



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Office of the Secretariat

June 14, 2010

Mr. William H. Navin  
Executive Vice President, General Counsel, and Secretary  
The Options Clearing Corporation  
One N. Wacker Drive, Suite 500  
Chicago, Illinois 60606

Re: Request by the Options Clearing Corporation for Approval of OCC Rule Filing SR-OCC-2009-20

Dear Mr. Navin:

By submission received December 15, 2009, the Options Clearing Corporation ("OCC"), a registered derivatives clearing organization ("DCO"), submitted for Commission approval, pursuant to Section 5c(c)(2) of the Commodity Exchange Act ("CEA") and Section 39.4(a) and 40.5 of the Commission's regulations, an interpretation to be inserted in Article I, Section 1(F)(8) of OCC's By-Laws. The interpretation states that OCC will clear and treat as options on securities any options on, inter alia, ETFS Physical Swiss Gold Shares ("Gold Products") or ETFS Physical Silver Shares ("Silver Products"), and will clear and treat as security futures any futures contracts on Gold and Silver Products in its capacity as a registered securities clearing agency. The Commission extended the initial review period of the submissions by forty-five days to March 15, 2010. By letters dated March 12, 2010 and May 13, 2010, OCC consented to extend the review period, ultimately until June 14, 2010.

Section 5c(c)(3) of the CEA provides that the Commission shall approve any new rule or rule amendment of a registered entity (which includes interpretations of the type submitted by OCC) unless the Commission finds that such new rule or rule amendment would violate the CEA. The Commission has today issued an Order, pursuant to the Commission's authority under Section 4(c) of the CEA, exempting the trading of options on Gold Products or Silver Products on national securities exchanges and the trading of security futures on Gold Products and Silver Products on derivatives contract markets registered with the SEC as limited purpose national securities exchanges, and the clearing of both options and security futures on Gold Products and Silver Products through the Options Clearing Corporation ("OCC") in its capacity as a registered securities clearing agency, from the provisions of the CEA and the regulations thereunder, to the extent necessary to permit the options and security futures to be so traded and cleared. The Commission has no basis on which to find that the proposed rule amendments violate the CEA. Accordingly, OCC's proposed rule amendments have been approved by the Commission pursuant to Section 5c(c)(3) of the CEA.

Sincerely,

Sauntia S. Warfield  
Assistant Secretary of the Commission

## COMMODITY FUTURES TRADING COMMISSION

Order Exempting the Trading and Clearing of Certain Products Related to ETFs Physical Swiss Gold Shares and ETFs Physical Silver Shares.

AGENCY: Commodity Futures Trading Commission.

ACTION: Final Order.

SUMMARY: On April 15, 2010, the Commodity Futures Trading Commission (“CFTC” or the “Commission”) published for public comment in the Federal Register<sup>1</sup> a proposal to exempt the trading and clearing of certain contracts called “options” and other contracts called “security futures” on each of ETFs Physical Swiss Gold Shares (“Gold Products”) and ETFs Physical Silver Shares (“Silver Products”) (collectively, “Gold and Silver Products”), which would be traded on national securities exchanges (as to options) and designated contract markets registered with the Securities and Exchange Commission (“SEC”) as limited purpose national securities exchanges (as to security futures), and in either case cleared through the Options Clearing Corporation (“OCC”) in its capacity as a registered securities clearing agency, from the provisions of the Commodity Exchange Act (“CEA”)<sup>2</sup> and the regulations thereunder, to the extent necessary to permit them to be so traded and cleared. Authority for this exemption is found in Section 4(c) of the CEA.<sup>3</sup> The Commission also requested comment on whether it should amend all orders issued exempting the trading and clearing of options on gold and silver

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<sup>1</sup> 75 FR 19619 (April 15, 2010).

<sup>2</sup> 7 U.S.C. 1 *et seq.*

<sup>3</sup> 7 U.S.C. 6(c).

share-based products from CEA provisions and Commission regulations thereunder, to impose market and large trader reporting requirements under Commission regulations to the trading and clearing of the options in order to assist the Commission in monitoring and addressing, among other things, the effect on designated contract markets of trading in such products.<sup>4</sup>

DATES: Effective Date: June 14, 2010

FOR FURTHER INFORMATION CONTACT:

Robert B. Wasserman, Associate Director, 202-418-5092, [rwasserman@cftc.gov](mailto:rwasserman@cftc.gov), or Lois J. Gregory, Special Counsel, 202-418-5569, [lgregory@cftc.gov](mailto:lgregory@cftc.gov), Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21<sup>st</sup> Street, NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

**I. Introduction**

The OCC is both a Derivatives Clearing Organization (“DCO”) registered pursuant to Section 5b of the CEA,<sup>5</sup> and a securities clearing agency registered pursuant to Section 17A of the Securities Exchange Act of 1934 (“the ‘34 Act”).<sup>6</sup>

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<sup>4</sup> The Commission has provided exemptions for gold and silver products in three prior cases. *See* Order Exempting the Trading and Clearing of Certain Products Related to SPDR® Gold Trust Shares, 73 FR 31981 (June 5, 2008), Order Exempting the Trading and Clearing of SPDR Gold Futures Contracts, 73 FR 31979 (June 5, 2008), and Order Exempting the Trading and Clearing of Certain Products Related to iShares® COMEX Gold Trust Shares and iShares® Silver Trust Shares, 73 FR 79830 (December 30, 2008).

<sup>5</sup> 7 U.S.C. 7a-1

<sup>6</sup> 15 U.S.C. 78q-1.

OCC has filed with the CFTC, pursuant to Section 5c(c) of the CEA and Commission Regulations 39.4(a) and 40.5 thereunder,<sup>7</sup> a request for approval of rules and rule amendments that would enable OCC (1) to clear and settle contracts called “options” (“Options”) on Gold and Silver Products traded on national securities exchanges, in its capacity as a registered securities clearing agency (and not in its capacity as a DCO) and (2) to clear and settle contracts called “security futures” (“Security Futures”) on Gold and Silver Products traded on designated contract markets<sup>8</sup> registered with the SEC as limited purpose national securities exchanges pursuant to Section 6(g) of the ’34 Act<sup>9</sup> (“DCMs”) as security futures subject to the CEA and CFTC regulations thereunder governing security futures, in OCC’s capacity as a registered securities clearing agency (and not in its capacity as a DCO).<sup>10</sup> Section 5c(c)(3) provides that the CFTC must approve such rules and rule amendments submitted for approval unless it finds that the rules or rule amendments would violate the CEA.

In each case, the shares of the ETFS Physical Swiss Gold Shares and the ETFS Physical Silver Shares are designed to reflect the performance of the price of gold and silver bullion, respectively, less the expenses of operations. The shares represent entitlement to a specified quantity of physical gold or silver bullion, or, in certain circumstances, the proceeds from the sale of such quantity of such physical gold or silver bullion.

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<sup>7</sup> 7 U.S.C. 7a-2(c), 17 C.F.R. §§39.4(a), 40.5.

<sup>8</sup> See Section 5 of the CEA, 7 U.S.C. 7.

<sup>9</sup> 15 U.S.C. 78f(g).

<sup>10</sup> See Securities Exchange Act Release No. 61591 (February 25, 2010), 75 FR 9981 (March 4, 2010)(File No. SR-OCC-2009-20 filed with both the Commission and the Securities and Exchange Commission (“SEC”). See also Securities Exchange Act Release No. 61483 (February 3, 2010), 75 FR 6753 (February 10, 2010)(SEC approval of securities exchanges’ listing and trading options on ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares).

The gold and silver bullion is held in vault by or on behalf of the custodian. All physical gold and silver conforms to the London Bullion Market Association's rules for good delivery.

## II. Section 4(c) of the Commodity Exchange Act

Section 4(c)(1) of the CEA empowers the CFTC to "promote responsible economic or financial innovation and fair competition" by exempting any transaction or class of transactions from any of the provisions of the CEA (subject to exceptions not relevant here) where the Commission determines that the exemption would be consistent with the public interest.<sup>11</sup> The Commission may grant such an exemption by rule, regulation or order, after notice and opportunity for hearing, and may do so on application of any person or on its own initiative.

Section 4(c) does not require the Commission determine the jurisdictional status of the Options and Security Futures on Gold and Silver Products. In enacting Section 4(c), Congress noted that the goal of the provision "is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner."<sup>12</sup> Permitting Options and

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<sup>11</sup> Section 4(c)(1) of the CEA, 7 U.S.C. 6(c)(1), provides in full that:

In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 7 of this title) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of this section (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a) of this section, or from any other provision of this chapter (except subparagraphs (c)(ii) and (D) of section 2(a)(1) of this title, except that the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D) of this title), if the Commission determines that the exemption would be consistent with the public interest.

<sup>12</sup> HOUSE CONF. REPORT NO. 102-978, 1992 U.S.C.C.A.N. 3179, 3213 ("4(c) Conf. Report").

Security Futures on Gold and Silver Products to trade on national securities exchanges (as to Options) and DCMs (as to Security Futures) and to be cleared by OCC in its capacity as a securities clearing agency, as discussed above, may foster both financial innovation and competition.

The Options and Security Futures on Gold and Silver Products described above are novel instruments. Given, among other things, the fact that the Commission has previously exempted similar Gold and Silver Products, the Commission believes that this is an appropriate case for issuing an exemption without issuing a finding as to the nature of these particular instruments.

Section 4(c)(2) provides that the Commission may grant exemptions only when it determines: that the requirements for which an exemption is being provided should not be applied to the agreements, contracts or transactions at issue, and the exemption is consistent with the public interest and the purposes of the CEA; that the agreements, contracts or transactions will be entered into solely between appropriate persons; and that the exemption will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory responsibilities under the CEA.<sup>13</sup>

In the April 15, 2010 Federal Register release, the CFTC requested comment as to whether this exemption from the requirements of the CEA and regulations thereunder should be

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<sup>13</sup> Section 4(c)(2) of the CEA, 7 U.S.C. 6(c)(2), provides in full that:

The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) of this section unless the Commission determines that--

(A) the requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and

(B) the agreement, contract, or transaction—

(i) will be entered into solely between appropriate persons; and

(ii) will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act.

granted in the context of these transactions. The CFTC also requested comment as to whether national securities exchanges that list Options on Gold and Silver Products should comply with market reporting requirements and brokers and traders that carry accounts or trade in Options on Gold and Silver products should comply with large trader reporting requirements.<sup>14</sup>

Five comments were received: One from OCC, two from national securities exchanges,<sup>15</sup> and two from private citizens.<sup>16</sup> Two of the comments (OCC and CBOE) support the current exemption, but urge the Commission to deal with the status of commodity-based ETFs on a categorical rather than a case-by-case basis. The Commission will consider this suggestion.

OCC and CBOE also argue that any large trader reporting requirements imposed by the Commission would result in unnecessary and duplicative regulatory burdens, while ISE (which also supports the proposed exemption) notes that securities options exchanges have large option position reporting requirements in place, and that the Commission should consider coordinating these protections between markets in order to address its concern regarding the effective regulation of interconnected markets. By contrast, one public commenter (who opposes granting the exemption) suggests that, if the exemption is granted, it is crucial that reporting requirements be imposed. The Commission will consider these comments in deciding what action to take and or to propose with respect to market and large trader reporting for the trading and clearing of Options Gold and Silver Products and similar options on gold and silver products for which exemptions have previously been granted.<sup>17</sup>

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<sup>14</sup> See Parts 15 through 21 of the Commission's regulations.

<sup>15</sup> Chicago Board Options Exchange (CBOE) and International Securities Exchange (ISE).

<sup>16</sup> All five comments are available on the Commission's website, under comment file 10-04, at <http://www.cftc.gov/LawRegulation/PublicComments/10-004.html>.

<sup>17</sup> See footnote 4, *supra*. The other public commenter submitted an article suggesting that the silver and gold futures markets were being manipulated. There was no reference, however, to Options on Gold or Silver Products.

#### **IV. Findings and Conclusions**

After considering the complete record in this matter, the Commission has determined that the requirements of Section 4(c) have been met. First, the exemption is consistent with the public interest and with the purposes of the CEA, including “promot[ing] responsible innovation and fair competition among boards of trade, other markets and market participants.”<sup>18</sup>

Particularly in light of the exemptions previously granted by the Commission with respect to Options and Security Futures on Gold and Silver Products, it appears consistent with these and the other purposes of the CEA, and with the public interest, for the mode of trading and clearing these Options and Security Futures – whether the mode applicable to options on securities or commodities, or to security futures or futures – to be determined by competitive market forces.

Second, Options and Security Futures on Gold and Silver Products will be entered into solely between appropriate persons. Section 4(c)(3) includes within the term “appropriate persons” a number of specified categories of persons, and also in subparagraph (K) thereof “such other persons that the Commission determines to be appropriate in light of ... the applicability of appropriate regulatory protections.” National securities exchanges and OCC, as well as their members who will intermediate Options on Gold and Silver Products, are subject to extensive and detailed regulation by the SEC under the ‘34 Act. Similarly, DCMs and OCC, as well as their members who will intermediate Security Futures on Gold and Silver Products, are subject to regulation by the SEC and CFTC. Given that the Options and Security Futures on Gold and Silver Products will be traded on national securities exchanges (as to Options) and DCMs (as to Security Futures), the regulatory protections available under securities laws and regulations governing security futures, and the goal of promoting fair competition, the Options and Security

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<sup>18</sup> CEA §3(b), 7 U.S.C. §5(b). *See also* CEA §4(c)(1), 7 U.S.C. §6(c)(1) (purpose of exemptions is “to promote responsible economic or financial innovation and fair competition.”).

Futures on Gold and Silver Products will be traded by appropriate persons.

Third, in light of the previous exemptions granted for similar gold and silver products, the grant of this exemption would not have a material adverse effect on the ability of the Commission or any DCM to carry out their regulatory responsibilities under the CEA.

Therefore, upon due consideration, pursuant to its authority under Section 4(c) of the CEA, the Commission hereby issues this Order and exempts the trading of Options on Gold and Silver Products on national securities exchanges and the trading of Security Futures on Gold and Silver Products on DCMs registered with the SEC as limited purpose national securities exchanges, and the clearing of both the Options and Security Futures through the Options Clearing Corporation (“OCC”) in its capacity as a registered securities clearing agency, from the provisions of the CEA and the regulations thereunder, to the extent necessary to permit the Options and Security Futures to be so traded and cleared.

This Order is subject to termination or revision, on a prospective basis, if the Commission determines upon further information that this exemption is not consistent with the public interest. If the Commission believes such exemption becomes detrimental to the public interest, the Commission may revoke this Order on its own motion.

## **V. Related Matters**

### **A. Paperwork Reduction Act**

The Paperwork Reduction Act of 1995 (“PRA”)<sup>19</sup> imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The proposed exemptive order would not,

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<sup>19</sup> 44 U.S.C. 3507(d).

if approved, require a new collection of information from any entities that would be subject to the proposed order.

**B. Cost-Benefit Analysis**

Section 15(a) of the CEA,<sup>20</sup> as amended by Section 119 of the Commodity Futures Modernization Act of 2000, requires the Commission to consider the costs and benefits of its action before issuing an order under the CEA. By its terms, Section 15(a) as amended does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs. Rather, Section 15(a) simply requires the Commission to “consider the costs and benefits” of its action.

Section 15(a) of the CEA further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

The Commission has considered the costs and benefits of the order in light of the specific provisions of Section 15(a) of the CEA, as follows:<sup>21</sup>

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<sup>20</sup> 7 U.S.C. 19(a).

<sup>21</sup> See also Previous Orders, 73 FR at 31982 (June 5, 2008), 73 FR at 3 FR at 31980 (June 5, 2008), and 73 FR at 79832 (December 30, 2008).

1. Protection of market participants and the public. National securities exchanges, OCC, and their members who would intermediate the above-described Options and Security Futures on Gold and Silver Products are subject to extensive regulatory oversight.

2. Efficiency, competition, and financial integrity. The exemptive order may enhance market efficiency and competition since it could encourage potential trading of Options and Security Futures on Gold and Silver Products through modes other than those normally applicable; that is, designated contract markets or derivatives transaction execution facilities. Financial integrity will not be affected since the Options and Security Futures on Gold and Silver Products will be cleared by OCC, a DCO and SEC-registered clearing agency, intermediated by SEC-registered broker-dealers.

3. Price discovery. Price discovery may be enhanced through market competition.

4. Sound risk management practices. The Options and Security Futures on Gold and Silver Products will be subject to OCC's current risk-management practices including its margining system. In addition, OCC is supervised by both the SEC and the Commission, and the Commission has found OCC's risk management practices, including its margining system, generally sound.<sup>22</sup>

5. Other public interest considerations. The exemptive order appears likely to encourage development of derivative products through market competition without unnecessary regulatory burden.

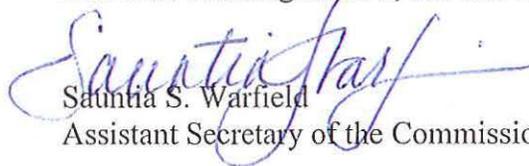
The Commission requested comment on its application of these factors in the proposing release. As noted above, one comment was received.

After considering these factors, the Commission has determined to issue this order.

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<sup>22</sup> One commenter questioned whether the Commission's conclusions regarding sound risk management practices at OCC were unduly reliant on supervision by others. In fact, the Commission itself conducts supervision of OCC and its risk management practices.

Issued in Washington, DC, on June 14, 2010 by the Commission.

  
Sauntia S. Warfield  
Assistant Secretary of the Commission