Exhibit A

ELX Futures

October 14, 2009
ELXNTP-Reg-09018

MEMO TO MARKET ON EXCHANGE OF FUTURES FOR FUTURES (EFF)

On October 7, the Commodity Futures Trading Commission (the CFTC or Commission) informed ELX Futures, L.P. (ELX or the Exchange) that the CFTC approved ELX Rule IV-5(a) providing for Exchange of Futures for Futures (EFF) as part of the Exchange's EFRP Rules. ELX submitted the EFF Rule to the CFTC on July 6 for formal prior approval. Prior rule approval is typically not the process that exchanges use for rule approval because another process of self-certification is permitted which allows for a rule to take effect immediately. However, prior approval, although time consuming, provides for a determination by the Commission that the Rule is compliant with the Commodity Exchange Act (CEA), and is consistent with the public interest and the pro-competitive goals of futures regulation. ELX sought the Commission's determination of compliance to obtain legal certainty, and avoid any uncertainty in the event of a claim that the EFF Rule was somehow a fictitious trade or otherwise in violation of the CEA. Now, we know that cannot be the case.

The standards for CFTC prior rule approval are set forth in Section 5c(c) of the CEA, and CFTC Reg. 40.5. Section 5c(c)(3) states the standard for approval as follows: "The Commission shall approve any such new ...rule amendment unless the Commission finds that the new rule amendment would violate this Act."

During the pendency of the EFF Rule with the CFTC, the Commission staff posed three sets of questions, and had several discussions with ELX by phone. The approval process was extended from the normal 45 days to a 90-day review period because of what the staff felt were complex issues requiring additional time to consider. ELX's EFF Rule was posted on the CFTC's website for comment, as is the normal process, and no comment was received. The Commission approved the EFF rule at the end of the extended review period after a full, thorough vetting.

Among specific provisions of the CEA that the CFTC would have considered are Section 4c(a)(2) dealing with the prohibition on wash trading and fictitious trades. Once the CFTC has taken the time to thoughtfully reach a conclusion on these issues, an exchange may ask the CFTC to review its conclusions, but may not independently ignore those conclusions, and usurp the legal certainty that ELX is entitled to by having filed for prior approval. Certainly, there is no open issue of a regulatory offense for which another exchange can use its rule enforcement powers should market participants avail themselves of the new EFF Rule. Any such use of disciplinary powers would be anticompetitive, no matter how it is labeled.

The CME's recent Advisory Notice, RA0910-5 (Exchange for Related Positions) defines an EFR transaction as:

> "a privately negotiated and simultaneous exchange of a futures position for a corresponding OTC swap or other OTC derivative in the same or a related instrument." (page 4 – Q1: What is an EFRP?)

An ELX U.S. Treasury futures contract that is executed off-exchange as part of an EFF satisfies the "other OTC derivative" requirement and falls within this definition. Recall, that the NYMEX division explicitly allowed transactions similar to ELX EFFs in the gas and crude e-mini contracts, and did not prohibit them in the recent Advisory. Certainly, there is no prohibition of EFFs.

How the Rule Works

An EFF is intended to be a simple and straightforward transaction. Two parties, OTC, privately negotiate to buy and sell futures on two exchanges as the basis for an EFF. For simplicity, let's say Trader A Buys 10 December 5 Year ELX UST Futures from Trader B and Trader B Buys 10 December 5 Year CME UST Futures from Trader A. The clearing firms representing Clearing Firm A and B report the EFRP trades to the OCC (the clearinghouse for ELX) and the CME Clearinghouse.

As a result of this trade, A and B can manage their respective positions in related contracts on two markets, giving them flexibility to act in their commercial interests.

Conclusion

The rule is in effect and the EFF is a permitted transaction. Nonetheless, Parties should discuss with their clearing firms in advance their position on EFF transactions.

Please call ELX at 212-294-8000 for further information, or visit our website, www.elxfutures.com.

Exhibit B

CME Group
A CME/Chicago Board of Trade Company

Kathleen M. Cronin
Managing Director
General Counsel and Corporate Secretary

November 16, 2009

VIA ELECTRONIC MAIL

Steven Schoenfeld
Director, Division of Market Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20581

Re: The Board of Trade of the City of Chicago, Inc. ("CBOT") Market Regulation Advisory Notice RA0907-1

Dear Mr. Schoenfeld:

CBOT hereby responds to the Commission's letter dated October 30, 2009 with respect to CBOT's Market Regulation Advisory Notice RA0907-1 (the "Advisory Notice"). For the reasons discussed below, the Advisory Notice does not constitute a "false certification" within the meaning of Commission Regulation 40.6(b). Moreover, neither the Advisory Notice nor CBOT Rule 538 violates Core Principle 18. ELX Futures, L.P.'s ("ELX") request for a stay of the Advisory Notice should be denied and the Commission's inquiry should be terminated.

I. Background

In accordance with Core Principle 9 and Commission Regulations 1.38 and 1.39, CBOT's rules prohibit non-competitive trades except in limited circumstances. (*See* CBOT Rule 539.) The only prearranged trades permitted on CBOT are block trades made pursuant to CBOT Rule 526 and Exchange for Related Positions ("EFRPs") pursuant to CBOT Rule 538. As authorized by the Commodity Exchange Act ("CEA"), CBOT Rules 526 and 538 were self-certified, without subsequent objection from the Commission.

CBOT Rule 538 specifically permits three types of Exchange for Related Positions ("EFRPs") transactions: (i) Exchange for Physical ("EFP"); (ii) Exchange for Risk ("EFR"); and (iii) Exchange of Options for Options ("EOO"). In relevant part, CBOT Rule 538 provides:

> **538. EXCHANGE FOR RELATED POSITIONS**
> The following transactions shall be permitted by arrangement between parties in accordance with the requirements of this rule:
>
> Exchange for Physical ("EFP") – A privately negotiated and simultaneous exchange of an Exchange futures position for a corresponding cash position.

Exchange for Risk ("EFR") – A privately negotiated and simultaneous exchange of an Exchange futures position for a corresponding OTC swap or other OTC instrument.
Exchange of Options for Options ("EOO") – A privately negotiated and simultaneous exchange of an Exchange option position for a corresponding OTC option position or other OTC instrument with similar characteristics.

For purposes of this rule, an EFP, EFR or EOO shall be referred to as an Exchange for Related Position ("EFRP").

538.A. Nature of an EFRP
An EFRP consists of two discrete but related simultaneous transactions. One party to the EFRP must be the buyer of (or the holder of the long market exposure associated with) the related position and the seller of the corresponding Exchange contract. The other party to the EFRP must be the seller of (or the holder of the short market exposure associated with) the related position and the buyer of the corresponding Exchange contract. However, a member firm may facilitate, as principal, the related position on behalf of a customer, provided that the member firm can demonstrate that the related position was passed through to the customer who received the Exchange contract position as part of the EFRP.

538.B. Related Positions
The related position (cash, OTC swap, OTC option, or other OTC derivative) must involve the commodity underlying the Exchange contract, or must be a derivative, by-product, or related product of such commodity that has a reasonable degree of price correlation to the commodity underlying the Exchange contract.

538.C. Quantity
The quantity covered by the related position must be approximately equivalent to the quantity covered by the Exchange contracts.

538.D. Prices and Price Increments
An EFRP transaction may be entered into in accordance with the applicable price increments or option premium increments set forth in the rules governing the pertinent Exchange contracts, at such prices as are mutually agreed upon by the two parties to the transaction.

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538.H. Documentation
Parties to any EFRP transaction must maintain all documents relevant to the Exchange contract and the cash, OTC swap, OTC option, or other OTC derivatives, including all documents customarily generated in accordance with relevant market practices and any documents reflecting payment and transfer of title. Any such documents must be provided to the Exchange upon request, and it shall be the responsibility of the carrying clearing member firm to provide such requested documentation on a timely basis.

In its Request for Approval of Amendment to ELX Futures, L.P. Rule IV-5(a)(iv) and (v) to add an Exchange of Futures for Futures, or "EFF"," Rule to the Rule Governing Exchange for Futures for Related Positions dated July 6, 2009 (the "Rule Filing"), ELX asked the Commission for, among other things, prior approval of Rule IV-5(a)(iv) to ELX's rules. ELX's Rule IV-5(a)(iv) (the "EFF Rule") amends ELX's existing rule respecting Exchange of Futures for Related Position to explicitly permit a futures contract to serve as the related position in such transactions. The ELX EFF Rule does not explicitly establish the means to liquidate the futures positions held at another clearing house or to establish new positions at another clearing house. Based on ELX's press statements and the explanation supporting its

rule filing, it is clear that the purpose of the EFF Rule is to enable persons who hold open, equal and opposite futures positions at another clearing house to require that clearing house and the relevant exchange that lists the contract to permit the liquidation of those positions and the corresponding open interest at that clearing house by means of some form of notice of fictitious paired transactions rather than a legitimate transaction. In relevant part, ELX's EFF Rule provides:

> **IV-5 Exchange of Futures**
>
> (a) The following transactions may be executed outside of the ELX System in all Futures in accordance with the requirements of this Rule.
>
> **********
>
> (iv) *Exchange of Futures for, or in connection with, futures transactions (Exchange for Futures Transactions" or "EFFs").*
> (v) For purposes of this Rule, all EFPs, EFSs, EFFs and EFRs shall be referred to as Exchanges of Futures for Related Positions.
>
> (b) The Related Position (cash, swap, futures or OTC derivative) must involve the commodity underlying the Future, or must be a derivative by-product or related product of such commodity that has a reasonable degree of price correlation or other significant price relationship to the commodity underlying the Future.
>
> (c) An Exchange of Futures for a Related Position consists of two discrete, but related simultaneous transactions. One party must be the buyer of (or have the long market exposure associated with) the Related Position and the seller of the corresponding Future, and the other party must be the seller of (or have the short market exposure associated with) the Related Position and the buyer of the corresponding Future. However, a Participant may facilitate, as principal, an Exchange of Futures for a related Position on behalf of a Customer, provided that the Participant can demonstrate that the Futures Position or Related Position as the case may be, was passed through to the Customer.
>
> (d) The accounts involved on each side of an Exchange of Futures for a Related Position: (i) must have different Beneficial Ownership; and (ii) must be under separate control; or (iii) must involve separate legal entities.
>
> (e) The quantity covered by the Related Position must be approximately equivalent to the quantity covered by the Futures.
>
> (f) Exchanges of Futures for Related Positions may be entered into in accordance with the applicable trading increments for the Future involved, at such prices as are mutually agreed upon by the two parties to the transaction.

In its Rule Filing, ELX states that the purpose of its proposed rule "is to enable market participants to establish positions in futures contracts on ELX and liquidate such positions on another DCM that lists an *identical contract,* or to establish a position on such other DCM and liquidate it on ELX." (Rule Filing at 1, (emphasis added).) According to ELX, an EFF "consists of two related but discrete transactions which are executed non-competitively between the same exempt commercial participants." (Rule Filing at 2 n.1.) ELX further states in the Rule Filing that the specific purpose of its request for prior approval by the Commission is "to confirm that the EFF Rule can be used to create a trade that must be accepted under CBOT Rule 538 of the CBOT Rules. . . . and will not subject the CBOT participant to disciplinary action or threat thereof." (Rule Filing at 2.) Finally, in its Rule Filing, ELX specifically asks the Commission to "use the powers granted to it to order an amendment to CBOT Rule 538 in order to give

effect" to the ELX Rule Proposal. (Id.) The Commission neither granted ELX's request for prior approval nor amended CBOT Rule 538. ELX's proposed EFF rule, however, was "approved" by virtue of the fact that the Commission failed to take action within the statutory timeframe, which expired on October 5, 2009.

ELX's EFF Rule, that was submitted to the CFTC and permitted to become effective by the passage of time, neither requires nor permits the use of matching, prearranged block trades that negate market risk to liquidate positions in one clearing house and reestablish those same positions at another clearing house. Rather, it provides: "An Exchange of Futures for a Related Position consists of two discrete, but related simultaneous transactions. One party must be the buyer of (or have the long market exposure associated with) the Related Position and the seller of the corresponding Future, and the other party must be the seller of (or have the short market exposure associated with) the Related Position and the buyer of the corresponding Future." ELX's EFF Rule does not specify how the related futures position may be bought or sold and does not purport to control or alter the rules of the exchange at which the related futures position was established and where it is part and parcel of the open interest.

ELX's EFF Rule does not purport to provide the mechanism for the extinguishment of open interest at another clearing house. The rule can only control the creation or liquidation of open interest on its exchange and at its clearing house. The legitimate mechanism to transfer CBOT open interest to ELX is for the party who is short a CBOT contract to close that position by buying-in its short and reestablishing its short position by means of a lawful transaction at ELX. A party who is long the CBOT contract may close that position by selling its position and may reestablish that position by going long at ELX. Provided that the trades at CBOT occur in the open, competitive market, or as *legitimate* privately negotiated transactions executed consistent with CBOT rules, CBOT has no further interest in any subsequent transaction that does not take place through the use of its facilities.

In the absence of a ruling from the Commission stating that CBOT must adopt ELX's EFF Rule – an omission which effectively denied ELX's request for the Commission to amend CBOT Rule 538 – ELX embarked on an aggressive publicity campaign purporting to interpret CBOT Rule 538. For example, on October 14, 2009, ELX issued a press release stating that the Commission's approval of the EFF Rule gives "traders the ability to move positions between clearinghouses." On that same day, ELX issued a "Memo to Market" stating "[a]n ELX U.S. Treasury futures contract that is executed off-exchange as part of an EFF satisfies the 'other OTC derivative' requirement" of CBOT Rule 538. (*See* ELX Memo to Market, attached hereto as exhibit A.) ELX further states in the "Memo to Market" that there is "no open issue of a regulatory offense for which another exchange can use its rule enforcement powers should market participants" attempt to trade on another exchange pursuant to ELX's EFF rule. (Id.) ELX's claim that CBOT is obligated by ELX's EFF Rule to accept a non-competitive trade that is not permitted by CBOT rules is not supported by the terms of the CEA, by any rule or regulation of the CFTC, or by the terms of the ELX EFF rule. CBOT is unaware of any authority conferring such power on any DCM.

In response to ELX's erroneous statements regarding CBOT Rule 538, including the issuance of its *own* interpretation of CBOT's rule, CBOT was forced to issue Advisory Notice RA0907-1 on October 16, 2009 (the "Advisory Notice"), which clarified the scope of CBOT Rule 538. Although the plain language of CBOT Rule 538 makes clear that an EFF transaction is not a permissible EFRP transaction

on CBOT (*i.e.,* unlike the language added to ELX's previous EFRP rule, CBOT's Rule 538 nowhere mentions the term "EFF"), CBOT informed market participants in the Advisory Notice that, contrary to the information that had been circulated by ELX respecting CBOT Rule 538, EFF transactions were prohibited by the rule and that the rule, by its terms, permitted *only* EFPs, EFRs and EOOs. (Advisory Notice at 1.) The Advisory Notice also noted that CBOT's rules have "*never* permitted a futures contract to be used as the related position component of an EFR transaction" (Id., emphasis added.)

On October 20, 2009, pursuant to Commission Regulation 40.6, ELX requested that the Commission stay CBOT's Advisory Notice ("Request for Stay"). ELX asserts that its Request for Stay is based on: (1) factual errors contained in CBOT's Advisory Notice, which render it a "false certification" within the meaning of Regulation 40.6(b); and (2) an alleged violation of Core Principle 18. Although we respond to ELX's allegations in more detail below in response to the specific questions posed by the Commission, we briefly note that there are many ways in which a market participant could effectively move its positions in CBOT Treasuries to ELX Treasuries while complying with CBOT's rules, and that ELX's complaint regarding the Advisory Notice and CBOT Rule 538 is based on a willful misreading of the Advisory Notice and the certification, and on a misconstruction of the antitrust definitions and concepts embodied in Core Principle 18.

II. Legal and Economic Principles Justify Distinguishing Between EFFs and EFPs, EFRs and EOOs

If a designated contract market chooses to permit non-competitive trades, it has the right and obligation to shape its rules permitting such trades in the best interests of preserving transparency and liquidity on its markets. Commission Regulation 1.38 generally requires that all purchases and sales of a futures contract or an options contract on a futures should be executed by open and competitive methods. However, transactions may be executed in a "non-competitive" manner if executed pursuant to exchange rules specifically providing for the non-competitive execution of such transactions, provided such rules were approved by the Commission.[1] Nonetheless, futures exchanges must balance such rules with Core Principle 9 (Execution of Transactions) applicable to futures exchanges, which mandates that "[t]he board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions."

Last fall, the Commission issued a request for comment on revised guidance for Core Principle 9 and on certain proposed amendments for Regulation 1.38. In that Federal Register release, the Commission opined that the "implicit assumption" in Regulation 1.38 was that "trading should take place

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[1] Commission Regulation 1.38 provides, in relevant part:

(a) *Competitive execution required; exceptions.* All purchases and sales of any commodity for future delivery, and of any commodity option, on or subject to the rules of a contract market shall be executed openly and competitively by open outcry or posting of bids and offers or by other equally open and competitive methods, in the trading pit or ring or similar place provided by the contract market, during the regular hours prescribed by the contract market for trading in such commodity or commodity option: *Provided, however,* That this requirement shall not apply to transactions which are executed non-competitively in accordance with written rules of the contract market which have been submitted to and approved by the Commission, specifically providing for the non-competitive execution of such transactions.

on the centralized market unless there is a compelling reason to allow certain transactions to take place off the centralized market."[2] The Commission further noted that exchange rules and policies allowing such transactions:

> "should ensure that the impact on the centralized market is kept to a minimum. For example, certain types of off-centralized market transactions, such as block trades and exchanges of futures for related positions, can create new positions or reduce prior positions. If these transactions become the exclusive or predominant method of establishing or offsetting positions in a particular market, it might jeopardize the centralized market's role in price discovery and would not comply with Core Principle 9, which provides that trading be competitive, open and efficient." (id.)

In addition, the application guidance for Core Principle 9 provides that a "competitive, open and efficient market and mechanism for executing transactions includes a board of trade's methodology for entering orders and executing transactions" and that "a designated contract market that determines to allow block trading should ensure that the block trading does not operate in a manner that compromises the integrity of prices or price discovery on the relevant market."

The Treasury complex at both CBOT and ELX are liquid markets and there is no legitimate reason to permit a non-competitive transaction without any economic substance that will cause sudden, inexplicable changes in open interest. Any trader with a position at CBOT in a Treasury contract can quickly and easily exit that position and reestablish it at ELX by simultaneously buying and selling at the respective exchanges on their electronic systems. Indeed, our records indicate that CBOT has, at all relevant times respecting such transactions, had narrow spreads and substantial size bid and offered at the inside market. It is our understanding that ELX offers similarly narrow spreads and reported record volume in October 2009. If the size of the position to be moved is "too big" for the competitive market, a customer may enter into a block trade to liquidate its CBOT position and enter into a *separate and independent* block trade to establish an ELX position. In fact, ELX's block trading thresholds during regular trading hours are at least 80% smaller than the CBOT's block trading thresholds. While block trades may detract from the benefits derived from bringing all transactions to the competitive arena, they are tolerated, subject to clear limits and strict measures to assure a significant measure of transparency and fairness to other market participants pursuant to the rules established by CBOT and the Commission. CBOT does not believe it is in the interest of the market or of its customers to offer holders of open interest the opportunity to eliminate their positions and impact the open interest without any legitimate trade.

On its face the ELX rule does not permit a purely fictitious trade to eliminate open positions at another exchange. It requires a transaction. If the required transaction begins or ends with a legitimate competitive transaction at CBOT, CBOT does not have a direct regulatory interest. ELX, however, is promoting an entirely different means to accomplish the liquidation of open positions at CBOT and the reestablishment of those positions at ELX. ELX expects to authorize its members to enter into a matched pair of transactions, that involve no market risk and no change of position and to then send a note to

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[2] *See* Execution of Transactions: Regulation 1.38 and Guidance on Core Principle 9, 73 Fed. Reg. 54097, 54099 (Sept. 18, 2008).

CBOT and its clearing house announcing that 5,000, 10,000 or even 100,000 open bond positions have been liquidated.

EFRP transactions have traditionally been executed to preserve basis relationships and mitigate the execution risk associated with the initiation or liquidation of a futures or futures option position to hedge a physical or OTC position, and have fostered the use of transparent exchange markets as a price source for transactions in the physical and over the counter markets. In the case of certain transitory EFRPs, the mechanism has facilitated clearing for the OTC market, thereby allowing for the mitigation of counterparty and systemic risk and enhanced transparency. Contrary to ELX's assertion that an ELX futures contract represents an OTC instrument that qualifies under CBOT Rule 538 as the OTC component of a CBOT EFRP transaction, it is clearly not an OTC instrument but an identical futures contract.

If prearranged, matching pairs of offsetting EFP, EFR, EOO or block transactions were executed, without incurring market risk, CBOT's prohibitions on wash sales and fictitious trading would be violated. The fact that the prearranged and matching pair of transactions involves trades on CBOT and another exchange does not obviate the requirement that the CBOT trade be bona fide. In our view such trades constitute fictitious or wash trading, which, consistent with Commission precedent, are prohibited by CBOT Rules.[3] The Commission defines wash trading as "entering into, or purporting to enter into, transactions to give the appearance that purchases and sales have been made, without incurring market risk or changing the trader's market position." Such fictitious and wash trades are expressly prohibited by the CEA:

> **§ 4c. Prohibited transactions**
> (a) **In general**
> (1) **Prohibition**
> It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction described in paragraph (2) involving the purchase or sale of any commodity for future delivery (or any option on such a transaction or option on a commodity) if the transaction is used or may be used to—
> (A) hedge any transaction in interstate commerce in the commodity or the product or byproduct of the commodity;
> (B) determine the price basis of any such transaction in interstate commerce in the commodity; or
> (C) deliver any such commodity sold, shipped, or received in interstate commerce for the execution of the transaction.

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[3] Rule 534. Wash Trades Prohibited

No person shall place or accept buy and sell orders in the same product and expiration month, and, for a put or call option, the same strike price, where the person knows or reasonably should know that the purpose of the orders is to avoid taking a bona fide market position exposed to market risk (transactions commonly known or referred to as wash sales). Buy and sell orders for different accounts with common beneficial ownership that are entered with the intent to negate market risk or price competition shall also be deemed to violate the prohibition on wash trades. Additionally, no person shall knowingly execute or accommodate the execution of such orders by direct or indirect means.

(2) **Transaction**
A transaction referred to in paragraph (1) is a transaction that—
(A) (i) is, of the character of, or is commonly known to the trade as, a "wash sale" or "accommodation trade"; or
(ii) is a fictitious sale; or
(B) is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price.

That the two legs contemplated by ELX's EFF Rule would be related to the identical contract traded on different contract markets is of no consequence. In fact, the Commission has expressly held on a number of occasions that a purchase and sale on two distinct systems does not avoid the wash sale prohibition when those trades have been prearranged. *See In the Matter of Byron G. Biggs,* CFTC Docket No. 04-22:

> "WASHINGTON, D.C. -- The U.S. Commodity Futures Trading Commission (CFTC) today announced the filing and simultaneous settlement of charges against Byron G. Biggs, a founder trader for BP Energy Company, for engaging in illegal wash trading on an electronic trading platform. Biggs has agreed to cooperate with the CFTC's Division of Enforcement.
> The CFTC order, issued on August 11, 2004, finds that on six occasions between April and June 2000, Biggs executed prearranged trades for electricity contracts at identical prices. On each occasion, according to the order, Biggs agreed to execute a buy or a sell order on the electronic trading platform and then immediately to reverse the transaction by bilaterally executing by telephone an equal and opposite buy or sell. The order finds that these trades resulted in a financial nullity." CFTC Release: 4967-04 (August 11, 2004)
>
> See also *In the Matter of Joseph B. Knauth, Jr.,* CFTC Docket No. 04-15.
> "WASHINGTON, D.C. -- The U.S. Commodity Futures Trading Commission (CFTC) today announced the filing and simultaneous settlement of charges against Joseph B. Knauth, Jr., a former electricity trader, for engaging in illegal wash trading on an electronic trading platform.
> The CFTC order, issued on May 10, 2004, finds that on five occasions between April and June 2000, Knauth executed prearranged trades for electricity contracts at identical prices. On each occasion, according to the order, Knauth agreed to execute a buy and a sell order on the electronic trading platform and immediately to reverse the transaction by bilaterally executing over the telephone an equal and opposite buy and sell. The order finds that these trades resulted in a financial nullity." CFTC Release: 4925-04 (May 10, 2004)

Judicial and administrative authorities have been consistent and clear: Proof of intent is not required to prove a wash trade, nor will a purported business motive prevent a transaction from being deemed a wash trade where the intent to avoid or negate market risk is sufficiently evident from the transaction's structure.

In *In the Matter of Olam International Ltd:* CFTC Docket No. 04-13 (April 15, 2004), the customer explained that it had a legitimate commercial purpose for its transaction – specifically, its interest in offsetting positions that were held at different clearing firms. The customer in *Olam* also appears to have

had a legitimate alternative means to accomplish its goal, which it failed to pursue out only of ignorance. The Commission rejected these defenses and reiterated its view of the legal standard:

> Section 4c(a) of the Act makes it "unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction" that "is of the character of, or is commonly known to the trade as, a 'wash sale'. . . ." The central characteristic of a wash sale is the intent to avoid making a *bona fide* transaction or taking a *bona fide* market position. *In re Citadel Trading Co. of Chicago, Lid.,* [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,082 at 32,190 (CFTC May 12, 1986).
>
> The factors that indicate a wash result are (1) the purchase and sale (2) of the same delivery month of the same futures contract (3) at the same (or a similar) price. *In re Gilchrist,* [19901992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,993 at 37,653 (CFTC Jan. 25, 1991). Here, Olam bought and sold the same delivery month of the same futures contract at the same price in two delivery months on June 13, 2002 (i.e., 345 July 2002 cocoa futures contracts at 1475 per contract and 345 March 2003 cocoa futures contracts at 1465 per contract) and again in two delivery months on July 10, 2002 (*i.e.*, 450 September 2002 cocoa futures contracts at 1780 per contract and 450 December 2002 cocoa futures contracts at 1761 per contract).

Nonetheless, in addition to these factors, the liability of the customer initiating the wash sale depends upon evidence demonstrating that the customer intended to negate market risk or price competition. *In re Piasio,* [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH)1 28,276 at 50,685 (CFTC Sep. 29, 2000). Market risk or price competition is negated "when it is reduced to a level that has no practical impact on the transactions at issue." *In re Gimbel,* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) 1 24,213 at 35,004 n.7 (CFTC Apr. 14, 1998), *aff'd as to liability,* 872 F.2d 196 (7th Cir. 1989). Similarly, the liability of a participant in the wash sale depends upon the demonstration that the participant knew, at the time he chose to participate in the transaction, that the transaction was designed to achieve a wash result in a manner that negated risk. *In re Bear Stearns & Co.,* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,994 at 37,665 (CFTC *Jan.* 25, 1991).

While the intent to avoid a *bona fide* market position can properly be inferred from prearrangement, it can also be inferred "from the intentional structuring of a transaction in a manner to achieve the same result as prearrangement." *In re Three Eight Corporation,* [19921994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,749 at 40,444 n.15 (CFTC Jun. 16, 1993) (citing *In re Collins* [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH)¶22,982 at 31,90001 (CFTC Apr. 4, 1986), *rev'd on other grounds sub. nom. Stoller v. CFTC,* 834 F.2d 262 (2d Cir. 1987) *("Collins I")).* "In an individual transaction . . ., a trader may avoid a *bona fide* market transaction in many instances merely by structuring the buy and sell orders so that they are simultaneous, or practically so, and by signaling . . . , directly or indirectly, that a price match is the objective of the transaction." *Collins 1,1* 22,982 at 31,900-01.

CBOT rules permit a firm or customer to establish or liquidate a position by means of a legitimate trade. CBOT rules require, in accordance with the requirements of the CEA, that the trade be a bona

fide trade rather than a fictitious trade. CBOT's interpretation of its rules, consistent with CFTC precedent, makes clear that a prearranged, matched pair of trades executed for the purpose of moving a futures position from one clearing house to another involves both contingent and transitory trades that are fictitious rather than bona fide and consequently violate CBOT rules. The Advisory Notice did not change CBOT Rules.

III. The Advisory Notice and CBOT Rule 538 Comply With Core Principle 18

In neither its Rule Filing nor its Request for Stay does ELX explain how CBOT's Advisory Notice or CBOT Rule 538 violates Core Principle 18. Rather, ELX simply makes the conclusory assertion that "[t]he use or threat of disciplinary action by an SRO to prevent another exchange from competing is a chilling threat." (Rule Filing at 4.) ELX's assertion that CBOT is "prevent[ing]" ELX – or any other exchange – from competing is outlandish. Nothing in CBOT's Advisory precludes any person from trading Treasury contracts at ELX or clearing those trades at the OCC. As discussed above, no CBOT rule prevents CBOT customers from closing open positions and reestablishing them at ELX. We are aware of no principle of antitrust law that requires a successful business to structure its rules in the way that will best facilitate the transfer of its open book of business to a third party (OCC) in order to assist a competitor (ELX). It is unequivocal that a violation of Core Principle 18 requires an "unreasonable restraint of trade," not "refusal to assist a competitor."

Core Principle 18 states:

> "Unless necessary or appropriate to achieve the purposes of this chapter, the board of trade shall endeavor to avoid:
> (A) adopting any rules or taking any action that result in any unreasonable restraints on trade; or
> (B) imposing any material anticompetitive burden on trading on the contract market.

The legislative history of Core Principle 18 makes clear that its terms are derived from antitrust law. *See* 1 PHILIP MCBRIDE JOHNSON & THOMAS LEE HAZEN, DERIVATIVES REGULATION §2.12[1] (2004) (discussing legislative history of CEA Section 15, the predecessor to Core Principle 18). Mere disadvantage to a competitor does not fall within the scope of "unreasonable restraint on trade" or "material anticompetitive burden" as those terms are defined by antitrust law. An exchange's refusal to adopt new rules or amend established rules in order to assist a competitor is not the kind of behavior contemplated by Core Principle 18.

It is not anticompetitive for an exchange or a clearing house to refuse to enter into offset arrangements (formal or de facto) with another exchange or clearing house. There are a plethora of cases enunciating this basic principle of antitrust law. For example, in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP.*, 540 U.S. 398, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004), the Supreme Court emphasized that traditional antitrust principles recognized only very limited exceptions (none of which is applicable here) to the general and well-accepted proposition that there is no duty for an enterprise to assist its rivals. 157 L.Ed.2d at 838. The Supreme Court and lower federal courts have repeatedly held that the purpose of antitrust laws is to protect competition, not competitors such as ELX. As the Supreme Court stated in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993): "The purpose of the [Sherman] Act is not to protect businesses from the working of the market, it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."

ELX fails to explain how CBOT's Advisory Notice or Rule 538 harms consumers by raising prices or reducing output. *See Ball Mem. Hosp., Inc. v. Mut. Ins., Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986) (antitrust injury "means injury from higher prices or lower output....") Nor has ELX even suggested how CBOT's Advisory Notice might cause an actual and substantial adverse effect on competition that outweighs its pro-competitive effects of fostering an open and competitive marketplace and prohibiting unlawful and misleading fictitious transactions. *See Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (To determine whether conduct promotes or suppresses competition, "the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.) The view that any impediment to a competitor is an unreasonable restraint of trade does not deserve to be given any credence by the Commission. *See NYMEX v. Intercontinental Exchange, Inc.*, 323 F.Supp.2d 559 (S.D.N.Y. 2004).

Moreover, in this instance, the question of whether or not CBOT's Advisory Notice or CBOT Rule 538 constitutes an unreasonable restraint of trade is not relevant. Core Principle 18 begins with the clause, "[u]nless necessary or appropriate to achieve the purposes of this chapter." This means that the antitrust considerations do not apply when the action is necessary or appropriate to achieve the purposes of the CEA. One of the explicit purposes of the CEA is to prevent fictitious trading and wash trading. If a rule or rule interpretation is "appropriate" to achieve that purpose, the antitrust concerns of Core Principle 18 do not come into play. Section 4c(a) clearly prohibits wash trades, accommodation trades and fictitious trades. It also forbids the reporting of prices that are not true and bona fide prices. As previously discussed, the EFF contemplated by ELX constitutes a fictitious trade. CBOT's Advisory Notice setting forth its interpretation of its existing rule prohibiting conduct forbidden by the CEA is thus fully consistent with CBOT's obligation to take affirmative steps to prevent violations of the CEA involving the reporting of fictitious transactions and prices. For this reason, the Advisory Notice (and CBOT Rule 538) is exempt from any limitation in subparagraphs A and B[4] of Core Principle 18.

It appears that ELX interprets Core Principle 18 as precluding CBOT, or any contract market for that matter, from taking any action that ELX judges to be contrary to its best interests. As the discussion above demonstrates, this is not what Core Principle 18 stands for, and neither the Advisory Notice nor CBOT Rule 538 violates this principle.

IV. CBOT's Self-Certification of the Advisory Notice Is Not a "False Certification" Within the Meaning of Regulation 40.6(b)

Regulation 40.6(b), in relevant part, provides that the Commission may stay "the effectiveness of a rule implemented pursuant to paragraph (a) of this section during the pendency of Commission proceedings for filing a false certification or to alter or amend the rule pursuant to section 8a(7) of the Act." (Reg. 40.6(b).) Although Regulation 40.6 does not define the term "false certification," CBOT can confidently attest that there is nothing "false" or otherwise incorrect in its Advisory Notice.

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[4] In fact, subparagraph (B) is not applicable here. It pertains to a rule of a board of trade that imposes anticompetitive burdens on the participants trading on the contract market that adopts the rule. Note that it does not refer to trading on "another contract market." The actual clause pertains to restrictions "on trading on *the* contract market." (emphasis added.) This clause was intended to prevent an exchange from discriminating among its own members in respect of trading on its markets.

As previously noted, ELX's claim that CBOT committed a violation of Commission Regulation 40.6(b) is itself based on false information. ELX states that "CME contends that it does not accept 'contingent or transitory EFRPs,'" (Request for Stay at 2,) yet the Advisory Notice clearly was issued on behalf of the DCM CBOT, and explicitly states that "*CBOT rule*s do not and have never permitted a futures contract to be used as the related position component of an EFR[P] transaction" and that "a prearranged, matched pair of block trades that are executed for the purpose of moving a futures position from one clearing house to another are *both contingent and transitory trades*, and under *CBOT rules*, may not be employed to create or liquidate a futures position." (Advisory Notice at 1 (emphasis added).) Although at one time CBOT did allow transitory EFRP trades in its metals complex (which, as the Commission knows, was sold over a year and a half ago), CBOT's current rules prohibit both contingent and transitory trades. Contrary to ELX's contention that CBOT permits transitory EFRPs in its agricultural products (Request for Stay at 2,) the referenced transactions are not transitory in nature. Indeed, in the transactions referenced in ELX's Request for Stay, there is no obligation by either party to do the second EFRP; instead, a non-transferable right to effectuate the second EFRP at some future date is granted by one party to the other. ELX does not, because it cannot, explain how a non-transferable right to effectuate the second EFRP at some future date renders the transaction transitory.

Without mischaracterizing the content of the Advisory Notice, ELX cannot claim that any aspect of the Advisory Notice contains false information. Indeed, nowhere in its Request for Stay does ELX attempt to challenge the veracity of the *actual* statements made in the Advisory Notice by CBOT. Moreover, CBOT – the DCM at issue here – has authority to interpret its rules and make a determination as to the types of trades permitted on its exchange so long as its rules are consistent with the CEA. Just as ELX's Rule IV did not expressly permit EFFs prior to its recent amendment, CBOT's rules do not – and have never – expressly permitted EFFs. As previously noted, the Advisory Notice was issued only in response to the inaccurate information disseminated by ELX respecting CBOT Rule 538's application to EFFs. Indeed, it is entirely inappropriate for ELX to be issuing public regulatory guidance with respect to CBOT rules. That ELX disagrees with CBOT's reading of *its own* rules does not render that interpretation "false." ELX does not – because it cannot – provide any evidence demonstrating that CBOT has acted inconsistent with the interpretation of CBOT Rule 538 set forth in the Advisory Notice.

Finally, ELX argues that an EFF is "factually not a transitory trade." (Request for Stay at 3.) In support of this argument, ELX states that "A transitory trade involves the rapid or prearranged purchase and sale of **the same** contracts between the parties. Here the parties are exchanging different contracts ... and thus the EFF trade as proposed by ELX and approved by the Commission is not transitory or contingent." (Request for Stay at 3 (emphasis in original).) This statement flatly contradicts the representations ELX made in its Rule Filing. Indeed, in its Rule Filing, ELX states that these same contracts are "identical." (Rule Filing at 1.) ELX cannot now change its position before the Commission out of convenience. In fact, to accept the position articulated in ELX's Request for Stay would be to make a finding that ELX's own Rule Filing was based on false information.

For all these reasons, the Advisory Notice does not constitute a "false certification" within the meaning of Regulation 40.6(b).

V. Respond to the Assertion in the ELX Letter That CME Group Designated Contract Markets Have "in a number of markets, and for many years, accepted transitory trades."

As the Commission is aware, CME Group Inc. ("CME Group") was formed in 2007 following the merger of CME Holdings and CBOT Holdings. At the creation of CME Group, CBOT and the CME became wholly owned subsidiaries of CME Group. When CME acquired NYMEX in 2008, NYMEX also became a wholly owned subsidiary of CME Group.[5] CME Group is not a designated contract market pursuant to the CEA, nor has it been delegated any SRO responsibilities with respect to its subsidiary contract markets. Designated contract market status is maintained individually by each of CME, CBOT, NYMEX and COMEX. Thus, each designated contract market is responsible for its *own* rules and operation.[6] CBOT, for example, limits block trading and pre-execution communications in the electronic trading environment to a greater degree than CME, NYMEX or COMEX. None of these markets is answerable for or in any way responsible for the actions taken by another market. Thus, for purposes of the instant inquiry, we submit the only relevant contract market is CBOT.

Notwithstanding the foregoing, NYMEX, COMEX and CME permit transitory trades in limited circumstances, which are expressly provided for by the respective contract market's rules. Specifically, transitory EFRPs are permitted *only* in NYMEX energy and metals products, COMEX metals products and CME foreign exchange products. None of these markets, however, permit fictitious or wash trades. As discussed above, based on the information submitted by ELX, CBOT does not believe that actual economic risk is incurred in each part of the EFF contemplated by ELX's Rule Filing.

Moreover, as noted in our response to the Commission's first question, the Commission recently has become more critical of transitory EFRPs. Specifically, in its release of last fall on revised guidance for Core Principle 9, the Commission proposed to make two substantive amendments to its acceptable practices regarding EFRPs, including one that clarifies that transitory EFRPs are permissible *only* when each part of the transaction – the EFRP itself and the related cash transaction – is a stand-alone, bona fide transaction. Inasmuch as certain of the CME Group DCMs permit transitory EFRPs, we have been working very closely with the Commission to address its concerns in this context.

Although a centerpiece to ELX's Rule Filing was the fact that, in 2002, NYMEX sought and obtained approval from the Commission for a rule entitled "EXCHANGE OF FUTURES FOR, OR IN CONNECTION WITH, FUTURES TRANSACTION" (the "NYMEX Rule"), this is mentioned nowhere in its Request for Stay. To rely on the title of the NYMEX Rule to advance its claim that the Commission should approve its EFF Rule and force CBOT to accept non-competitive and/or fictitious trades from ELX is to elevate form over substance.

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5 Prior to the CME Group's acquisition of NYMEX, COMEX was a subsidiary of NYMEX. COMEX remains a subsidiary of NYMEX today.

6 Each of the DCMs owned by CME Group has its own rules respecting the rule approval process. Indeed, the CBOT rule approval process is different in key respects from the rules of CME Group's other DCMs. (*Compare* CBOT Rule 230J *with* CME Rule 230J and NYMEX Rule 230J.)

No trade was ever effectuated pursuant to the NYMEX Rule and the rule was subsequently withdrawn at the Commission's request. Moreover, there are genuine, material differences between the NYMEX Rule and ELX's EFF Rule.[7] The NYMEX Rule was, in substance, a restricted block trading rule that included information reporting requirements that were analogous those contained in EFRP rules. Specifically, the NYMEX Rule provided that the minimum transaction size for effectuating trades pursuant to the rule was 50 contracts, which, at the time, exceeded in size more than 90% of the transactions that had been executed in the months before NYMEX sought approval for the rule in the contract at issue. (*See* NYMEX RULE, attached hereto as exhibit B.) Moreover, only "eligible contract participants," as defined in the CEA, could take advantage of the new procedure set forth in the NYMEX Rule. (Id.) Neither requirement is present in ELX's EFF Rule.

Significantly, the NYMEX Rule did not seek to bind other contract markets. In fact, the NYMEX Rule explicitly provided that a market participant seeking to take advantage of the rule needed to liquidate its position on the other contract market involved pursuant to the rules of *that* contract market. Specifically, the NYMEX Rule provided: "As a condition precedent to the NYMEX Transaction, the parties to the NYMEX Transaction *must have engaged in a transaction on the other regulated futures exchange pursuant to the procedures of such other exchange that resulted in liquidating an existing position at such other exchange*." (*See* NYMEX Rule, subsection (2), (emphasis added).) ELX, whose CEO should be intimately familiar with the NYMEX Rule, obviously withheld these key details from its Rule Filing and Request for Stay, and failed to include similar provisions in ELX's EFF Rule.

VI. EFFs Are Not Permitted on COMEX

Neither COMEX nor any of the other three CME Group exchanges permits EFFs. Although the question posed by the Commission does not explain the basis for the assertion that EFFs are permitted on COMEX, we assume for purposes of this response that the Commission had in mind the London Metals Exchange ("LME") copper contract that COMEX permitted to be used as part of an EFP. The LME contracts are appropriately considered forward rather than futures contracts and therefore have been permitted as the physical leg of an EFP; COMEX did not, and does not, consider such a transaction to be an EFF.[8]

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[7] *See* New York Mercantile Exchange, Inc., CFTC Rule Approval Notice (May 3, 2002), *available at* http://www.cftc.gov/files/foia/comment02/foicf0203b002.pdf.

[8] *See, for example:*
The Professional Risk Managers' Guide to Financial Markets, Alexander and Sheedy, 2007, p.169: "Most forwards are not traded on exchanges, but there are anomalies. For example, on the LME, forwards are traded."

Futures and Options, Spence, 1997, p.20: "The LME is not a futures market in the traditional sense – it is more a forward market."

VII. Conclusion

For the foregoing reasons, CBOT's Rule 538 and its Advisory Notice are entirely accurate. Neither constitutes a "false certification" under the meaning of Regulation 40.6(b). Moreover, for the reasons set forth above, CBOT Rule 538 and the Advisory Notice comply with Core Principle 18. Accordingly, ELX's Request for Stay should be denied and this inquiry should be ended. If you have any comments or questions, please feel free to contact me at (312) 930-3488 or Kathleen.Cronon@cmegroup.com, or Brian Regan, Managing Director, Regulatory Counsel at (212) 299-2207 or Brian.Regan@cmegroup.com.

Sincerely,

Kathleen M Cronin

Kathleen Cronin
General Counsel and Corporate Secretary
CME Group Inc.

Exhibit C

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ELX Electronic Liquidity Exchange

February 23, 2009

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

Re: Application of ELX Futures, L.P. for Designation as a Contract Market

Dear Mr. Stawick:

This letter is submitted on behalf of ELX Futures, L.P. ("ELX"), in response to the comment filed by the CME Group ("CME"), dated February 9, 2009, on the Application of ELX for designation as a Designated Contract Market ("DCM"). In its comment letter, CME takes the position that its rules should govern the rule-making of competing exchanges on such fundamental issues as block trading minimum sizes and position accountability levels. We fundamentally disagree with this assertion and believe that it is anti-competitive and contrary to the principles advanced by the Commission in its recent proposed rules on block trading and related matters (73 Fed. Reg. 54097 (Sept. 18, 2008) (the "Block Trading Release")).

In the Block Trading Release, the Commission noted that its proposal is premised on each DCM determining the minimum block trade size that is appropriate for its market, taking into account the relevant considerations, such as liquidity in the market:

> One method by which DCMs could determine what number of contracts is an appropriate minimum size would be to assess the market liquidity (the number of contracts the centralized market is able to absorb at the best execution price) and market depth (which measures the potential price slippage if a large order were to be executed in the centralized market). . . . For new contracts that have no trading history,

> a DCM should strive to set its initial minimum block trade size based on what the DCM reasonably believes will be a "large" order (i.e., the order size that would likely move the market price). . . . As such, the proposed guidance notes that minimum block trade sizes should be larger than the size at which a single buy or sell order is customarily able to be filled in its entirety at a single price (though not necessarily with a single counterparty) in that contract's centralized market, and exchanges should determine a fixed minimum number of contracts needed to meet this threshold.

Block Trading Release, at 54,100.

In other words, each DCM should determine the appropriate block trading level based on trading and market conditions in its own markets and the Commission's proposed guidance directs a DCM as to the factors to be considered in making this determination. ELX fully intends to comply with the Commission's final rules on this subject, at such time as they are adopted. ELX is currently investigating the block trading levels that are appropriate to its markets, based on the guidance provided in the Block Trading Release. However, there is no basis for ELX to adopt automatically the standards set by the CME, which would be completely contrary to the approach set out in the Block Trading Release. ELX has filed a lengthy letter dated January 27, 2009 with the Office of the Secretary in response to CME's Comment Letter on the Block Trading Release, in which the CME originally set forth its belief that its rules on block trading should govern ELX. Rather than repeat our arguments, please find our letter attached hereto for your reference.

With respect to position accountability standards, ELX has determined to adopt standards which are at this time the same as the CME levels because such levels appear to us to be reasonable for purposes of trading on ELX. The CME's view on accountability levels is thus moot; however we wish to make clear that our decision on accountability levels is substantive, and should not be viewed as endorsing an argument that any exchange should be empowered to control the rules of another exchange as CME suggests. In this respect as well, ELX will make its determination of the appropriate accountability levels based solely on the Commission's final rules and on the factors related to trading on ELX that it believes relevant to the decision.

We understand that the composition of the CME's shareholders and legacy members may cause it to advocate policies that serve the interests of these legacy members, such as extraordinarily large block trading sizes. Of course, the CME couches its arguments in the context of market integrity or regulatory necessity, but it is clear that its judgments are driven in large part by institutional political considerations. Regardless of the merits of those judgments or the process by which they are reached, the CME's determination on block trading levels should in no way bind other exchanges, which are not subject to the same constraints and might not have the same goals.

ELX applauds the Commission for proposing a block trading standard that is based on the overall nature and needs of the relevant market, and, as noted, we intend to be guided by and comply with the standards advanced by the Commission, and only by those standards.

Please let us know if we can be of further assistance in this process.

Very truly yours,

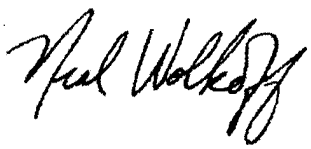

Exhibit D

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January 4, 2010

Gary Gensler,
Chairman,
Commodity Futures Trading Commission,
Three Lafayette Center,
1155 21st, N.W.,
Washington, D.C. 20581.

Re: ELX Futures, L.P./Exchange of Futures for Futures Rule

Dear Chairman Gensler:

On behalf of ELX Futures, L.P. ("ELX"), I am writing to follow up on our recent meeting with you and members of the staff of the Commission regarding ELX Rule IV-15 (the "EFF Rule"), which authorizes the execution of Exchanges of Futures for Futures ("EFFs") on ELX. The EFF Rule was approved by the Commission on October 14, 2009. We very much appreciated the time that you and the staff devoted to meeting with us and considering this issue. The meeting was very helpful and productive and we valued the opportunity to share our views and to gain a better understanding of your thinking on the issue. The purpose of this letter is respectfully to request that the Commission take appropriate action to effectuate the Commission's approval of the EFF Rule and to permit ELX to implement the Rule in accordance with that approval.

As you know, the EFF Rule authorizes participants on ELX to liquidate positions in futures on the same underlying commodity traded on another exchange and to re-establish those positions on ELX. Conversely, two participants may, under the EFF Rule, liquidate an ELX position and re-establish a position on another exchange. The EFF mechanism, which has been widely used by other exchanges, including exchange subsidiaries of the CME Group, Inc. ("CME Group"), is an important tool by which market participants are able to manage their positions and margin funds in an efficient and cost-effective manner. In this regard, while we believe that market participants will find the EFF vehicle useful, we do not believe that it will become the dominant form of execution on ELX, and that belief has been supported by our discussions with market participants. At the same time, however, those discussions have underscored the importance and utility of the EFF structure.

The EFF Rule was submitted to the Commission for approval and was, as noted, affirmatively approved by the Commission. The Commission is required under the Commodity Exchange Act (the "CEA") to approve a rule submitted for approval by a designated contract market ("DCM") "unless the Commission finds that the new contract or instrument, new rule, or rule amendment would violate" the CEA. The Commission, therefore, in order to approve the EFF Rule, had to have determined that the Rule, and transactions executed pursuant to the Rule, would not be in violation of the CEA.

Notwithstanding the Commission's action, on October 19, 2009, five days following the Commission's approval, the Chicago Board of Trade ("CBOT"), a subsidiary of CME Group, which also owns the Chicago Mercantile Exchange ("CME") and the New York Mercantile Exchange ("NYMEX"), issued an Advisory Notice (the "Advisory") entitled "Prohibition of Exchange of Futures for Futures (EFF) Transactions." In the Advisory, the CBOT stated that "CBOT rules do not permit the execution of Exchange of Futures for Futures (EFF) transactions. The CBOT, as a designated contract market, establishes its rules in accordance with the Commodity Exchange Act and CFTC regulations" (emphasis in original). The Advisory went on to state that, because a futures contract is not an over-the-counter swap or other over-the-counter instrument, it does not qualify as one of the many types of "exchange for risk" transactions permitted under CBOT rules. In other words, the Advisory asserted that EFFs are prohibited because they are not currently provided for under CBOT rules and that, at least by implication, that EFFs could not be permitted under such rules because they are not "in accordance with the Commodity Exchange Act and CFTC rules." This contention was subsequently made more explicitly by representatives of CME Group in public statements. For example, Rick Redding, head of products and services for CME Group, was quoted in a media report as saying that "trades designed to move Treasury futures positions out of CME's clearinghouse and into a competitor's would violate the Commodity Exchange Act." "CME Says Moving Futures Trades Prohibited by Law," Dow Jones Market Talk, November 5, 2009. Mr. Redding was further quoted in that article as saying "Essentially, it becomes a wash trade by definition of the CEA, so we couldn't accept it."

The Advisory and other statements by the CME Group were intended to, and did, have a significant chilling effect that has prevented market participants from executing a single EFF into or out of ELX since the approval of the EFF Rule. Indeed, no rational market participant would execute an EFF involving ELX when it has been advised that it may face enforcement action from CME Group, the dominant exchange in the marketplace. As a result, CME Group has thus far been able to use its overwhelming market power to deny a small, newly organized competitor – and market participants –

the use of an effective and desirable tool to manage positions and margin in an efficient manner.

Moreover, as set forth below, the statements in the Advisory are false and misleading, and contrary to the Commission's action in approving the EFF Rule as well as the history of EFFs being permitted and aggressively marketed by the CBOT's affiliate, NYMEX. The Commission cannot and should not countenance this challenge to its authority and the language and purposes of the CEA. We respectfully request that the Commission act promptly to effectuate its approval of the EFF Rule by requiring the CBOT to permit the execution of EFFs between ELX and CBOT and prohibiting the CBOT or CME Group from threatening or bringing enforcement action in connection with the execution of EFPs.

1. The EFF Rule Does Not Violate the CEA.

The Commission, not another designated contract market subject to the Commission's jurisdiction, is responsible for determining whether the EFF Rule violates the CEA. By approving the EFF Rule, the Commission has clearly concluded that the Rule, and the transactions that are permitted under the Rule, do not violate the CEA and the CME Group cannot usurp the Commission's statutory role by making and acting upon a contrary interpretation. Moreover, the CME Group's conclusion – that EFFs violate the CEA because they "essentially" constitute "wash trades" is simply incorrect as a matter of law and must be rejected. Wash trading has historically been prohibited under the CEA because it "is the archetypical form of fictitious trading," which "gives the appearance of being a purchase and sale" that is competitively executed in the market when in fact it is designed to mislead the market by making a fictitious trade appear to be bona fide. Pouncy, The Scienter Requirement and Wash Trading in Commodity Futures: The Knowledge Lost in Knowing, 16 Cardozo Law Rev. 1625 (1995): "Wash trading is inimical to the pricing and risk shifting functions of the futures markets because it can result in the reporting of prices for commodity futures contracts that are not true and bona fide prices, and it can result in the promulgation of inaccurate information concerning the futures contracts being traded." Id. For this reason, the Commission has stated that "the common denominator of the specific abuses prohibited in Section 4c(a) – wash sales, cross trades, and accommodation trades – and the central characteristic of the general category of fictitious sales, is the use of trading techniques that give the appearance of submitting trades to the open market while negating the risk or price competition incident to such a market." In re Collins, CFTC Docket No. 77-15, April 4, 1986.

EFFs, unlike wash trades executed on a single exchange, involve actual changes in position – the liquidation of a position on one exchange and the establishment

of a position on another. Because a futures position on a second exchange is a fundamentally different instrument, involving the credit of a different clearing house and rules and operations of a separate exchange, it cannot be equated to a wash trade executed on the same exchange, involving a simultaneous purchase and sale at or about the same price. EFFs, therefore, cannot be characterized as wash trades. Moreover, in contrast to wash trades, EFFs will not necessarily be executed with the legs of the trade priced the same.

In any event, none of the various types of non-competitive trades that are permitted under the CEA or that have been approved by the Commission – including exchanges of futures for physicals, exchange of futures for swaps, and EFFs -- are considered wash trades because they do not falsely create the appearance of bona fide competitive trading in the market that distorts the pricing mechanism. To the contrary, permissible non-competitive trades, including EFFs, are subject to procedures designed to ensure that the transactions do not have a distortive effect and are executed and reported in a manner that cannot possibly mislead the market. Accordingly, CME Group's contention is completely without merit and, as noted below, is contrary to the longstanding practices of its own exchange subsidiaries. The argument is therefore disingenuous at best and reflects a transparent attempt to suppress competition in the markets that CME Group dominates.

For the same reasons, EFFs cannot be considered "transitory" or "contingent" trades. Transitory or contingent trades are exchanges of futures for physicals ("EFPs") involving offsetting cash market transactions that result in no change in ownership of the physical commodity. See, Execution of Transactions: Regulation 1.38 and Guidance on Core Principle 9, 73 Fed. Reg. 54,097 (Sept. 18, 2008). Specifically, because a bona fide EFP, by its terms, requires that there be a legitimate cash market transaction that is linked to the futures transaction, a transitory transfer of ownership of the physical commodity, contingent on a transfer back to the original owner, could, depending on the circumstances, convert a permissible EFP into an illegal off-exchange futures transaction. An EFF involves an actual liquidation on one exchange and an actual establishment of a position on the second exchange. There is no transitory feature to the transaction at all. Indeed, under an EFF, there is no cash market transaction, or any offsetting leg of the transaction that could even allegedly be part of a transitory trade and, for this reason, neither the Commission nor any of the CME Group exchanges has previously applied the concepts of "transitory" or "contingent" trades to EFFs. CME Group's contention that EFFs constitute transitory or contingent trades is just another baseless attempt to undermine a permissible type of transaction that has been approved by the Commission in connection with ELX and the CME Group exchanges themselves.

The Commission has determined that the EFF Rule and the transactions permitted thereunder do not violate the CEA. Another exchange cannot eviscerate that approval, effectively reversing the Commission's decision, by substituting its own conclusions for those of the Commission.

2. The Advisory is Inconsistent with the Rules and Actions of the CME Group and was Clearly Issued for Anticompetitive Reasons.

As ELX has previously detailed in its prior submissions to the Commission, the CME Group exchanges have long permitted EFFs, as well as related types of permissible non-competitive transactions, to be executed and cleared through their facilities. See, Letter of ELX to David Stawick, Secretary of the Commission, dated November 12, 2009. Indeed, NYMEX, a CME Group subsidiary and an affiliate of the CBOT, developed the first EFF in 2002, and has introduced several variations on its original structure in the years since that time. In addition, NYMEX has a long history of allowing block trades to be used to exchange positions between NYMEX and IntercontinentalExchange, Inc. ("ICE"). See, http://www.nymex.com/notice_to_member.aspx?id=ntm110&archive=2007.[1] These trades have a practical effect that is substantially equivalent to that of EFFs, provided that the small minimum block trade requirement (200 contracts in the case of the NYMEX crude oil contract) is satisfied. CME Group cannot have it both ways – it cannot assert that EFFs and similarly structured transactions are fully permissible and provided for under its Rule 538 when executed on its exchanges while contending that ELX's EFF transaction violates the CEA and Commission regulations when executed through an exchange it considers a competitor.

Moreover, both CBOT and CME, as well as NYMEX, permit various types of "exchange for risk" transactions under rules that are sufficient, in their current form, to accommodate the execution of EFFs, without additional rule changes. In particular, CME Rule 538 broadly covers various types of "exchange for related position"

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[1] In a related context, CME has interpreted its rules to prohibit block trades (aimed at a competitive effort by the LIFFE Exchange) to prevent transferring Eurodollar contracts to another market. On June 24, 2004 CME self-certified Rule 4.32.D Interpretation, Submission No. 04-61, which states: *CME Rule 432.D. prohibits factitious trades. A prearranged trade wherein the parties agree to a transaction at CME which is reversed, in whole or in part, by another transaction at CME or at another Board of Trade is a fictitious trade prohibited by CME rules. CME facilities that permit prearrangement of trades (Rule 526 – Block Transactions ...) may not be used to facilitate a fictitious trade* ***as defined above***. (Emphasis added).

transactions, or "EFRPs." In an FAQ on Rule 538, issued with an Advisory dated October 2, 2009, the CME answered the question "What are EFRP transactions" as follows:

EFRP is an acronym for Exchange for Related Positions. Exchange for Physical ("EFP"), Exchange for Risk ("EFR") and Exchange of Options for Options ("EOO") transactions are collectively known as EFRP transactions. . . .

An EFR transaction is a privately negotiated and simultaneous exchange of a futures position for a corresponding ***OTC swap or other OTC derivative*** *in the same or a related instrument (emphasis added).*

An exchange of an OTC futures trade (which is OTC, from the perspective of the CME, because it is not executed on the CME) for an on-exchange futures position, pursuant to ELX's EFF Rule, is the "simultaneous exchange of a futures position for a corresponding OTC swap or other OTC derivative" within the meaning of Rule 538. This conclusion is underscored by the fact that the CME has in effect two rules of its NYMEX affiliate expressly covering EFFs and has recently "harmonized" its rules across its exchange affiliates.[2]

Moreover, all of the types of EFRPs permitted under Rule 538 involve non-competitive executions of futures transactions in a manner that is substantially the same as the execution of EFFs, except that they take place within one exchange rather than between exchanges. We recognize, of course, that there are differences between these types of transactions and EFFs. However, all of these categories, including EFFs, involve non-competitive executions of trades that, but for their permissibility under the CEA and Commission regulations and orders, might otherwise violate the CEA prohibition on non-competitive trades. Here as well, if the conduct related to the execution of these transactions is permissible when applied within an exchange, it cannot become illegal when utilized in transactions effected between exchanges. Indeed, as noted, the Commission has found that such transactions are permissible under the CEA.

The Advisory disingenuously notes that CBOT rules do not permit EFFs. That statement, while technically accurate, is seriously misleading, and intentionally so.

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2 Prior to the Issuance of CME Advisory Notice RA0910-5, which sought the "harmonization of EFRP Rules across markets, and was made effective October 5, 2009, the NYMEX rulebook contained EFF Rules for natural gas and crude markets:: Rule 6.21B Exchange of NYMEX Futures, Section B. Exchange of NYMEX Cash Settled "Penultimate Big" Futures for, or in Connection with, NYMEX "Physical" Futures Transactions

While nothing in CBOT rules expressly sanctions EFFs, the rules also do not prohibit such transactions. Moreover, and more importantly, CME Group has been in the process of harmonizing the rules of its various exchanges, and particularly the rules governing permissible non-competitive transactions. See, CME Group Advisory RA0910-5 (October 2, 2009). That harmonization process left untouched, and therefore retained, two of the NYMEX rules permitting EFFs, specifically those related to the "e-mini" contracts in natural gas and crude oil. If the CME Group believes that EFFs violate the CEA and Commission regulations, why does it continue to permit them in certain of its markets? The answer, of course, is obvious – it believes such transactions to be permitted but only asserts their alleged illegality in connection with the rules of another exchange which it views as a competitor. It is therefore apparent that the Advisory was issued solely for the purpose of undermining a nascent competitor seeking to challenge the overwhelming dominance of the CBOT, and CME Group generally, in the market.

Finally, we note that CME Group has taken a similar position with respect to block trades, which makes it difficult or impossible for market participants to utilize the block trade mechanism as a means of liquidating a position on one exchange and reestablishing it on another. Specifically, in interpretations issued in 2004 and 2008, CME Group stated that using a block trade for this purpose would constitute a "fictitious trade," in violation of CME Rule 432.D. Rule 432.D Interpretation dated July 9, 2004 and Special Executive Report S-4735, dated July 21, 2008. As a result, CME Group has foreclosed the use of this trading approach – which is perfectly permissible and has been approved by CME Group and the Commission in other contexts – for purposes that it believes pose a competitive threat to its market dominance. We note that the use of block trades is not an effective alternative to EFFs in any event, because the substantial minimum size requirements imposed on block trades by CME Group operate as a deterrent on its use for this purpose. However, the actions of CME Group in connection with the use of block trades further underscores the anticompetitive nature of its conduct.

3. The Commission is Authorized and Required to Take Action Against CME Group's Anti-Competitive Conduct.

One of the fundamental purposes of the CEA and the regulatory scheme administered by the Commission is "to promote responsible innovation and fair competition among boards of trade, other markets and market participants." CEA, §3(b). For this reason, "in requiring or approving any bylaw, rule, or regulation of a contract market," the Commission is required to "take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives" of the rule or other action. CEA, §15(b). The purpose of the EFF Rule is to facilitate competition in the market for Treasury futures contracts and other products that now or in the future may be listed by ELX and the CME Group exchanges. In particular, the ELX Rule will provide market participants with the ability to execute transactions on the exchange of their choice with the knowledge that they will be able to liquidate the resulting positions and re-establish them on another exchange. This in turn will allow for more efficient management of positions, margin requirements, hedging needs and recordkeeping. Moreover, the ability to liquidate and re-establish positions via an EFF will benefit both exchanges involved, by increasing liquidity on, and generating fees for, each of them. While not commenting on at what level such fees can of themselves be anti-competitive, we note that the CME has in the past imposed surcharges on similar types of transactions (it currently places a surcharge of $0.75/side in addition to regular transaction fees on Treasury futures transactions). The EFF Rule, therefore, is clearly pro-competitive and should be given full effect.

By blocking implementation of the EFF Rule through the Advisory, the CBOT and the CME Group have used their market dominance for anti-competitive purposes to deny market participants the advantages of this important tool, in violation of the CEA. Indeed, beyond the provisions cited above, the CEA expressly requires contract markets to "endeavor to avoid (A) adopting any rules or taking any actions that result in any unreasonable restraints of trade; or (B) imposing any material anticompetitive burden on trading on the contract market." CEA, §5(d)(18). The Advisory is unquestionably an action that results in an unreasonable restraint of trade, by prohibiting market participants from engaging in transactions that the Commission has concluded are permissible under the CEA, that the CME Group itself permits in other contexts and that would promote competition in a market overwhelmingly dominated by a single player. The Commission is therefore compelled to use its authority "to promote responsible innovation and fair competition among boards of trade" by requiring CME Group to permit EFFs between ELX and the CBOT.

Accordingly, we respectfully request that the Commission take appropriate action to require the CBOT to refrain from threatening or initiating enforcement action in connection with EFFs between the CBOT and ELX and to permit such EFFs to be executed. In this regard, the Commission clearly has the authority under the CEA to require a DCM to take action, or to refrain from taking action, as may be necessary in order to ensure its compliance with the Core Principles. Specifically, the CEA expressly provides that the Commission is authorized "to alter or supplement the rules of a registered entity insofar as necessary or appropriate by rule or regulation or by order, if after making the appropriate request in writing to a registered entity that such registered entity effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such registered entity has not made the changes so required, and that such changes are necessary or appropriate for the protection of . . . traders or to insure fair dealing in commodities traded for future delivery on such registered entity. Such rules, regulations, or orders may specify changes with respect to such matters as— . . . the form or manner of execution of purchases and sales for future delivery . . ." CEA, §8a(7). The Commission is also authorized, under Section 6b of the CEA, to order any registered entity to cease and desist from violations of the CEA or Commission regulations or orders. The statute therefore provides the Commission with ample authority, and in fact requires that the Commission take action, to effectuate the implementation of the EFF Rule it has approved.

In our meeting with you and members of your staff, the staff raised an issue regarding the effect of the antitrust laws, and particularly the U.S. Supreme Court's decision in the Trinko case, Verizon Communications, Inc. v. Trinko, 540 U.S. 406 (2004), on this analysis and on the Commission's authority to take action in this instance. While the conduct of the CBOT and CME Group described above, in addition to violating the CEA and the Commission's regulations, could also constitute a violation of the antitrust laws, that question is not properly directed to the Commission. However, the status of their conduct under the antitrust laws has no bearing on the CEA analysis, and the Commission remains obligated to take action if it concludes, as we believe it must, that the conduct violated the CEA and Commission regulations. Accordingly, regardless of whether the antitrust laws provide further support for the action we are requesting here, they cannot in any event preclude such action.

For these reasons, we do not believe that the Trinko case has any applicability to the circumstances presented here. Nevertheless, in response to the questions raised by the staff, we have analyzed the Trinko case in this context and have concluded that, to the extent that it is applicable, it supports, rather than undermines, the illegality of the conduct of the CBOT and CME Group under the antitrust laws. In

Trinko, the Supreme Court held that a telecommunications carrier that was a monopolist in the relevant market did not violate the antitrust laws by refusing to provide competitors with access to its operation support system. In reaching this conclusion, the Court distinguished the facts in Trinko from those presented in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). In Aspen, a monopolist unilaterally terminated a voluntary agreement with a competitor to bundle lift tickets and thereafter refused to sell such tickets to its competitor even at the retail price. The Court held in that case that the monopolist's conduct in Aspen "suggested a willingness to forsake short-term profits to achieve an anticompetitive end. . . . [T]he defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive intent" (emphasis in original). In contrast, the Court in Trinko found that the defendant did not engage in behavior that could be explained only or primarily by reference to an anticompetitive motive. Here, the anticompetitive intent of the CBOT and CME Group is patently obvious and cannot be denied. CME Group permits EFFs and other forms of non-competitive trading in other markets, the Advisory was issued only days after the Commission's approval of the EFF Rule and, like the defendant in Aspen, CME Group is willing to forsake profits – which it would earn through the fees it could collect on the execution of EFFs -- to achieve an anticompetitive objective. To the extent that Trinko is relevant here at all, therefore, which we believe it is not, it supports our conclusion that CBOT and CME Group have engaged in illegal conduct that must be remedied.

Moreover, we note that the plaintiff in Trinko was seeking to require Verizon to take affirmative steps that would adversely affect Verizon's own customers, by making capacity available to customers of a competitor, thereby reducing the level of service to its own customers. In the case of EFFs, as in Aspen, no affirmative conduct by the CME is required in order to effectuate the purposes and intent of the EFF Rule; CME simply needs to allow its facilities to be used to execute EFFs, to the benefit of its own market participants, and itself (in the form of additional fees). There are no new "facilities" that need to be created, and CME's "customers" will not be adversely affected. To the contrary, they are the intended beneficiaries of the EFF Rule. This factor as well underscores the anti-competitive purpose of the CME Group's actions.

For the foregoing, reasons, we respectfully request that the Commission promptly take appropriate action to require the CBOT to permit EFFs to be executed by market participants between CBOT and ELX, pursuant to the EFF Rule, and to refrain from threatening or initiating enforcement action in connection with the execution of such EFFs. We defer to the Commission's judgment as to the type of action that would be most appropriate in this instance. However, as an initial matter, we respectfully request that the Commission stay the effectiveness of the Advisory and any statements by

Exhibit E

April 11, 2005

NOTICE
Ex-Pit Transactions

Exchange for Physical (EFP) Transactions
Exchange for Swap (EFS) Transactions
Exchange for Risk (EFR) Transactions

The following notice summarizes the various requirements related to the execution of certain types of ex-pit transactions, including EFP, EFS and EFR transactions. Member firms are urged to ensure that all employees are fully informed regarding these requirements. Violations of the relevant CBOT regulations may result in disciplinary action by the Business Conduct Committee.

1. Bona Fide EFP, EFS and EFR Transactions

For an EFP or EFS to be considered bona fide, the seller of the futures must simultaneously purchase the cash and the buyer of the futures must simultaneously sell the cash. Similarly, in an EFR transaction, the buyer and seller of the futures must have, respectively, the short and long market exposure associated with the OTC transaction. Multiparty transactions are prohibited except as provided in the following paragraph.

Member firms may facilitate, as principal, the cash commodity component of an EFP on behalf of a customer provided that the member firm can demonstrate that the cash commodity transaction was passed through to the customer that received the futures position as part of the EFP transaction.

In all EFP, EFS and EFR transactions, the associated cash product must be the commodity underlying the futures contract or a derivative, by-product, or related product that is reasonably correlated to the futures being exchanged. The parties to the transaction may be required to demonstrate that the cash and futures products exchanged are reasonably correlated.

The futures exchanged in an EFP, EFS or EFR must be an outright futures contract. Futures combinations are not a permissible component of an EFP, EFR or EFS. Additionally, the quantity of futures exchanged must be approximately equivalent to the underlying quantity of the cash product being exchanged. The parties involved may be required to demonstrate such equivalency.

2. Contingent EFP, EFS and EFR Transactions Prohibited

Two parties may not execute contingent EFP, EFS or EFR transactions in which the execution of one such trade is contingent upon the execution of another EFP/EFS/EFR or cash transaction. In cases where two parties execute an EFP, EFS or EFR and execute an economically offsetting cash transaction, the participants may be required to demonstrate that there was no express or implied obligation or understanding to execute both transactions.

Two parties, for example, would be prohibited from executing contingent March and June Treasury Bond EFPs to roll a position. Similarly, two parties would be prohibited from executing a CBOT EFP and a contingent EFP on another market in which the cash transaction economically offset the cash leg of the CBOT EFP. Such transactions are considered prearranged futures trades that circumvent the open market execution requirement.

3. Pilot Program Permitting Transitory EFPs in CBOT 100 oz. Gold and 5,000 oz. Silver

Transitory EFPs, wherein the parties to the EFP immediately offset the cash leg of the transaction, are currently permitted on a pilot basis in 100 oz. Gold and 5,000 oz. Silver exclusively during the hours of 12:25 p.m. to 7:30 a.m. (Central Time). Such transactions are permitted subject to the following requirements:

a) The seller of the futures contract must simultaneously purchase the cash commodity and the buyer of the futures contract must simultaneously sell the cash commodity.

b) All documents typically generated in accordance with cash market conventions must be generated and retained.

c) The execution time of the EFP must be recorded on the order ticket and, upon submission of the EFP for clearing, on the order entry screen.

d) All other CBOT and CFTC requirements regarding EFP transactions must be adhered to in connection with these transactions.

4. Permissible Counterparties

EFPs, EFSs and EFRs may be executed between two accounts provided that one of the following applies:

a) the accounts have different beneficial ownership;

b) the accounts have the same beneficial ownership, but are under separate control;

c) the accounts are commonly controlled, but involve separate legal entities which may or may not have the same beneficial ownership.

In cases where the parties to a transaction involve the same legal entity, same beneficial owner, or separate legal entities under common control, the parties must be able to demonstrate that the EFP, EFS or EFR was a legitimate arm's length transaction.

The term "same beneficial ownership" refers to a parent and its wholly owned subsidiaries or subsidiaries that are wholly owned by the same parent.

5. Restrictions in a Delivery Month

EFPs, EFSs and EFRs which involve the same legal entity cannot be executed during the delivery month and two business days prior to the first delivery day to offset existing positions in the expiring contract.

6. Execution of EFPs, EFSs and EFRs Following Contract Expiration

After trading has ceased on the last trading day in a physically delivered contract, outstanding positions in the contract may be liquidated by executing an EFP, EFS or EFR, provided that both sides of the trade are liquidating positions. CBOT Regulations specify for each contract the number of days after the last trading day during which such transactions are permitted.

7. Permissible Contracts for EFPs, EFSs and EFRs

EFPs may be executed in all CBOT futures contracts.

EFSs may be executed only in the following futures contracts: Treasury Bond, 10-Year Note, 5-Year Note, 2-Year Note, Dow Jones-AIG Commodity Index, 10-Year Municipal Note Index and 10-Year and 5-Year Interest Rate Swaps.

EFRs may be executed only in agricultural futures contracts. The OTC component of an EFR must comply with any applicable regulatory requirements prescribed by the Commodity Futures Trading Commission.

Options on futures are not a permissible component of an EFP, EFS or EFR.

8. Documentation Requirements for EFPs, EFSs and EFRs

Parties to such transactions must maintain all documents relevant to the futures and cash transactions and must provide such documents to the Office of Investigations and Audits upon request. Documents that may be requested include, but are not limited to, the following:

a) futures order tickets
b) futures account statements
c) documentation customarily generated in accordance with cash market practices such as cash contracts, confirmation statements, invoices, warehouse receipts or other documents of title
d) third party documentation to support proof of payment or that the title of the cash was transferred from the seller to the buyer; this may include, but is not limited to, bills of lading, truck receipts, canceled checks, bank statements, cash account statements, Fed wire confirms or Fixed Income Clearing Corporation documents.

All futures order tickets must clearly indicate the time of execution of the ex-pit transaction. Additionally all futures account statements must designate ex-pit transactions as such.

Questions regarding this notice may be directed to the following individuals in the Office of Investigations and Audits:

William Lange	(312) 341-7750 or wlange@cbot.com
Sandra Valtierra	(312) 347-4137 or svaltierra@cbot.com

Paul J. Draths
Vice President & Secretary

Chicago Board of Trade

141 W. Jackson Blvd.
Chicago, Illinois 60604-2994
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July 24, 2006

NOTICE
Exchange of Futures for Related Positions

Exchange for Physical (EFP) Transactions
Exchange for Swap (EFS) Transactions
Exchange for Risk (EFR) Transactions

The following notice summarizes requirements related to the execution of the various types of Exchange of Futures for Related Positions, which include EFP, EFS, and EFR transactions. Member firms are urged to ensure that all employees are fully informed regarding these requirements, as violations of the relevant CBOT Regulations (444.01, 444.04 and 444.05) may result in disciplinary action by the Business Conduct Committee.

1. Bona Fide EFP, EFS and EFR Transactions

For an EFP, EFS, or EFR to be considered bona fide, the seller of the futures must simultaneously purchase (or have the long market exposure associated with) the related cash commodity position, and the buyer of the futures must simultaneously sell (or have the short market exposure associated with) the related cash commodity position. Multiparty transactions are prohibited except as provided in the following paragraph.

A member firm may facilitate, as principal, the transfer of the related position component of an EFP, EFS, or EFR transaction on behalf of a customer provided that the member firm can demonstrate that the related position was passed through to the customer who received the futures position as part of the transaction.

The related cash commodity position (e.g. cash, swap, or OTC derivative) must involve the commodity underlying the futures contract or a derivative, by-product, or related product that is reasonably correlated to the futures being exchanged. The parties to the transaction may be required to demonstrate that the related cash commodity position and the futures position are reasonably correlated.

The futures that are exchanged in an EFP, EFS, or EFR must be an outright position in a futures contract. A futures combination is not a permissible component of an EFP, EFR, or EFS transaction. Additionally, the quantity of futures exchanged must be approximately equivalent to the underlying quantity of the related cash commodity being exchanged. The parties to the transaction may be required to demonstrate such equivalency.

2. Contingent EFP, EFS and EFR Transactions Are Prohibited

Two parties may not execute contingent EFP, EFS, or EFR transactions in which the execution of one such trade is contingent either upon either the execution of another EFP/EFS/EFR or another offsetting cash, swap, or OTC transaction. In cases where two parties execute an EFP, EFS, or EFR and execute an economically offsetting cash, swap or OTC transaction, the participants may be required to demonstrate that there was no express or implied obligation or understanding to execute both transactions.

For example, two parties are prohibited from executing contingent March and June Treasury Bond EFPs to roll a position. Similarly, two parties are prohibited from executing a CBOT EFP and a contingent EFP on another market in which the cash transaction economically offsets the cash leg of the CBOT EFP. Such transactions are considered to be prearranged futures trades that circumvent the open market execution requirement.

3. Transitory EFPs in CBOT 100 oz. Gold and 5,000 oz. Silver

Transitory EFPs, wherein the parties to the EFP immediately offset the cash leg of the transaction, are currently permitted in 100 oz. Gold and 5,000 oz. Silver. Such transactions are permitted subject to the following requirements:

a) The seller of the futures contract must simultaneously purchase the cash commodity and the buyer of the futures contract must simultaneously sell the cash commodity.

b) All documents typically generated in accordance with cash market conventions must be generated and retained.

c) The execution time of the EFP must be recorded on the order ticket and, upon submission of the EFP for clearing, on the order entry screen.

d) All other CBOT and CFTC requirements regarding EFP transactions must be adhered to in connection with these transactions.

4. Permissible Counterparties

EFPs, EFSs, and EFRs may be executed between two accounts provided that at least one of the following applies:

a) the accounts have different beneficial ownership;

b) the accounts have the same beneficial ownership, but are under separate control;

c) the accounts are commonly controlled, but involve separate legal entities which may or may not have the same beneficial ownership.

In cases where the parties to a transaction involve the same legal entity, same beneficial owner, or separate legal entities under common control, the parties must be able to demonstrate that the EFP, EFS, or EFR was a legitimate arm's length transaction.

The term "same beneficial ownership" refers to a parent and its wholly owned subsidiaries or subsidiaries that are wholly owned by the same parent.

5. Restrictions in a Delivery Month

EFPs, EFSs, and EFRs in an expiring futures contract are prohibited during the contract's delivery month, and on the first and second business days preceding the first delivery day of the expiring contract, if such EFP, EFS, or EFR transactions:

are made for the purpose of offsetting existing positions in the expiring contract; and

involve the same legal entity (i.e., no change of ownership); and

are executed such that the date of futures position being offset is not the same as the date of the EFP, EFS, or EFR transaction

Such positions, whether carried at the same FCM or at different FCMs, must be either offset in the open market or fulfilled through the delivery process. (See Regulation 444.05)

6. Execution of EFPs, EFSs and EFRs Following Contract Expiration

After trading has ceased on the last trading day in a physical delivery contract, outstanding positions in the contract may be liquidated by executing an EFP, EFS, or EFR, provided that both sides of the trade are liquidating positions. CBOT Regulations found in each product chapter of the Rulebook specify for each product the number of days after the last trading day during which such transactions are permitted for the purpose of liquidating open positions.

7. Permissible Contracts for EFPs, EFSs and EFRs

EFPs may be executed in all CBOT futures contracts.

EFSs may be executed only in the following futures contracts: Treasury Bond, 10-Year Treasury Note, 5-Year Treasury Note, 2-Year Treasury Note, Dow Jones AIG Commodity Index^{SM}, 10-Year Interest Rate Swap and 5-Year Interest Rate Swap.

EFRs may be executed in all agricultural futures contracts and ethanol, as well as in the following financial futures contracts: Treasury Bond, 10-Year Treasury Note, 5-Year Treasury Note, 2-Year Treasury Note, 30-Day Fed Fund, Dow Jones AIG Commodity Index^{SM}, 10-Year Interest Rate Swap and 5-Year Interest Rate Swap. The OTC component of an EFR transaction must comply with any applicable regulatory requirements prescribed by the Commodity Futures Trading Commission.

Options on futures are not permissible components of an EFP, EFS, or EFR.

8. Documentation Requirements for EFPs, EFSs and EFRs

Parties to EFPs, EFSs, or EFRs must maintain all documents relevant to the futures and related cash commodity position transactions, and must provide such documents to the Office of Investigations and Audits upon request. Documents that may be requested include, but are not limited to, the following:

a) futures order tickets;
b) futures account statements;
c) documentation customarily generated in accordance with cash market or other relevant market practices such as cash, swap or OTC contracts, confirmation statements, invoices, warehouse receipts or other documents of title;
d) third party documentation to support proof of payment or to verify that the title of the related cash commodity position was transferred from the seller to the buyer. This may include, but is not limited to, bills of lading, truck receipts, canceled checks, bank statements, cash account statements, Fed wire confirms or Fixed Income Clearing Corporation documents.

All futures order tickets must clearly indicate the time of execution of EFP, EFS, or EFR transactions. Additionally all futures account statements must designate Exchange of Futures for Related Position transactions as such.

9. Submission of EFP, EFS and EFR Transactions to Clearing

All Exchange of Futures for Related Position transactions must be accurately submitted to the CBOT's Clearing Services Provider. The record of the trade must include the time of execution and must be properly designated as either an EFP, EFS, or EFR transaction.

Questions regarding this notice may be directed to the following individuals in the Office of Investigations and Audits:

William Lange	(312) 341-7757 or wlange@cbot.com
Sandra Valtierra	(312) 347-4137 or svaltierra@cbot.com

Paul J. Draths
Vice President & Secretary

January 25, 2006

NOTICE
Exchange of Futures for Related Positions

Exchange for Physical (EFP) Transactions
Exchange for Swap (EFS) Transactions
Exchange for Risk (EFR) Transactions

The following notice summarizes requirements related to the execution of the various types of Exchange of Futures for Related Positions, which include EFP, EFS, and EFR transactions. Member firms are urged to ensure that all employees are fully informed regarding these requirements, as violations of the relevant CBOT Regulations (444.01, 444.04 and 444.05) may result in disciplinary action by the Business Conduct Committee.

1. Bona Fide EFP, EFS and EFR Transactions

For an EFP, EFS, or EFR to be considered bona fide, the seller of the futures must simultaneously purchase (or have the long market exposure associated with) the related cash commodity position, and the buyer of the futures must simultaneously sell (or have the short market exposure associated with) the related cash commodity position. Multiparty transactions are prohibited except as provided in the following paragraph.

A member firm may facilitate, as principal, the transfer of the related position component of an EFP, EFS, or EFR transaction on behalf of a customer provided that the member firm can demonstrate that the related position was passed through to the customer that received the futures position as part of the transaction.

The related cash commodity position (e.g. cash, swap, or OTC derivative) must involve the commodity underlying the futures contract or a derivative, by-product, or related product that is reasonably correlated to the futures being exchanged. The parties to the transaction may be required to demonstrate that the related cash commodity position and the futures position are reasonably correlated.

The futures that are exchanged in an EFP, EFS, or EFR must be an outright position in a futures contract. A futures combination is not a permissible component of an EFP, EFR, or EFS transaction. Additionally, the quantity of futures exchanged must be approximately equivalent to the underlying quantity of the related cash commodity being exchanged. The parties to the transaction may be required to demonstrate such equivalency.

141 W. Jackson Blvd.
Chicago, Illinois 60604-2994
312 435-3500

2. Contingent EFP, EFS and EFR Transactions Are Prohibited

Two parties may not execute contingent EFP, EFS, or EFR transactions in which the execution of one such trade is contingent either upon either the execution of another EFP/EFS/EFR or another offsetting cash, swap, or OTC transaction. In cases where two parties execute an EFP, EFS, or EFR and execute an economically offsetting cash, swap or OTC transaction, the participants may be required to demonstrate that there was no express or implied obligation or understanding to execute both transactions.

For example, two parties are prohibited from executing contingent March and June Treasury Bond EFPs to roll a position. Similarly, two parties are prohibited from executing a CBOT EFP and a contingent EFP on another market in which the cash transaction economically offsets the cash leg of the CBOT EFP. Such transactions are considered to be prearranged futures trades that circumvent the open market execution requirement.

3. Pilot Program Permitting Transitory EFPs in CBOT 100 oz. Gold and 5,000 oz. Silver

Transitory EFPs, wherein the parties to the EFP immediately offset the cash leg of the transaction, are currently permitted on a pilot basis in 100 oz. Gold and 5,000 oz. Silver exclusively during the hours of 12:25 p.m. to 7:30 a.m. (Chicago time). Such transactions are permitted subject to the following requirements:

a) The seller of the futures contract must simultaneously purchase the cash commodity and the buyer of the futures contract must simultaneously sell the cash commodity.

b) All documents typically generated in accordance with cash market conventions must be generated and retained.

c) The execution time of the EFP must be recorded on the order ticket and, upon submission of the EFP for clearing, on the order entry screen.

d) All other CBOT and CFTC requirements regarding EFP transactions must be adhered to in connection with these transactions.

4. Permissible Counterparties

EFPs, EFSs, and EFRs may be executed between two accounts provided that at least one of the following applies:

a) the accounts have different beneficial ownership;

b) the accounts have the same beneficial ownership, but are under separate control;

c) the accounts are commonly controlled, but involve separate legal entities which may or may not have the same beneficial ownership.

MARKET REGULATION ADVISORY NOTICE

Exchange	**CME & CBOT**
Subject	**Exchange of Futures for Related Positions**
Rule References	**Rule 538**
Advisory Date	**December 13, 2007**
Advisory Number	**CME & CBOT – RA0709-3**

Effective November 29, 2007, CME and CBOT adopted substantially common rule language with respect to Rule 538 ("Exchange of Futures for Related Positions"), which is set forth below. The only difference between the CME and CBOT rules is in Section 8 of the rule. A detailed FAQ document addressing EFRP transactions is attached to this advisory.

Member firms are strongly encouraged to ensure that all firm employees, as well as customers on whose behalf the firm clears EFRPs, are fully informed of the requirements of Rule 538.

Rule 538 – ("Exchange of Futures for Related Positions")

The following transactions shall be permitted by arrangement between parties in accordance with the requirements of this rule:

1. Exchange for Physical ("EFP") - A privately negotiated and simultaneous exchange of a futures position for a corresponding cash position.

   Exchange for Risk ("EFR") – A privately negotiated and simultaneous exchange of a futures position for a corresponding agricultural commodity swap or other OTC instrument.

   For purposes of this rule, all EFPs and EFRs shall be referred to as Exchanges of Futures for Related Positions ("EFRP").

2. Options on futures are not a permissible component of an EFRP.

3. The related position (cash, swap, or OTC derivative) must involve the commodity underlying the futures contract, or must be a derivative, by-product or related product of such commodity that has a reasonable degree of price correlation to the commodity underlying the futures contract.

4. An EFRP consists of two discrete, but related simultaneous transactions. One party must be the buyer of (or have the long market exposure associated with) the related position and the seller of the corresponding futures, and the other party must be the seller of (or have the short market exposure associated with) the related position and the buyer of the corresponding futures. However, a member firm may facilitate, as principal, the related position on behalf of a customer provided that the member firm can demonstrate that the related position was passed through to the customer who received the futures position as part of the EFRP transaction.

5. The accounts involved in the execution of an EFRP must be (a) independently controlled accounts with different beneficial ownership; or (b) independently controlled accounts of separate legal entities with the same beneficial ownership, provided that the account controllers operate in separate business units; or (c) independently controlled accounts within the same legal entity provided that the account controllers operate in separate business units;

or (d) commonly controlled accounts of separate legal entities provided that the separate legal entities have different beneficial ownership. However, on or after the first day on which delivery notices can be tendered in a physically delivered contract, an EFRP may not be executed for the purpose of offsetting concurrent long and short positions in the expiring contract when the accounts involved in the transaction are owned by the same legal entity and when the date of the futures position being offset is not the same as the date of the offsetting transaction.

6. The quantity covered by the related position must be approximately equivalent to the quantity covered by the futures contracts.

7. An EFRP may be entered into in accordance with the applicable trading increments set forth in the rules governing such futures contracts, at such prices as are mutually agreed upon by the two parties to the transaction.

8. **CBOT** - EFRP transactions may be permitted during the contract month after termination of the contract as prescribed in the applicable product chapters. Such transactions shall not establish new futures positions.

   CME - Subject to approval by the Clearing House, EFRP transactions may be permitted during the contract month after termination of the contract. Such transactions shall not establish new futures positions.

9. Clearing firms on opposite sides of an EFRP must subsequently approve the terms of the transaction, including the clearing firm (division), price, quantity, commodity, contract month and date prior to submitting the transaction to the Clearing House. All EFRP transactions must be submitted to the Clearing House by a clearing firm acting on its own behalf or for the beneficial account of a customer who is a party to the transaction. Clearing firms are responsible for exercising due diligence as to the bona fide nature of EFRP transactions submitted on behalf of customers.

10. Each EFRP transaction shall be designated as such, and cleared through the Clearing House. Each such transaction shall be submitted to the Clearing House within the time period and in the manner specified by the Exchange.

11. The time of execution of an EFRP must be recorded on the futures order ticket, and on the record submitted to the Clearing House.

12. Parties to any EFRP transaction must maintain all documents relevant to the futures and the cash, swap, or OTC transactions, including all documents customarily generated in accordance with cash or other relevant market practices and any documents reflecting payment and transfer of title. Any such documents must be provided to the Exchange upon request and it shall be the responsibility of the carrying clearing firm to provide the requested documentation on a timely basis.

FAQ Related to CME and CBOT Rule 538
Exchange of Futures for Related Positions

Q1: What are EFRP transactions?

A1: EFRP is an acronym for Exchange of Futures for Related Positions.

Exchange of Futures for Physical ("EFP") transactions and Exchange of Futures for Risk ("EFR") transactions are collectively known as EFRP transactions.

An EFP transaction is a privately negotiated and simultaneous exchange of a futures position for a corresponding cash position in the same or a related cash instrument or physical commodity. CME previously referred to EFPs in interest rate contracts as EBF (Exchange Basis Facility) transactions, but all such transactions will now be referred to as EFPs.

An EFR transaction is a privately negotiated and simultaneous exchange of a futures position for a corresponding OTC swap or other derivative in the same or a related instrument. CBOT previously referred to EFRs in which the related position was a swap transaction as EFS (Exchange for Swap) transactions, but all such transactions will now be referred to as EFRs.

Q2: What is the difference between EFRP transactions and "Ex-Pit" transactions?

A2: The term "Ex-Pit Transaction" refers broadly to transactions that exchange rules permit to be executed non-competitively outside of the central market. Such transactions are also sometimes referred to as PNTs ("Privately Negotiated Transactions"). Permissible ex-pit transactions at CME and CBOT include EFRPs, block trades and transfer trades. EFRPs are addressed in Rule 538; block trades are addressed in Rule 526, and transfer trades are addressed in Rule 853.

Q3: Is there a difference between EFP transactions and transactions commonly referred to as "Cash for Futures", "Versus Cash" or "Against Actuals"?

A3: No. All of the referenced terms describe transactions that CME and CBOT refer to as EFPs.

Q4: Can an EFRP be executed in any CME or CBOT futures contract?

A4: An EFRP may be executed in any CME or CBOT futures contract provided that the transaction conforms to the requirements of Rule 538.

Q5: Are options on futures a permissible component of an EFRP?

A5: No. Options on futures are not a permissible component of an EFRP.

Q6: Can there be more than two parties to an EFRP transaction?

A6: Typically, there may be only two parties involved in an EFRP transaction. One party must be the buyer of futures and the seller of the related cash or OTC instrument, and the other party must be the seller of the futures and the buyer of the related cash or OTC instrument. Multi-party EFRPs are

prohibited except as provided in the following paragraph.
A member firm may facilitate, as principal, the transfer of the related position component of an EFRP transaction on behalf of a customer provided that the member firm can demonstrate that the related position was passed through to the customer who received the futures position as part of the transaction.

Q7: Are there any restrictions on the permissible counterparties to an EFRP transaction?

A7: Yes. The accounts involved in the execution of an EFRP must be:

a) independently controlled accounts with different beneficial ownership; or
b) independently controlled accounts of separate legal entities with the same beneficial ownership, provided that the account controllers operate in separate business units; or
c) independently controlled accounts within the same legal entity provided that the account controllers operate in separate business units; or
d) commonly controlled accounts of separate legal entities provided that the separate legal entities have different beneficial ownership.

The term "same beneficial ownership" refers to a parent and its wholly owned subsidiaries or subsidiaries that are wholly owned by the same parent.

If the parties to a transaction involve the same legal entity, same beneficial owner, or separate legal entities under common control, the parties must be able to demonstrate that the EFRP was a legitimate arm's length transaction.

Q8: Can an EFRP be executed to either initiate or offset a position? If so, are there any restrictions during the delivery period?

A8: Prior to the termination of trading in a contract on the last day of trading, EFRP transactions generally can be used to either initiate or offset positions. The two exceptions are described below.

On or after the first day on which delivery notices can be tendered in a physically delivered contract, an EFRP may not be executed for the purpose of offsetting concurrent long and short positions in the expiring contract when the accounts involved in the transaction are owned by the same legal entity and when the date of the futures position being offset is not the same as the date of the offsetting transaction. Where the positions are carried at different FCMs, the receiving firm is responsible for ensuring compliance with this requirement.

Additionally, after trading has ceased in an expiring contract, EFRP transactions in certain CBOT products may be permitted for a defined period of time, as prescribed in the applicable product chapters, but only for liquidating purposes. For CME products, EFRPs executed after the termination of trading in the contract are subject to prior approval by the Clearing House and are also permitted for liquidating purposes only.

Q9: Are there any restrictions on the price at which an EFRP transaction may be executed?

A9: An EFRP may be executed at any commercially reasonable price agreed upon by both parties, provided that the price of the contract conforms to the standard minimum tick increment as set forth in the rules of the relevant product chapter.

Q10: What are the hours of trading for EFRP transactions?

A10: EFRPs may be executed at any time. However, an EFRP transaction is not considered to have been accepted by the Clearing House until the transaction is matched and cleared, and the first payment of settlement variation and performance bond has been confirmed.

Q11: How quickly after execution must EFRPs be submitted to the Clearing House?

A11: For EFRPs executed between 6:00 a.m. and 6:00 p.m., firms must submit the trade to the clearing system within one hour. For EFRPs executed between 6:00 p.m. and 6:00 a.m., firms have until 7:00 a.m. to submit the trade to the clearing system.

Q12: How are EFRPs submitted to the Clearing House?

A12: For information regarding the submission of EFRPs using Front End Clearing, please contact Client Management at 312-930-3241 or go to:

http://www.cme.com/clearing/cm/apps/manuals.html, and click on CME® Front-End Clearing (FEC) User Guide (PDF).

All EFRPs must be accurately submitted to the Clearing House and the transaction(s) must be accurately designated as an EFP or EFR.

Q13: Must there be a filling broker indicated for EFRPs?

A13: No, a filling broker is not required for EFRPs.

Q14: How do I properly record the execution time and date when submitting an EFRP to the Clearing House?

A14: EFRP transactions are considered executed on the same trade date if submitted prior to 7:00 p.m. Central Time.

Rule 538 requires the submission of the execution time for each EFRP transaction. The execution time must be the actual time (in Central Time) at which the transaction was concluded by the two parties, not the time at which the trade was reported by the parties to their respective firms. Thus, if the clearing member has not acted as either principal or agent in the transaction, it must ensure that its customer provides an accurate execution time.

For additional information, please refer to the Front End Clearing Manual at http://www.cme.com/clearing/cm/apps/manuals.html, and click on CME® Front-End Clearing (FEC) User Guide (PDF)

Q15: Do the exchanges publicly disseminate EFRP transaction information?

A15: The quantity and price of the futures component of an EFRP is available through the CME Group's MERQUOTE PC/IDS Inquiry system. The total EFRP volume, by contract, is reported separately in the exchanges' volume reports.

Q16: Are contingent EFRP transactions permitted?

A16: Two parties may not execute contingent EFRPs in which the execution of one EFRP transaction is contingent upon the execution of another EFRP transaction and the cash, swap or OTC transactions related to the two EFRPs economically offset. Such transactions are considered to be prearranged futures trades that circumvent the open market execution requirement.

For example, two parties are prohibited from executing contingent March and June EFRPs to roll a position in a particular product. Similarly, two parties are prohibited from executing an EFRP on the CME or CBOT and a contingent EFRP on another exchange in which the related position transactions of the two EFRPs economically offset.

Q17: Are transitory EFRPs permitted?

A17: Transitory EFRPs in which two parties execute an EFRP and subsequently execute an economically offsetting cash, swap or OTC transaction with each other are prohibited except as noted below.

Transitory EFPs are permitted in CME Currency futures and in CBOT 100 oz. Gold futures and CBOT 5,000 oz. Silver futures. Such transactions are permitted subject to the following requirements:

a) The seller of the futures contract must simultaneously purchase the cash commodity and the buyer of the futures contract must simultaneously sell the cash commodity.

b) All documents typically generated in accordance with cash market conventions must be generated and retained.

c) The execution time of the EFP must be recorded on the order ticket and, upon submission of the EFP for clearing, on the order entry screen.

d) All other Exchange and CFTC requirements regarding EFP transactions must be adhered to in connection with the transaction.

Q18: What types of instruments are considered acceptable for use as the related position side of EFRPs and what are the equivalency requirements with respect to the quantities exchanged?

A18: In general, the related position (i.e. cash, swap or other OTC derivative) must involve the product underlying the futures contract or a derivative, by-product or related product that is reasonably correlated to the futures being exchanged. Market Regulation may request that the parties to an EFRP transaction demonstrate that the related position and the futures position are reasonably correlated. Additionally, the quantity of the futures being exchanged must be approximately equivalent to the quantity of the related position being exchanged. Upon request, the parties to an EFRP transaction must be able to demonstrate such equivalency.

Generally acceptable related position instruments for EFRPs for different product groups include, but are not limited to, the following:

Foreign Exchange Futures: Both currency spot and forward transactions are acceptable. The related position side of an EFRP transaction in the CME$INDEX may consist of any single currency or a basket of currencies from within the index with a historical correlation to the index of 80% or greater ($r \geq .80$). Non-deliverable forwards (NDF) are an acceptable form of cash for a

currency EFRP in the Russian Ruble and the Brazilian Real contracts. Exchange Traded Funds ("ETFs") are acceptable provided that the ETF mirrors the relevant Exchange currency product.

Interest Rate Futures: Fixed income instruments with risk characteristics and maturities that parallel the instrument underlying the futures contract are acceptable. Such instruments include, but are not necessarily limited to, money market instruments, Treasuries, Agencies, investment grade corporates, forward rate agreements (FRAs), mortgage instruments including collateralized mortgage obligations (CMOs) and interest rate swaps and swaptions.

Stock Index Futures: Stock baskets must be highly correlated to the underlying index with a historical correlation to the index of 90% or greater ($r \geq .90$). Further, these stock baskets must represent at least 50% of the underlying index by weight or must include at least 50% of the stocks in the underlying index. The notional value of the basket must be approximately equal to the value of the corresponding futures. ETFs are acceptable provided that the ETF mirrors the relevant Exchange stock index product.

Agricultural Futures: For Dairy Products, Live Cattle, Feeder Cattle, Lean Hogs and Pork Bellies, the acceptable related position component is limited to the specific underlying commodity (e.g., Live Cattle for Live Cattle futures); although the related position need not be deliverable grade of the particular commodity, there must be a reasonable level of correlation with the associated futures. In the case of Random Length Lumber futures, the related position must be deliverable species dimension lumber, variances are permitted with respect to grade/size and tally. Additionally, with respect to Random Length Lumber, the buyer of the cash lumber must retain ownership of the transferred product for personal use or resale to customers and may not resell the product either directly or indirectly to the original seller.

For all other agricultural futures contracts, the related position must involve the commodity underlying the futures contract or a derivative, by-product or related product that is reasonably correlated to the futures being exchanged. The related position in an EFR may be an agricultural commodity swap or other agricultural OTC instrument, but in all cases must comply with any applicable regulatory requirements prescribed by the CFTC.

Commodity Index Futures: For futures based on Commodity Indexes, (*e.g.*, Goldman Sachs Commodity Index (GSCI), Dow AIG Index), acceptable related positions include ETFs provided that the ETF mirrors the relevant Commodity Index product traded on the Exchange.

Metal Futures: Metal bars with characteristics that parallel the underlying futures contract. ETFs are acceptable provided that the ETF characteristics parallel the underlying futures contract.

As noted above, associated related position transactions must be comparable with respect to quantity, value or risk exposure to the futures utilized.

Questions regarding the acceptability of related position instruments may be addressed to the Market Regulation contacts listed on this advisory.

Q19: Does a firm that executes and/or clears an EFRP on behalf of a customer have any regulatory exposure if the EFRP does not conform to the requirements of Rule 538?

A19: A firm that executes and submits an EFRP on behalf of a customer is responsible for exercising due diligence as to the bona fide nature of the EFRP. Failure to do so may be deemed a violation of 538 by the firm. Additionally, a firm that accepts and clears a give-up EFRP may be liable for violation of Rule 538 if it accepts an EFRP that it knows, or should know, is not bona fide.

Q20: What are the documentation requirements for EFRPs?

A20: Parties to an EFRP must maintain all documents relevant to the futures and related position transactions and must provide such documents to Market Regulation upon request. Documents that may be requested include, but are not necessarily limited to, the following:

1. All documents relevant to the futures side of the trade including order tickets and account statements;
2. Documentation customarily generated in accordance with cash market or other relevant market practices such as cash, swap or OTC contracts, cash confirmations, invoices, warehouse receipts and bills of sale, as well as documentation that demonstrates proof of payment and transfer of ownership of the related position transaction (e.g. canceled checks, bank statements, Fedwire confirms, Fixed Income Clearing Corporation documents, bills of lading etc.).

With respect to EFRPs in foreign exchange futures wherein the parties immediately offset the cash transaction ("transitory EFPs"), CME would expect to see confirmation statements issued by the bank/foreign exchange dealer party to the transaction. These confirmation statements should be the type normally produced by the bank/foreign exchange dealer for confirmation of currency deals and should indicate, by name, the identity of the counter party principal to the transaction.

However, in circumstances where the EFP transaction is between a bank/foreign exchange dealer and a CTA, account controller, or other person acting on behalf of a third party (such as a commodity pool or fund), the cash side confirmation statement must identify, at minimum, the name of the third party's carrying clearing member and the third party's account number (or other account specific designation), but need not identify the third party by name.

Q21: Must transactions executed as EFRPs be reflected as such on customer account statements?

A21: Yes, FCMs must identify EFRP transactions on confirmation and monthly account statements delivered to customers.

Q22: Who is responsible for submitting related position documentation when a request for such documentation is made by the Market Regulation Department?

A22: Related position documentation for an EFRP must be provided to the Market Regulation Department upon request. Market Regulation will request such information from the firm carrying the account, and the carrying firm is responsible under the rules for providing the documentation.

Questions regarding this advisory may be directed to the following individuals in Market Regulation:

Steven Mair, Manager Market Surveillance, 312.466.4382

Sandra Valtierra, Sr. Market Surveillance Analyst, 312.347.4137

Joe Hawrysz, Associate Director, 312.341.7750

Jerry O'Connor, Associate Director, 312.930.3256

MARKET REGULATION ADVISORY NOTICE

Exchange	**CME & CBOT**
Subject	**Exchange of Futures for Related Positions**
Rule References	**Rule 538**
Advisory Date	**May 1, 2008**
Advisory Number	**CME & CBOT – RA0809-3**

This Advisory Notice supersedes Market Regulation Advisory Notice CME & CBOT – RA0708-3 from December 13, 2007. The only changes from the information provided in the previous notice appear in the answer to question 12 (see page 5), which indicate that EFRP transactions designated for Average Pricing System (APS) allocation must conform to the requirements of Rule 553 ("Average Price System") and Rule 538 ("Exchange of Futures for Related Positions"), and that questions concerning the submission of EFRPs using Front End Clearing should be directed to Clearing Services.

Effective November 29, 2007, CME and CBOT adopted substantially common rule language with respect to Rule 538, which is set forth below. The only difference between the CME and CBOT rules is in Section 8 of the rule. A detailed FAQ document addressing EFRP transactions is attached to this Advisory Notice.

Member firms are strongly encouraged to ensure that all firm employees, as well as customers on whose behalf the firm clears EFRPs, are fully informed of the requirements of Rule 538.

Rule 538 – ("Exchange of Futures for Related Positions")

The following transactions shall be permitted by arrangement between parties in accordance with the requirements of this rule:

1. Exchange for Physical ("EFP") - A privately negotiated and simultaneous exchange of a futures position for a corresponding cash position.

   Exchange for Risk ("EFR") – A privately negotiated and simultaneous exchange of a futures position for a corresponding agricultural commodity swap or other OTC instrument.

   For purposes of this rule, all EFPs and EFRs shall be referred to as Exchanges of Futures for Related Positions ("EFRP").

2. Options on futures are not a permissible component of an EFRP.

3. The related position (cash, swap, or OTC derivative) must involve the commodity underlying the futures contract, or must be a derivative, by-product or related product of such commodity that has a reasonable degree of price correlation to the commodity underlying the futures contract.

4. An EFRP consists of two discrete, but related simultaneous transactions. One party must be the buyer of (or have the long market exposure associated with) the related position and the seller of the corresponding futures, and the other party must be the seller of (or have the short market exposure associated with) the related position and the buyer of the corresponding futures. However, a member firm may facilitate, as principal, the related position on behalf of a customer provided that the member firm can demonstrate that the

related position was passed through to the customer who received the futures position as part of the EFRP transaction.

5. The accounts involved in the execution of an EFRP must be (a) independently controlled accounts with different beneficial ownership; or (b) independently controlled accounts of separate legal entities with the same beneficial ownership, provided that the account controllers operate in separate business units; or (c) independently controlled accounts within the same legal entity provided that the account controllers operate in separate business units; or (d) commonly controlled accounts of separate legal entities provided that the separate legal entities have different beneficial ownership. However, on or after the first day on which delivery notices can be tendered in a physically delivered contract, an EFRP may not be executed for the purpose of offsetting concurrent long and short positions in the expiring contract when the accounts involved in the transaction are owned by the same legal entity and when the date of the futures position being offset is not the same as the date of the offsetting transaction.

6. The quantity covered by the related position must be approximately equivalent to the quantity covered by the futures contracts.

7. An EFRP may be entered into in accordance with the applicable trading increments set forth in the rules governing such futures contracts, at such prices as are mutually agreed upon by the two parties to the transaction.

8. **CBOT** - EFRP transactions may be permitted during the contract month after termination of the contract as prescribed in the applicable product chapters. Such transactions shall not establish new futures positions.

   CME - Subject to approval by the Clearing House, EFRP transactions may be permitted during the contract month after termination of the contract. Such transactions shall not establish new futures positions.

9. Clearing firms on opposite sides of an EFRP must subsequently approve the terms of the transaction, including the clearing firm (division), price, quantity, commodity, contract month and date prior to submitting the transaction to the Clearing House. All EFRP transactions must be submitted to the Clearing House by a clearing firm acting on its own behalf or for the beneficial account of a customer who is a party to the transaction. Clearing firms are responsible for exercising due diligence as to the bona fide nature of EFRP transactions submitted on behalf of customers.

10. Each EFRP transaction shall be designated as such, and cleared through the Clearing House. Each such transaction shall be submitted to the Clearing House within the time period and in the manner specified by the Exchange.

11. The time of execution of an EFRP must be recorded on the futures order ticket, and on the record submitted to the Clearing House.

12. Parties to any EFRP transaction must maintain all documents relevant to the futures and the cash, swap, or OTC transactions, including all documents customarily generated in accordance with cash or other relevant market practices and any documents reflecting payment and transfer of title. Any such documents must be provided to the Exchange upon request and it shall be the responsibility of the carrying clearing firm to provide the requested documentation on a timely basis.

FAQ Related to CME and CBOT Rule 538

Exchange of Futures for Related Positions

Q1: What are EFRP transactions?

A1: EFRP is an acronym for Exchange of Futures for Related Positions.

Exchange of Futures for Physical ("EFP") transactions and Exchange of Futures for Risk ("EFR") transactions are collectively known as EFRP transactions.

An EFP transaction is a privately negotiated and simultaneous exchange of a futures position for a corresponding cash position in the same or a related cash instrument or physical commodity. CME previously referred to EFPs in interest rate contracts as EBF (Exchange Basis Facility) transactions, but all such transactions will now be referred to as EFPs.

An EFR transaction is a privately negotiated and simultaneous exchange of a futures position for a corresponding OTC swap or other derivative in the same or a related instrument. CBOT previously referred to EFRs in which the related position was a swap transaction as EFS (Exchange for Swap) transactions, but all such transactions will now be referred to as EFRs.

Q2: What is the difference between EFRP transactions and "Ex-Pit" transactions?

A2: The term "Ex-Pit Transaction" refers broadly to transactions that exchange rules permit to be executed non-competitively outside of the central market. Such transactions are also sometimes referred to as PNTs ("Privately Negotiated Transactions"). Permissible ex-pit transactions at CME and CBOT include EFRPs, block trades and transfer trades. EFRPs are addressed in Rule 538; block trades are addressed in Rule 526, and transfer trades are addressed in Rule 853.

Q3: Is there a difference between EFP transactions and transactions commonly referred to as "Cash for Futures", "Versus Cash" or "Against Actuals"?

A3: No. All of the referenced terms describe transactions that CME and CBOT refer to as EFPs.

Q4: Can an EFRP be executed in any CME or CBOT futures contract?

A4: An EFRP may be executed in any CME or CBOT futures contract provided that the transaction conforms to the requirements of Rule 538.

Q5: Are options on futures a permissible component of an EFRP?

A5: No. Options on futures are not a permissible component of an EFRP.

Q6: Can there be more than two parties to an EFRP transaction?

A6: Typically, there may be only two parties involved in an EFRP transaction. One party must be the buyer of futures and the seller of the related cash or OTC instrument, and the other party must be the seller of the futures and the buyer of the related cash or OTC instrument. Multi-party EFRPs are prohibited except as provided in the following paragraph.

A member firm may facilitate, as principal, the transfer of the related position component of an EFRP transaction on behalf of a customer provided that the member firm can demonstrate that the related position was passed through to the customer who received the futures position as part of the transaction.

Q7: Are there any restrictions on the permissible counterparties to an EFRP transaction?

A7: Yes. The accounts involved in the execution of an EFRP must be:

a) independently controlled accounts with different beneficial ownership; or
b) independently controlled accounts of separate legal entities with the same beneficial ownership, provided that the account controllers operate in separate business units; or
c) independently controlled accounts within the same legal entity provided that the account controllers operate in separate business units; or
d) commonly controlled accounts of separate legal entities provided that the separate legal entities have different beneficial ownership.

The term "same beneficial ownership" refers to a parent and its wholly owned subsidiaries or subsidiaries that are wholly owned by the same parent.

If the parties to a transaction involve the same legal entity, same beneficial owner, or separate legal entities under common control, the parties must be able to demonstrate that the EFRP was a legitimate arm's length transaction.

Q8: Can an EFRP be executed to either initiate or offset a position? If so, are there any restrictions during the delivery period?

A8: Prior to the termination of trading in a contract on the last day of trading, EFRP transactions generally can be used to either initiate or offset positions. The two exceptions are described below.

On or after the first day on which delivery notices can be tendered in a physically delivered contract, an EFRP may not be executed for the purpose of offsetting concurrent long and short positions in the expiring contract when the accounts involved in the transaction are owned by the same legal entity and when the date of the futures position being offset is not the same as the date of the offsetting transaction. Where the positions are carried at different FCMs, the receiving firm is responsible for ensuring compliance with this requirement.

Additionally, after trading has ceased in an expiring contract, EFRP transactions in certain CBOT products may be permitted for a defined period of time, as prescribed in the applicable product chapters, but only for liquidating purposes. For CME products, EFRPs executed after the termination of trading in the contract are subject to prior approval by the Clearing House and are also permitted for liquidating purposes only.

Q9: Are there any restrictions on the price at which an EFRP transaction may be executed?

A9: An EFRP may be executed at any commercially reasonable price agreed upon by both parties, provided that the price of the contract conforms to the standard minimum tick increment as set forth in the rules of the relevant product chapter.

Q10: What are the hours of trading for EFRP transactions?

A10: EFRPs may be executed at any time. However, an EFRP transaction is not considered to have been accepted by the Clearing House until the transaction is matched and cleared, and the first payment of settlement variation and performance bond has been confirmed.

Q11: How quickly after execution must EFRPs be submitted to the Clearing House?

A11: For EFRPs executed between 6:00 a.m. and 6:00 p.m., firms must submit the trade to the clearing system within one hour. For EFRPs executed between 6:00 p.m. and 6:00 a.m., firms have until 7:00 a.m. to submit the trade to the clearing system.

Q12: How are EFRPs submitted to the Clearing House?

A12: For information regarding the submission of EFRPs using Front End Clearing, please contact Clearing Services at 312.207.2525, via email at ccs@cmegroup.com or go to:

http://www.cme.com/clearing/cm/apps/manuals.html, and click on CME® Front-End Clearing (FEC) User Guide (PDF).

All EFRPs must be accurately submitted to the Clearing House and the transaction(s) must be accurately designated as an EFP or EFR.

EFRP transactions designated for Average Pricing System (APS) allocation must conform to the requirements of Rules 553 and 538.

Q13: Must there be a filling broker indicated for EFRPs?

A13: No, a filling broker is not required for EFRPs.

Q14: How do I properly record the execution time and date when submitting an EFRP to the Clearing House?

A14: EFRP transactions are considered executed on the same trade date if submitted prior to 7:00 p.m. Central Time.

Rule 538 requires the submission of the execution time for each EFRP transaction. The execution time must be the actual time (in Central Time) at which the transaction was concluded by the two parties, not the time at which the trade was reported by the parties to their respective firms. Thus, if the clearing member has not acted as either principal or agent in the transaction, it must ensure that its customer provides an accurate execution time.

For additional information, please refer to the Front End Clearing Manual at http://www.cme.com/clearing/cm/apps/manuals.html, and click on CME® Front-End Clearing (FEC) User Guide (PDF)

Q15: Do the exchanges publicly disseminate EFRP transaction information?

A15: The quantity and price of the futures component of an EFRP is available through the CME Group's MERQUOTE PC/IDS Inquiry system. The total EFRP volume, by contract, is reported separately in the exchanges' volume reports.

Q16: Are contingent EFRP transactions permitted?

A16: Two parties may not execute contingent EFRPs in which the execution of one EFRP transaction is contingent upon the execution of another EFRP transaction and the cash, swap or OTC transactions related to the two EFRPs economically offset. Such transactions are considered to be prearranged futures trades that circumvent the open market execution requirement.

For example, two parties are prohibited from executing contingent March and June EFRPs to roll a position in a particular product. Similarly, two parties are prohibited from executing an EFRP on the CME or CBOT and a contingent EFRP on another exchange in which the related position transactions of the two EFRPs economically offset.

Q17: Are transitory EFRPs permitted?

A17: Transitory EFRPs in which two parties execute an EFRP and subsequently execute an economically offsetting cash, swap or OTC transaction with each other are prohibited except as noted below.

Transitory EFPs are permitted in CME Currency futures and in CBOT 100 oz. Gold futures and CBOT 5,000 oz. Silver futures. Such transactions are permitted subject to the following requirements:

a) The seller of the futures contract must simultaneously purchase the cash commodity and the buyer of the futures contract must simultaneously sell the cash commodity.

b) All documents typically generated in accordance with cash market conventions must be generated and retained.

c) The execution time of the EFP must be recorded on the order ticket and, upon submission of the EFP for clearing, on the order entry screen.

d) All other Exchange and CFTC requirements regarding EFP transactions must be adhered to in connection with the transaction.

Q18: What types of instruments are considered acceptable for use as the related position side of EFRPs and what are the equivalency requirements with respect to the quantities exchanged?

A18: In general, the related position (i.e. cash, swap or other OTC derivative) must involve the product underlying the futures contract or a derivative, by-product or related product that is reasonably correlated to the futures being exchanged. Market Regulation may request that the parties to an EFRP transaction demonstrate that the related position and the futures position are reasonably correlated. Additionally, the quantity of the futures being exchanged must be approximately equivalent to the quantity of the related position being exchanged. Upon request, the parties to an EFRP transaction must be able to demonstrate such equivalency.

Generally acceptable related position instruments for EFRPs for different product groups include, but are not limited to, the following:

Foreign Exchange Futures: Both currency spot and forward transactions are acceptable. The related position side of an EFRP transaction in the CME$INDEX may consist of any single currency or a basket of currencies from within the index with a historical correlation to the index of 80% or greater ($r \geq .80$). Non-deliverable forwards (NDF) are an acceptable form of cash for a currency EFRP in the Russian Ruble and the Brazilian Real contracts. Exchange Traded Funds ("ETFs") are acceptable provided that the ETF mirrors the relevant Exchange currency product.

Interest Rate Futures: Fixed income instruments with risk characteristics and maturities that parallel the instrument underlying the futures contract are acceptable. Such instruments include, but are not necessarily limited to, money market instruments, Treasuries, Agencies, investment grade corporates, forward rate agreements (FRAs), mortgage instruments including collateralized mortgage obligations (CMOs) and interest rate swaps and swaptions.

Stock Index Futures: Stock baskets must be highly correlated to the underlying index with a historical correlation to the index of 90% or greater ($r \geq .90$). Further, these stock baskets must represent at least 50% of the underlying index by weight or must include at least 50% of the stocks in the underlying index. The notional value of the basket must be approximately equal to the value of the corresponding futures. ETFs are acceptable provided that the ETF mirrors the relevant Exchange stock index product.

Agricultural Futures: For Dairy Products, Live Cattle, Feeder Cattle, Lean Hogs and Pork Bellies, the acceptable related position component is limited to the specific underlying commodity (e.g., Live Cattle for Live Cattle futures); although the related position need not be deliverable grade of the particular commodity, there must be a reasonable level of correlation with the associated futures. In the case of Random Length Lumber futures, the related position must be deliverable species dimension lumber, variances are permitted with respect to grade/size and tally. Additionally, with respect to Random Length Lumber, the buyer of the cash lumber must retain ownership of the transferred product for personal use or resale to customers and may not resell the product either directly or indirectly to the original seller.

For all other agricultural futures contracts, the related position must involve the commodity underlying the futures contract or a derivative, by-product or related product that is reasonably correlated to the futures being exchanged. The related position in an EFR may be an agricultural commodity swap or other agricultural OTC instrument, but in all cases must comply with any applicable regulatory requirements prescribed by the CFTC.

Commodity Index Futures: For futures based on Commodity Indexes, (*e.g.*, Goldman Sachs Commodity Index (GSCI), Dow AIG Index), acceptable related positions include ETFs provided that the ETF mirrors the relevant Commodity Index product traded on the Exchange.

Metal Futures: Metal bars with characteristics that parallel the underlying futures contract. ETFs are acceptable provided that the ETF characteristics parallel the underlying futures contract.

As noted above, associated related position transactions must be comparable with respect to quantity, value or risk exposure to the futures utilized.

Questions regarding the acceptability of related position instruments may be addressed to the Market Regulation contacts listed on this Advisory Notice.

Q19: Does a firm that executes and/or clears an EFRP on behalf of a customer have any regulatory exposure if the EFRP does not conform to the requirements of Rule 538?

A19: A firm that executes and submits an EFRP on behalf of a customer is responsible for exercising due diligence as to the bona fide nature of the EFRP. Failure to do so may be deemed a violation of 538 by the firm. Additionally, a firm that accepts and clears a give-up EFRP may be liable for violation of Rule 538 if it accepts an EFRP that it knows, or should know, is not bona fide.

Q20: What are the documentation requirements for EFRPs?

A20: Parties to an EFRP must maintain all documents relevant to the futures and related position transactions and must provide such documents to Market Regulation upon request. Documents that may be requested include, but are not necessarily limited to, the following:

1. All documents relevant to the futures side of the trade including order tickets and account statements;
2. Documentation customarily generated in accordance with cash market or other relevant market practices such as cash, swap or OTC contracts, cash confirmations, invoices, warehouse receipts and bills of sale, as well as documentation that demonstrates proof of payment and transfer of ownership of the related position transaction (e.g. canceled checks, bank statements, Fedwire confirms, Fixed Income Clearing Corporation documents, bills of lading etc.).

With respect to EFRPs in foreign exchange futures wherein the parties immediately offset the cash transaction ("transitory EFPs"), CME would expect to see confirmation statements issued by the bank/foreign exchange dealer party to the transaction. These confirmation statements should be the type normally produced by the bank/foreign exchange dealer for confirmation of currency deals and should indicate, by name, the identity of the counter party principal to the transaction.

However, in circumstances where the EFP transaction is between a bank/foreign exchange dealer and a CTA, account controller, or other person acting on behalf of a third party (such as a commodity pool or fund), the cash side confirmation statement must identify, at minimum, the name of the third party's carrying clearing member and the third party's account number (or other account specific designation), but need not identify the third party by name.

Q21: Must transactions executed as EFRPs be reflected as such on customer account statements?

A21: Yes, FCMs must identify EFRP transactions on confirmation and monthly account statements delivered to customers.

Q22: Who is responsible for submitting related position documentation when a request for such documentation is made by the Market Regulation Department?

A22: Related position documentation for an EFRP must be provided to the Market Regulation Department upon request. Market Regulation will request such information from the firm carrying the account, and the carrying firm is responsible under the rules for providing the documentation.

Questions regarding this Advisory Notice may be directed to the following individuals in Market Regulation:

Steven Mair, Manager Market Surveillance, 312.466.4382

Sandra Valtierra, Sr. Market Surveillance Analyst, 312.347.4137

Joe Hawrysz, Associate Director, 312.341.7750

Jerry O'Connor, Associate Director, 312.930.3256

MARKET REGULATION ADVISORY NOTICE

Exchange	**CME & CBOT**
Subject	**Exchange of Futures for Related Positions**
Rule References	**Rule 538**
Advisory Date	**September 8, 2008**
Advisory Number	**CME & CBOT RA0815-3**

This Advisory Notice supersedes CME & CBOT Market Regulation Advisory Notice RA0809-3 from May 1, 2008, and is being updated and reissued in connection with today's transition of the CBOT Metals contracts to NYSE Liffe. The only changes appear in the answers to questions 17 and 18 (see pages 6 and 7) where former references to the Metals contracts have been eliminated.

Effective November 29, 2007, CME and CBOT adopted substantially common rule language with respect to Rule 538, which is set forth below. The only difference between the CME and CBOT rules is in Section 8 of the rule. A detailed FAQ document addressing EFRP transactions is attached to this Advisory Notice.

Member firms are strongly encouraged to ensure that all firm employees, as well as customers on whose behalf the firm clears EFRPs, are fully informed of the requirements of Rule 538.

Rule 538 – ("Exchange of Futures for Related Positions")

The following transactions shall be permitted by arrangement between parties in accordance with the requirements of this rule:

1. Exchange for Physical ("EFP") - A privately negotiated and simultaneous exchange of a futures position for a corresponding cash position.

   Exchange for Risk ("EFR") – A privately negotiated and simultaneous exchange of a futures position for a corresponding agricultural commodity swap or other OTC instrument.

   For purposes of this rule, all EFPs and EFRs shall be referred to as Exchanges of Futures for Related Positions ("EFRP").

2. Options on futures are not a permissible component of an EFRP.

3. The related position (cash, swap, or OTC derivative) must involve the commodity underlying the futures contract, or must be a derivative, by-product or related product of such commodity that has a reasonable degree of price correlation to the commodity underlying the futures contract.

4. An EFRP consists of two discrete, but related simultaneous transactions. One party must be the buyer of (or have the long market exposure associated with) the related position and the seller of the corresponding futures, and the other party must be the seller of (or have the short market exposure associated with) the related position and the buyer of the corresponding futures. However, a member firm may facilitate, as principal, the related position on behalf of a customer provided that the member firm can demonstrate that the related position was passed through to the customer who received the futures position as part of the EFRP transaction.

5. The accounts involved in the execution of an EFRP must be (a) independently controlled accounts with different beneficial ownership; or (b) independently controlled accounts of separate legal entities with the same beneficial ownership, provided that the account controllers operate in separate business units; or (c) independently controlled accounts within the same legal entity provided that the account controllers operate in separate business units; or (d) commonly controlled accounts of separate legal entities provided that the separate legal entities have different beneficial ownership. However, on or after the first day on which delivery notices can be tendered in a physically delivered contract, an EFRP may not be executed for the purpose of offsetting concurrent long and short positions in the expiring contract when the accounts involved in the transaction are owned by the same legal entity and when the date of the futures position being offset is not the same as the date of the offsetting transaction.

6. The quantity covered by the related position must be approximately equivalent to the quantity covered by the futures contracts.

7. An EFRP may be entered into in accordance with the applicable trading increments set forth in the rules governing such futures contracts, at such prices as are mutually agreed upon by the two parties to the transaction.

8. **CBOT** - EFRP transactions may be permitted during the contract month after termination of the contract as prescribed in the applicable product chapters. Such transactions shall not establish new futures positions.

   CME - Subject to approval by the Clearing House, EFRP transactions may be permitted during the contract month after termination of the contract. Such transactions shall not establish new futures positions.

9. Clearing firms on opposite sides of an EFRP must subsequently approve the terms of the transaction, including the clearing firm (division), price, quantity, commodity, contract month and date prior to submitting the transaction to the Clearing House. All EFRP transactions must be submitted to the Clearing House by a clearing firm acting on its own behalf or for the beneficial account of a customer who is a party to the transaction. Clearing firms are responsible for exercising due diligence as to the bona fide nature of EFRP transactions submitted on behalf of customers.

10. Each EFRP transaction shall be designated as such, and cleared through the Clearing House. Each such transaction shall be submitted to the Clearing House within the time period and in the manner specified by the Exchange.

11. The time of execution of an EFRP must be recorded on the futures order ticket, and on the record submitted to the Clearing House.

12. Parties to any EFRP transaction must maintain all documents relevant to the futures and the cash, swap, or OTC transactions, including all documents customarily generated in accordance with cash or other relevant market practices and any documents reflecting payment and transfer of title. Any such documents must be provided to the Exchange upon request and it shall be the responsibility of the carrying clearing firm to provide the requested documentation on a timely basis.

FAQ Related to CME and CBOT Rule 538

Exchange of Futures for Related Positions

Q1: What are EFRP transactions?

A1: EFRP is an acronym for Exchange of Futures for Related Positions.

Exchange of Futures for Physical ("EFP") transactions and Exchange of Futures for Risk ("EFR") transactions are collectively known as EFRP transactions.

An EFP transaction is a privately negotiated and simultaneous exchange of a futures position for a corresponding cash position in the same or a related cash instrument or physical commodity. CME previously referred to EFPs in interest rate contracts as EBF (Exchange Basis Facility) transactions, but all such transactions will now be referred to as EFPs.

An EFR transaction is a privately negotiated and simultaneous exchange of a futures position for a corresponding OTC swap or other derivative in the same or a related instrument. CBOT previously referred to EFRs in which the related position was a swap transaction as EFS (Exchange for Swap) transactions, but all such transactions will now be referred to as EFRs.

Q2: What is the difference between EFRP transactions and "Ex-Pit" transactions?

A2: The term "Ex-Pit Transaction" refers broadly to transactions that exchange rules permit to be executed non-competitively outside of the central market. Such transactions are also sometimes referred to as PNTs ("Privately Negotiated Transactions"). Permissible ex-pit transactions at CME and CBOT include EFRPs, block trades and transfer trades. EFRPs are addressed in Rule 538; block trades are addressed in Rule 526, and transfer trades are addressed in Rule 853.

Q3: Is there a difference between EFP transactions and transactions commonly referred to as "Cash for Futures", "Versus Cash" or "Against Actuals"?

A3: No. All of the referenced terms describe transactions that CME and CBOT refer to as EFPs.

Q4: Can an EFRP be executed in any CME or CBOT futures contract?

A4: An EFRP may be executed in any CME or CBOT futures contract provided that the transaction conforms to the requirements of Rule 538.

Q5: Are options on futures a permissible component of an EFRP?

A5: No. Options on futures are not a permissible component of an EFRP.

Q6: Can there be more than two parties to an EFRP transaction?

A6: Typically, there may be only two parties involved in an EFRP transaction. One party must be the buyer of futures and the seller of the related cash or OTC instrument, and the other party must be the seller of the futures and the buyer of the related cash or OTC instrument. Multi-party EFRPs are prohibited except as provided in the following paragraph.

A member firm may facilitate, as principal, the transfer of the related position component of an EFRP transaction on behalf of a customer provided that the member firm can demonstrate that the related position was passed through to the customer who received the futures position as part of the transaction.

Q7: Are there any restrictions on the permissible counterparties to an EFRP transaction?

A7: Yes. The accounts involved in the execution of an EFRP must be:

a) independently controlled accounts with different beneficial ownership; or
b) independently controlled accounts of separate legal entities with the same beneficial ownership, provided that the account controllers operate in separate business units; or
c) independently controlled accounts within the same legal entity provided that the account controllers operate in separate business units; or
d) commonly controlled accounts of separate legal entities provided that the separate legal entities have different beneficial ownership.

The term "same beneficial ownership" refers to a parent and its wholly owned subsidiaries or subsidiaries that are wholly owned by the same parent.

If the parties to a transaction involve the same legal entity, same beneficial owner, or separate legal entities under common control, the parties must be able to demonstrate that the EFRP was a legitimate arm's length transaction.

Q8: Can an EFRP be executed to either initiate or offset a position? If so, are there any restrictions during the delivery period?

A8: Prior to the termination of trading in a contract on the last day of trading, EFRP transactions generally can be used to either initiate or offset positions. The two exceptions are described below.

On or after the first day on which delivery notices can be tendered in a physically delivered contract, an EFRP may not be executed for the purpose of offsetting concurrent long and short positions in the expiring contract when the accounts involved in the transaction are owned by the same legal entity and when the date of the futures position being offset is not the same as the date of the offsetting transaction. Where the positions are carried at different FCMs, the receiving firm is responsible for ensuring compliance with this requirement.

Additionally, after trading has ceased in an expiring contract, EFRP transactions in certain CBOT products may be permitted for a defined period of time, as prescribed in the applicable product chapters, but only for liquidating purposes. For CME products, EFRPs executed after the termination of trading in the contract are subject to prior approval by the Clearing House and are also permitted for liquidating purposes only.

Q9: Are there any restrictions on the price at which an EFRP transaction may be executed?

A9: An EFRP may be executed at any commercially reasonable price agreed upon by both parties, provided that the price of the contract conforms to the standard minimum tick increment as set forth in the rules of the relevant product chapter.

Q10: What are the hours of trading for EFRP transactions?

A10: EFRPs may be executed at any time. However, an EFRP transaction is not considered to have been accepted by the Clearing House until the transaction is matched and cleared, and the first payment of settlement variation and performance bond has been confirmed.

Q11: How quickly after execution must EFRPs be submitted to the Clearing House?

A11: For EFRPs executed between 6:00 a.m. and 6:00 p.m., firms must submit the trade to the clearing system within one hour. For EFRPs executed between 6:00 p.m. and 6:00 a.m., firms have until 7:00 a.m. to submit the trade to the clearing system.

Q12: How are EFRPs submitted to the Clearing House?

A12: For information regarding the submission of EFRPs using Front End Clearing, please contact Clearing Services at 312.207.2525, via email at ccs@cmegroup.com or go to:

http://www.cme.com/clearing/cm/apps/manuals.html, and click on CME® Front-End Clearing (FEC) User Guide (PDF).

All EFRPs must be accurately submitted to the Clearing House and the transaction(s) must be accurately designated as an EFP or EFR.

EFRP transactions designated for Average Pricing System (APS) allocation must conform to the requirements of Rules 553 and 538.

Q13: Must there be a filling broker indicated for EFRPs?

A13: No, a filling broker is not required for EFRPs.

Q14: How do I properly record the execution time and date when submitting an EFRP to the Clearing House?

A14: EFRP transactions are considered executed on the same trade date if submitted prior to 7:00 p.m. Central Time.

Rule 538 requires the submission of the execution time for each EFRP transaction. The execution time must be the actual time (in Central Time) at which the transaction was concluded by the two parties, not the time at which the trade was reported by the parties to their respective firms. Thus, if the clearing member has not acted as either principal or agent in the transaction, it must ensure that its customer provides an accurate execution time.

For additional information, please refer to the Front End Clearing Manual at http://www.cme.com/clearing/cm/apps/manuals.html, and click on CME® Front-End Clearing (FEC) User Guide (PDF)

Q15: Do the exchanges publicly disseminate EFRP transaction information?

A15: The quantity and price of the futures component of an EFRP is available through the CME Group's MERQUOTE PC/IDS Inquiry system. The total EFRP volume, by contract, is reported separately in the exchanges' volume reports.

Q16: Are contingent EFRP transactions permitted?

A16: Two parties may not execute contingent EFRPs in which the execution of one EFRP transaction is contingent upon the execution of another EFRP transaction and the cash, swap or OTC transactions related to the two EFRPs economically offset. Such transactions are considered to be prearranged futures trades that circumvent the open market execution requirement.

For example, two parties are prohibited from executing contingent March and June EFRPs to roll a position in a particular product. Similarly, two parties are prohibited from executing an EFRP on the CME or CBOT and a contingent EFRP on another exchange in which the related position transactions of the two EFRPs economically offset.

Q17: Are transitory EFRPs permitted?

A17: Transitory EFRPs in which two parties execute an EFRP and subsequently execute an economically offsetting cash, swap or OTC transaction with each other are prohibited except as noted below.

Transitory EFPs are permitted in CME Currency futures subject to the following requirements:

a) The seller of the futures contract must simultaneously purchase the cash commodity and the buyer of the futures contract must simultaneously sell the cash commodity.

b) All documents typically generated in accordance with cash market conventions must be generated and retained.

c) The execution time of the EFP must be recorded on the order ticket and, upon submission of the EFP for clearing, on the order entry screen.

d) All other Exchange and CFTC requirements regarding EFP transactions must be adhered to in connection with the transaction.

Q18: What types of instruments are considered acceptable for use as the related position side of EFRPs and what are the equivalency requirements with respect to the quantities exchanged?

A18: In general, the related position (i.e. cash, swap or other OTC derivative) must involve the product underlying the futures contract or a derivative, by-product or related product that is reasonably correlated to the futures being exchanged. Market Regulation may request that the parties to an EFRP transaction demonstrate that the related position and the futures position are reasonably correlated. Additionally, the quantity of the futures being exchanged must be approximately equivalent to the quantity of the related position being exchanged. Upon request, the parties to an EFRP transaction must be able to demonstrate such equivalency.

Generally acceptable related position instruments for EFRPs for different product groups include, but are not limited to, the following:

Foreign Exchange Futures: Both currency spot and forward transactions are acceptable. The related position side of an EFRP transaction in the CME$INDEX may consist of any single currency or a basket of currencies from within the index with a historical correlation to the index of 80% or greater ($r \geq .80$). Non-deliverable forwards (NDF) are an acceptable form of cash for a currency EFRP in the Russian Ruble and the Brazilian Real contracts. Exchange Traded Funds ("ETFs") are acceptable provided that the ETF mirrors the relevant Exchange currency product. Interest Rate Futures: Fixed income instruments with risk characteristics and maturities that parallel the instrument underlying the futures contract are acceptable. Such instruments include, but are not

necessarily limited to, money market instruments, Treasuries, Agencies, investment grade corporates, forward rate agreements (FRAs), mortgage instruments including collateralized mortgage obligations (CMOs) and interest rate swaps and swaptions.

Stock Index Futures: Stock baskets must be highly correlated to the underlying index with a historical correlation to the index of 90% or greater ($r \geq .90$). Further, these stock baskets must represent at least 50% of the underlying index by weight or must include at least 50% of the stocks in the underlying index. The notional value of the basket must be approximately equal to the value of the corresponding futures. ETFs are acceptable provided that the ETF mirrors the relevant Exchange stock index product.

Agricultural Futures: For Dairy Products, Live Cattle, Feeder Cattle, Lean Hogs and Pork Bellies, the acceptable related position component is limited to the specific underlying commodity (e.g., Live Cattle for Live Cattle futures); although the related position need not be deliverable grade of the particular commodity, there must be a reasonable level of correlation with the associated futures. In the case of Random Length Lumber futures, the related position must be deliverable species dimension lumber, variances are permitted with respect to grade/size and tally. Additionally, with respect to Random Length Lumber, the buyer of the cash lumber must retain ownership of the transferred product for personal use or resale to customers and may not resell the product either directly or indirectly to the original seller.

For all other agricultural futures contracts, the related position must involve the commodity underlying the futures contract or a derivative, by-product or related product that is reasonably correlated to the futures being exchanged. The related position in an EFR may be an agricultural commodity swap or other agricultural OTC instrument, but in all cases must comply with any applicable regulatory requirements prescribed by the CFTC.

Commodity Index Futures: For futures based on Commodity Indexes, (*e.g.*, Goldman Sachs Commodity Index (GSCI), Dow AIG Index), acceptable related positions include ETFs provided that the ETF mirrors the relevant Commodity Index product traded on the Exchange.

As noted above, associated related position transactions must be comparable with respect to quantity, value or risk exposure to the futures utilized.

Questions regarding the acceptability of related position instruments may be addressed to the Market Regulation contacts listed on this Advisory Notice.

Q19: Does a firm that executes and/or clears an EFRP on behalf of a customer have any regulatory exposure if the EFRP does not conform to the requirements of Rule 538?

A19: A firm that executes and submits an EFRP on behalf of a customer is responsible for exercising due diligence as to the bona fide nature of the EFRP. Failure to do so may be deemed a violation of 538 by the firm. Additionally, a firm that accepts and clears a give-up EFRP may be liable for violation of Rule 538 if it accepts an EFRP that it knows, or should know, is not bona fide.

Q20: What are the documentation requirements for EFRPs?

A20: Parties to an EFRP must maintain all documents relevant to the futures and related position transactions and must provide such documents to Market Regulation upon request. Documents that may be requested include, but are not necessarily limited to, the following:

1. All documents relevant to the futures side of the trade including order tickets and account statements;
2. Documentation customarily generated in accordance with cash market or other relevant market

practices such as cash, swap or OTC contracts, cash confirmations, invoices, warehouse receipts and bills of sale, as well as documentation that demonstrates proof of payment and transfer of ownership of the related position transaction (e.g. canceled checks, bank statements, Fedwire confirms, Fixed Income Clearing Corporation documents, bills of lading etc.).

With respect to EFRPs in foreign exchange futures wherein the parties immediately offset the cash transaction ("transitory EFPs"), CME would expect to see confirmation statements issued by the bank/foreign exchange dealer party to the transaction. These confirmation statements should be the type normally produced by the bank/foreign exchange dealer for confirmation of currency deals and should indicate, by name, the identity of the counter party principal to the transaction.

However, in circumstances where the EFP transaction is between a bank/foreign exchange dealer and a CTA, account controller, or other person acting on behalf of a third party (such as a commodity pool or fund), the cash side confirmation statement must identify, at minimum, the name of the third party's carrying clearing member and the third party's account number (or other account specific designation), but need not identify the third party by name.

Q21: Must transactions executed as EFRPs be reflected as such on customer account statements?

A21: Yes, FCMs must identify EFRP transactions on confirmation and monthly account statements delivered to customers.

Q22: Who is responsible for submitting related position documentation when a request for such documentation is made by the Market Regulation Department?

A22: Related position documentation for an EFRP must be provided to the Market Regulation Department upon request. Market Regulation will request such information from the firm carrying the account, and the carrying firm is responsible under the rules for providing the documentation.

Questions regarding this Advisory Notice may be directed to the following individuals in Market Regulation:

Steven Mair, Manager Market Surveillance, 312.341.7034

Sandra Valtierra, Sr. Market Surveillance Analyst, 312.347.4137

Joe Hawrysz, Associate Director, 312.341.7750

Jerry O'Connor, Associate Director, 312.341.7048

Exhibit F

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	)	
Pinemore, L.P. and Birchmore, L.P.,	)	**CFTC Docket** 10-04
Respondents.	)	**ORDER INSTITUTING PROCEEDINGS PURSUANT TO SECTIONS 6(c) AND 6(d) OF THE COMMODITY EXCHANGE ACT, MAKING FINDINGS AND IMPOSING REMEDIAL SANCTIONS**

I.

The Commodity Futures Trading Commission ("Commission") has reason to believe that Pinemore, L.P. ("Pinemore") and Birchmore, L.P. ("Birchmore") have violated Section 4c(a) of the Commodity Exchange Act (the "Act"), 7 U.S.C. § 6c(a) (2006). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Pinemore and Birchmore (collectively "Respondents") engaged in the violations set forth herein, and to determine whether any order shall be issued imposing remedial sanctions.

II.

In anticipation of the institution of an administrative proceeding, Respondents have submitted Offers of Settlement (the "Offers"), which the Commission has determined to accept. Without admitting or denying any of the findings or conclusions herein, Respondents consent to the entry of, and acknowledge service of, this Order Instituting Proceedings Pursuant to Sections 6(c) and 6(d) of the Commodity Exchange Act, Making Findings and Imposing Remedial Sanctions ("Order").[1]

[1] Respondents consent to the use of these findings in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party. Respondents, however, do not consent to the use of the Offers or the findings or conclusions in this Order as the sole basis for any other proceeding brought by the Commission, other than a proceeding in bankruptcy or to enforce the terms of this Order. Nor do Respondents consent to the use of the Offers or this Order, or the findings consented to in the Offers or this Order, by any party in any other proceeding.

III.

A. SUMMARY

As set forth below, Pinemore and Birchmore developed and implemented a trading strategy that involved trades that are, are of the character of, or are commonly known as wash sales in violation of Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006). .

On one or more occasions in November and December 2006, Pinemore and Birchmore, two limited partnerships controlled by the same general partner and with substantially identical ownership, ordered through their broker certain futures trades in natural gas on the New York Mercantile Exchange ("NYMEX") that were wash sales. The trades were part of a strategy involving the purchase and sale of the same quantity of NYMEX natural gas futures contracts by Pinemore and the opposite sale and purchase of the same quantity of NYMEX natural gas futures contracts by Birchmore. The resulting profit to Pinemore was intended by the general partner to be equal or similar to the resulting loss to Birchmore, or vice versa. This strategy was designed to take advantage of the volatility of the natural gas future contract price over a short period of time. Pinemore and Birchmore instructed the broker to minimize the "slippage" or price difference between the long and short positions purchased on their behalf.

Once the losses and gains were captured and recognized by the partnerships, through liquidation of the positions, the trading losses from the partnership that had the losing position were to be funded by the general partner to offset taxable capital gains. The gains from the partnership that had realized gains from its trades would be allocated to all limited partners, one of whom was a retirement trust, thus deferring taxes on the trading gain allocated to such limited partner.

Because the trades ordered by Pinemore and Birchmore were designed to give the appearance of submitting trades to the open market, while negating the risk incident to the market and produced a virtual financial nullity, they constituted wash sales in violation of Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006).

The Commission acknowledges the cooperation of Respondents during the investigation of this matter.

B. RESPONDENTS

Pinemore, L.P. is a limited partnership formed under the laws of Alberta, Canada with its principal place of business in Calgary, Alberta, Canada. Pinemore has never been registered with Commission.

Birchmore, L.P. is a limited partnership formed under the laws of Alberta, Canada with its principal place of business in Calgary, Alberta, Canada. Birchmore has never been registered with Commission.

C. FACTS

Pinemore and Birchmore Ordered Wash Sales That Were Executed On The NYMEX

Pinemore and Birchmore are limited partnerships that are 99.5% owned by identical partners. They have a common general partner (hereafter "trader") that directed and controlled both of their futures trading. In or about 2006, the trader decided to implement a trading strategy in response to tax advice he received. The trader developed a trading strategy that involved the purchase of the same quantity of opposite positions of NYMEX natural gas futures contracts by Pinemore and Birchmore, long in one account and short in the other. This strategy was designed to take advantage of the volatility of the natural gas futures contract price over a short period of time. Once the losses and gains were captured and recognized by the partnerships, through liquidation of the positions, the trading losses from the partnership that had the losing position were to be funded by the general partner to offset taxable capital gains. The gains from the partnership that had realized gains from its trades would be allocated to all limited partners, one of whom was a retirement trust, thus deferring taxes on the trading gain allocated to such limited partner.

The trader contacted the broker to implement this strategy. The broker discussed with Pinemore and Birchmore the possibility of trading opposite each other electronically, but ultimately advised against it. Pinemore and Birchmore then instructed the broker to minimize the "slippage" or price difference between the long and short positions purchased on their behalf.

On one or more days in November and December 2006, a matching (buy versus sell) NYMEX natural gas futures market orders were entered for the Pinemore and Birchmore accounts. In each instance, the matching pair of orders were executed either at the same price or prices that differed by a maximum of half a cent per million British thermal units of natural gas.

D. LEGAL DISCUSSION

The Pinemore and Birchmore Transactions Were Wash Sales in Violation of Section 4c(a) of the Act

Section 4c(a) of the Act, in relevant part, makes it "unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction" that "is of the character of, or is commonly known to the trade as, a 'wash sale'. . ." 7 U.S.C. § 6c(a) (2006). A wash sale is a form of fictitious transaction. *In re Gimbel,* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,213 at 35,003 (CFTC Apr. 14, 1988), *aff'd as to liability*, 872 F.2d 196 (7th Cir. 1989); *In re Goldwurm,* 7 A.D. 265, 274 (CEA 1948).

A wash sale is a transaction made without intent to take a genuine, bona fide position in the market, such as a simultaneous purchase and sale designed to negate each other so that there is no change in financial position. *Reddy v. CFTC*, 191 F.3d 109, 115 (2d Cir 1999). *See also Goldwurm*, 7 A.D. at 274. Wash sales are "grave" violations, even in the absence of customer harm or appreciable market effect, because "they undermine confidence in the market mechanism that underlies price discovery." *In re Piasio*, [1999-2000 Transfer Binder] Comm.

Fut. L. Rep. (CCH) ¶ 28,276 at 50,691 (CFTC Sep. 29, 2000), *aff'd sub nom. Wilson v. CFTC*, 322 F.3d 555, 559 (8th Cir 2003) (wash sales are designed to give the appearance of submitting trades to the open market, while negating the risk or price competition incident to the market and produce a virtual financial nullity because the resulting net financial position is near or equal to zero). *See also CFTC v. Savage*, 611 F.2d 270, 284 (9th Cir. 1979) (wash sales may mislead market participants because they do not reflect the forces of supply and demand).

The central characteristic of a wash sale is the intent to avoid making a *bona fide* transaction or taking a *bona fide* market position. *In re Citadel Trading Co. of Chicago, Ltd.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,082 at 32,190 (CFTC May 12, 1986). "The factors that show a wash result are (1) the purchase and sale (2) of the same delivery month of the same futures contract (3) at the same (or a similar) price." *Piasio*, ¶ 28,276 at 50,685 (*citing In re Gilchrist*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,653 (CFTC Jan. 25, 1991)). Here, Pinemore and Birchmore purchased and sold the same delivery month of the same futures contracts at substantially the same price with the intention to avoid taking a *bona fide* market position.

In addition to the factors enumerated above, intent must be proved to establish a violation of Section 4c of the Act. *Reddy v. CFTC*, 191 F.3d 109, 119 (2d Cir. 1999). In the context of a customer's liability for a wash sale transaction, the scienter requirement relates to the customer's intent at the time the challenged transactions are initiated; specifically whether the customer intended to negate market risk or price competition. *Piasio*, ¶ 28,276 at 50,685. Negated risk is not "the equivalent of no risk or the complete elimination of risk;" rather the Commission has "clearly held that risk is negated whenever it is ' 'reduced to a level that has no practical impact on the transaction at issue.'" *Id.*, ¶ 28,276 at 50,688 (*quoting Gimbel*, ¶ 24,213 at 35,003 n.7). "[S]cienter may be inferred from the circumstantial evidence" and while motive is not an element of a trade practice case, "evidence of motive strengthens an inference of intent." *Reddy*, 191 F.3d at 119 (citations omitted).

Pinemore's and Birchmore's avowed purpose in entering into the natural gas futures trades on NYMEX was to capture both the gain and the loss based on movement of the market prices. Pinemore and Birchmore intentionally structured the trades with the intent to negate market risk, to thereby avoid a *bona fide* market transaction. Accordingly, Pinemore and Birchmore entered into transactions that were wash sales and therefore violated Section 4c(a) of the Act.

IV.

FINDINGS OF VIOLATIONS

Based on the foregoing, the Commission finds that Pinemore and Birchmore violated Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006).

V.

OFFERS OF SETTLEMENT

Respondents have submitted Offers in which, without admitting or denying the findings herein, they each:

(A) Acknowledge service of this Order;

(B) Admit the jurisdiction of the Commission with respect to all the matters set forth herein;

(C) Waive: the filing and service of a complaint and notice of hearing; a hearing; all post-hearing procedures; judicial review by any court; any and all objections to the participation by any member of the Commission's staff in consideration of their Offers; any and all claims that it may possess under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2006) and 28 U.S.C. § 2412 (2006), and/or Part 148 of the Commission's Regulations, 17 C.F.R. §§ 148.1 *et seq.* (2009), relating to, or arising from, this proceeding; any and all claims that it may possess under the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, §§ 231-232, 110 Stat. 857, 862-63 (1996), as amended by Pub. L. No. 110-28, 121 Stat. 112 (2007), relating to, or arising from, this proceeding; and any claim of Double Jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief;

(D) Stipulate that the record basis on which this Order may be entered consists solely of this Order and the findings in this Order consented to in their Offers; and

(E) Consent to the entry of this Order, which

(1) makes findings that Pinemore and Birchmore violated Section 4c(a) of the Act;

(2) orders Pinemore and Birchmore to cease and desist from violating Section 4c(a) of the Act,

(3) orders Pinemore and Birchmore to each pay civil monetary penalties in the amount of $250,000; and

(4) orders Respondents to comply with the undertakings consented to their Offers and set forth below in Section VI of this Order.

Upon consideration, the Commission has determined to accept the Offer.

VI.

ORDER

Accordingly, IT IS HEREBY ORDERED THAT:

1. Pinemore and Birchmore shall each cease and desist from violating Section 4c(a) of the Act, 7 U.S.C. § 6c(a) (2006);

2. Pinemore shall pay a civil monetary penalty of Two Hundred Fifty Thousand Dollars ($250,000) and Birchmore shall pay a civil monetary penalty of Two Hundred Fifty Thousand Dollars ($250,000) within ten (10) business days of the date of entry of this Order. Pinemore and Birchmore shall pay their respective civil monetary penalties by making electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made by other than electronic funds transfer, the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

   Commodity Futures Trading Commission
   Division of Enforcement
   ATTN: Marie Bateman – AMZ-300
   DOT/FAA/MMAC
   6500 S. MacArthur Blvd.
   Oklahoma City, OK 73169
   Telephone 405-954-6569

   If payment by electronic transfer is chosen, the paying Respondent shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Respondents shall accompany payment of their penalties with a cover letter that identifies the paying Respondent, and the name and docket number of this proceeding. Respondents shall simultaneously transmit copies of the cover letter and the form of payment to: (1) the Director, Division of Enforcement, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington, D.C. 20581 and (2) the Chief, Office of Cooperative Enforcement, Division of Enforcement, Commodity Futures Trading Commission, at the same address. In accordance with Section 6(e)(2) of the Act, 7 U.S.C. § 9a(2) (2006), any Respondent that does not pay their respective civil monetary penalty in full within fifteen (15) days of the due date shall be prohibited automatically from the privileges of all registered entities, and, if registered with the Commission, such registration shall be suspended automatically until it has shown to the satisfaction of the Commission that payment of the full amount of the penalty with interest thereon to the date of the payment has been made; and

3. Respondents shall comply with the following undertakings as set forth in their Offers:

(a) Future Cooperation With the Commission

Respondents shall continue to cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement, in this proceeding and in any civil or criminal investigation, litigation, or administrative or self-regulatory matter related to the subject matter of this proceeding. As part of such cooperation with the Commission, Respondents agree to:

(1) preserve all records relating to the subject matter of this proceeding, including but not limited to audio files, e-mails, and trading records for a period of five years from the date of this Order;

(2) comply fully, promptly, completely, and truthfully with any inquiries or requests for information or documents;

(3) provide authentication of documents and other evidentiary material;

(4) produce any current (as of the time of the request) officer, director, employee, or agent of Respondents, regardless of the individual's location and at such location that minimizes Commission travel expenditures, to provide assistance at any trial, proceeding, or Commission investigation related to the subject matter of this proceeding, including but not limited to, requests for testimony, depositions, and/or interviews, and to encourage them to testify completely and truthfully in any such proceeding, trial, or investigation; and

(5) assist in locating and contacting any prior (as of the time of the request) officer, director, employee or agent of either of the Respondents.

(b) Public Statements

Neither Respondents nor any of Respondents' agents or employees under their authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in this Order or creating, or tending to create, the impression that this Order is without factual or legal basis; provided, however, that nothing in this provision shall affect Respondents' (i) testimonial obligations; or (ii) right to take appropriate legal positions in other proceedings to which the Commission is not a party. Respondents shall undertake all steps necessary to ensure that all of their agents and employees under their authority or control understand and comply with this undertaking.

By the Commission.

David A. Stawick
Secretary of the Commission
Commodity Futures Trading Commission

Dated: January 28, 2010

Exhibit G

PROPOSED NEW NYMEX RULE 6.21D

(Entire rule is new.)

Rule 6.21D. EXCHANGE OF FUTURES FOR, OR IN CONNECTION WITH, FUTURES TRANSACTIONS

(A) **General Requirements.** (1) An exchange of futures for, or in connection with, futures (EFF) consists of two discrete, but related, transactions; one initial futures transaction effected on another regulated futures exchange (Underlying Transaction) and a subsequent futures transaction in an eligible NYMEX contract that is reported at the Exchange pursuant to the procedures specified in this rule (NYMEX Transaction).

(2) **Liquidating Transactions.** As a condition precedent to the NYMEX Transaction, the parties to the NYMEX Transaction must have engaged in a transaction on the other regulated futures exchange pursuant to the procedures of such other exchange that resulted in liquidating an existing position at such other exchange.

(3) **Quantity.** (a) The quantity covered by the Underlying Transaction must be substantially equivalent to the quantity covered by the NYMEX Transaction. The contract specifications for the futures contract traded in the Underlying Transaction must be substantially equivalent, as determined by the Exchange, to the contract specifications for the eligible futures contract comprising the NYMEX Transaction. In addition, the minimum transaction size for the NYMEX Transaction is 50 contracts.

(4) **Report to Clearing Member.** For each party to the NYMEX Transaction, that party, within two hours of its receipt of trade confirmation on the Underlying Transaction(s) at the other exchange, must submit to the NYMEX Clearing Member(s) carrying its account the details of the NYMEX Transaction. Upon receipt of such information, the NYMEX Clearing Member(s) must prepare a contemporaneous record of the information that also indicates the time of receipt of such information.

(5) **Eligible Contracts and Transactions.** EFF transactions may be effected only for transactions in the Exchange's Brent Crude Oil futures contract.

(6) **Eligible Participants.** This trading procedure is available only to a person or entity qualifying as an "eligible contract participant" as that term is defined by the Commodity Exchange Act and CFTC rules.

(7) **Floor Reporting Requirements and Deadlines.** (1) A report of each EFF transaction shall be given, and notice thereof shall be posted on the Floor of the Exchange. The report of an EFF transaction shall be given on the Floor of the Exchange during the hours of futures trading on the day that the transaction thereto was made, or if such agreement was made after the close of trading, then on the next business day.

(8) EFF 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.

(9) EFF transactions are permitted until the close of trading on the last trading day in the expiring contract month of the Exchange's NYMEX Brent Crude Oil futures contract.

(C) **Clearing Member Reporting Requirements**. A report of such EFF transaction shall be submitted to the Exchange by each Clearing Member representing the buyer and/or seller. Such report shall identify the EFF as made under this Rule and shall contain the following information: a statement that the EFF has resulted or will result in a change of positions or other such change, the kind and quantity of the futures, the price at which the futures transaction is to be cleared, the names of the Clearing Members and customers and such other information as the Exchange may require. Such report (form) shall be submitted to the Compliance Department by 12:00 noon, no later than two (2) Exchange business days after the day of posting the EFF on the Floor of the Exchange.

(D) **Exchange Request for Information**. Each buyer and seller must satisfy the Exchange, at its request, that the transaction is a legitimate EFF transaction. Upon the request of the Exchange, all documentary evidence relating to the EFF, including documentation of the Underlying Transaction on the other futures exchange, shall be obtained by the Clearing Members from the buyer or seller and made available by the Clearing Members for examination by the Exchange.

(E) **Omnibus Accounts and Foreign Brokers**. All omnibus accounts and foreign brokers shall submit a signed EFF reporting agreement in the form prescribed by the Exchange to the Exchange's Compliance Department. Such Agreement shall provide that any omnibus account or foreign broker identified by a Clearing Member (or another omnibus account or foreign broker) as the buyer or seller of an EFF pursuant to this Rule 6.21D, shall supply the name of its customer and such other information as the Exchange may require. Such information shall be submitted to the Exchange's Compliance Department by 12:00 noon no later than two (2) Exchange business days after the day of posting the EFF on the Floor of the Exchange. Failure by an omnibus account or foreign broker to submit either the agreement or the particular EFF information to the Exchange may result in a hearing by the Business Conduct Committee to limit, condition or deny access of such omnibus account or foreign broker to the market.

Exhibit H

INTERNATIONAL REGULATORY DEVELOPMENTS

By Emma Radmore (Senior Solicitor) and

Elizabeth Bhagan (Paralegal) Denton Wilde Sapte

November 2004

WORLDWIDE

Bank for International Settlements (BIS)/Basel Committee on Banking Supervision

BIS appoints new Secretary General: Peter Dittus will take on the post for a 5 year term.

Committee on Payment and Settlement Systems (CPSS) and IOSCO publish Central Counterparty (CCP) recommendations: The report includes 15 recommendations covering the major risks faced by central counterparties, and a methodology for assessing implementation of them.

EUROPEAN UNION

European Commission

CESAME group meets: The CESAME group met on 25 October to discuss the way forward to integration of clearing and settlement in the EU. A presentation was given on the results of the consultation on the Commission's Communication on clearing and settlement.

Commission publishes consumer credit frequently asked questions (FAQs): The Commission has made a number of changes to its original proposal for a new consumer credit Directive, and has issued a set of FAQs setting out the main changes, most of which were driven by comments from the Parliament.

Commission publishes minutes of European Securities Committee (ESC) meeting: The Commission has published a summary record of the October meeting of the European Securities Committee. The meeting discussed:

- current initiatives relating to the undertakings for collective investment in transferable securities (UCITS) Directive;
- review of the Lamfalussy process;
- level 4 of the Lamfalussy process;
- preventing and combating corporate financial malpractice;
- study on the Investor Compensation Directive;
- EU/US Dialogue;
- implementation deadline for Markets in Financial Instruments Directive (MiFID);
- market developments in Member States;

- other business including International Accounting Standards (IAS) and extension of a CESR mandate.

Commission assesses application of Lamfalussy to securities legislation: The Commission has published a working document for comment. The document assesses how the Lamfalussy process has been put into effect, and the current Level 1 outcomes from the Financial Services Actions Plan (FSAP). It discusses the current Level 2 initiatives, and considers how the process might be further improved, with particular reference to timetables and levels of detail in Level 1 and 2 measures. Level 3 is still largely untested and undefined, whilst Level 4 (enforcement) will require major effort to achieve the desired outcomes. The Commission seeks comments on its preliminary assessment by 31 January 2005.

Commission extends MiFID mandate deadline: The Commission has agreed to CESR's request that the deadline for its advice on client order handling rules be extended to 30 April 2005, so that the topic can be considered together with other topics covered by the mandate with an April deadline, such as best execution and the obligation to act fairly, honestly and professionally.

The European Banking Federation (FBE)

FBE urges open consultation on European System of Central Banks (ESCB)-CESR standards: The FBE, the European Savings Bank Group and the European Association of Cooperative Banks are disappointed that the CESR-ESCB standards on clearing and settlement were approved before a number of known controversial issues had been resolved in consultation with industry. They are keen that these issues should now be addressed by close co-operation between the standard setters and industry.

FBE appoints new Head Officers: Michel Pebereau, Hein Blocks and Guido Ravoet have been elected to the posts of President, Chairman of the Executive Committee and Secretary General respectively. We extend our congratulations and wish them every success in their new endeavours.

Committee of European Securities Regulators (CESR)

Commission asks CESR to consider eligible investments for UCITS: The Commission has asked CESR to consider specific issues relating to permitted investments of UCITS under the UCITS Directives as recently amended (and referred to as UCITS III). In particular, the mandate covers:

- the permissible forms in which a "transferable security" may be constituted, and what is meant by "techniques and instruments" referred to in Article 21 of the UCITS Directive which are excluded from the definition of transferable security;
- the definition of "money market instruments";
- treatment of investment in "other collective investment undertakings";
- the scope of "derivative financial instruments"; and
- the conditions to be met by an "index replicating UCITS".

CESR must give its advice by the October 2005, and has launched a call for evidence, requesting views by 28 November 2004.

CESR consults on Market Abuse Directive (MAD) Level 3: CESR has issued a consultation paper on its proposed level 3 guidance on certain aspects of the Market Abuse Directive. The paper provides preliminary guidance on three particular issues:

- market practices in relation to market manipulation;
- what is considered to be market manipulation with guidance; and
- a common reporting format for reporting suspicious transactions

In relation to the UK, the paper provides some detail of market aberrations on the London Metal Exchange (LME). Comments are requested by 31 January 2005.

CESR considers its Lamfalussy Level 3 role: CESR has published a paper setting out its 2005 Action Plan together with a summary of responses to its consultation on its role in ensuring greater consistency and convergence across Europe in the day to day application of European financial services legislation. The paper clarifies the general principles of the Level 3 process and the role of CESR standards and guidance. It then sets out the existing Level 3 functions and gives examples of CESR's work in specific areas. One particular issue raised is CESR's new function which will comprise a mediation system amongst regulators to solve conflicts between national securities regulators.

CESR consults on Transparency Directive: CESR has issued a consultation paper on its proposed advice in relation to part of its mandate from the Commission relating to the Transparency Directive. The consultation covers the dissemination of regulated information and considers how best to implement a single point for EU investors to access financial information on issuers. There will be separate consultation on other issues covered by the mandate. CESR is due to report to the Commission by June 2005 and the consultation closes on 28 January 2005.

CESR publishes fund mispractice results: CESR has published a report of its members' investigations into the possibility of abusive mispractices in the European investment fund industry. They looked particularly at late trading and market timing. Although some results are not yet complete, there was no evidence of widespread problems in either area. Of more concern is perceived inadequacies in internal procedures, as well as some perceived initiatives by investors to become involved in the type of activities recently examined in the US.

CESR consults further on MiFID mandate: CESR has issued a second consultation on its draft advice in relation to its first mandate from the Commission to advise on MiFID implementation. As a result of responses to the first consultation, which closed in September, CESR is now consulting further on some key policy and practical issues identified. The paper seeks views on:

- the independence of compliance, including whether it should be compulsory to outsource compliance;
- record keeping and the burden of proof, in particular whether proposals amount to the reversal of the premise of "innocent until proven guilty";
- a requirement to keep tape records, including the costs ramifications of a requirement to keep records for various periods;
- outsourcing of investment services, in particular the application and possible extension of existing standards on the outsourcing of portfolio management;

- conflicts of interest and the segregation of areas of business: respondents to the first consultation strongly supported a suggestion that an indicative list of possible methods to address these issues would be preferable to specific mandatory requirements;
- investment research, in relation to which responses to consultation were not unanimous and CESR seeks more views;
- methods and arrangements for reporting financial transactions;
- most relevant market in terms of liquidity; and
- the minimum content and the common standard or format of the reports to facilitate exchange between competent authorities. In relation to the last 3 items, CESR has drafted its proposed advice, as well as recommendations for possible Level 3 work, and seeks comments.

CESR has also given some feedback on the general questions it posed in the first consultation, but few decisions have as yet been made. Comments are requested by 17 December.

CESR publishes MiFID Work Plan: CESR has published charts showing the deadlines for various parts of its work on MiFID implementation up to April 2005.

CESR consults on Credit Rating Agencies (CRA) regulation: CESR has issued a consultation paper seeking comments on its draft technical advice to the Commission on regulatory issues affecting Credit Rating Agencies. The paper covers:

- a possible registration system for CRAs: as part of this, CESR has addressed whether such a procedure could be perceived as an entry barrier to the market; and
- rules of conduct: for example, conflicts of interest and fair presentation of credit ratings.

CESR seeks views generally, and on some specific questions relating to policy issues. Comments are requested by 1 February 2005, and CESR is due to provide its advice to the Commission by 1 April 2005.

OTHER AUTHORITIES/ REGULATORS/ TRADE ASSOCIATIONS

International Organisation of Securities Commissions (IOSCO)

IOSCO consults on consulting!: IOSCO has issued a document on its policies and procedures for public consultations, on which it seeks comments by 8 January 2005.

IOSCO looks at Collective Investment Schemes (CIS) merger issues: IOSCO has published the conclusions of its review of regulatory issues arising from mergers of collective investment schemes, including cross-border mergers. It circulated a questionnaire, and a number of common themes have emerged from responses, including that:

- regulatory approval is generally required in advance of any proposal going to unit-holders;
- unitholder approval is generally required, and sufficient information must be given to unit-holders to enable them to make an informed decision;

- regulators do not generally intervene to encourage mergers; and
- dissenting unitholders usually have the right to redeem free of charge.

IOSCO reports on investment fund fees: IOSCO has reported on international best practice in the area of fees and expenses in investment funds, in relation to amounts paid directly by investors and amounts borne by the fund and deducted from its assets. Its standards recognise the importance of matters such as:

- disclosure of fees and expenses to investors;
- conditions of operator remuneration;
- hard and soft commissions; and
- fee differentiation in multiclass funds.

Organisation for Economic Co-operation and Development (OECD)

OECD meets to discuss corruption: Two OECD events in early December will discuss current initiatives to tackle corruption.

INTERNATIONAL MARKETS AND CLEARING HOUSES

Crest/Euroclear

CREST consults on cross-exchange netting: CREST is consulting on a proposal by CRESTCo and LCH.Clearnet to introduce a functionality to allow firms to net trades struck on different exchanges in the same security whilst avoiding double settlement transactions and additional money flows. It seeks comments on its proposals by 17 December 2004.

International Petroleum Exchange (IPE)

IPE offers incentives: IPE is offering fee rebates for screen-based trading and for white badge locals, until the end of the year. IPE has also announced that the ICE Board (IPE's parent) will no longer require that IPE become fully electronic as a condition of B share redemption.

IPE reminds members of obligations: IPE has reminded members that it does not offer EFF (exchange of futures for futures) facilities and that any pre-negotiation involving such a facility may result in members breaching their obligations under IPE regulations. IPE has made the announcement because another exchange is understood to be planning to offer EFF on the IPE Brent Crude futures contract.

IPE starts electronic mornings: On 1 November, IPE successfully began exclusive electronic trading of its benchmark Brent Crude contract.

IPE reminds members of timely processing requirements: IPE has reminded its members of their obligation to ensure that trades are input and processed promptly after execution and that they should ensure that sufficient staff are present at the end of each trading day to do the necessary processing.

virt-x

virt-x makes rule changes for trade reporting: The changes will take effect from 24 January 2005, when members will be able to provide additional information about the nature of trades executed on virt-x. The new rules have been published for comment by 10 December.

Emma Radmore (senior solicitor) and Elizabeth Bhagan (paralegal) are members of Denton Wilde Sapte's Financial Markets and Regulation Group. The Editor is Ben Goh, Secretary of The Compliance Register.