



DIVISION OF  
TRADING AND MARKETS

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC 20549

January 10, 2012

Thomas Friedmann  
Dechert LLP  
1775 I Street, N.W.  
Washington, DC 20006-2401

Re: FS Energy and Power Fund  
Request for Exemptive Relief under Rule 102 of Regulation M  
TP File No. 11-23

Dear Mr. Friedman:

In your letter dated January 10, 2012, as supplemented by conversations with the staff, you request that the Commission grant an exemption from Rule 102 of Regulation M to permit FS Energy and Power Fund ("Company") to effect repurchases of its common shares pursuant to its proposed Repurchase Program. We have attached a copy of your letter to this response to avoid reciting the facts. Unless otherwise noted, terms in this letter have the same meaning as in your letter.

As a consequence of the continuous offering of the Company's common shares, the Company will be engaged in a distribution of shares of its common stock pursuant to Rule 102 of Regulation M. As a result, bids for or purchases of shares of its common stock or any reference security by the Company or any affiliated purchaser of the Company are prohibited during the restricted period specified in Rule 102, unless specifically excepted by or exempted from Rule 102.

*Response:*

On the basis of your representations and the facts presented, but without necessarily concurring in your analysis, we find that it is appropriate in the public interest and consistent with the protection of investors to grant, and hereby grant, an exemption from Rule 102 of Regulation M to permit the Company to repurchase shares of its common stock under its Repurchase Program while the Company is engaged in a distribution of shares of common stock. In granting this exemption, we considered the following facts, among others:

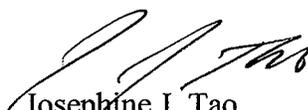
- There is no trading market for the Company's common shares;

- The Company will terminate its Repurchase Program in the event a secondary market for its common shares develops;
- The Company will repurchase shares of its common shares under its Repurchase Program at a price that does not exceed the then current public offering price of its common shares; and
- The terms of the Repurchase Program will be fully disclosed in the Company's prospectus.

This exemption is subject to the condition that the Company shall terminate its Repurchase Program during the distribution of its common shares if a secondary market for its common shares develops.

The foregoing exemption from Rule 102 is based solely on your representations and the facts presented to the staff, and are strictly limited to the application of Rule 102 to the Repurchase Program as described above. The Repurchase Program should be discontinued, pending presentation of the facts for our consideration, in the event that any material change occurs with respect to any of those facts or representations. In addition, your attention is directed to the anti-fraud and anti-manipulation provisions of the federal securities laws, particularly Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. Responsibility for compliance with these and any other applicable provisions of the federal securities laws must rest with the Company. The Division of Trading and Markets expresses no view with respect to any other question that the Repurchase Program may raise, including, but not limited to, the adequacy of the disclosure concerning, and the applicability of other federal or state laws to, the Repurchase Program.

For the Commission, by the  
Division of Trading and Markets,  
pursuant to delegated authority,<sup>1</sup>



Josephine J. Tao  
Assistant Director

Attachment

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<sup>1</sup> 17 C.F.R. § 200.30-3(a)(6)

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January 10, 2012

Josephine J. Tao, Esq.  
Assistant Director  
Office of the Trading Practices and Processing  
Division of Trading and Markets  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

Re: Request for Exemptive Relief from Rule 102 of Regulation M

Dear Ms. Tao:

We are counsel to FS Energy and Power Fund (the "Company"), a Delaware statutory trust that is an externally managed, non-diversified, closed-end management investment company that has elected to be treated as a business development company under the Investment Company Act of 1940, as amended (the "1940 Act"). On behalf of the Company, we request that the Division of Trading and Markets (the "Division") of the Securities and Exchange Commission (the "SEC") grant the Company an exemption from the prohibitions of Rule 102(a) of Regulation M under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), with respect to periodic repurchases that may be made by the Company of its common shares of beneficial interest ("common shares") under its proposed share repurchase program (the "Repurchase Program") pursuant to the authority provided by Rule 102(e) of Regulation M.

The Company

The Company is a Delaware statutory trust that was formed on September 16, 2010. Its investment objectives are to generate current income and long-term capital

appreciation. The Company is externally managed by FS Investment Advisor, LLC (the “Adviser”). Pursuant to authority delegated by the board of trustees of the Company (the “Board”), all investment decisions for the Company will be made by the Adviser, which will be compensated pursuant to the terms of the Investment Advisory and Administrative Services Agreement entered into between the Company and the Adviser and approved by the Board on April 28, 2011.

The Company initially filed a registration statement on Form N-2 (the “Registration Statement”) under the Securities Act of 1933, as amended (the “Securities Act”), on September 30, 2010, which was declared effective by the SEC on May 12, 2011, with respect to the offer and sale of up to \$1.5 billion of common shares to be sold in a continuous offering under Rule 415 of the Securities Act. The Company, through its affiliated dealer manager, FS<sup>2</sup> Capital Partners, LLC, is selling its common shares on a “best efforts” basis at an initial offering price of \$10.00 per share<sup>1</sup>, except for sales to the Company’s executive officers, trustees and others designated by management, who may pay the offering price per share net of some or all of the selling commissions and dealer manager fees.

The Company’s public offering is a minimum-maximum offering, pursuant to which the Company was required to raise at least \$2.5 million in gross proceeds from subscribers who are not affiliated with the Company or the Adviser within one year following the effectiveness of the Registration Statement (the “Minimum Offering Requirement”). Prior to receiving gross proceeds of \$2.5 million from unaffiliated subscribers, all subscription payments were placed in an account held by the escrow agent, UMB Bank, N.A., in trust for the benefit of the subscribers, pending release to the Company once the Minimum Offering Requirement was met. As of July 18, 2011, the Company met the Minimum Offering Requirement and, consequently, subscriber funds were released to the Company by its escrow agent and invested in debt securities as

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<sup>1</sup> The 1940 Act prohibits business development companies from selling shares at prices below net asset value per share unless they first receive shareholder approval for such sales. To the extent that the Company’s net asset value per share increases, the Company will sell its common shares at a price necessary to ensure that common shares are not sold at a price, after the deduction of selling commissions and dealer manager fees, that is below net asset value per share.

described in the Company's prospectus relating to its public offering (as supplemented and amended from time to time, the "Prospectus"). As of August 12, 2011, the Company had sold common shares yielding gross proceeds to the Company of approximately \$25.7 million.

The Company intends to file post-effective amendments to the Registration Statement in order to continue the current offering for at least two years, or until the Company has sold the maximum number of common shares registered in the current offering. The Company intends to declare ordinary cash distributions in respect of its common shares on either a semi-monthly or monthly basis and pay such distributions on a monthly or quarterly basis, the first of which was paid on July 29, 2011 to shareholders of record on July 28, 2011. The Company has adopted an "opt in" Distribution Reinvestment Plan (the "DRP") pursuant to which shareholders may elect to have the full amount of their cash distributions reinvested in the Company's common shares. All such reinvested distributions will be used to purchase the Company's common shares at a price equal to 95% of the price at which common shares are sold at the semi-monthly closing occurring immediately following the distribution payment date.

The Company does not currently intend to list its common shares on a national securities exchange or any other market or to provide any liquidity to shareholders except for periodic repurchases of its common shares through its Repurchase Program until the occurrence of a "liquidity event."<sup>2</sup> The Registration Statement clearly indicates to shareholders that the Company intends to seek to complete a liquidity event within five years following the completion of its "offering stage," which is considered to be complete as of the termination date of the Company's most recent public equity offering, if a public equity offering has not been conducted during any continuous two-year period, although the Company may determine to complete a liquidity event earlier. Accordingly, the

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<sup>2</sup> "Liquidity event" is defined in the Registration Statement to be an event that could include (1) the sale of all or substantially all of the Company's assets either on a complete portfolio basis or individually followed by a liquidation, (2) a listing of the Company's common shares on a national securities exchange or (3) a merger or another transaction approved by the Board in which the Company's shareholders will receive cash or shares of a publicly-traded company.

Company intends to provide limited liquidity to its shareholders by periodically offering to repurchase its common shares pursuant to its Repurchase Program.

#### The Repurchase Program

Beginning with the first calendar quarter-end following July 18, 2012, which is 12 months after the date on which the Company met the Minimum Offering Requirement, and on a quarterly basis thereafter, the Company intends to offer to repurchase common shares on such terms as may be determined by the Board in its complete and absolute discretion (subject, in any such case, to the conditions set forth in this letter) unless, in the judgment of the independent trustees of the Board, such repurchases would not be in the best interests of the Company's shareholders or would violate applicable law. The Company will conduct any such repurchase offers in accordance with the requirements of Rule 13e-4 and Regulation 14E under the Exchange Act and pursuant to the rules of the 1940 Act. In months in which the Company repurchases common shares, it will conduct repurchases on the same date that it holds the last of its semi-monthly closings during such months for the sale of common shares in its public offering.

The Company intends to limit the number of common shares to be repurchased during any calendar year to that number of common shares it can repurchase with the proceeds received from its sale of common shares under the DRP. At the discretion of the Board, the Company may also use cash on hand, cash available from borrowings and cash from liquidation of securities investments as of the end of the applicable period to repurchase common shares. In addition, the Company will limit the number of common shares to be repurchased in any calendar year to 10% of the weighted average number of its common shares outstanding in the prior calendar year, or 2.5% in each quarter, though the actual number of common shares that the Company offers to repurchase may be less in light of the limitation noted above. Further, the Company will offer to repurchase such common shares on each date of repurchase at a price equal to 90% of the then-current offering price on each date of repurchase.

If a shareholder wishes to tender his/her common shares to be repurchased, he/she must either tender at least 25% of the common shares purchased in the offering or all of the common shares that he/she owns. If a shareholder chooses to tender only a portion of his/her common shares, then he/she must maintain a minimum balance of \$5,000 worth of common shares following a tender of common shares for repurchase. If the amount of repurchase requests exceeds the number of common shares the Company seeks to

repurchase, the Company will repurchase common shares on a pro rata basis. As a result, the Company may repurchase less than the full number of common shares that shareholders request to have repurchased. Any periodic repurchase offers will be subject, in part, to the Company's available cash and compliance with the 1940 Act.

The Board will require that the Company offer to repurchase common shares or portions thereof from shareholders pursuant to written tenders only on terms the Board determines to be fair to the Company and to its shareholders. Repurchases of common shares by the Company will be paid solely in cash and will be effective after receipt and acceptance by the Company of all eligible written tenders of common shares from its shareholders.

When the Board determines that the Company will repurchase common shares or fractions thereof, tender offer materials will be provided to each of the Company's shareholders describing the terms thereof as well as information each shareholder should consider in deciding whether and how to participate in such repurchase opportunity.

Any tender offer presented to the Company's shareholders will remain open for a minimum of 20 business days following the commencement of the tender offer. In the materials that will be sent to the Company's shareholders, the Company will include the date that the tender offer will expire. All tenders for repurchase requests must be received prior to the expiration of the tender offer in order to be valid. If there are any material revisions to the tender offer materials (not including the price at which common shares may be tendered) sent to the Company's shareholders, the Company will send revised materials reflecting such changes and will extend the tender offer period by a minimum of five additional business days. If the price at which common shares may be tendered is changed, the Company will extend the tender offer period by a minimum of ten additional business days.

In order to submit common shares to be tendered, shareholders will be required to complete a letter of transmittal, which will be included in the materials sent to shareholders, as well as any other documents required by the letter of transmittal. At any time prior to the expiration of the tender offer, shareholders may withdraw their tenders by submitting a notice of withdrawal to the Company. If common shares have not been accepted for payment by the Company, tenders may be withdrawn at any time prior to 40 business days following the expiration of the tender offer.

The Company will not repurchase common shares, or fractions thereof, if such repurchase will cause it to be in violation of the securities or other laws of the United States, Delaware or any other relevant jurisdiction.

In the event that the Adviser or any of its affiliates holds common shares, any of those entities may tender common shares for repurchase in connection with any repurchase offer on the same basis as any other shareholder, except for the initial investments of Michael C. Forman and David J. Adelman, the co-founders of the Company, who made aggregate initial seed contributions to the Company of approximately \$200,000 and purchased (through entities controlled by each of them) an aggregate of approximately \$2 million in common shares pursuant to a private placement in April 2011. Messrs. Forman and Adelman will not tender these common shares for repurchase as long as the Adviser remains the Company's investment adviser.

#### Discussion

Rule 102(a) of Regulation M prohibits issuers and those affiliated with issuers, among others, from bidding for, purchasing or attempting to induce another to bid for or purchase a security that is the subject of a then-current distribution during the applicable restricted period. Rule 102(e) of Regulation M authorizes the SEC to exempt from the provisions of Rule 102 any transaction or series of transactions, either unconditionally or subject to specified terms and conditions.

The Company respectfully requests that the Division, pursuant to the authority delegated to it by the SEC and the authority of Rule 102(e) of Regulation M, grant the Company an exemption from the prohibitions of Rule 102(a) of Regulation M to permit it to effect repurchases of common shares under the Repurchase Program, as proposed, during the course of the Company's public offering. The Company does not intend to list its common shares on a national securities exchange or other market and does not anticipate that there will be any liquidity in its common shares prior to the occurrence of a "liquidity event," as defined in the Prospectus. The Repurchase Program is designed to provide a limited source of liquidity for the Company's shareholders prior to the occurrence of a liquidity event.

Under the Repurchase Program, the repurchase price will never exceed the then-current offering price because repurchases will be conducted at 90% of the offering price in effect of each date of repurchase. Shareholders of the Company are apprised of the

availability of the Repurchase Program at the time they purchase their common shares by means of the Prospectus but will only be solicited for participation in the Repurchase Program by means of the materials required by the rules relating to issuer tender offers under Rule 13e-4 and Regulation 14E of the Exchange Act. Repurchases will not be made with the purpose of trading in, and should not have the effect of manipulating or raising the offering price of, the Company's common shares. To date, the Company has not repurchased any common shares pursuant to the Repurchase Program.

Repurchases of common shares under the Repurchase Program should not manipulate the Company's share price in connection with the Company's offering because (i) there is no public trading market for the Company's common shares and (ii) the repurchase price under the Repurchase Program will be fixed at 90% of the offering price in effect on each date of repurchase and will, therefore, always be less than the then-current offering price of the Company's common shares. Moreover, the extent of the Repurchase Program will be limited by the Company's intention to limit the number of common shares repurchased in any calendar year to the lesser of (i) 10% of the weighted average number of common shares outstanding in the prior calendar year, or 2.5% each quarter, and (ii) the number of common shares the Company can repurchase with the proceeds received from the sale of its common shares under the DRP. These and all other terms of the Repurchase Program are clearly set forth in the Prospectus.

The Company believes that the relief it requests in this letter is consistent with the relief granted under Regulation M by the Division in FS Investment Corporation (April 20, 2009), Request for Class Exemption From Rule 102(a) of Regulation M (October 22, 2007), REITPlus, Inc. (October 9, 2007), Cole Credit Property Trust II, Inc. (April 11, 2007), Hines Real Estate Investment Trust, Inc. (September 7, 2006), NNN Healthcare/Office REIT, Inc. (August 24, 2006), NNN Apartment REIT, Inc. (April 19, 2006), Dividend Capital Total Realty Trust, Inc. (January 31, 2006), Inland American Real Estate Trust, Inc. (June 7, 2005), Boston Capital Real Estate Investment Trust, Inc. (February 10, 2005), Paladin Realty Income Properties, Inc. (October 14, 2004), Hines Real Estate Investment Trust, Inc. (June 18, 2004), CNL Retirement Properties, Inc. (May 19, 2004), Wells Real Estate Investment Trust II, Inc. (December 9, 2003), Inland Western Retail Real Estate Trust, Inc. (August 25, 2003), and T REIT, Inc. (June 4, 2001).

In particular, we note that (i) shareholders of the Company will not have the ability to have common shares repurchased under the Repurchase Program until the first calendar quarter-end following July 18, 2012, which is one year after the Company met the Minimum Offering Requirement, and on a quarterly basis thereafter; (ii) the Company will terminate its Repurchase Program in the event a secondary market for its common shares develops; (iii) so long as the Company is engaged in a public offering, the per share price for common shares to be repurchased under the Repurchase Program will never be greater than the then-current offering price of the Company's common shares in the public offering; (iv) the number of common shares to be repurchased under the Repurchase Program in any calendar year is not expected to exceed the lesser of (A) the number of common shares the Company can repurchase with the proceeds received from the sale of its common shares under the DRP during such period and (B) 10% of the weighted average number of common shares outstanding during the prior calendar year, or 2.5% each quarter; and (v) the terms of the Repurchase Program are fully disclosed in the Prospectus.

The Company also believes that the requested relief is consistent with relief granted in Panther Partners, L.P. (March 3, 1994) and Dean Witter Cornerstone Funds II, III and IV (June 3, 1992) with respect to certain limited partnerships under former Rule 10b-6 where (i) no secondary market existed or was expected to develop for the limited partnership interests, (ii) the motivation for repurchasing limited partnership interests was to create liquidity for limited partners, (iii) the limited partnership interests were repurchased at prices that were based on the valuation of such partnerships' net assets and (iv) the repurchase programs were to be terminated in the event a secondary market developed. The Company believes the Repurchase Program as proposed is consistent with those plans described in the aforementioned cases and, similarly, has a very low risk of the type of manipulation that Regulation M was promulgated to address.

For these reasons we believe that the proposed Repurchase Program, as described in the Prospectus, would not have the effect of influencing or manipulating the market for the common shares to be offered and sold in the Company's public offering. We, therefore, respectfully request that the Division grant the Company an exemption from Rule 102(a) of Regulation M with respect to periodic repurchases of the Company's common shares pursuant to the Repurchase Program.

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If you have any questions regarding this request or need any additional information, please feel free to contact me at (202) 261-3313 or James A. Lebovitz at (215) 994-2510.

Very truly yours,



Thomas Friedmann

cc: Gerald F. Stahlecker  
Stephen S. Sypherd  
FS Energy and Power Fund  
James A. Lebovitz, Esq.  
Dechert LLP