShares"). The initial application was dated March 29, 1989 and filed April 3, 1989.

[4] Application for Orders Under section 6(c) of the Investment Company Act of 1940 exempting the SPDR Trust, Series I (and any additional and similar Series of the SPDR Trust), and SPDR Services Corporation, as Sponsor, from the Provisions of sections 4(2), 12(d)(3), 14(a), 22(c), 22(d) and 26(a)(2)(C) of said Act and from rules 12d3-1 and 22c-1 promulgated thereunder (Jun. 26, 1990). *SPDR Trust, Series 1*, Investment Company Act Rel. Nos. 18959 (Sept. 17, 1992) (notice) and 19055 (Oct. 26, 1992) (order) ("SPDR Order").

[5] Peter Tufano and Barbara B. Kyrillos, "Leland O'Brien Rubinstein Associates Incorporated: Portfolio Insurance," Harvard Business School (1994).

[6] Peter Tufano and Barbara B. Kyrillos, "Leland O'Brien Rubinstein Associates, Inc.: SuperTrust™," Harvard Business School (1995).

Summary Graphics

The Foundation
and Building Blocks
for Your Portfolio

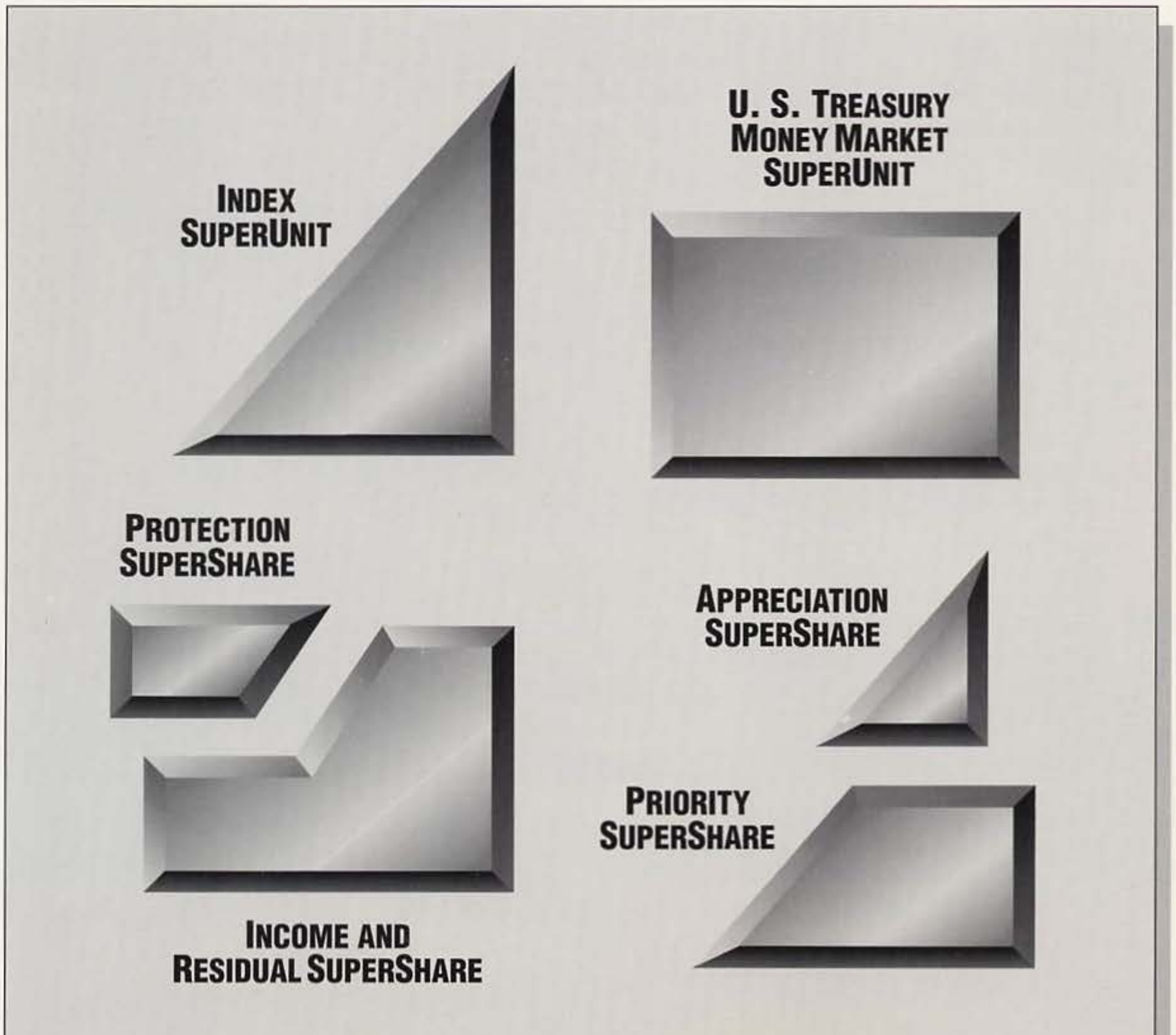
The SuperTrust™

Registration statements relating to these securities have been filed with the Securities and Exchange Commission but have not yet become effective. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statements become effective. This brochure shall not constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sale of these securities in any State in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such State.

For more complete information about The SuperTrust Trust for Capital Market Fund, Inc. Shares and the Capital Market Fund, Inc. including charges and expenses, please obtain their prospectuses from SSC Distribution Services, Inc., P.O. Box 1078, Framingham, MA 01701-1078, or by telephoning 1-800-328-7408. Read the prospectuses carefully before you invest or forward funds.

THE SuperTrust™

This brochure is intended to illustrate graphically the structure, operation, and benefits of the SuperTrust securities. The last section of this brochure contains a brief written summary of the SuperTrust structure and securities.

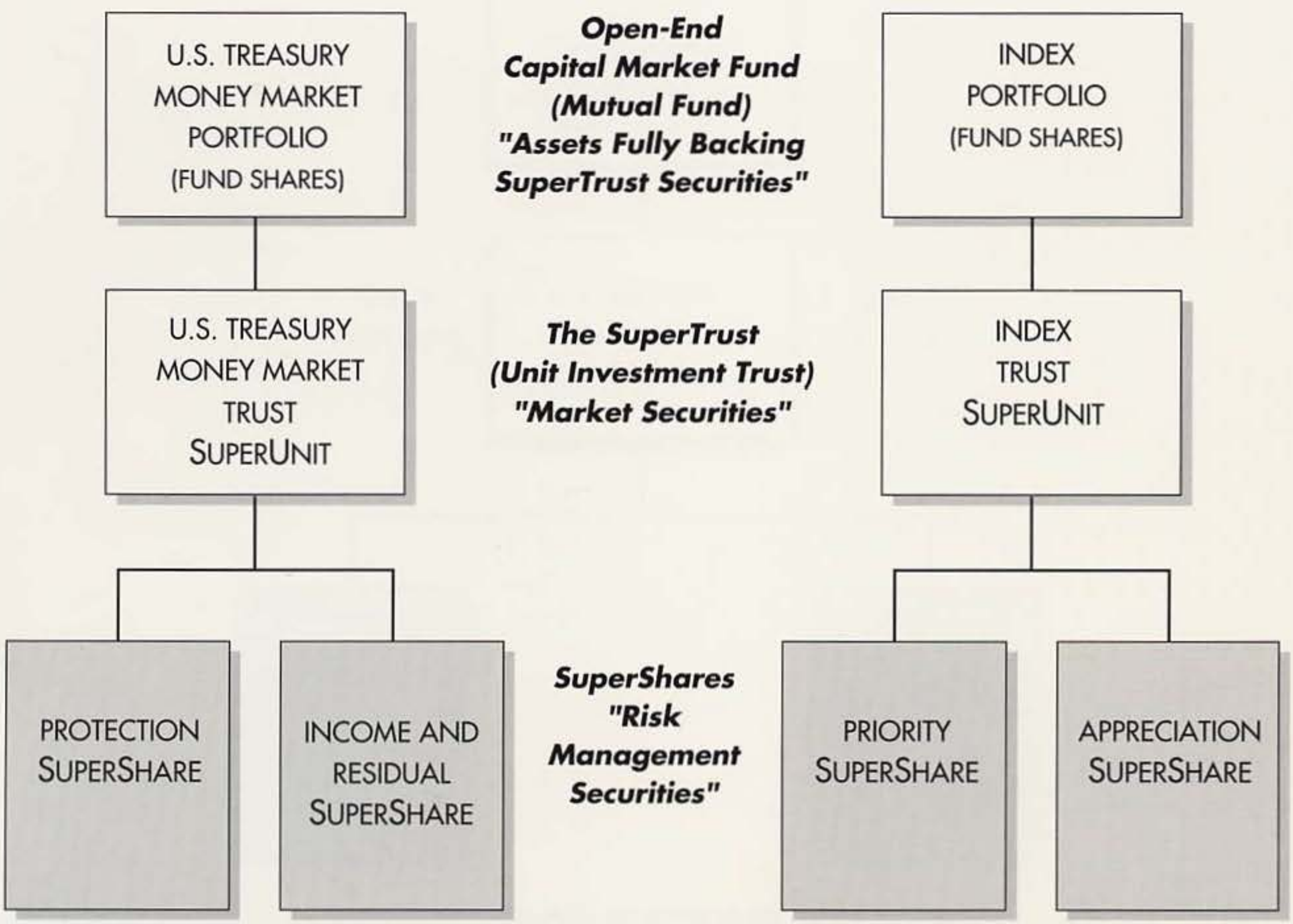


Summary Graphics

The SuperTrust

- '40 Act registered investment company
- Issues SuperUnit & SuperShare securities
- Securities are '33 Act registered, exchange listed
- SuperUnits & SuperShares fully backed by securities portfolios
- Initial subtrusts terminate in 3 years

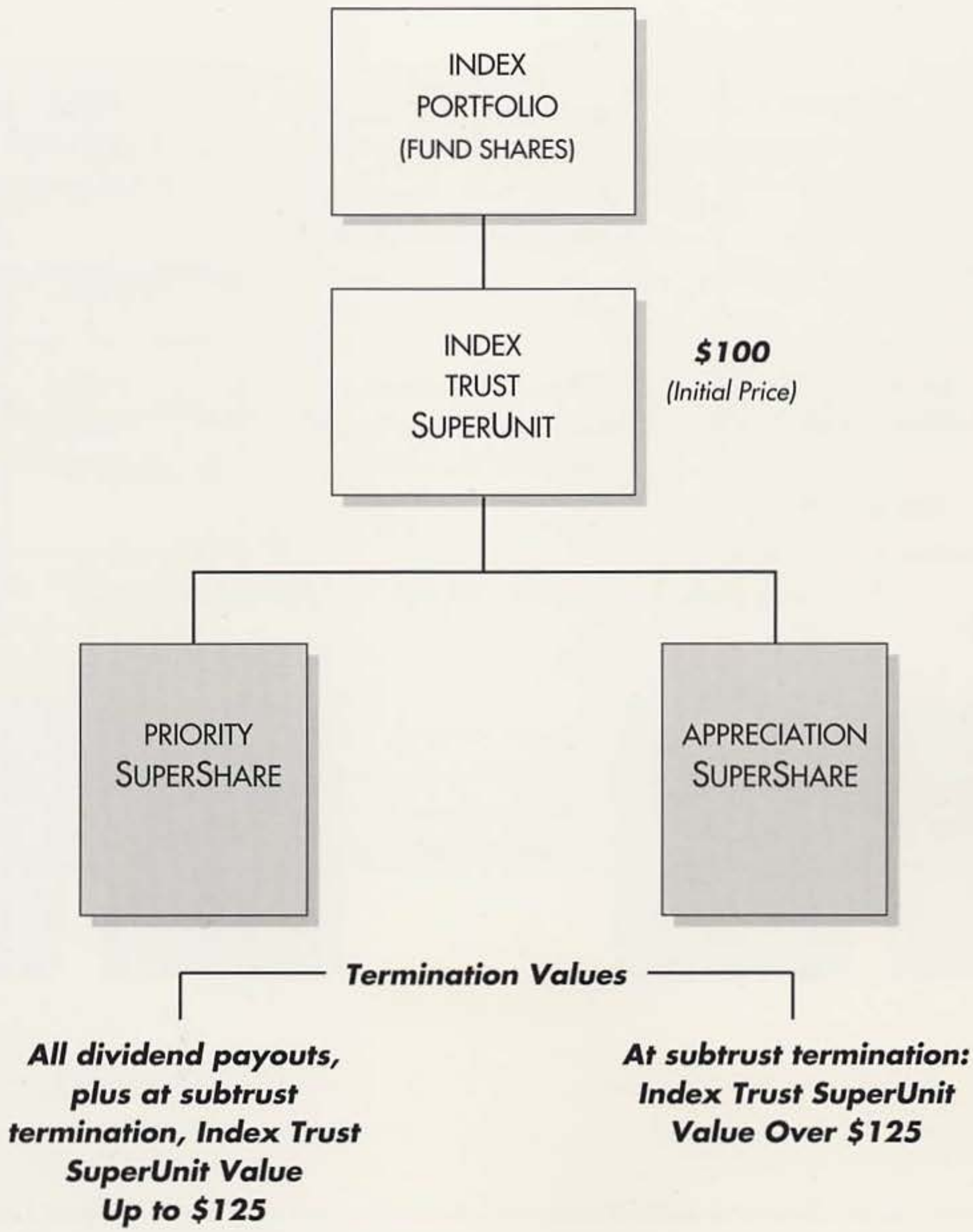
Structure & Function



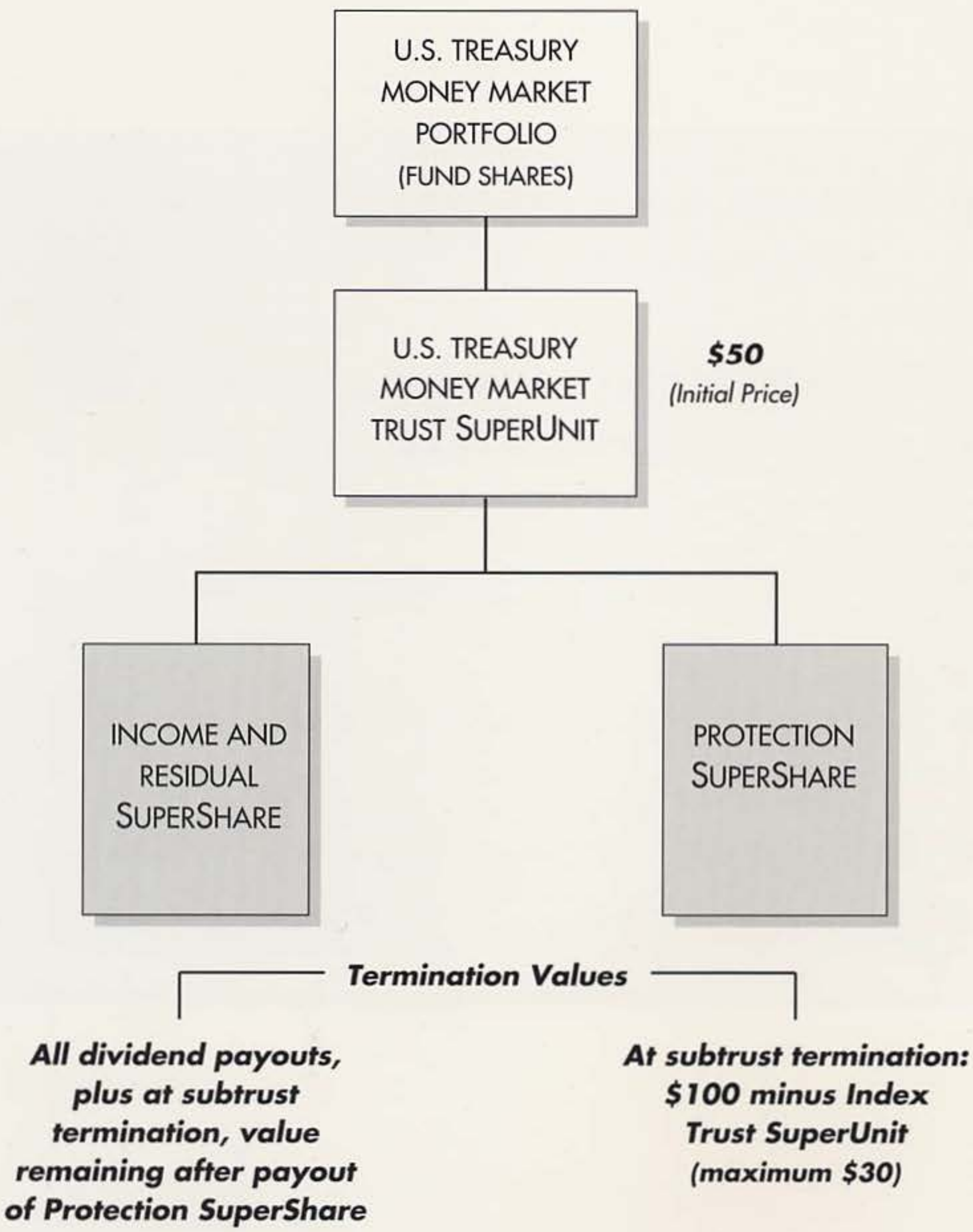
Note: Money Market & Index Trusts are independent and need not be of equal $ size.

Summary Graphics

Initial Pricing & Termination Values



Initial Pricing & Termination Values



Summary Graphics

Benefits to the Market

- Trade market index (S&P 500) with a single security
- Provides market clearing mechanism for large-scale risk management strategies
- Macro consistent: everyone can participate
- Attracts funds into the capital markets
- SuperUnits and SuperShares fully backed by underlying securities portfolios

Benefits to Institutional Investors

- Trade market index (S&P 500) with a single security
- Wide range of risk control strategies
- SuperUnits and SuperShares fully backed by underlying securities portfolios
- Sound public policy response to market instability

Summary Graphics

Benefits to Individual Investors

- Trade market index (S&P 500) with a single security
- A level playing field
- Wide range of risk control strategies
- SuperUnits and SuperShares fully backed by underlying securities portfolios
- Standard security market accounts & customer agreements

The SuperTrust

- Trade market index (S&P 500) with a single security
- Tailor risks & returns to goals & outlooks
- Payouts assured by actual securities portfolios
- Allows appreciation & protection strategies without intensive trading

Summary Graphics

Pension Fund Applications

EQUITY

FLEXIBLE CORE

FIXED INCOME

The SuperTrust

Standard Features

- Equity "market" portfolio
- Money market portfolio
- Create balanced portfolio

Unique Features

- Trade market index with a single security
- Offers downside protection
- Offers upside appreciation
- Facilitates range participation
- Facilitates liability hedge strategies

Summary of SuperTrust Structure and Securities

(This is intended as a summary only. More information is available in the prospectuses, as noted on the cover page, including charges and expenses.)

The Fund: Capital Market Fund, Inc. (the "Fund") is a no-load open-end mutual fund which will issue redeemable shares ("Shares") of its stock initially in two Series, the Index Series and the U.S. Treasury Money Market Series ("Money Market Series"). Each Series' Shares may be exchanged for SuperUnits as described below, upon payment of the applicable Deposit Fee.

The Index Series will invest in a portfolio of stocks structured to substantially replicate the investment performance of the Standard & Poor's 500 Composite Stock Price Index ("S&P 500 Index"); and its Shares will be the underlying assets for Index Trust SuperUnits. The Money Market Series will seek to provide as high a level of current income as is consistent with stability of principal and liquidity. The Series will invest only in short-term U.S. Treasury securities and repurchase agreements collateralized fully by such securities; and its Shares will be the underlying assets for the U.S. Treasury Money Market Trust SuperUnits ("Money Market Trust SuperUnits").

While the Money Market Series will attempt to maintain a stable net asset value of $1.00 per share, there can be no assurance that it will be able to do so. In addition, an investment in the Money Market Series is neither insured nor guaranteed by the U.S. Government.

The SuperTrust: The SuperTrust Trust for Capital Market Fund, Inc. Shares (the "SuperTrust") is a unit investment trust, the assets of which will be invested exclusively in the Shares of the Fund. However, unlike a traditional unit investment trust, the SuperTrust has been authorized to issue its SuperUnits on any Business Day (days when the New York Stock Exchange is open) in an exchange offer with the Fund. While the SuperTrust may issue a variety of SuperUnits over time, it will initially issue two types of SuperUnits, Index Trust SuperUnits and Money Market Trust SuperUnits. At the discretion of the owner, and upon payment of the applicable separation fee, each SuperUnit may be separated into complementary pairs of SuperShares. SuperUnits may be redeemed on any Business Day at the investor's discretion for Shares of the respective Series of the Fund.

SuperUnits will trade on the American Stock Exchange in round lots of 10 Units. SuperUnits represent an ownership interest in a portfolio of securities and may be redeemed on any Business Day. SuperUnit holders will receive dividends which are net of expenses. All initial SuperTrust securities will have a three-year life.

Index Trust SuperUnit

(initial net asset value $100)

- Issued in exchange for Shares of the Index Series, upon payment of the applicable Deposit Fee, and represents ownership interest in an S&P 500 Index portfolio.
- Is a "basket" security: one trade serves to trade the equivalent of the S&P 500 Index stocks. Lowers trading costs.
- Net asset value will closely track investment performance of S&P 500 Index.
- Receives pro-rata portion of dividends and other distributions (which are net of expenses) paid by the Index Trust, and upon termination of the Index Trust receives net asset value of Index Trust SuperUnit.
- Separable, upon payment of the applicable separation fee, into an Appreciation SuperShare and a Priority SuperShare (see SuperShares).

Summary Graphics

Money Market Trust SuperUnit

(initial net asset value $50)

- Issued in exchange for Shares of the Money Market Series, upon payment of the applicable Deposit Fee, and represents ownership interest in portfolio of short-term U.S. Treasury securities and repurchase agreements collateralized fully by such securities; net asset value expected to remain nearly constant.
- Receives pro-rata portion of dividends and other distributions (which are net of expenses) paid by the Money Market Trust and at termination of the Money Market Trust receives net asset value of Money Market Trust SuperUnit.
- Separable, upon payment of the applicable separation fee, into a Protection SuperShare and an Income and Residual SuperShare (see SuperShares).

SuperShares will trade on the Chicago Board Options Exchange as ordinary equity securities (not options). SuperShares are not separately redeemable. However, complementary SuperShares (i.e., Appreciation and Priority SuperShares, or Protection and Income and Residual SuperShares) may be recombined into their respective SuperUnits which may be redeemed. There is no charge for such recombination or redemption. However, the purchase of complementary SuperShares, if not already held by an investor, involves brokerage costs. SuperShares have certain rights, and represent various claims on the net asset values of SuperUnits at termination of the Index Trust and Money Market Trust.

Appreciation SuperShare

- At termination will receive a payout equal to the amount, if any, that the Index Trust SuperUnit's terminal net asset value exceeds $125*. *Will expire worthless if terminal net asset value of an Index Trust SuperUnit is less than $125*.* Receives no dividends or other distributions prior to termination of the Index Trust.

Priority SuperShare

- Will receive dividends and other distributions in the amount paid to an Index Trust SuperUnit, plus at termination will receive that portion of the net asset value of an Index Trust SuperUnit remaining after payment, if any, to the Appreciation SuperShare. Maximum payment on termination of $125*.

Protection SuperShare

- At termination will receive a payout equal to the amount, if any, by which the Index Trust SuperUnit's net asset value is less than its initial value of $100* to a maximum of $30. Provides protection (up to 30%) for broad-based stock portfolio (e.g., S&P 500 Index). *Will expire worthless if terminal net asset value of an Index Trust SuperUnit exceeds $100*.* Receives no dividend or other distributions prior to termination of the Money Market Trust.

Income and Residual ("I&R") SuperShare

- Will receive dividends and other distributions in the amount paid to a Money Market Trust SuperUnit, plus at termination will receive that portion of the net asset value of a Money Market Trust SuperUnit remaining after payment, if any, to the Protection SuperShare (which could be up to $30). *Accordingly, purchasers of Income and Residual SuperShares may sustain a loss of a substantial portion of their investment.*

*The $125 is the "Termination Date Amount for Index Trust SuperUnits", and $100 is the "Termination Date Amount for Money Market Trust SuperUnits". ***Both the $125 and $100 Termination Date Amounts will be reduced by the amount of capital gains distributions, if any, paid to an Index Trust SuperUnit prior to termination.***