



December 27, 2024

VIA CFTC PORTAL

Christopher J. Kirkpatrick
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Rule Certification for Updates to OCC's By-Laws

Dear Secretary Kirkpatrick:

Pursuant to Section 5c(c)(1) of the Commodity Exchange Act, as amended ("Act"), and Commodity Futures Trading Commission ("CFTC") Regulation 40.6, The Options Clearing Corporation ("OCC") hereby certifies to the CFTC amendments to OCC's By-Laws. The date of implementation of the rule is at least 10 business days following receipt of the certification by the CFTC or the date the proposed rule is approved by the Securities and Exchange Commission ("SEC") or otherwise becomes effective under the Securities Exchange Act of 1934 ("Exchange Act").

In conformity with the requirements of Regulation 40.6(a)(7), OCC states the following:

Explanation and Analysis

OCC proposes to revise the definition of "Fund Share" in Article I of OCC's By-Laws (including the Interpretation and Policy), consistent with the staff advisory ("Advisory") recently issued by the CFTC regarding the clearing of options on spot commodity exchange traded funds ("ETFs").¹ Amendments to OCC's By-Laws are included in Exhibit A. Material proposed to be added to OCC's By-Laws as currently in effect is underlined and material proposed to be deleted is marked in strikethrough text. All capitalized terms not defined herein have the same meaning as set forth in the OCC By-Laws and Rules.²

OCC clears and settles options on ETFs. Such ETFs are classified under the definition of "Fund Share" in OCC's By-Laws. An Interpretation and Policy to the fund share definition lists by name certain precious metals commodity-based ETFs for which OCC can provide clearance and

¹ See CFTC Staff Advisory Relating to the Clearing of Options on Spot Commodity Exchange Traded Funds (ETFs), Letter No. 24-16 (Nov. 15, 2024), available at <https://www.cftc.gov/csl/24-16/download>.

² OCC's By-Laws and Rules can be found on OCC's public website: <https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules>.

settlement services on related options and security futures contracts. This practice began in 2008 because of the uncertain jurisdictional status of options or security futures on precious metals commodity-based ETFs.³ As exchanges have launched more of these products since 2008, OCC has, for each product, (i) sought CFTC exemptive relief pursuant to Section 4(c) of the Act from regulations that would be inconsistent with the trading and clearing of these products if the underlying were considered a commodity that is not a security⁴ and then (ii) filed a proposed rule change with the SEC to incorporate the name of the product for which relief was granted into the Interpretation and Policy of the fund share definition.⁵

On November 15, 2024, the CFTC issued the Advisory relating to the clearing of options on spot commodity ETFs. The Advisory provided that it is “substantially likely” that these spot commodity ETF shares would be held to be securities.⁶ The Advisory further concluded that “these shares listed on SEC registered national securities exchanges do not implicate the [CFTC’s] jurisdiction, and therefore, the clearing of these options by OCC would be undertaken in its capacity as a registered clearing agency subject to SEC oversight.”⁷ OCC believes the Advisory largely forecloses any potential liability under the Act, as amended, including the argument that OCC’s clearance and settlement of options on spot commodity ETFs constitutes a violation of the Act.

In light of the Advisory, OCC will no longer seek product-by-product exemptive relief from the CFTC to clear spot commodity-based ETF products. OCC will, therefore, no longer need to specifically identify commodity-based products in the fund share definition. OCC proposes to make clarifications to the fund share definition based on the contents of the Advisory and delete the Interpretation and Policy to the fund share definition, which is no longer relevant or necessary, as further described below.

³ In seeking comment to an OCC request to clear and settle options on streetTRACKS® Gold Trust Shares, the CFTC indicated 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 [...]” The CFTC further noted that in considering the exemption, “the CFTC need not – and does not – find that [these options] are (or are not) subject to the CEA” and that the options were “‘novel instruments’ and the ‘determination as to [their] jurisdiction is not straightforward.’” Given their potential usefulness to the market, however, the [CFTC] believes that this may be an appropriate case for issuing an exemption without making a finding as to the nature of these particular instruments.” See Proposal to Exempt the Trading and Clearing of Certain Products Related to streetTRACKS® Gold Trust Shares, 73 FR 21917, at 21918 (Apr. 23, 2008).

⁴ See *infra* note 9.

⁵ See *e.g.*, Securities Exchange Act Release Nos. 57466 (Mar. 11, 2008), 73 FR 14297 (Mar. 17, 2008) and 57695 (Apr. 21, 2008), 73 FR 22452 (Apr. 25, 2008) (SR-OCC-2008-07) (SPDR Gold Trust f/k/a streetTRACKS® Gold Shares); 59054 (Dec. 4, 2008), 73 FR 75159 (Dec. 10, 2008) (SR-OCC-2008-13 and SR-OCC-2008-14) (iShares COMEX Gold Trust Shares and iShares Silver Trust Shares); 61254 (Dec. 29, 2009), 75 FR 1093 (Jan. 8, 2010) (SR-OCC-2009-20) (ETFs Physical Swiss Gold Shares and ETFs Physical Silver Shares).

⁶ See *supra* note 1.

⁷ *Id.*

Changes to OCC's By-Laws

OCC would amend the definition of “Fund Share” in Article I of OCC’s By-Laws (including the Interpretation and Policy), consistent with the Advisory recently issued by the CFTC regarding the clearing of options on spot commodity ETFs. Currently, Article I, Section 1, of OCC’s By-Laws defines “Fund Share” as a publicly traded security (as defined in Section 3(a)(10) of the Exchange Act, as amended) that represents an interest in a trust, investment company, commodity pool, or similar entity holding and/or trading in one or more investments. Where the investments are commodities, the amended definition would clarify that such term is subject to any applicable advisory, exemption or other relief or guidance issued by the CFTC. This proposed change is intended to facilitate the clearance of these products in a manner that is consistent with the Advisory and applicable regulations.

Additionally, the Interpretation and Policy to the fund share definition currently identifies on a product-by-product basis specific precious metals commodity-based ETFs that OCC includes within the definition of fund share. OCC previously added these precious metals commodity-based ETFs to the Interpretation and Policy.⁸ As discussed above, the purpose of adding specific ETF names to the Interpretation and Policy was to clarify the jurisdictional status of options or security futures on these products, and was done in conjunction with the CFTC’s issuance of a 4(c) order exempting the trading and clearing of the specific ETF names from CFTC regulations with which trading and clearing would be inconsistent if the products were commodities that were not securities.⁹ Because the Advisory finds it “substantially likely” likely that spot commodity ETF shares would be held to be securities, OCC believes that it no longer needs to seek product-by-product exemptive relief from the CFTC to clear spot commodity-based ETF products, including precious metals commodity-based ETFs. OCC will no longer need to specifically identify commodity-based products in the fund share definition. OCC thus proposes a clean-up change to delete in its entirety the Interpretation and Policy to the fund share definition, which is no longer relevant or necessary, to avoid potential confusion.

In general, OCC believes that the proposed changes would provide additional certainty to market participants regarding OCC’s treatment of fund shares, including commodity-based ETF products, in accordance with applicable regulatory requirements and guidance. OCC believes that these changes do not make any substantive modifications to the fund share definition. Instead, the changes update the definition with current details and remove those details that have become

⁸ See e.g., Securities Exchange Act Release Nos. 57895 (May 30, 2008), 73 FR 32066 (June 5, 2008) (SR-OCC-2008-07) (SPDR Gold Trust f/k/a streetTRACKS® Gold Trust Shares)); and 61591 (Feb. 25, 2010), 75 FR 9981 (Mar. 4, 2010) (SR-OCC-2009-20) (ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares).

⁹ See e.g., 73 FR 31979 (Jun. 5, 2008) (SPDR® Gold Futures Contracts (f/k/a streetTRACKS® Gold Trust Shares security futures)); 73 FR 31981 (Jun. 5, 2008) (SPDR® Gold Trust Shares (f/k/a streetTRACKS® Gold Trust Shares options)); 73 FR 79830 (Dec. 30, 2008) (iShares® COMEX Gold Trust Shares and iShares® Silver Trust Shares); and 75 FR 37406 (Jun. 29, 2010) (ETFS Physical Swiss Gold Shares and ETFS Physical Silver Shares).

irrelevant due to the Advisory. Such changes would further ensure that OCC's By-Laws remain up-to-date, clear, and transparent.

Consistency with DCO Core Principles

OCC reviewed the DCO core principles ("Core Principles") as set forth in the Act,¹⁰ the regulations thereunder,¹¹ and the provisions applicable to a DCO that elects to be subject to the provisions of 17 CFR Subpart C.¹² During this review, OCC identified the following as potentially being impacted:

Public Information. OCC believes that implementing the changes will align with Core Principle L,¹³ and CFTC Rule 39.21 thereunder,¹⁴ which require, in part, that a DCO make information concerning the rules and operating and default procedures governing the clearing and settlement systems of the DCO available to market participants,¹⁵ and making its rulebook publicly available on its website.¹⁶ The changes to the fund share definition are intended to facilitate the clearance of commodity-based ETF products in a manner that is consistent with the Advisory and applicable regulations and to provide additional certainty regarding OCC's treatment of such products. OCC believes that implementing the changes and posting the updated By-Laws to OCC's public website would facilitate a clear understanding of the regulatory framework for these products.

For these reasons, OCC believes that the proposed changes are consistent with the requirements of the DCO Core Principles and the CFTC regulations thereunder.

Opposing Views

No substantive opposing views were expressed related to the rule amendments by OCC's Board members, Clearing Members or market participants. Public comments on the proposed rule change filed with the SEC, if any, may be viewed on the SEC's public website.¹⁷

Notice of Pending Rule Certification

OCC hereby certifies that notice of this rule filing has been given to Clearing Members of OCC in compliance with Regulation 40.6(a)(2) by posting a copy of the rule filing on OCC's website concurrently with the filing of this submission.

¹⁰ 7 U.S.C. 7a-1(c)(2).

¹¹ 17 CFR 39.9-39.27.

¹² E.g., 17 CFR 39.30-39.39.

¹³ 7 U.S.C. 7a-1(c)(2)(L).

¹⁴ 17 CFR 39.21.

¹⁵ 7 U.S.C. 7a-1(c)(2)(L)(ii); 17 CFR 39.21(b).

¹⁶ 17 CFR 39.21(c)(6).

¹⁷ See Options Clearing Corporation (OCC) Rulemaking at <https://www.sec.gov/rules/sro/occ.htm>.

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Certification

OCC hereby certifies that the rule set forth at Exhibit A of the enclosed filing complies with the Act and the CFTC's regulations thereunder.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

/s/ Maria Alarcon
Assistant General Counsel

Enclosure: Exhibit A