CBOE
CHICAGO BOARD OPTIONS EXCHANGE

Edward J. Joyce
President and
Chief Operating Officer

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

December 9, 2010

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 on Options for a Proposed Exemptive Order Relating to the Trading and Clearing of Precious Metal Commodity-Based ETFs; Concept Release

Dear Mr. Stawick:

The Chicago Board Options Exchange, Incorporated ("CBOE") previously submitted a comment letter on the release ("Release") by the Commodity Futures Trading Commission ("CFTC") regarding the proposal by The Options Clearing Corporation ("OCC") to issue and clear options and security futures on certain exchange-traded funds ("ETFs") based on palladium and platinum as well as a concept release on whether the CFTC should exempt the trading and clearing of certain options and futures on gold, silver, palladium, and platinum ETFs on a categorical basis.[1] In our prior letter, CBOE urged the CFTC to grant the proposed exemption and to adopt a category exemptive process by which OCC does not need to seek an exemption for every new physically-settled option on an ETF based on metals (single or a basket).[2] We are now submitting a supplemental comment letter to respond to the letter submitted by Senator Carl Levin to the CFTC that focuses exclusively on the underlying commodity based ETFs, and not on the proposed derivatives, which are the subject matter of the Release.[3]

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1 See 75 FR 60411 (September 30, 2010). As it is has previously done with respect to these types of products, OCC submitted a rule filing with the CFTC seeking affirmative approval of rule changes to permit the issuance and clearance of options and security futures. The CFTC has responded to these requests for affirmative approval by issuing exemptive orders.

2 See Letter dated November 1, 2010, from Edward J. Joyce, President and Chief Operating Officer, CBOE, to David A. Stawick, Secretary, CFTC. In that letter, CBOE also recommended that the category exemptive process include physically-settled options on any ETF traded as a security as well as any options on any index or calculation based on or derived from such options, regardless of whether the instrument involved in the ETF is a metal or a different type of instrument.

3 See Letter dated November 1, 2010, from Senator Carl Levin, Chairman, Permanent Subcommittee on Investigations, United States Senate, to David A. Stawick, Secretary, CFTC, regarding Commodity Based Exchange Traded Funds.

In his letter, Senator Levin expresses concern about the concept release and exemptive proposal contained in the Release and characterizes the proposal, in part, as the CFTC proposing to delay determining whether commodity-based ETFs qualify as securities or commodities. The Senator believes that commodity-based ETFs have a potential impact on commodity prices, supplies, and markets, and therefore suggests that the CFTC treat them as "hybrid financial instruments" having features of both securities and commodities, and should subject them to joint regulation by the CFTC and Securities and Exchange Commission ("SEC").

The CFTC's Release solely relates to options and security futures on ETFs that already trade as securities. However, Senator Levin expresses concern about the possible impact of the commodity ETFs on the market for the underlying commodities. The Senator does not directly address, and thus does not appear to object to, the granting of the proposed exemptive order or the proposed category exemption that are the subjects of the Release's request for comments. CBOE is concerned, however, that the Senator's letter might result in delaying the CFTC taking action on the proposed exemptive order and the proposed category exemption for options and security futures on commodity-based ETFs that trade as securities. As noted above, the Senator's concerns about commodity-based ETFs address an issue that is different than the proposed exemptions. The only question before the CFTC is whether to issue an exemption from the Commodity Exchange Act ("CEA") for **options and security futures** overlying ETFs that trade as securities.

Pursuant to statute, options on these ETFs clearly are securities subject to the exclusive jurisdiction of the SEC. Section 3(a)(10) of the Securities Exchange Act of 1934 ("Exchange Act") defines the term "security" to include an option on a security or any group or index of securities. As the metal-based ETFs in question already are trading as securities, options overlying such instruments must be securities.[4] Options on metal-based ETFs already have been approved for trading by the SEC on CBOE, a securities exchange, and for clearing by the OCC. The *only* reason that OCC feels compelled to file with the CFTC is that OCC is dually-registered with the SEC and CFTC as a clearing agency because it clears both securities options subject to the SEC's jurisdiction and commodities products subject to the CFTC's jurisdiction. 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 from the CFTC to clear securities products that are under the exclusive jurisdiction of the SEC. Thus, the only consequence of the CFTC's exemptive proposal and category-based exemptive proposal is to free OCC to proceed to clear instruments that undeniably are securities.

In making the above points, CBOE is not suggesting that the Senator's concerns about the impact of commodity-based ETFs are unfounded or meritless; rather they are misplaced in response to a Release seeking comment on exempting the issuance and clearing of certain derivatives. CBOE respects the findings of the Senate Permanent Subcommittee on Investigations on the impact of commodity-based ETFs on the U.S. commodity markets, and

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[4] These commodity-based ETFs are registered as securities with the SEC under the Securities Act of 1933 and trade on registered national securities exchanges. The decision already has been made to treat these instruments as securities as they have been processed and approved by the SEC as securities and there has been no legal objection or ruling to the contrary.

agrees with the Senator that the issues arising from this impact are worthy of joint discussions between the CFTC and SEC. There may be ways to address the Senator's concerns without imposing joint regulation on commodity-based ETFs, such as coordinated surveillance sharing between the SEC and CFTC or use of the Intermarket Surveillance Group ("ISG") to perform cross-market surveillance of these products. Another means to resolve issues arising from commodity-based ETFs is the Memorandum of Understanding ("MOU") signed between the CFTC and SEC, which includes information sharing provisions and should provide an additional means by which the CFTC and SEC could reach agreement on issues on the trading and oversight of such products.[5] In addition, Senator Levin suggests that the commodity–based ETFs may be considered "hybrid instruments." Indeed, even if the products may in some sense have attributes of "hybrid instruments," it is clear that they would fall within the exclusion from the CEA provided by Section 2(f) of that Act for hybrid instruments that are predominantly securities. The reason for this exclusion is to avoid the duplicative regulation of two agencies of an instrument that is predominantly a security, notwithstanding that in some respect it may be characterized as a hybrid financial instrument, and instead to rely upon the sharing of information between the agencies as may be needed. Any such joint-agency coordination respecting the underlying ETFs, however, can be accomplished without further delaying issuance of the options exemptions proposed in the Release.

As with all ETF options approved for trading by the SEC, the position limit levels for these products will be established based on shares outstanding and trading volume at the time they are listed. In addition, these products will be subject to large position reporting requirements for options. As part of CBOE's rule filing with the SEC, both the position limits and large position reporting requirements were proposed in connection with trading these products, and have been approved by the SEC.[6] It would be duplicative, burdensome and contrary to statutory authority for the CFTC to impose separate position limit and large trader reporting requirements on these options as part of an exemptive request. Moreover, as we noted in our comment letter on the Release, simply because certain information from the securities markets might be helpful to the CFTC, however, does not justify the CFTC to de facto extend its jurisdiction (through imposition of position limit or reporting requirements) to securities products over which the SEC exercises exclusive and plenary jurisdiction. As CBOE has repeatedly stated, if the CFTC has a concern about cross-market surveillance of commodity-related products, there are ample means to address those through coordination with the SEC and through the auspices of the ISG, and the existing MOU between the CFTC and the SEC.

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[5] The MOU was signed between the CFTC and the SEC on March 11, 2008 and has a separate addendum thereto concerning Principles Governing the Review of Novel Derivative Products. A copy of the MOU may be accessed as: http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/addendumtomou-principles.pdf.

[6] See Securities Exchange Act Release 61892 (April 13, 2010), 75 FR 20649 (April 20, 2010) (SEC order approving options on the ETFS Palladium Trust and the ETFS Platinum Trust, including establishment of position limits and large position reporting obligations as set forth in CBOE Rule 4.11).

In conclusion, CBOE believes that the Senator's comments are not within the scope of the Release's proposals and therefore should not delay the introduction of security options on commodity-based ETFs that already trade as securities. Indeed doing so would be counterproductive and contrary to both the Exchange Act and the CEA. Preventing the CFTC from issuing an exemptive order (responding to OCC's request) or issuing a category-based exemption would have the perverse effect of preventing market participants who have a desire to trade commodity-based ETFs from spreading their trading interest over options and security futures on such instruments and instead would force them to concentrate their trading in the ETFs themselves. Moreover, it would prevent the introduction of an important means to hedge or reduce risk in holding commodity-based ETF positions. Options on commodity-based ETFs that trade as securities are clearly securities. Thus, we urge the CFTC to move swiftly to issue the proposed exemption as well as the category-based exemption discussed in the Release.[7]

Sincerely,

Edward J Joyce

Edward J. Joyce

cc: CFTC Division of Clearing and Intermediary Oversight
Ananda Radhakrishnan, Director
Ryne Miller, Attorney Advisor
David Van Wagner, Chief Counsel

SEC Division of Trading and Markets
Robert W. Cook, Director
Heather Seidel, Associate Director
James L. Eastman, Associate Director and Chief Counsel

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7 In addition, as we note in footnote two above, CBOE continues to recommend that the category exemptive process be broader than just options on metals-based ETFs.