

**SUPPLEMENTARY INFORMATION:** The PTs will meet to discuss the following agenda items.

**January 15, 2009, 1 p.m. to 4 p.m. (HST)**

1. Introductions
2. Review draft "Risk Ranked" list of management unit species by Archipelago
  - a. American Samoa
  - b. Commonwealth of the Northern Mariana Islands
  - c. Guam
  - d. Hawaii & Pacific Remote Island Areas
3. Establishment of annual catch limits (ACLs) for non-pelagic species with known maximum sustainable yield (MSY) values
4. Emerging issues
5. Plan Team Discussion and Recommendations
6. Other Business

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

**Special Accommodations**

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kitty M. Simonds, (808) 522-8220 (voice) or (808) 522-8226 (fax), at least 5 days prior to the meeting date.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: December 23, 2008.

**Tracey L. Thompson,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*  
[FR Doc. E8-30989 Filed 12-29-08; 8:45 am]

**BILLING CODE 3510-22-S**

**COMMODITY FUTURES TRADING COMMISSION**

**Order Exempting the Trading and Clearing of Certain Products Related to iShares® COMEX Gold Trust Shares and iShares® Silver Trust Shares**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final order.

**SUMMARY:** On November 12, 2008, 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 iShares® COMEX Gold Trust Shares ("Gold Products") and iShares® Silver Trust Shares ("Silver Products") (collectively, "Gold and Silver Products") 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 traded and cleared as described below. The contracts are proposed to 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 both cases to be cleared through the Options Clearing Corporation ("OCC") in its capacity as a registered securities clearing agency. Authority for this exemption is found in Section 4(c) of the CEA.<sup>3</sup>

**DATES:** *Effective Date:* December 3, 2008

**FOR FURTHER INFORMATION CONTACT:**

Robert B. Wasserman, Associate Director, 202-418-5092, [rwasserman@cftc.gov](mailto:rwasserman@cftc.gov), Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st 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>4</sup> and a securities clearing agency registered pursuant to Section 17A of the Securities Exchange Act of 1934 ("the '34 Act"),<sup>5</sup>

OCC filed with the CFTC, pursuant to Section 5c(c) of the CEA and Commission Regulations 39.4(a) and 40.5 thereunder,<sup>6</sup> requests 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>7</sup> registered with the SEC as limited purpose national securities exchanges pursuant to Section 6(g) of the '34 Act<sup>8</sup> ("DCMs") as security futures subject to the CEA and CFTC regulations thereunder governing security futures, in both cases in OCC's capacity as a registered securities clearing agency (and not in its capacity as a DCO).<sup>9</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.

The request for approval concerning the Options and Security Futures on Gold and Silver Products was filed effective July 23, 2008. By letter dated August 20, 2008, the Director of the Division of Clearing and Intermediary Oversight, pursuant to delegated authority, extended the review period of the request until October 21, 2008 due to the novel and complex issues raised by the products that are the subject of the request. By letters dated October 16, 2008 and November 19, 2008, OCC consented to extensions of the review period, ultimately until December 3, 2008.

**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>10</sup> The Commission

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

<sup>8</sup> 15 U.S.C. 78ff(g).

<sup>9</sup> See SR-OCC-2008-13 and SR-OCC-2008-14. OCC has also filed these proposed rule changes with the Securities and Exchange Commission ("SEC").

<sup>10</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

<sup>1</sup> 73 FR 66847 (November 12, 2008).

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

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

<sup>4</sup> 7 U.S.C. 7a-1

<sup>5</sup> 15 U.S.C. 78q-1.

<sup>6</sup> 7 U.S.C. 7a-2(c), 17 CFR 39.4(a), 40.5.

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."<sup>11</sup> Permitting Options and Security Futures on Gold and Silver Products to trade on national securities exchanges (as to Options) and DCMs (as to Security Futures) and in both cases be cleared by OCC in its capacity as a securities clearing agency, 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 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).

The Options and Security Futures on Gold and Silver Products described above are novel instruments. Given, among other things, 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

(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>11</sup> HOUSE CONF. REPORT NO. 102-978, 1992 U.S.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.<sup>12</sup>

In the November 12, 2008 **Federal Register** release, the CFTC requested comment as to whether this exemption from the requirements of the CEA and regulations thereunder should be granted in the context of these transactions. 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."<sup>13</sup> It appears 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 and clearing the Options and Security Futures on Gold and Silver Products 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

<sup>12</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.

<sup>13</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.").

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 the applicable regulations governing security futures, and the goal of promoting fair competition, the Options and Security Futures on Gold and Silver Products will be traded by appropriate persons.

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

### IV. Related Matters

#### A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")<sup>14</sup> imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or

<sup>14</sup> 44 U.S.C. 3507(d).

sponsoring any collection of information as defined by the PRA. The exemptive order will not 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>15</sup> as amended by Section 119 of the Commodity Futures Modernization Act of 2000,<sup>16</sup> 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, DCMs, 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 appears likely to 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 to 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, and 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.

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.

\* \* \* \* \*

Issued in Washington, DC, on December 3, 2008 by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

**Commissioner Michael V. Dunn**

*Signing Statement*

#### **CFTC Recommendations in Connection With iShares® Silver Trust Shares and iShares® COMEX Gold Trust Shares**

According to the CFTC/SEC Memorandum of Understanding (MOU), each of our agencies “recognizes that enhanced coordination and cooperation concerning issues of common regulatory interest is necessary in order to foster market innovation and fair competition and to promote efficiency in regulatory oversight.” The CFTC/SEC MOU further states that “the agencies can facilitate the introduction of novel derivative products to market users and investors.” While the CFTC and SEC may be adhering to the words of their MOU, I am not certain that we are following the spirit of this document. I fear that it is no easier today for novel products to get to market than it was pre-MOU. I also fear that if this lack of cooperation and coordination continues, given today’s financial environment, both agencies will be doing a disservice to the markets we regulate and the investors we seek to protect. I believe that in order to foster true cooperation between the CFTC and SEC, we must hold joint public meetings so that each agency’s Chairmen and Commissioners set a tone

of cooperation for their staffs, and can be held accountable to those they serve if their coordination and cooperation does not foster the market innovation or efficiency the public demands.

Pending before the Commission are requests by the Options Clearing Corporation (“OCC”) for approval of OCC rules allowing them to clear iShares® Silver Trust Shares and iShares® Comex Gold Trust Shares, and an order pursuant to Section 4(c) of the Commodity Exchange Act (CEA) exempting the trading and clearing of the iShares Option and Futures Contracts as options on securities and security futures.

The propriety of treating the iShares Option and Futures Contracts as options on securities and security futures depends on the status of the underlying iShares contracts as securities. While I have questions about the status of the underlying iShares contracts as securities, *see SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), I believe innovative products, in a regulated environment, should be brought to market in a timely fashion. If, *absent* the 4(c) exemptive order, the OCC rules are permitted to be deemed approved, an inference might be drawn concerning the status of the iShares Option and Futures Contracts as securities. Accordingly, I am voting to approve the 4(c) exemptive order and, based on the Commission’s approval of that order, to approve the OCC rules. While I vote to approve the exemptive order and OCC rules, it is my hope that in the future, greater cooperation between our agencies will facilitate the introduction of similar innovative products regardless of who develops them.

#### **Dissenting in Part and Concurring in Part to Exemptive Order Exempting the Trading and Clearing of Certain Products Related to iShares COMEX Gold Trust Shares and iShares Silver Trust Shares and Approval of Request for Approval of Rules**

As I have noted previously in a similar context, I applaud efforts to enhance cooperation and coordination in approving innovative and novel products, and it is my hope and expectation that such efforts will improve in the near future. I dissent, however, from the Commission’s issuance of the above-referenced order, because—as I have stated before—I believe the Commission’s issuance of such an order should be predicated upon assurance that the SEC will similarly exercise its broad statutory exemptive authorities under the securities laws to permit futures exchanges to trade products that are

<sup>15</sup> 7 U.S.C. 19(a).

<sup>16</sup> 7 U.S.C. 19(a).

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. My objective here is not to impair or impede the trading of such cross-jurisdictional products; rather, my concern is solely to ensure that futures markets are not in any way competitively disadvantaged. I dissent once again, as I have in the past, because I do not believe that we have up to this point reached the level of coordination and cooperation between our agencies that provides the assurance of such reciprocity. I look forward to working with colleagues at the SEC on such collaborative efforts promptly to achieve these goals. Given the issuance of the order, however, I concur in the approval of the request for approval of rules.

**Bart Chilton,**

*Commissioner, Commodity Futures Trading Commission.*

[FR Doc. E8-31110 Filed 12-29-08; 8:45 am]

BILLING CODE 6351-01-P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Docket ID DOD-2008-OS-0163]

### Privacy Act of 1974; System of Records

**AGENCY:** Office of the Secretary, DoD.

**ACTION:** Notice to Add a System of Records.

**SUMMARY:** The Office of the Secretary of Defense proposes to add a system of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

**DATES:** This proposed action would be effective without further notice on January 29, 2009 unless comments are received which result in a contrary determination.

**ADDRESSES:** Send comments to Chief, OSD/JS Privacy Office, Freedom of Information Directorate, Washington Headquarters Services, 1155 Defense Pentagon, Washington, DC 20301-1155.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cindy Allard at (703) 588-6830.

**SUPPLEMENTARY INFORMATION:** The Office of the Secretary of Defense notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was

submitted on December 17, 2008, to the House Committee on Oversight and Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, 'Federal Agency Responsibilities for Maintaining Records About Individuals', dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: December 18, 2008.

**Morgan E. Frazier,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

### DHRA 06

#### SYSTEM NAME:

National Security Education Program Records.

#### SYSTEM LOCATION:

National Security Education Program, 1101 Wilson Blvd., Suite 1210, Arlington, VA 22209-2248.

Institute of International Education, 1400 K Street, 6th floor, Washington, DC 20005.

Trident Systems, Inc., 10201 Fairfax Blvd., Suite 300, Fairfax, VA 22030.

#### CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who apply for the following scholarships or fellowships: David L. Boren Scholarships, English for Heritage Language Speakers Scholarships, David L. Boren Fellowships, and Flagship Fellowships.

#### CATEGORIES OF RECORDS IN THE SYSTEM:

Information collected on the online application and an award recipient includes not limited to: Title; full name; current address, city, state, and zip code; permanent address, city, state; Social Security Number (SSN); current telephone number and permanent telephone number; e-mail address; voting district; date of birth; country or state of birth; naturalization information; educational information; region, country, and language to be studied under award; other languages spoken; proficiency in language studied at time of award; overseas experience; relevant activities; honors and awards; government agencies of interest; proposed study abroad program information and budget; other scholarship funding information; gender; ethnicity; employer name and employer address; supervisor name, title, and telephone number; position title; employment dates and hours; language used in position; security clearance held for position; award type; date of award completion; graduation date; length of service requirement; date

of availability for work; information on veteran's preference, Federal employment history, and preferences with regard to being contacted by intelligence agencies; degree information; foreign language information; job history; overseas experience; other information e.g., special recognitions or memberships; special skills and qualifications; fieldwork or volunteer experience.

#### AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

50 U.S.C. 1901 *et. seq.*, as amended; Pub. L. 102-183, David L. Boren National Security Education Act of 1991; DoDD 1025.6, National Security Education Program; and E.O. 9397 (SSN).

#### PURPOSE(S):

To provide Americans with the resources and encouragement needed to acquire skills and experiences in areas of the world critical to the future security of nations in exchange for a commitment to seek work in the federal government. This will enable the National Security Education Program to select qualified applicants to be awarded National Security Education Program scholarships and fellowships.

#### ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To authorized federal hiring officials to facilitate the recruiting of National Security Education Program award recipients into federal service for the purpose of fulfilling National Security Education Program's mission.

To the Boren Forum, the non-profit National Security Education Program alumni organization to confirm the name, award year and type of award of National Security Education Program award recipients.

#### DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Disclosures pursuant to 5 U.S.C. 552a(b)(12) may be made from this system to 'consumer reporting agencies' as defined in the Fair Credit Reporting Act (14 U.S.C. 1681a(f)) or the Federal Claims Collection Act of 1966 (31 U.S.C. 3701(a)(3)). The purpose of this disclosure is to aid in the collection of outstanding debts owed to the Federal government, typically to provide an incentive for debtors to repay delinquent Federal government debts by