



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5000
www.cftc.gov

Division of Clearing and Risk

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Staff Advisory Relating to the Clearing of Options on Spot Commodity Exchange Traded Funds (ETFs)

The Division of Clearing and Risk (“Division” or “DCR”) of the Commodity Futures Trading Commission (“Commission”) is issuing this advisory (“Advisory”) regarding the clearing of options on various spot commodity-based exchange traded fund (“Spot Commodity ETF”) share products.

The Division notes that Spot Commodity ETF shares based on various precious metals have been listed and traded on national securities exchanges since 2004.¹ In addition, since January 2024,² Spot Commodity ETF shares based on bitcoin have been listed and traded on national securities exchanges with the Securities and Exchange Commission (“SEC”) recently approving Spot Commodity ETF shares on ethereum in May 2024.³ In connection with the listing and trading of the Spot Commodity ETF shares, national securities exchanges typically seek to list and trade options on the shares of Spot Commodity ETF shares to provide market participants with the ability to hedge their positions and portfolios.⁴ The clearing and settlement

¹ See e.g. Securities Exchange Act Release Nos. 50603 (October 28, 2004), 69 FR 64614 (November 5, 2004) (approval of the listing and trading of streetTRACKS Gold Shares); 51058 (January 19, 2005), 70 FR 3749 (January 26, 2005) (approval of the iShares COMEX Gold Trust (IAU)); 53521 (March 20, 2006), 71 FR 14967 (March 24, 2006) (approval of the iShares Silver Trust (SLV)); 59781 (April 17, 2009), 74 FR 18771 (April 24, 2009) (approval of the ETFS Silver Trust); 59895 (May 8, 2009), 74 FR 22993 (May 15, 2009) (approval of the ETFS Gold Trust); 61220 (December 22, 2009), 74 FR 68895 (December 29, 2009) (approval of ETFS Palladium) and 60970 (November 9, 2009), 74 FR 59319 (November 17, 2009) (approval of ETFS Platinum).

² See SEC Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Bitcoin-Based Commodity-Based Trust Shares and Trust Units, Securities Exchange Act Release No. 99306 (January 10, 2024), 89 FR 3008 (January 17, 2024).

³ See SEC Order Granting Accelerated Approval of Proposed Rule Changes, as Modified by Amendments Thereto, To List and Trade Shares of Ether-Based Exchange-Traded Products, Securities Exchange Act Release No. 100224 (May 23, 2024), 89 FR 46937 (May 30, 2024).

⁴ See e.g. Notice of Filing of a Proposed Rule Change To Permit Cboe To List and Trade Options on ETPs That Hold Bitcoin, Securities Exchange Act Release No. 99395 (January 19, 2024), 89 FR 5075 (January 25, 2024); MIAAX Notice of Filing of a Proposed Rule Change To Amend Exchange Rule 402, Criteria for Underlying Securities, Securities Exchange Act Release No. 34-99394 (January 19, 2024), 89 FR 5079 (January 25, 2024); MIAAX Pearl Notice of Filing of a Proposed Rule

of these ETF options is performed by the Options Clearing Corporation (“OCC”) as the sole issuer of all equity options.

It is the Division’s understanding that Spot Commodity ETFs do not trade in commodity interests;⁵ that the shares are registered with the SEC as securities, typically on SEC Forms S-1 and 8-A, and that shares of the ETF are listed and traded on a national securities exchange that is registered with the SEC.⁶

In contrast, staff notes that this Advisory is not directed to, and therefore, not applicable to shares of commodity pool ETFs. These ETF shares are equity interests issued by ETFs that trade directly or indirectly in commodity interests⁷ including (i) futures contracts, (ii) contracts, agreements or transactions subject to a Commission regulation under section 4c or 19 of the Act; (iii) contracts, agreements or transactions subject to Commission jurisdiction under section 2(c)(2) of the Act; and (iv) swaps.⁸

Previously, the Commission has permitted the listing and trading of options and futures on certain spot precious metals ETF shares through various exemptive orders pursuant to Section 4(c) of the Commodity Exchange Act (“CEA”).⁹ In each instance, the Commission did not make any finding that options were securities or commodities subject to the CEA but instead reserved making any affirmative determination as to whether Spot Commodity ETF shares were either commodities or securities.¹⁰ Although the Commission previously did not affirmatively determine whether options on Spot Commodity ETFs are “securities,” staff believes that it is

Change To Amend Exchange Rule 402, Criteria for Underlying Securities, Securities Exchange Act Release No. 34-99394 (January 19, 2024), 89 FR 5058 (January 25, 2024); and Nasdaq Stock Market LLC Notice of Filing of Amendment No. 1 to a Proposed Rule Change To List and Trade Shares of the iShares Bitcoin Trust Under Nasdaq Rule 5711(d), Securities Exchange Act Release No. 99295 (January 8, 2024), 89 FR 2321 (January 12, 2024).

⁵ See 17 CFR 1.3.

⁶ In general, commodity-based ETF shares are shares (a) that are issued by a trust (“Trust”) that holds a commodity or commodities deposited with the Trust; (b) that is issued by the Trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (c) that, when aggregated in the same specified minimum number, may be redeemed at a holder’s request by such Trust, which will deliver to the redeeming holder the quantity of the underlying commodity.

⁷ See 17 CFR 1.3.

⁸ See *e.g.* SEC Order Granting Approval of a Proposed Rule Change Relating to the Definition of Fund Share and Options on Commodity Pool ETFs, Securities Exchange Act Release No. 55152 (January 23, 2007), 72 FR 4763 (February 1, 2007); SEC Order Granting Approval of Proposed Rule Change Relating to Options Based on Commodity Pool ETFs, Securities Exchange Act Release No. 55547 (March 28, 2007) 64 FR 16388 (April 4, 2007) and CFTC Final Rule Granting Relief From Compliance With Certain Disclosure, Reporting and Recordkeeping Requirements for Registered CPOs of Commodity Pools Listed for Trading on a National Securities Exchange, 76 FR 28641 (May, 18, 2011).

⁹ See Exemptive Order for SPDR® Gold Futures Contracts, 73 FR 31979 (June 5, 2008); 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 Certain Products Related to iShares® COMEX Gold Trust Shares and iShares® Silver Trust Shares, 73 FR 79830 (Dec. 30, 2008); Order Exempting the Trading and Clearing of Certain Products Related to ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares, 75 FR 37406 (June 29, 2010). In addition, the Commission has also permitted the trading of options and futures on a volatility index based on spot gold, *see* Order Exempting the Trading and Clearing of Certain Products Related to the CBOE Gold ETF Volatility Index and Similar Products, 75 FR 81977 (Dec. 29, 2010).

¹⁰ See CFTC, Request for Comment on Options for a Proposed Exemptive Order Relating to the Trading and Clearing of Precious Metal Commodity-Based ETFs; Concept Release, 75 FR 60411, 60413 (Sept. 30, 2010) and *supra* note 8.

substantially likely that shares of Spot Commodity ETFs (and the corresponding options) would judicially be held to be a security based on the statutory framework of the securities laws and various court precedents.¹¹

Because staff believes (as noted above) that it is substantially likely that Spot Commodity ETF shares would be held to be securities, we believe that these shares listed on SEC registered national securities exchanges do not implicate the Commission's jurisdiction, and therefore, the clearing of these options by OCC would be undertaken in its capacity as a registered clearing agency¹² subject to SEC oversight. Accordingly, it is the staff's position that the Commission does not have any more role regarding the clearing of these options on the part of OCC than with regard to OCC's clearing of any security.

This Advisory is intended to reflect the views of the staff of the Division relating to the clearing of options on Spot Commodity ETF shares. It is not intended to create any enforceable rights or any new binding rules or regulations, or an amendment to existing rules or regulations. This Advisory represents only the views of DCR staff and does not necessarily represent the views of the Commission or of any other Division or Office of the Commission. If you have any questions regarding this matter, please contact Clark Hutchison at c_hutchison@cftc.gov.

¹¹ See *e.g.* *Reves v. Ernst & Young*, 494 U.S. 56, 66 (1990); *Pollack v. Laidlaw Holdings, Inc.*, 27 F.3d 808 (2d Cir. 1994); *Gary Plastic Packaging Corp. v. Merrill, Lynch, Pierce, Fenner & Smith*, 756 F.2d 230 (2d Cir. 1985); *U.S. v. Tucker*, 345 F.3d 320 (5th Cir. 2003); and *Battig v. Simon*, 237 F.Supp.2d 1139 (D. Or. 2001). See also *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) and *Glen-Arden Commodities, Inc. v. Constantino*, 493 F.2d 1027 (2nd Cir. 1974).

¹² See Section 3(a)(23)(A) of the Exchange Act of 1934 ("Exchange Act") and Exchange Act Rule 17Ab2-1.