

# **Exhibit A**



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](http://www.elxfutures.com).

# **Exhibit B**

## 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.