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OFFICE OF

ECRETARIAT

### **By Electronic Filing**

November 4, 2009

Mr. David A. Stawick Secretary to the Commission Commodity Futures Trading Commission Three Lafayette Center 1155 21<sup>st</sup> Street, NW Washington, DC 20581

Re: Supplement to Letter to the Commission Dated October 20, 2009 to stay the effectiveness of CME Group's self-certified Rule Interpretation concerning EFF

Dear Mr. Stawick:

ELX Futures, L.P. ("ELX") respectfully submits this supplemental material in connection with ELX's letter dated October 20, 2009 to the Secretary of the Commodity Futures Trading Commission (the "Commission") to stay the self-certified Advisory Notice filed by the CME Group ("CME") and dated October 19, 2009 (CBOT RA0907-1) (the "Rule Interpretation"). The request for the stay is predicated on the certification accompanying the Rule Interpretation being a "false certification," which is a basis for the Commission to stay, or reject, the CME's Rule Interpretation, and reassert the primacy of the Commission's rule approval process.

Among other claims, the Rule Interpretation states:

Additionally, a prearranged, matched pair of ... 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.

As previously pointed out, by calling the EFF a "prearranged trade," the Rule Interpretation is giving supremacy to the CME's view of what constitutes a violation of commodity law above the Commission's determination in the rule approval process.<sup>1</sup> The Commission's rule approval after due consideration determined that the EFF transaction did not violate the Act and, as a result, ELX and its users were entitled to the legal certainty of the rule having been approved with finality. CME's usurpation of regulatory authority from the Commission must be resolved in favor of the Commission to preserve the legal certainty of Commission actions, including rule approvals, from subsequent attacks by regulated entities.

Further, in ELX's letter of October 20, ELX points out that the CME routinely accepts what it refers to as "transitory" trades, i.e. trades that the CME claims are in violation of various rules and regulations, including as we noted in its CBOT division.

Accompanying this letter we provide the Commission with additional information that ELX was not aware of on October 20. This concerns the existence of an electronic marketplace on a major electronic platform that offers trades termed "EFS" between NYMEX and ICE crude oil futures contracts. These futures against futures transactions involve "matched pair[s] of... trades that are executed for the purpose of moving a futures position from one clearing house to another [and] are both contingent and transitory trades..."(see the Rule Interpretation).

Copies of screen shots are attached as evidence. The futures against futures trades between exchanges are offered as part of a menu of Clearport services, which is a major offering of CME. CME, of course, clears these trades, and its marketing department heavily markets the Clearport services. In addition, its compliance department conducts audits to determine the bona fides of EFRP trades. We are not seeking to undo, or sanction the electronic service, but merely point out the hypocrisy and lack of regulatory purpose in allowing transitory trades in all of CME's markets, and allowing the equivalent of EFF trades both inter-market (NYMEX-ICE) and intra-market (NYMEX eminis vs. NYMEX standard sized physically settled contracts), while concurrently espousing regulatory concerns, and threatening regulatory sanctions against firms, from the same trades when they pose a possible source of competition to CME.

It is clear that as long as the beneficiary of the rules is CME and not ELX, CME views the practices of transitory trades and EFFs as permissible, but if the beneficiary is a competitor, like ELX, the practices are said to be abhorrent. The Act's Core Principle 18 (Anti-Trust Considerations) should not permit a Self-Regulatory Organization ("SRO") to exercise rule enforcement powers for any reason other than protection of investors and the public at large.<sup>2</sup>

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<sup>&</sup>lt;sup>1</sup> The terms "transitory" and "prearranged" trades are not specifically mentioned in the Act, but the terms "wash trade," fictitious trade," §4c(a), 7 USC §6c(a) and the Act requires a "competitive, open and efficient market," §5d(9), 7 USC §7(d)(9). Prearranged and transitory trades derive their illegitimacy through non-compliance with the foregoing sections of the Commodity Exchange Act, the "Act." The Commission's rule approval after due consideration determined that the EFF transaction did not violate the Act.

<sup>&</sup>lt;sup>2</sup> Section 3(b) of the Act, 7USC § 5(b) – PROTECTION OF THE PUBLIC INTEREST, states: It is the purpose of this Act to serve the public interests...through a series a system of effective self-regulation of trading facilities...under the oversight of the Commission.

Thank you for your consideration. Please don't hesitate to call me with any questions.

Sincerely,

Neal L. Wolkoff

cc: Chairman Gary Gensler Commissioners Dunn, Sommers, Chilton and O'Malia Dan Berkovitz Steven Schoenfeld Eric Juvenas Tim Karpoff Richard Shilts Riva Adriance

Attachments: Prior Filing of October 20, 2009; screen shots; CBOT RA0907-1

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## MARKET REGULATION ADVISORY NOTICE

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This Market Regulation Advisory Notice addresses inaccurate information that has circulated recently regarding CBOT rules governing Exchange for Related Position transactions.

CBOT Rule 538 ("Exchange for Related Positions") permits specified types of privately negotiated transactions in which a futures or options contract is exchanged for an economically equivalent quantity of a cash commodity or OTC derivatives instrument. These transactions are broadly referred to as EFRP transactions and the permissible types of EFRP transactions are detailed in the rule, which states, in part:

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.

CBOT rules <u>do not</u> 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 requirements of the Commodity Exchange Act and CFTC regulations. A futures contract clearly does not qualify as a "corresponding OTC swap or other OTC instrument," and CBOT rules do not and have never permitted a futures contract to be used as the related position component of an EFR transaction.

CME Group issued a comprehensive Market Regulation Advisory Notice regarding EFRP transactions executed on CME, CBOT, NYMEX and COMEX on October 2, 2009. That notice can be found at the following link:

### http://www.cmegroup.com/rulebook/files/CME Group RA0910-5.pdf

As reflected in the notice, CBOT also does not permit contingent or transitory EFRPs.

Additionally, 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.

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CBOT will continue to enforce its rules and member firms are strongly encouraged to ensure that all employees, as well as customers on whose behalf firms clear EFRPs, are fully informed of the requirements of Rule 538 and the interpretations in the associated Market Regulation Advisory Notices.

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

Dean Payton, Managing Director, 312.435.3658 Joe Hawrysz, Director, 312.341.7750 Robert Sniegowski, Associate Director, 312.341.5991

For media inquiries concerning this Advisory Notice, please contact CME Group Corporate Communications at 312.930.3434 or news@cmegroup.com.