

# ELX Futures

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

November 12, 2009

**Re: 2d Supplemental Filing: EFF and Transitory Trade Chronology at the CME Group's NYMEX Affiliate**

Dear Mr. Stawick:

ELX Futures, L.P. ("ELX") respectfully submits this 2d Supplement in support of ELX's Request for a Stay dated October 20, 2009, in connection with the self-certified Advisory Notice filed by the CME Group's ("CME") subsidiary CBOT on October 16, 2009 (CBOT RA0907-1), and hereinafter referred to as the "Rule Interpretation." ELX Rule IV-15, which creates an Exchange of Futures for Futures ("EFF") transaction, has been labeled by the CME Group as a "prearranged matched pair of block trades<sup>1</sup>," and "a wash trade by definition of the CEA (Commodity Exchange Act)<sup>2</sup>," and dismissed with the

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<sup>1</sup> CBOT Advisory RA0907-1, 10/19/09,  
[http://services.cftc.gov/sirt/sirt.aspx?Topic=TradingOrganizationRulesAD&Key=18428&Organization=CBOT&Filing%20Description=Provides%20CBOT%20Market%20Regulation%20Advisory%20Notice%20RA-0907-1%20\(Prohibition%20of%20EFF%20Transactions\),%20informing%20the%20marketplace%20that%20CBOT%20Rule%20538%20does%20not%20permit%20the%20execution%20of%20an%20Exchange%20of%20Futures%20for%20Futures%20in%20any%20CBOT%20product.%20%20CBOT%20#09-244](http://services.cftc.gov/sirt/sirt.aspx?Topic=TradingOrganizationRulesAD&Key=18428&Organization=CBOT&Filing%20Description=Provides%20CBOT%20Market%20Regulation%20Advisory%20Notice%20RA-0907-1%20(Prohibition%20of%20EFF%20Transactions),%20informing%20the%20marketplace%20that%20CBOT%20Rule%20538%20does%20not%20permit%20the%20execution%20of%20an%20Exchange%20of%20Futures%20for%20Futures%20in%20any%20CBOT%20product.%20%20CBOT%20#09-244)

<sup>2</sup> Dow Jones: MARKET TALK: CME Says Moving Futures Trades Prohibited By Law, November 5, 2009, By Jacob Bunge, quoting Rick Redding, head of products and services for CME, at an industry event November 5, 2009

By Jacob Bunge

Dow Jones: MARKET TALK: CME Says Moving Futures Trades Prohibited By Law  
1735 GMT [Dow Jones] Rick Redding, head of products and services for CME Group Inc. (CME), says trades designed to move Tsy futures positions out of CME's clearinghouse and into a competitor's would violate the Commodity Exchange Act. "Essentially, it becomes a wash trade by definition of the CEA, so we couldn't accept it," Redding says at an industry event Thurs. CME rival ELX Futures last month received regulators' approval for a new rule letting investors arrange to move positions from CME to ELX or vice versa, and ELX charges that CME is misrepresenting the issue for competitive reasons. (JAB)

note that “CME has a long-standing policy of prohibiting the sort of transitory trades covered by the ELX rule<sup>3</sup>.”

While maintaining that its use of fining powers is justified by the EFF’s so-called illegal characteristics – notwithstanding the CFTC’s approval after a 90 day formal review process<sup>4</sup> – the CME’s NYMEX division has a long history of rules that allow trades that are called EFFs, or that provide its market participants with a functional equivalent of EFF transactions, i.e. rules that permit the transfer of positions through Over the Counter (OTC) non-competitively executed trades.

In addition, while also maintaining that the CME’s subsidiary CBOT prohibits transitory trades, we have found that not to be the case at all.

A review of NYMEX’s rules from 2002 continuing after its August 2008 merger with the CME shows a regular use of the EFF and EFF equivalent transaction in both energy and metals markets. The EFF and EFF equivalent rules have allowed for the exchange of NYMEX WTI crude oil futures for ICE WTI crude oil futures, and between NYMEX’s crude oil futures contract (WTI) and Brent futures. NYMEX’s EFF and EFF equivalent rules have allowed for the exchange of futures positions in the cash settled “eMini” versions of natural gas, crude oil, gold and silver futures, into their larger sized, physically settled futures cousins.

During the course of NYMEX’s use of the EFF and EFF equivalent rules, it has called these transactions by various names and acronyms, and has used an assortment of Rule Numbers to classify them. The rules have included the following transactions: IXA (Interexchange Arbitrage); “EFM” (“Exchange of NYMEX e-miNYFutures For, Or In Connection With, NYMEX Futures Transactions”); EFF (Exchange of Futures for Futures); and the “EFB” (Exchange of Futures for Bigs). When the CME “harmonized” its EFRP rules under Rule 538 on October 5, 2009 (Advisory Notice RA0910-5 (concerning Rule 538 (EFRP))<sup>5</sup>,

<sup>3</sup> Dow Jones: ELX Says It Has Proof CME Accepts Transitory Trades, November 4, 2009, By Jacob Bung <http://www.easybourse.com/bourse/actualite/update-elx-says-it-has-proof-cme-accepts-transitory-trades-US6294911010-756101>

<sup>4</sup> §5c(c)(3), 7USC§7a-2©(3), of the Commodity Exchange Act governs the standard for Commission Approval of exchange rules submitted for prior approval: “ the Commission shall approve any such new...rule, or rule amendment unless the Commission finds that the new ...rule, or rule amendment would violate this [Commodity Exchange] Act.” ELX maintains that the Commission spent an extended statutory review period of 90 days reviewing the EFF Rule prior to approval, and that Commission approval was an unassailable determination that the EFF Rule did not violate the Commodity Exchange Act, as is now being maintained by CME’s spokespeople.

<sup>5</sup> [http://services.cftc.gov/sirt/sirt.aspx?Topic=TradingOrganizationRulesAD&Key=18247&Organization=CME&Filing%20Description=Issues%20Market%20Regulation%20Advisory%20Notice%20RA0910-5%20\(concerning%20Rule%20538%20\(EFRP\)\)%20and%20Market%20Regulation%20Advisory%20Notice%20RA0911-5%20\(concerning%20Rules%20533%20and%20531\).%20CME/CBOT/NYMEX%20#09-225](http://services.cftc.gov/sirt/sirt.aspx?Topic=TradingOrganizationRulesAD&Key=18247&Organization=CME&Filing%20Description=Issues%20Market%20Regulation%20Advisory%20Notice%20RA0910-5%20(concerning%20Rule%20538%20(EFRP))%20and%20Market%20Regulation%20Advisory%20Notice%20RA0911-5%20(concerning%20Rules%20533%20and%20531).%20CME/CBOT/NYMEX%20#09-225)

CME eliminated all such rule references to the foregoing, but did not prohibit or even mention the foregoing. ELX does not find it reasonable to presume, in the absence of notice to the contrary, that all of these long-standing practices were eliminated by the CME's rule harmonization, but instead sees the only reasonable conclusion to be that these various practices were incorporated therein.

In addition, while CME also maintains that the CME's subsidiary CBOT prohibits transitory trades, we have found that not to be the case at all. In its Rule Interpretation (RA0907-1) (see footnote 1), CME through its CBOT subsidiary, states that "transitory trades...under CBOT Rules may not be employed to create or liquidate a futures position." However, in a filing with the CFTC dated 12/12/07 containing RA0708-3, on page 7 the CME states explicitly that transitory trades "are permitted in CME Currency futures and in CBOT 100 oz. Gold futures and CBOT 5000 oz. Silver futures."

As ELX mentioned in its original Request for a Stay, in its Advisory Notice dated October 2, 2009, (CME Group RA0910-5) CME proposes for its CBOT affiliate a transitory EFRP (see Q&A #9).

CME's protestations in its certification are shown clearly to be false in light of the history of its rules and advisory notices, which have the same effect as rules, and the rules of its merged entity, Nymex.

The following chronology, and supporting source records, tracks the EFF transaction and functionally related or equivalent transactions from inception in 2002 through a post-merger filing in November 2008. (The merger of CME and NYMEX occurred in August 2008.)

**CHRONOLOGY**

**1. 3/13/02 The EFF**

<http://www.cftc.gov/foia/fedreg02/foi020313b.htm>

New York Mercantile Exchange's Proposal To Permit Exchange of  
Futures for, or in Connection With, Futures Transactions in Brent Crude  
Oil Futures Contracts  
[Federal Register: March 13, 2002 (Volume 67, Number 49)]  
[Notices]  
[Page 11286-11288]  
From the Federal Register Online via GPO Access [wais.access.gpo.gov]  
[DOCID:fr13mr02-28]

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COMMODITY FUTURES TRADING COMMISSION

New York Mercantile Exchange's Proposal To Permit Exchange of

Futures for, or in Connection With, Futures Transactions in Brent Crude Oil Futures Contracts

AGENCY: Commodity Futures Trading Commission.

ACTION: Request for public comment on a proposed exchange rule to permit Exchange of Futures for Futures ("EFF") transactions.

SUMMARY: The New York Mercantile Exchange ("NYMEX" or "Exchange") has requested that the Commission approve proposed new Rule 6.21D to permit EFF transactions in the Exchange's Brent Crude Oil ("Brent") futures contract. The proposed new rule would establish a non-competitive trading procedure that would operate in a manner that is analogous in some respects to block trading rules and in other respects to exchange of futures for physicals ("EFP") rules currently in operation at some exchanges. NYMEX intends for the proposal to enable "eligible contract participants," as that term is defined by section 1a(12) of the Commodity Exchange Act, to liquidate open positions in Exchange-specified substantially equivalent contracts at another exchange and to establish comparable positions in the Exchange's Brent contract. The proposed rule essentially provides a mechanism to transfer Brent futures positions from another exchange to NYMEX.

## 2. 2. 6/11/02 – The EFM

NYMEX NTM establishes Rule 6.21E to allow for Exchange of NYMEX e-miNY for NYMEX Futures: [http://www.nymex.com/notice\\_to\\_member.aspx?id=ntm172&archive=2002](http://www.nymex.com/notice_to_member.aspx?id=ntm172&archive=2002)

### Notice to Members

Notice No. 172

06/11/2002

#### **e-miNY: Implementation of New NYMEX Rule 6.21E ("Exchange OF NYMEX e-miNY Futures For, Or In Connection With, NYMEX Futures Transactions")**

In connection with the launch of NYMEX's new e-miNY futures contracts in Crude Oil and Natural Gas, please be advised that NYMEX will implement new NYMEX Rule 6.21E, which is attached and which establishes a new procedure for an exchange of NYMEX futures for NYMEX e-miNY futures (or "EFM") in these two new NYMEX futures contracts. The new rule will become effective upon the launch of the e-miNY project on June 17, 2002.

**EFM Transactions.** The execution of an EFM transaction will consist of a purchase (sale) of a NYMEX e-miNY futures contract and the sale (purchase) of the corresponding full or "Big" NYMEX futures contract in the appropriate ratio of 5:2 e-miNY futures contract to a full-size NYMEX futures contract.

**Purpose.** The purpose of the EFM transaction is to provide an ex-pit offset facility for persons who have an arbitrage position between one of the NYMEX e-miNY and a NYMEX Big contract.

**Analogy to EFP/EFS Transactions.** These transactions will be transacted in a fashion similar in nature to that of an EFP or EFS in that they are pre-negotiated, non-competitive transactions. The party who sells the e-miNY component will, for operational purposes, be referred to as the seller of the EFM.

**EFM Transaction Price.** The trade will not have either the e-miNY or Big legs priced on trade entry but instead ultimately will have the Big settlement price (as determined that trading day) assigned to both legs of the EFM transaction.

**Fees.** NYMEX will not charge ANY fees for these transactions to any party.

**EFM Transaction Deadline.** The deadline for posting EFM transactions is the close of trading on the third business day preceding the last day of trading in the applicable e-miNY contract. (For example, if the expiration day for an e-miNY futures contract would be Friday, August 20, then the last day to post EFM transactions would be the close of trading on Tuesday, August 17.)

**Example of EFM Transaction**

An EFM would be transacted as follows:

Trader AAA has an open arbitrage position of Long 50 Crude Oil e-miNY's and Short 20 Crude Oil Bigs.

Trader BBB has an open arbitrage position of Short 50 Crude Oil e-miNY's and Long 20 Crude Oil Bigs.

Rather than going into both the e-miNY market AND the Big market and executing competitive liquidating transactions, which effectively look like an inter-market spread, AAA and BBB negotiate to post an EFM.

Both AAA and BBB may have openly expressed interest in the trading pit in seeking an EFM counterparty or their clearing members may have directed them to one another.

An EFM is posted at NYMEX with AAA recognized as the seller of the EFM. AAA simultaneously sold 50 Crude Oil e-miNY's and purchased 20 Crude Oil Bigs from BBB.

please select one

NYMEX.com: Notices to Members

[http://www.nymex.com/notice\\_to\\_member.aspx?id=ntm172&archive=2002\[11/10/2009 3:34:47 PM\]](http://www.nymex.com/notice_to_member.aspx?id=ntm172&archive=2002[11/10/2009 3:34:47 PM])

AAA would **submit his/her pit card to the TRADE CORRECTIONS AREA ONLY**. EFM's should NOT be submitted directly into either the Crude Oil or Natural Gas pits. The EFM should be the only trade on the specific trading card for AAA since he/she is the seller. **See the attached illustration of trading cards for additional guidance on specific trading card requirements.**

BBB who is buying the e-miNY's will record the EFM as illustrated in the attachment. BBB is **not** restricted from having other transactions on the specific trading card.

**NOTIFICATION OF NEW NYMEX RULE 6.21E**

*(Entire rule is new)*

**Rule 6.21E. EXCHANGE OF NYMEX e-miNY FUTURES FOR, OR IN CONNECTION WITH, NYMEX FUTURES TRANSACTIONS**

(A) **General Requirements.** An exchange of futures for, or in connection with, mini futures (EFM) consists of two discrete, but related transactions; a purchase (sale) transaction in a NYMEX e-miNY and a sale (purchase) transaction in the related NYMEX futures contract. At the time such transaction is effected, the buyer (seller) of the NYMEX e-miNY shall be the seller (buyer) of the related NYMEX futures contract in the ratio designated by the Board of Directors.

(B) **Final Deadline for Transactions.** An EFM involving an expiring e-miNY futures contract month is permitted at any time up to and must be reported to the Exchange by the close of trading on the third business day preceding the last day of trading in the applicable e-miNY futures contract.

(C) **Contract Month and Quantity.** An EFM transaction may only be effected for the same contract month in both of the applicable NYMEX futures contracts. The quantity of contracts to be exchanged in the EFM transaction must be consistent with the size ratio then in effect between the applicable e-miNY NYMEX futures contract listed for trading on Globex and the regular size NYMEX contract listed for trading at NYMEX.

(D) **Transaction Price.** An EFM transaction may only be transacted at the settlement price for the regular size NYMEX futures contract for the trading session in which the EFM transaction was reported to the Exchange.

(E) **Floor Reporting Requirements and Deadlines.** A report of each EFM transaction must be given and notice thereof must be posted on the Floor of the Exchange. The report of an EFM transaction must be given on the Floor prior to the end of the trading session on the day that the agreement was made, or if such agreement was made after the close of trading, then during the trading session on the next business day.

(F) **Clearing.** EFM transactions shall be cleared through the Exchange in accordance with normal procedures, shall be clearly identified and marked in the manner provided by the Exchange, and shall be recorded by the Exchange and by the Clearing Members involved.

Should you have any questions or require any further information, please contact [exchangeinfo@nymex.com](mailto:exchangeinfo@nymex.com)

### 3. 8/6/02 - The floor is reminded of the EFM in August:

[http://www.nymex.com/notice\\_to\\_member.aspx?id=ntm216&archive=2002](http://www.nymex.com/notice_to_member.aspx?id=ntm216&archive=2002)

Notice No. **216**

08/06/2002

#### **EFM Reminder**

NYMEX Rule 6.21E established a procedure for an exchange of NYMEX futures for NYMEX e-miNY futures (or "EFM"). The EFM allows two parties to simultaneously offset e-miNY and Big positions through a non-competitive, negotiated transaction.

EFM's must be executed in the established 5:2 ratio and can be arranged and executed in two ways.

1. Your Clearing Member can assist in finding a counterparty and then direct the counterparties to one another

or

2. The desire to execute an EFM can be openly expressed in the trading pit and a counterparty can be located through the open outcry method.

Please remember that while EFM's are always executed in the pit, they MUST be brought to the NYMEX Trade Processing Area. DO NOT SUBMIT EFM PIT CARDS TO THE PIT.

Should you have any questions or require any further information, please contact [exchangeinfo@nymex.com](mailto:exchangeinfo@nymex.com)

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### 4. 10/21/04 – The EFF in connection with the Dublin Floor

[http://www.nymex.com/notice\\_to\\_member.aspx?id=ntm398&archive=2004](http://www.nymex.com/notice_to_member.aspx?id=ntm398&archive=2004)

#### **Notice to Members**

Notice No. **398**

10/21/2004

#### **Brent Crude Oil Frequently Asked Questions**

Q: Why is the New York Mercantile Exchange, Inc., opening a satellite trading floor in Dublin to offer trading in a Brent crude oil futures contract?

**Q: What transaction rules and procedures will apply to the NYMEX Division Brent crude oil futures contract?**

A:

1. In general, current Exchange Chapter 6 floor trading rules also will be applicable to trading on the Dublin trading floor. For example, crossing orders by a floor broker will be permitted in the NYMEX Division Brent market where a floor broker holding buy and sell orders from different customers for the same contract month can cross the two orders after first offering both orders to the market, as provided by NYMEX Division Rule 6.40, "Simultaneous Buy and Sell Orders on the Exchange Trading Floor."

2. Market participants will be permitted to engage in an EFF transaction only in the NYMEX Division Brent crude oil futures contract as provided in Rule 6.21 D. An EFF consists of two discrete but related transactions; an initial futures transaction effected on another board of trade and a subsequent futures

NYMEX.com: Notices to Members

[http://www.nymex.com/notice\\_to\\_member.aspx?id=ntm398&archive=2004](http://www.nymex.com/notice_to_member.aspx?id=ntm398&archive=2004)[11/10/2009 3:14:56 PM]

transaction in the NYMEX Division Brent contract that is reported to the Exchange. It allows for the position on the other board of trade to be liquidated and exchanged with a position in the NYMEX Division Brent futures contract at a price determined by the participants. The minimum transaction size is 50 contracts.

## 5. 8/22/05 – The IXA

8/16/05 Certified new Rule 6.21B for IXA rules to address IPE WTI contract threat submission:  
<http://www.cftc.gov/files/submissions/rules/selfcertifications/2005/rul081605nymex002.pdf>

**Re: Rule Certification. NYMEX Submission 05.146: Notification of New NYMEX Rule 6.21B, Inter-Exchange Arbitrage (“IXA”) Trades.**

Dear Ms. Jean Webb:

The New York Mercantile Exchange (“NYMEX” or the “Exchange”) is notifying the Commodity Futures Trading Commission (“CFTC” or “Commission”) of new NYMEX Rule 6.21B, Inter-Exchange Arbitrage (“IXA”) Trades.

This new Rule would permit sophisticated market participants to post a negotiated transaction of 50 contracts or more in the Crude Oil (“CL”) futures contract solely in connection with a contemporaneous arbitrage transaction against an opposite but economically equivalent futures transaction on another board of trade. This new rule would address the legitimate needs of market participants who maintain exposure in the various physical markets for Crude Oil worldwide. This new rule will be effective as of Monday, August 22, 2005. Pursuant to Section 5c(c) of the Commodity Exchange Act (“Act”) and CFTC Rule 40.6, the Exchange hereby certifies that the attached rule amendment complies with the Act, including regulations under the Act.

## 6. 10/11/05 allow members of other boards of trades to enter IXA trades

10/11/05 adds language to allow members of other boards of trades to enter IXA trades:  
<http://www.cftc.gov/files/submissions/rules/selfcertifications/2005/rul101105nymex002.pdf>

## 7. 3/3/06 EFM Rule change to allow spread price of up to two cents:

<http://www.cftc.gov/files/submissions/rules/selfcertifications/2006/rul030306nymex001.pdf>

### Notice to Members

Notice No. **114**

03/03/2006

### **NYMEX Rule Change: Spread Markets in the Exchange of Futures for NYMEX miNY™ Natural Gas (EFM)**

The Exchange of Futures for miNYs program, which is set forth in NYMEX Rule 6.21 E, was introduced to facilitate the reversal of an arbitrage position between the NYMEX miNY futures and the standard size futures contracts. The transaction price has been based on the standard size contract settlement for both sides of the posted trade.

Effective immediately, in NYMEX miNY Natural Gas only, a spread market or differential will be allowed between the NYMEX miNY natural gas futures and the standard natural gas futures contracts for EFM transactions. The Lead Market Makers (LMM) in the miNY natural gas are required to make a spread market of no more than four ticks or two cents wide on either side of the bid/offer between the miNY and standard contracts.

To execute an EFM, a customer must contact their NYMEX Clearing Member. It should be noted that EFMs can only be executed to close out an existing customer position. Please see amended NYMEX rule below.

8. **6/28/06 EFM Rule 6.21E deleted and referred to 11G.22**  
[http://www.nymex.com/notice\\_to\\_member.aspx?id=ntm296&archive=2006](http://www.nymex.com/notice_to_member.aspx?id=ntm296&archive=2006)

Notice No. **286**  
 06/08/2006

**Summary of Rule Changes Related to Listing of NYMEX Products on CME Globex® Trading System**

In connection with the launch on June 11 (for trade date June 12) of the initial slate of NYMEX products to be listed on the CME's Globex® trading system, NYMEX is adding or amending a number of rules to reflect this transition. With the exception of a few provisions that are noted below, the organizing principle is to include all substantive rules relating to the trading of NYMEX products on Globex in NYMEX Chapter 11G (Electronic Trading Rules for Globex Trading System). This notice includes links to two PDF files that display the rule changes being made at this time. One file includes the changes made to NYMEX Chapter 11G, while the other file includes changes being made to other NYMEX rule chapters.

**Exchange of NYMEX Physically Settled Regular Size Futures for NYMEX miNY™ Contracts (EFM)**

The Exchange will continue to allow for EFM transactions and is renumbering former Rule 6.21E as Rule 11G.22. The only significant change is in the elimination of the prior restrictions on eligible transaction prices.

**Exchange of Regular Size Financially Settled Futures Contracts for Regular Size Physically Settled Futures Contracts**

The Exchange is adding a new rule (11G.23) to allow for the exchange of regular size physically-settled and regular size cash-settled futures contracts in the same underlying commodity ("exchange of futures for bigs" or "EFB"), which in substance parallels the provisions of the EFM rule noted above.

9. **11/29/06 – EFM's in COMEX Metals**

[http://www.nymex.com/notice\\_to\\_member.aspx?id=ntm627&archive=2006](http://www.nymex.com/notice_to_member.aspx?id=ntm627&archive=2006)

**Notice to Members**

Notice No. **627**  
 11/29/2006

**Procedures for Exchange of COMEX Futures for COMEX miNY Futures ("EFM")**

In connection with the launch of the COMEX miNY futures contracts in Gold, Silver and Copper, please be advised that NYMEX will amend Rule 11G.22 (attached) to incorporate an Exchange of COMEX Futures for COMEX miNY Futures ("EFM"). The amended rule will become effective upon the launch of the miNY contracts on December 3, 2006 for trade date December 4, 2006.

**EFM Transactions.** The execution of an EFM transaction will consist of a purchase (sale) of a COMEX miNY futures contract and the sale (purchase) of the corresponding full or "Big" COMEX futures contract in the appropriate ratio of 2:1 miNY futures contract to a full-size COMEX futures contract.

**Purpose.** The purpose of the EFM transaction is to provide an ex-pit offset facility for persons who have an arbitrage position between one of the COMEX miNY and a COMEX Big contract.

**Analogy to EFP/EFS Transactions.** These transactions will be transacted in a fashion similar in nature to that of an EFP or EFS in that they are pre-negotiated, non-competitive transactions. The party who sells the Big component will, for operational purposes, be referred to as the seller of the EFM.

**EFM Transaction Price.** The trade will not have either the miNY or Big legs priced on trade entry (values based on the settlement price from the prior session will be used as a placeholder) but instead ultimately will have the Big settlement price (as determined that trading day) assigned to both legs of the EFM transaction. Alternatively, the EFM may be posted at a differential to the settlement price for the physical COMEX futures contract for the trading session in which the EFM

