

COMMODITY FUTURES TRADING COMMISSION**RIN 3038-AC52****Proposed Exemptive Order for ST Gold Futures Contracts****AGENCY:** Commodity Futures Trading Commission**ACTION:** Notice of proposed order and request for comment.

SUMMARY: The Commodity Futures Trading Commission (Commission) is proposing to exempt certain transactions in physically delivered futures contracts based on streetTRACKS® Gold Trust Shares (ST gold futures contracts)¹ from those provisions of the Commodity Exchange Act (CEA or Act),² and the Commission's regulations thereunder, that are inconsistent with the trading and clearing of ST gold futures contracts as security futures. The proposed exemption would be conditioned on the compliance of transactions in ST gold futures contracts with the requirements established for security futures. The authority for the issuance of this exemption is found in Section 4(c) of the Act.³

DATES: Comments must be received on or before **[15 days after publication in Federal Register]**.

ADDRESSES: Comments should be sent to the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581, attention: Office of the Secretariat. Comments may be sent by facsimile to 202.418.5521, or by e-mail to secretary@cftc.gov. Reference should be made to the "Proposed Exemptive Order for ST Gold Futures Contracts." Comments may also be submitted through the Federal eRulemaking Portal

¹ streetTRACKS® is a registered service mark of State Street Corporation, an affiliate of State Street Global Markets, LLC, the marketing agent for the streetTRACKS® Gold Trust.

² 7 U.S.C. §§ 1 *et seq.*

³ 7 U.S.C. §6(c).

at <http://www.regulations.gov>. All comments received will be posted without change to <http://www.CFTC.gov>.

FOR FURTHER INFORMATION CONTACT: Bruce Fekrat, Special Counsel, Office of the Director (telephone 202.418.5578, e-mail bfekrat@cftc.gov), Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Introduction

In correspondence dated October 26, 2007, OneChicago, LLC (OneChicago or the Exchange),⁴ a contract market designated with the Commission pursuant to Sections 5 and 6(a) of the Act, proposed and requested Commission approval to list for trading ST gold futures contracts as security futures.⁵ OneChicago is notice-registered with the Securities and Exchange Commission (SEC) as a national securities exchange under Section 6(g) of the Securities Exchange Act of 1934 ('34 Act) for the purpose of listing and trading security futures products. The approval request was filed pursuant to Section 5c(c)(2) of the Act and Commission Regulations 40.5 and 41.23.⁶ OneChicago submitted its request for approval under the 45-day fast-track review period established by Commission Regulation 40.5. The fast-track review

⁴ OneChicago is jointly owned by the CME Group, Inc., IB Exchange Corp., and the Chicago Board Options Exchange.

⁵ In accordance with Section 2(a)(9)(B)(i) of the Act, Commission staff forwarded the new contract filing to the Securities and Exchange Commission, the U.S. Department of Treasury and the Board of Governors of the Federal Reserve System on October 29, 2007. No comments were received in response to this correspondence. On January 4, 2008, the Exchange filed a rule amendment concerning minimum price fluctuations to supplement its initial submission.

⁶ 7 U.S.C. §7a-2(c)(2), 17 CFR 40.5, 41.23.

period for the Exchange's submission was scheduled to expire on December 10, 2007. The review period was extended by the Director of the Division of Market Oversight, pursuant to Regulations 40.5(c) and 40.7(a)(1), by another 45 days beyond December 10, 2007 to January 24, 2008 on the grounds that the ST gold futures contracts raised novel and complex issues that required additional time for review.⁷ By letter dated January 23, 2008, the Exchange, upon the request of the Commission's staff, voluntarily extended the review period to March 17, 2008.⁸ On February 26, 2008, the Exchange gave a further voluntary extension of the review period until April 30, 2008.

II. Description of the Underlying Commodity

ST gold futures contracts would overlie 100 Shares of the streetTRACKS® Gold Trust (Trust).⁹ The Trust was formed under New York law pursuant to a trust indenture on November 12, 2004. World Gold Trust Services, LLC, a wholly owned limited liability company of the

⁷ Commission Regulations 40.5(c) and 40.7(a)(1) allow the Commission, and certain staff acting pursuant to delegated authority, to extend the 45-day fast-track review period by an additional 45 days if the product raises novel or complex issues requiring additional time for review. 17 CFR 40.5(c), 40.7(a)(1).

⁸ Section 5c(c) of the Act requires the Commission to approve any designated contract market instrument submitted for approval within 90 days after the submission of the request unless (1) it finds that the trading or clearing of the instrument would violate the Act (or the Commission's regulations), or (2) the person submitting the request for approval agrees to extend the period of review beyond the 90 day time limitation.

⁹ By its terms, an ST gold futures contract would expire on the third Friday of each contract month. The contract would not be subject to speculative position limits prior to the last five days of trading. During the last five trading days, however, speculative positions would be limited to 13,500 contracts, net long or short. Positions in ST gold futures contracts would become reportable to OneChicago when equal to or above 200 contracts. Positions in ST gold futures contracts would become reportable to the Commission when equal to or above 1000 contracts.

World Gold Council,¹⁰ is the sponsor of the Trust. In addition, The Bank of New York is the trustee of the Trust, HSBC Bank USA, N.A. is the custodian of the Trust, and State Street Global Markets, LLC is the marketing agent for the Trust.¹¹ The Trust presently does not engage in the business of investing or trading securities or commodity futures or options contracts. As a result, the Trust is not registered as an investment company under the Investment Company Act of 1940 and it is not managed by a commodity pool operator registered under the CEA.

The Trust, from time to time, creates, issues, and redeems Shares which represent fractional undivided beneficial interests in the assets of the Trust. The sole assets of the Trust consist of gold bullion and limited amounts of cash. Accordingly, the value of each Share will fluctuate with the value of the Trust's holdings,¹² which in turn is dependent on the spot price of gold.¹³ That value may be found by dividing the aggregate value of the gold and cash held by the Trust less applicable fees and expenses by the quantity of Shares outstanding at any specific

¹⁰ The World Gold Council (founded in 1987) is a not-for-profit association registered under the laws of Switzerland. The Council is funded by gold mining companies and is tasked, in part, with increasing the demand for gold through marketing initiatives and lowering regulatory barriers to the widespread ownership of gold products. About the World Gold Council, available at http://www.gold.org/discover/about_us/index.html.

¹¹ Prospectus for the Trust's offering of Shares (July 24, 2007), available at <http://www.streettracksgoldshares.com/pdf/streetTRACKS.pdf> (provides a detailed description of the Trust and its operations).

¹² The Net Asset Value (NAV) of the Trust is the aggregate value of the Trust's assets less its liabilities which include (1) fees paid to the Sponsor, (2) fees paid to the Trustee, (3) fees paid to the Custodian, (4) fees paid to the Marketing Agent, and (5) certain administrative expenses assessed as fees.

¹³ In determining the NAV of the Trust, the Trustee values the gold held by the Trust on the basis of the price of an ounce of gold as set by the afternoon session of the London Bullion Market Association's twice daily fix of the price of gold. The gold fix is performed by five members of the association. HSBC Bank USA, NA, the Custodian of the Trust, is one of five gold fixing members.

moment in time.¹⁴ The Trust is not actively managed and does not engage in any investment activities that are designed to avoid losses or profit from changes in the price of gold. Rather, the investment purpose of the Trust is to issue Shares that will track the spot price of gold and thereby give shareholders the opportunity to gain exposure to the commodity's price volatility.

The Trust, on an ongoing basis, will only issue Shares to, and only redeem Shares from, Authorized Participants in baskets of 100,000 Shares (ST Share Baskets). An Authorized Participant must (1) be a participant in the Depository Trust Company that is a registered broker-dealer or other securities market participant (such as a bank or other financial institution) that is not required to register as a broker-dealer to engage in securities transactions, (2) have entered into an agreement with the Trust and the Sponsor of the Trust, and (3) have established an unallocated gold account (paper transfer account) with the Custodian. Upon the payment of a transaction fee, Authorized Participants may purchase ST Share Baskets by depositing gold (and cash if necessary) in an amount equal to the NAV of an ST Share Basket per purchased basket. Likewise, Authorized Participants may redeem ST Share Baskets in exchange for an amount of gold (and cash if necessary) that corresponds to the NAV of an ST Share Basket per redeemed basket. All transfers of gold are accomplished through paper transfers, as opposed to physical transfers of gold, and are cleared through the clearing members of the London Bullion Market Association. Such members utilize mutually maintained unallocated gold accounts for the settlement of proprietary over-the-counter trades as well as for the settlement of client transfers.

¹⁴ By way of a simplified example, assume that the Trust holds 10,000 ounces of gold, the spot price of gold is \$900 per ounce, and that there are 50,000 Shares outstanding. Assume further that the Trust has accrued fees and expenses of \$50,000. Under this example, the value of the Trust's holdings of gold would be \$8,950,000, and the value of each Share would be 1/50,000 of \$8,950,000, or \$179.

Upon purchasing ST Share Baskets, Authorized Participants may divide the baskets into individual Shares for resale. Trust Shares are registered as securities under the Securities Act of 1933 ('33 Act) and listed on the NYSE Arca Exchange under the ticker symbol GLD.¹⁵ The continuous Share creation, sale, resale, and redemption process, coupled with a highly liquid market, creates an arbitrage mechanism that functions to keep the Shares trading at or near the NAV of the Trust's gold holdings.¹⁶ Authorized Participants act as arbitrageurs by taking advantage of significant premiums or discounts in the trading price of outstanding Shares relative to the spot price of gold. If individual exchange-traded Shares trade at a price that is below the spot market price of gold, Authorized Participants will purchase and aggregate Shares into ST Share Baskets and redeem the Baskets with the Trust for an amount of gold with an aggregate value that is greater than the aggregate trading value of the individual Shares that comprise the redeemed ST Share Baskets. Similarly, if ST Shares are trading at a price that is above the spot market price of gold, Authorized Participants will deposit gold with the Trust in exchange for ST Share Baskets that can then be divided into individual Shares for resale to retail investors at a premium.

III. Section 4(c) of the Commodity Exchange Act

Section 4(c)(1) of the CEA empowers the Commission to “promote responsible economic or financial innovation and fair competition” by exempting any transaction or class of

¹⁵ NYSE Arca is the electronic equities trading facility of NYSE Arca Equities, Inc., a wholly-owned subsidiary of NYSE Euronext.

¹⁶ See Elisabeth Hehn, Exchange Traded Funds: Structure, Regulation and Application of a New Fund Class (January 16, 2006).

transactions¹⁷ from any of the provisions of the Act upon determining that the exemption would be consistent with the public interest.¹⁸ Section 4(c)(2) of the Act provides that the Commission may grant exemptions only when it determines that the requirements for which an exemption is being provided should not be applied to the agreements, contracts or transactions at issue; that the exemption is consistent with the public interest and the purposes of the Act; that the agreements, contracts or transactions will be entered into solely between appropriate persons; and that the exemption will not have a material adverse effect on the ability of the Commission or any designated contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory responsibilities under the CEA.¹⁹ With respect to the term

¹⁷ Covered transactions are subject to certain exceptions not relevant to the publication of this proposal.

¹⁸ Section 4(c)(1) of the CEA, 7 U.S.C. §6(c)(1), provides in full that:

In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 7 of this title) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of this section (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a) of this section, or from any other provision of this chapter (except subparagraphs (c)(ii) and (D) of section 2(a)(1) of this title, except that the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D) of this title), if the Commission determines that the exemption would be consistent with the public interest.

¹⁹ Section 4(c)(2) of the CEA, 7 U.S.C. §6(c)(2), provides in full that:

The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) of this section unless the Commission determines that--

“appropriate persons,” Section 4(c)(3) of the Act enumerates several categories of appropriate persons and provides in subparagraph (K) that the term shall include “[s]uch other persons that the Commission determines to be appropriate in light of ... the applicability of appropriate regulatory protections.”

In order for the Commission to approve the Exchange’s request to list for trading ST gold futures contracts as security futures, it would have to find that the interest that would underlie an ST gold futures contract is a security. However, if the contracts are considered to be futures contracts based on a commodity that is not a security, then they would be subject to the exclusive jurisdiction of the CFTC under CEA Section 2(a)(1)(A), and listing the contract for trading as a security future as the Exchange proposes would violate the CEA.²⁰

ST gold futures contracts would be based on an innovative and highly successful product that efficiently and transparently creates exposure to the spot price of gold by combining attributes of exchange traded financial products, cash commodity ownership interests, and speculative participation in the price volatility of a commodity. The jurisdictional classification of the underlying instrument, whether as a security or a commodity that is not a security, is not straightforward.

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- (A) the requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and
 - (B) the agreement, contract, or transaction—
 - (i) will be entered into solely between appropriate persons; and
 - (ii) will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act.

²⁰ 7 U.S.C. §2(a)(1)(A). Security futures are subject to joint regulation by the CFTC and the SEC under Section 2(a)(1)(D) of the CEA, 7 U.S.C. §2(a)(1)(D).

In enacting Section 4(c) of the Act, Congress noted that the goal of the provision “is to give the Commission 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.”²¹ Accordingly, the Commission proposes to use its authority under Section 4(c) of the Act to exempt transactions in ST gold futures contracts that would be listed for trading on OneChicago from those provisions of the Act and the Commission’s 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 ST gold futures contracts as security futures.²² The proposed exemption would require that transactions in ST gold futures contracts comply with the requirements established for transactions in security futures by the Act and the Commission’s regulations thereunder.²³

In proposing to exercise its exemptive authority under Section 4(c) of the Act, the Commission is not required to, and does not, find either that an ST gold futures contract is based on a security, or that it is not based on a security and is thereby subject to exclusive regulation under the CEA. In this regard, the House-Senate Conference Committee in the legislative process leading to the enactment of CEA Section 4(c) noted that:

[T]his provision provides flexibility for the Commission to provide legal certainty to novel instruments where the determination as to jurisdiction is

²¹ H.R. CONF. REP. NO. 102-978, 1992 U.S.C.C.A.N. 3179, at 3213 (H.R. CONF. REP.).

²² The Commission recently issued a similar order with respect to exchange traded credit default products. See Order Exempting the Trading and Clearing of Certain Credit Default Products Pursuant to the Exemptive Authority in Section 4(c) of the Commodity Exchange Act, 72 FR 32079 (June 11, 2007).

²³ Transactions in ST gold futures contracts would be subject to the provisions of the securities laws, including any applicable provision of the ‘33 and ‘34 Acts.

not straightforward. Rather than making a finding as to whether a product is or is not a futures contract, the Commission in appropriate cases may proceed directly to issuing an exemption.²⁴

Futures contracts based on the underlying Shares of the Trust are “novel instruments” and, as noted above, the “determination as to [their] jurisdiction is not straightforward.” Given the potential usefulness of ST gold futures contracts to the significant market for the Shares that would underlie such contracts, as well as all gold-linked markets, the Commission believes that this may be an appropriate case for issuing an exemption without making a finding as to the precise nature of the underlying Shares of the Trust.

Exempting transactions in ST gold futures contracts from the provisions of the Act, and the Commission’s regulations thereunder, that are inconsistent with the trading and clearing of security futures, and thereby permitting the trading of ST gold futures contracts as security futures on OneChicago, may foster both financial innovation by expeditiously bringing an innovative derivatives product to market, and competition by not potentially excluding other similarly innovative products from trading on regulated futures markets. In addition, ST gold futures contracts, if traded as security futures pursuant to an exemption, would be subject to regulation by both the SEC and the Commission. The implementation of an exemption, under these circumstances, would not erode customer protections or impair the ability of the Commission or OneChicago to discharge any regulatory or self-regulatory duty under the Act.

IV. Request for Comment

The purposes of the CEA include “promot[ing] responsible innovation and fair competition among boards of trade, other markets and market participants.”²⁵ Based on the

²⁴ H.R. CONF. REP. at 3214-3215.

foregoing, it may be consistent with these and the other purposes of the CEA, and with the public interest, for ST gold futures contracts to trade on OneChicago as security futures. The Commission urges interested persons to provide comments that will assist the Commission in conducting its analysis of the issues relevant to this proposal. This release is not intended in any way to alter the current status of any transaction that is subject to one or more provisions of the '33 or '34 Acts or the CEA, including any regulations adopted thereunder.

V. Related Matters

A. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)²⁶ imposes certain requirements on federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The proposed exemptive order would not, if issued, require a new collection of information from any entity that would be subject to the proposed order.

B. Cost-Benefit Analysis

Section 15(a) of the CEA, as amended by Section 119 of the Commodity Futures Modernization Act of 2000,²⁷ requires the Commission to consider the costs and benefits of its action before issuing an order under the CEA. Section 15(a) of the Act further specifies that costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and

²⁵ CEA §3(b), 7 U.S.C. §5(b). See also CEA §4(c)(1), 7 U.S.C. §6(c)(1)(purpose of exemption is “to promote responsible economic or financial innovation and fair competition.”)

²⁶ 44 U.S.C. §3507(d).

²⁷ 7 U.S.C. §19(a).

other public interest considerations. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs. Rather, Section 15(a) simply requires the Commission to “consider the costs and benefits” of its action. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA. The Commission specifically invites public comment on its analysis of the costs and benefits associated with the proposed issuance of an exemptive order under Section 4(c) of the Act.

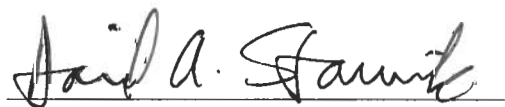
The primary cost that could be associated with the proposed exemptive order is the burden that may arise from subjecting transactions in ST gold futures contracts, and thereby the market participants transacting in such contracts, to the dual regulation of security futures by the Commission and the SEC. Potential costs arising from dual regulation, however, are outweighed by the legal certainty and additional benefits that could arise from the issuance of the proposed exemptive order. For example, permitting the trading of ST gold futures contracts on OneChicago, through the issuance of the proposed exemptive order, could facilitate price discovery for gold and gold-linked interests given that a liquid market in ST gold futures contracts would serve as an additional source for discerning the appropriate market value of gold. As discussed previously, the issuance of the proposed exemptive order may also foster competition by bringing a new derivatives product to market expeditiously without negatively impacting potential innovations in other markets for other commodities.

In addition, the issuance of the proposed exemptive order would not result in any costs in terms of reduced protections for Commission-regulated markets or market participants.

Transactions in ST gold futures contracts, pursuant to the proposed exemption, would be executed on OneChicago as security futures and would be subject to extensive and detailed regulation by the SEC and the Commission. Consequently, only intermediaries registered or notice-registered with the Commission and the SEC would be able to solicit, accept orders for, or deal in any transactions in connection with ST gold futures contracts. The implementation of an exemption, under these circumstances, would not negatively impact any applicable regulatory measure designed to protect market participants or the public interest. With respect to financial integrity, The Options Clearing Corporation, as both a derivatives clearing organization registered as such with the Commission and a clearing agency registered as such with the SEC, would carry out the clearing and settlement of OneChicago's ST gold futures contracts, including directing appropriate arrangements for the payment and physical delivery of the Shares that would underlie the ST gold futures contracts.

After considering the factors presented in this release, the Commission has determined to seek comment on the proposed order as discussed above.

Issued in Washington, DC, on March 10, 2008 by the Commission.

A handwritten signature in black ink, appearing to read "David A. Stawick". The signature is written in a cursive style and is positioned above a horizontal line.

David A. Stawick
Secretary of the Commission