

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-102018; File No. SR-OCC-2024-018)

December 20, 2024

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Update The Options Clearing Corporation's By-Laws

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 19, 2024, the Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by OCC. OCC filed the proposed rule change pursuant to Section 19(b)(3)(A)³ of the Act and Rule 19b-4(f)(6)⁴ thereunder. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would amend 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 Commodity Futures Trading Commission ("CFTC") regarding the clearing of options on spot commodity exchange traded funds ("ETFs")⁵ (hereinafter "Proposed Rule Change").

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ 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>.

The proposed changes to OCC's By-Laws are included [sic] in Exhibit 5 of File No. SR-OCC-2024-018. 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.⁶

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

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 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.⁷ As

⁶ 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>.

⁷ 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

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 Commodity Exchange Act (“CEA”)⁸ 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 security⁹ and then (ii) filed a proposed rule change with the Commission to incorporate the name of the product for which relief was granted into the Interpretation and Policy of the fund share definition.¹⁰

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.¹¹ 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.”¹² OCC believes the Advisory largely forecloses any potential

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).

⁸ 7 U.S.C. 7a-1.

⁹ See infra note 15.

¹⁰ 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).

¹¹ See supra note 5.

¹² Id.

liability under the CEA, as amended, including the argument that OCC's clearance and settlement of options on spot commodity ETFs constitutes a violation of the CEA.

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.

1. Purpose

The purpose of the Proposed Rule Change is to 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.¹³ 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 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

¹³ Id.

that OCC includes within the definition of fund share. The Commission previously approved proposed rule changes by OCC in which OCC added these precious metals commodity-based ETFs to the Interpretation and Policy.¹⁴ 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.¹⁵ 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

¹⁴ 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).

¹⁵ 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).

and guidance. OCC believes that this proposed rule change does not make any substantive modifications to the fund share definition. Instead, the proposed changes update the definition with current details and remove those details that have become irrelevant due to the Advisory. Such changes would further ensure that OCC's By-Laws remain up-to-date, clear, and transparent.

2. Statutory Basis

OCC believes the Proposed Rule Change is consistent with Section 17A of the Exchange Act¹⁶ and the rules and regulations thereunder applicable to OCC. In particular, OCC believes that the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act¹⁷ and Rule 17Ad-22(e)(21)¹⁸ thereunder, for the reasons described below.

Section 17A(b)(3)(F)¹⁹ of the Act requires, among other things, that the rules of a clearing agency be designed to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions. OCC believes the proposed changes would facilitate the clearance of spot commodity-based ETF products in a manner that is consistent with regulatory requirements and guidance. OCC believes the proposed changes would provide additional certainty to market participants regarding OCC's treatment of such products, which would reduce the likelihood that OCC Clearing Members would have jurisdictional concerns over trading these products. Reducing jurisdictional concerns that

¹⁶ 15 U.S.C. 78q-1.

¹⁷ 15 U.S.C. 78q-1(b)(3)(F).

¹⁸ 17 CFR 240.17ad-22(e)(21).

¹⁹ 15 U.S.C. 78q-1(b)(3)(F).

could impede the trading of new products would remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions by providing certainty regarding the treatment of fund shares.

Commission Rule 17Ad-22(e)(21) requires OCC to establish, implement, maintain, and enforce written policies and procedures reasonably designed to “be efficient and effective in meeting the requirements of its [clearing members] and the markets it serves”²⁰ OCC believes the Proposed Rule Change is consistent with this provision because, as described above, by providing clarity in its By-Laws, it will (i) reduce the likelihood that OCC Clearing Members would have jurisdictional concerns over trading these products and (ii) ensure that OCC’s By-Laws remain up-to-date and transparent. The proposed 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. The proposed deletion of the Interpretation and Policy to the fund share definition would prevent potential confusion, as this provision is no longer relevant or necessary. Moreover, the Proposed Rule Change is not inconsistent with the By-Laws and Rules of OCC.

(B) Clearing Agency’s Statement on Burden on Competition

Section 17A(b)(3)(I) of the Act²¹ requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. OCC does not believe that the proposed amendments to the fund

²⁰ 17 CFR 240.17ad-22(e)(21).

²¹ 15 U.S.C. 78q-1(b)(3)(I).

share definition, including the Interpretation and Policy, would impose any burden on competition because they would merely establish clear treatment of fund shares in a manner that is consistent with regulatory requirements and guidance. OCC believes that this Proposed Rule Change does not make any substantive modifications to the fund share definition but, instead, updates the definition with current details and removes those details that have become irrelevant due to the Advisory. The proposed changes would not inhibit access to OCC's services in any way, would apply to all Clearing Members uniformly and would not disadvantage or favor any particular user in relationship to another user. Accordingly, OCC does not believe that the Proposed Rule Change would have any impact or impose a burden on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments were not and are not intended to be solicited with respect to the Proposed Rule Change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

- (i) significantly affect the protection of investors or the public interest;
- (ii) impose any significant burden on competition; and
- (iii) become operative for 30 days from the date on which it was filed, or such

shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act²² and Rule 19b-4(f)(6)²³ thereunder.

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(f)(6).

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.²⁴

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-OCC-2024-018 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-OCC-2024-018. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission

²⁴ Notwithstanding its immediate effectiveness, implementation of this rule change will be delayed until this change is deemed certified under CFTC Regulation 40.6.

will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 am and 3 pm. Copies of such filing also will be available for inspection and copying at the principal office of OCC and on OCC's website at <https://www.theocc.com/Company-Information/Documents-and-Archives/By-Laws-and-Rules>.

Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-OCC-2024-018 and should be submitted on or before [INSERT DATE 21 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

J. Matthew DeLesDernier,

Deputy Secretary.

²⁵ 17 CFR 200.30-3(a)(12).