



Edward J. Joyce
President and
Chief Operating Officer

Phone: 312 786-7310
Fax: 312 786-7407
joyce@cboe.com

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Via Electronic Submission

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

Re: Request for Comment to Exempt the Clearing of Certain Products Related to ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares

Dear Mr. Stawick:

The Chicago Board Options Exchange, Incorporated ("CBOE") is commenting on the release ("Release") by the Commodity Futures Trading Commission ("CFTC") regarding the proposal by The Options Clearing Corporation ("OCC") to clear options and security futures on each of the ETFS Gold Trust and ETFS Silver Trust (collectively, the "Trusts").¹ As we discuss in detail in this letter, the options on the Trusts clearly are options on securities. As such, they are within the exclusive jurisdiction of the Securities and Exchange Commission ("SEC"). Nevertheless, to prevent any legal uncertainty, we urge the CFTC to issue the exemptions requested by OCC as soon as possible, because the underlying securities are registered and approved for trading by the SEC and because this past February the SEC approved CBOE to list and trade the products² and OCC to issue and clear the products.³ In addition, we feel strongly that no new reporting requirements should be imposed as a condition of an exemption. Finally, we urge the CFTC to adopt a generic exemptive process by which OCC does not need to seek an exemption for every new option on an exchange-traded fund ("ETF").

OCC has filed with the CFTC a request for approval to clear and settle options on the Trusts. Even though, as discussed below, the products are options on securities, and thus within the exclusive jurisdiction of the SEC, OCC is obligated to submit the request because it is both a derivatives clearing organization ("DCO") registered pursuant to the Commodity Exchange Act and a securities clearing agency registered under the Securities Exchange Act

¹ See 75 FR 19619 (April 15, 2010).

² See Securities Exchange Act Release No. 61493 (February 3, 2010), 75 FR 6753 (February 10, 2010) (SEC order approving listing and trading of options on Trusts).

³ See Securities Exchange Act Release No. 61591 (February 25, 2010), 75 FR 9981 (March 4, 2010) (SEC order approving OCC rule change to issue and clear options on the Trusts).

of 1934 ("Exchange Act"). As a preliminary matter, we believe that the CFTC should immediately provide the requested exemption. The products are clearly securities and should not be subject to the jurisdiction of the CFTC. First, the proposed options on the Trusts are options. They meet all the economic characteristics of options, including a strike price, expiration date, and the customary provision of puts and calls, whereby the holder has only rights and his loss is limited to the premium paid while the writer has obligations to perform under the contract. We are perplexed that the Release seems unwilling to acknowledge this fact, in that it avoids characterizing the products as options, but only as a contract "called options." We believe such phraseology creates needless issues as to the jurisdictional status of the product. The options on the Trusts are not *called* options, they *are* options. There is no reason to resort to the type of imprecise language used in the Release on this issue.

Second, the proposed options overlie securities.⁴ The Trusts are registered as securities under the Securities Act of 1933 and they trade as securities on national securities exchanges registered as such under the Exchange Act. The fact that the Trusts are designed to reflect the performance of gold and silver is irrelevant to their status as securities. Thus, since the proposed products are options overlying securities, they are subject to the exclusive jurisdiction of the SEC. The CFTC has no jurisdiction over these products, and thus issuance of an exemptive relief is arguably necessary only in that it will provide legal comfort for OCC to clear the products.

We have an overarching issue with the need for OCC to seek an exemptive order for options on ETFs and believe that the process by which OCC feels compelled to seek such an order should be addressed. The contorted position that OCC finds itself in as a dual registrant due to divided jurisdiction between the CFTC and SEC forces it to self-certify, seek approval, or seek an exemption of the CFTC to clear securities products that are under the exclusive jurisdiction of the SEC. This process introduces an additional layer of delay of many months before CBOE can introduce a new securities options product. We particularly do not understand the need for OCC to undergo this process for a product that is virtually identical to other products for which it has already obtained exemptive orders from the CFTC. Specifically, OCC obtained an exemptive order in June 2008 for options on the SPDR Gold Trust Shares and another exemptive order in December 2008 for options on the iShares COMEX Gold Trust and the iShares Silver Trust Shares.⁵ The process for seeking a CFTC exemption for the options on the Trusts is devoid of purpose and merely adds months to the regulatory process for introduction of a new securities options product. We urge the CFTC to work with the SEC to create a process to avoid CFTC review of products that are clearly securities options. At a minimum, we support OCC's previous requests to the CFTC that the agency issue a blanket exemption to permit OCC to clear options on any ETF trading as a security and strongly believe that the CFTC should do so promptly. Any reluctance to do so is inconsistent with the commitment made by Chairman Gensler and Chairman Schapiro last September in their hearings (and issuance of a report) on harmonization of the securities and

⁴ See Securities Exchange Act Release Nos. 59781 (April 17, 2009), 74 FR 18771 (April 24, 2009) (SEC order approving listing and trading of shares of the ETFS Silver Trust) and 59895 (May 8, 2009), 74 FR 22993 (May 25, 2009) (SEC order approving listing and trading of shares of the ETFS Gold Trust).

⁵ 73 FR 31981 (June 5, 2008) and 73 FR 79830 (December 30, 2008).

commodities laws to reduce jurisdictional issues that impede the introduction of new products.⁶

Finally, we object strongly to the portion of the Release that seeks comment on whether the securities exchanges that list the Trust options should comply with market reporting requirements (presumably to the CFTC) and that brokers and traders that carry accounts for these products comply with CFTC large trader reporting requirements. In the Release, the CFTC acknowledges that, “[n]ational 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.”⁷ Also, the CFTC notes the public interest balancing of encouraging the “development of derivatives products through market competition without unnecessary regulatory burden.”⁸ We believe that the proposed order will do just that: result in a duplicative and unnecessary regulatory burden.

The Release’s rationale for the proposed reporting requirements is that such information might enhance the CFTC’s ability to collect and analyze market data concerning trading in the markets for gold and silver, and its ability effectively to monitor the trading activity and financial risk exposure of market participants and thus the risk exposure of any DCO, such as OCC. Simply because certain information from securities markets might be helpful to the CFTC, however, does not provide justification for the CFTC to de facto extend its jurisdiction (through imposition of reporting requirements) to securities products over which the SEC exercises exclusive and plenary jurisdiction. Instead, the CFTC should use existing arrangements between it and the SEC whereby the two agencies can and do share information where doing so will assist each in performing its respective regulatory functions. For example, the SEC and CFTC entered into a Memorandum of Understanding less than two years ago, the purpose of which was to enhance coordination between the agencies. The same logic employed by the CFTC in the Release could be used by the SEC to insist that stock index futures markets and traders of stock index futures products provide the SEC with market and large trader information with respect to stock index futures. We assume that the CFTC would voice objections to such an action by the SEC. Most importantly, the use of an exemptive process to impose reporting requirements on securities market participants would be an improper use of exemptive authority by the CFTC. The exemptive process is simply a means by which OCC can obtain the necessary CFTC approval as a dual DCO-registered securities clearing organization to clear a securities options product. It should not be used by the CFTC as a means to impose quasi-jurisdiction over such a product by imposing conditions on the grant of an exemption.

⁶ A Joint Report of the SEC and the CFTC on Harmonization of Regulation, October 16, 2009.

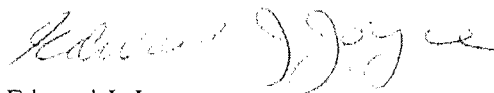
⁷ See 75 FR at 19620 (April 15, 2010).

⁸ See 75 FR at 19622 (April 15, 2010).

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In conclusion, we strongly support the grant of the exemption sought by OCC. At the same time, we also believe that the CFTC should seek means to free OCC from the need to seek such an exemption (or approval or self-certification) for, at a minimum, options on ETFs that trade as securities, and ideally for any options that overly securities.

Sincerely,



Edward J. Joyce

cc: CFTC Division of Clearing and Intermediary Oversight
Ananda Radhakrishnan, Director
Robert B. Wasserman, Associate Director
Lois J. Gregory, Special Counsel

SEC Division of Trading and Markets
Robert W. Cook, Director
Elizabeth K. King, Associate Director
James L. Fastman, Associate Director and Chief Counsel