

THE OPTIONS CLEARING CORPORATION

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Mr. David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Proposal to Exempt, Pursuant to the Authority in Section 4(c) of the Commodity Exchange Act ("CEA") the Trading and Clearing of Certain Products Related to ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares

Dear Mr. Stawick:

This letter is submitted by The Options Clearing Corporation ("OCC") in response to the Commission's request for comment on its proposal to exempt, pursuant to Section 4(c) of the CEA, trading and clearing of options and security futures on the above-captioned two classes of exchange-traded fund shares (the "ETFs") that hold physical gold and physical silver, respectively.¹ The proposed exemptive order ("Proposed Order") would permit options on the ETFs to be traded on national securities exchanges as securities and futures on such ETFs to be traded as security futures, while allowing OCC to clear such products as securities and security futures, respectively, in its capacity as a registered securities clearing agency. As noted in the filing, OCC has filed a proposed rule change with the Commission for approval pursuant to Section 5c(c) of the CEA in order to confirm that clearing such options and security futures (collectively, the "Contracts") as securities rather than as commodity options and commodity futures subject to the Commission's exclusive jurisdiction would not be deemed to violate the CEA. OCC supports the adoption of the proposed exemption because it is our understanding that the Commission chooses to rely on the exemption as the basis for its approval of OCC's proposed rule change.

Notwithstanding our support for the issuance of the proposed exemption, there are certain aspects of the Release that OCC's finds troubling. The fundamental legal issue with respect to the proposed Contracts is whether the underlying ETFs are themselves securities. If they are, then options on such securities would be securities for purposes of the Securities Exchange Act of 1934 (the "Exchange Act") and outside the Commission's jurisdiction under Section

¹ 75 FR 19619-19622 (April 15, 2010) (the "Release").

2(a)(1)(C)(i) of the CEA. Similarly, futures on them would be security futures subject to the joint jurisdiction of the SEC and CFTC. While we recognize that arguments can and have been made concerning the status of the underlying ETFs, OCC strongly believes that they are securities both because they are investment contracts within the meaning of that term as used in the Exchange Act and because essentially identical ETFs have been traded on securities exchanges and sold by registered broker-dealers to securities customers for several years and are commonly known as securities. While we recognize that a contrary characterization is possible, we do not believe that it is appropriate for the Commission to continue to deal with these contracts on a case-by-case basis by requiring a separate filing for each new brand of ETF or each new underlying interest. No new issues are raised by these Contracts. No legitimate regulatory purpose is served by requiring these case-by-case filings. See comments contained in the recent joint letter from OCC's Chairman and the Chairman of the Chicago Board Options Exchange to Chairman Gensler and Chairman Schapiro.² By imposing unnecessary delay and expense in bringing these products to market, this practice frustrates the goal of the 4(c) exemption as 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."

The first two questions on which comment was requested in the Release (whether the exemptions should be granted in the context of these transactions and whether all persons trading these Contracts are appropriate persons) have been asked and answered in connection with the Commission's issuance of its previous exemptive orders. There is nothing to add in the present context.

For the first time in this Release, the Commission asks whether it should amend all previous exemptive orders to impose market and large trader reporting requirements in order to assist it in monitoring and addressing, among other things, the effect on designated contract markets of trading in such products. While we do not here take a view as to what information the Commission needs to carry out its regulatory responsibilities, we strongly urge that it would be inappropriate to unilaterally impose these requirements under the CEA and thus create overlapping and potentially duplicative regulation. Consistent with the Memorandum of Understanding referred to in the Commission's release and with recent mandates to harmonize SEC and CFTC regulation, we strongly urge the Commission to work with the SEC through the harmonization process to consider the need for any additional reporting requirements.

On a different point, we note the description in the Release of the options on these underlying interests as "certain contracts called 'options.'" While this formulation has appeared in prior releases, we find it very troubling. The options in question are plain vanilla standardized options with terms identical to standardized options on other exchange-traded equity securities. By referring to them as "contracts called options" the Commission apparently seeks to cast doubt on whether they are properly characterized as options and thus to open yet another avenue through which to raise a jurisdictional question. We believe that this is entirely inappropriate. In OCC's view, the CFTC should be expending its efforts toward creating jurisdictional certainty and not gratuitously raising questions concerning the characterization of contracts that have traded as securities for more than thirty years.

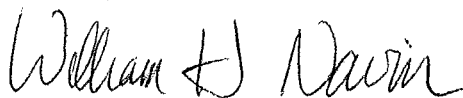
² Letter dated April 15, 2010.

CFTC proposes to exempt security futures “from those provisions of the [CEA and regulations thereunder] that, if the underlying were considered to be a commodity that is not a security, would be inconsistent with the trading and clearing of Security Futures on Gold and Silver Products as security futures.” This implies that the CFTC does not propose to exempt security futures on gold and silver ETFs from provisions of the CEA and regulations whose application would be consistent with the trading of such futures as security futures. But what would those provisions be? Security futures are already subject to joint jurisdiction and, to date, have been traded only on fully-registered futures exchanges. It should not be necessary to apply provisions of the CEA or rules thereunder beyond those already applicable to security futures.

The Commission also states that it is considering the question of whether exemptions for options and security futures on gold and silver ETFs “may interfere with the Commission’s ability to discharge its regulatory responsibilities . . . or with the self-regulatory duties of contract markets.” The Commission states that “physical and derivatives gold and silver markets” are highly interconnected, and that trading in options on a national securities exchange, if traded in sufficient volumes, can significantly affect the price discovery function of related commodity futures and option contracts.” We are not aware of any interference with the Commission’s jurisdiction that has resulted from trading in options on gold and silver ETFs, and the basis on which the Commission identifies trading in options on the ETFs rather than in the ETFs themselves as creating such interference is unstated.

OCC respects the statutory responsibilities of the Commission and in no way seeks to avoid oversight by the Commission with respect to products within its jurisdiction. We wish simply to urge the Commission to be constructive in working with the SEC to define the boundaries of the respective jurisdictions of the two agencies and to avoid calling into question long-settled interpretations and characterizations having jurisdictional significance. Where exemptive actions are taken as a means to avoid jurisdictional determination, we strongly urge that the Commission not initiate a new practice of partial exemptions while attempting to exercise its own jurisdiction over the same products in a unilateral manner that we believe is certain to result in further jurisdictional tension between the agencies and unnecessary regulatory burdens and inefficiencies.

Sincerely,



William H. Navin
Executive Vice President and General Counsel
The Options Clearing Corporation

cc: Robert B. Wasserman
Lois J. Gregory