



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.