

COMMODITY FUTURES TRADING COMMISSION

Order exempting the trading and clearing of certain products related to SPDR® Gold Trust Shares

AGENCY: Commodity Futures Trading Commission

SUMMARY: On April 23rd, 2008, the Commodity Futures Trading Commission (“CFTC” or the “Commission”) published for public comment in the Federal Register¹ a proposal to exempt the trading and clearing of products called options on streetTRACKS® Gold Trust Shares (“ST Gold Options”), proposed to be traded on national securities exchanges, and cleared by The Options Clearing Corporation (“OCC”), from the provisions of the Commodity Exchange Act (“CEA”)² and Commission regulations thereunder to the extent necessary for them to be so traded and cleared. The Commission has determined to issue this Order essentially as proposed. Authority for this exemption is found in Section 4(c) of the CEA.³

ACTION: Final Order.

DATES: Effective Date: May 30, 2008.

FOR FURTHER INFORMATION CONTACT:

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¹73 Fed. Reg. 21917 (April 23, 2008)

² 7 U.S.C. §§ 1 *et seq.*

³ 7 U.S.C. §6(c).

SUPPLEMENTARY INFORMATION:

I. Introduction

The OCC is both a Derivatives Clearing Organization (“DCO”) registered pursuant to Section 5b of the CEA,⁴ and a securities clearing agency registered pursuant to Section 17A of the Securities Exchange Act of 1934 (“the ‘34 Act”).⁵

OCC filed with the CFTC, pursuant to Section 5c(c) of the CEA and Commission Regulations 39.4(a) and 40.5 thereunder,⁶ requests for approval of rules and rule amendments that would enable OCC to clear and settle ST Gold Options⁷ traded on national securities exchanges in its capacity as a registered securities clearing agency regulated by the Securities and Exchange Commission (“SEC”) (and not in its capacity as a DCO).⁸ Section 5c(c)(3) provides that the CFTC must approve any such rules and rule amendments submitted for approval unless it finds that the rules or rule amendments would violate the CEA.

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. The

⁴ 7 U.S.C. §7a-1

⁵ 15 U.S.C. §78q-1.

⁶ 7 U.S.C. §7a-2(c), 17 C.F.R. §§39.4(a), 40.5.

⁷ streetTRACKS® Gold Trust Shares, which underlie ST Gold Options, are described in greater detail in the “Proposed Exemptive Order for ST Gold Futures Contracts,” 73 F.R. 13867, 13868 (March 14, 2008). On May 20, 2008, streetTRACKS® Gold Trust Shares were renamed SPDR® Gold Trust Shares. See Prospectus for SPDR® Gold Trust, available at <http://www.spdrgoldshares.com/pdf/SPDRGoldTrustProspectus.pdf> (reviewed May 22, 2008).

⁸ The request for approval concerning the ST Gold Options was filed effective February 4, 2008, and Amendment No. 1 thereto was filed effective March 7, 2008. See SR-OCC-2008-04 and Amendment No. 1. OCC has also filed these proposed rule changes with the SEC. See SEC Release No. 34-57695; File No. SR-OCC-2008-07 (April 21, 2008), 73 FR 22452 (April 25, 2008). On May 22, 2008, OCC filed Amendment No. 2 to the request for approval, reflecting the change in the name of streetTRACKS® Gold Trust Shares.

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.

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.”⁹ Permitting ST Gold Options to trade on national securities exchanges and be cleared on OCC as discussed above appears likely to foster both financial innovation and competition. In accordance with the Memorandum of Understanding entered into between the CFTC and the Securities and Exchange Commission (“SEC”) on March 11, 2008, and in particular the addendum thereto concerning *Principles Governing the Review of Novel Derivative Products*, the Commission believes that novel derivative products that implicate areas of overlapping regulatory concern should be permitted to trade in either or both a CFTC- or SEC-regulated environment, in a manner consistent with laws and regulations (including the appropriate use of all available exemptive and interpretive authority).

ST Gold Options are novel instruments and, given their potential usefulness to the market, the Commission believes that this is an appropriate case for issuing an exemption without making 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

⁹ HOUSE CONF. REPORT NO. 102-978, 1992 U.S.C.C.A.N. 3179, 3213 (“4(c) Conf. Report”).

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.

In the April 23, 2008 Federal Register Release, the Commission requested public comment on the matters discussed above and all issues raised by its proposed exemptive order. No comments were received.

III. 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.”¹⁰ It appears to be consistent with these and the other purposes of the CEA, with the public interest, with the CFTC-SEC Memorandum of Understanding of March 11, 2008, and with the addendum thereto, for the mode of trading of these transactions – whether it is to be through CFTC-regulated markets and clearing organizations or SEC-regulated markets and clearing agencies – to be determined by competitive market forces.

Second, the ST Gold Options 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, but also in subparagraph (K), “such other persons that the Commission determines to be appropriate in light of . . . the applicability of appropriate regulatory protections.” National securities exchanges, OCC and broker-dealers who will intermediate transactions in ST Gold Options are subject to extensive and detailed oversight by the SEC and, in the case of the intermediaries, the securities self-regulatory organizations. Given that the products will be

¹⁰ CEA Section 3(b), 7 U.S.C. 5(b).

traded on national securities exchanges, the regulatory protections available under the securities laws, and the goal of promoting fair competition, the ST Gold Options will be traded by appropriate persons.

Third, the exemption would not have a material adverse effect on the ability of the Commission or any designated contract market to carry out their regulatory responsibilities under the CEA. There is no reason to believe that granting an exemption here would interfere with the Commission's or a designated contract market's ability to oversee the trading of similar products or otherwise carry out their duties.

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 ST Gold Options on national securities exchanges and clearing of ST Gold Options by OCC in its capacity as a registered securities clearing agency from the CEA and the Commission's Regulations thereunder to the extent necessary to permit them 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.

IV. Related Matters

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")¹¹ 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 exemptive order will not require a

¹¹ 44 U.S.C. § 3507(d).

new collection of information from any entities.

B. Cost-Benefit Analysis

Section 15(a) of the CEA, as amended by Section 119 of the Commodity Futures Modernization Act of 2000 (“CFMA”),¹² 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:

1. Protection of market participants and the public. National securities exchanges, OCC and their members who will intermediate ST Gold Options are subject to extensive regulatory oversight.
2. Efficiency, competition, and financial integrity. The exemptive order appears likely to enhance market efficiency and competition since it could encourage potential trading of

¹² 7 U.S.C. § 19(a).

ST Gold Options on markets other than designated contract markets or derivative transaction execution facilities. Financial integrity will not be affected since the ST Gold Options will be cleared by OCC, a DCO and SEC-registered clearing agency, and intermediated by SEC-registered broker-dealers.

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

4. Sound risk management practices. The ST Gold Options will be subject to OCC's current risk-management practices including its margining system.

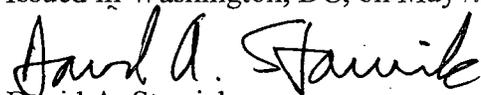
5. Other public interest considerations. The exemptive order appears likely to encourage development of derivative products through market competition without unnecessary regulatory burden.

The Commission requested comment on its application of these factors in the proposing release. No comments were received.

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

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Issued in Washington, DC, on May 30, 2008 by the Commission.



David A. Stawick
Secretary of the Commission

Dissenting in Part and Concurring in Part

to

Exemptive Order under Section 4(c) of the Commodity Exchange Act (CEA) to exempt certain products related to SPDR ® Gold Trust Shares traded on a national securities exchange and cleared by the Options Clearing Corporation (OCC) from provisions of the CEA, and approval of OCC's request for approval of rules

I applaud the agencies' efforts today to enhance cooperation and coordination in approving innovative and novel products. I respectfully dissent, however, from the Commission's issuance of the above-referenced order. In the promulgation of such an exemptive order in furtherance of the approval process, I believe the Commission should have adequate basis for confidence that the Securities and Exchange Commission will similarly fully exercise its broad statutory exemptive authority under the securities laws to permit futures exchanges to trade products that are economically equivalent to those that are or may be approved for trading on national securities exchanges, and to allow derivatives clearing organizations to clear such products, to ensure that the futures markets are not competitively disadvantaged with regard to such products. I dissent from today's action, because I do not believe this exemptive order provides sufficient basis for or assurance of such reciprocity in the future. Given the issuance of today's exemptive orders, I concur in the approval of the Options Clearing Corporation's above-referenced request.

Bart Chilton, Commissioner
Commodity Futures Trading Commission