

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-55951; File No. SR-Phlx-2007-35)

June 25, 2007

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto Relating to Options on Commodity Pool ETFs

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 18, 2007, the Philadelphia Stock Exchange, Inc. (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. On May 23, 2007, Phlx filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice and order to solicit comments on the proposed rule change, as amended, from interested persons and to approve the proposal on an accelerated basis.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend certain rules to permit the listing and trading of options on equity interests issued by trust issued receipts (“Commodity TIRs”), partnership units, and other entities (referred herein to as “Commodity Pool ETFs”) that hold or invest in commodity futures products. The text of the proposed rule change is available on Phlx’s Web site at <http://www.phlx.com>, at Phlx’s principal office, and at the Commission’s Public Reference Room.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Amendment No. 1 is incorporated in this notice.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Phlx has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to enable the listing and trading on the Exchange of options on interests in Commodity Pool ETFs that trade directly or indirectly commodity futures products. As a result, Commodity Pool ETFs are subject to the Commodity Exchange Act due to their status as a commodity pool,<sup>4</sup> and therefore, are regulated by the Commodity Futures Trading Commission ("CFTC").<sup>5</sup> Commodity Pool ETFs may hold or trade in one or more types of investments that may include any combination of securities, commodity futures contracts, options on commodity futures contracts, swaps, and forward contracts.

Currently, Commentary .06 to Phlx Rule 1009 provides that securities deemed appropriate for options trading shall include shares or other securities ("Exchange-Traded Fund

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<sup>4</sup> A "commodity pool" is defined in CFTC Regulation 4.10(d)(1) as any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading commodity interests. CFTC regulations further provide that a "commodity interest" means a commodity futures contract and any contract, agreement or transaction subject to Commission regulation under section 4c or 19 of the Act. See CFTC Regulation 4.10(a).

<sup>5</sup> The manager or operator of a "commodity pool" is required to register, unless applicable exclusions apply, as a commodity pool operator ("CPO") and commodity trading advisor ("CTA") with the CFTC and become a member of the National Futures Association.

Shares”) that are principally traded on a national securities exchange or through the facilities of a national securities association and reported as a national market system security, and that represent an interest in a registered investment company organized as an open-end management investment company, a unit investment trust or a similar entity which holds securities constituting or otherwise based on or representing an investment in an index or portfolio of securities.

The Exchange proposes to amend Commentary .06 to Rule 1009 to expand the type of options to include the listing and trading of options based on shares of Commodity Pool ETFs (the “Shares”) that may hold or invest directly or indirectly in commodity futures products, including but not limited to, commodity futures contracts, options on commodity futures contracts, swaps, and forward contracts. As part of this revision to Commentary .06 to Rule 1009, the Exchange proposes to add subsection (b)(iv) requiring for Commodity Pool ETFs that a comprehensive surveillance sharing agreement be in place with the marketplace or marketplaces with last sale reporting that represent(s) the highest volume in such commodity futures contracts and/or options on commodity futures contracts on the specified commodities or non-U.S. currency, which are utilized by the national securities exchange where the underlying Commodity Pool ETFs are listed and traded.

As set forth in proposed amended Commentary .06 to Rule 1009, Commodity Pool ETFs must be traded on a national securities exchange or through the facilities of a national securities association and must be reported as a national market security. In addition, shares of Commodity Pool ETFs must meet either: (i) the criteria and guidelines under Commentary .01 to Rule 1009; or (ii) be available for creation or redemption each business day in cash or in kind from the commodity pool, trust, or similar entity at a price related to net asset value. In addition,

the commodity pool, trust or other similar entity shall provide that shares may be created even though some or all of the securities needed to be deposited have not been received by the commodity pool, trust or other similar entity, provided the authorized creation participant has undertaken to deliver the shares as soon as possible and such undertaking has been secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the commodity pool, trust, or other similar entity which underlies the option as described in the prospectus.

New Commentary .08 to Rule 1010 defines “Partnership Units.” The definition tracks the definition that recently has been proposed by the Chicago Board Options Exchange (“CBOE”) in its proposal to list and trade Commodity Pool ETFs, and approved by the Commission.<sup>6</sup> The proposed definition of “Partnership Units” includes a broad universe of securities, including those of entities that invest in physical commodities. However, the current filing proposes to list and trade options only on Commodity Pool ETFs that invest in a combination of commodity derivative products, and not in physical commodities.

Under the applicable continued listing criteria in Commentary .08 to Phlx Rule 1010, the Shares may be subject to delisting as follows: (1) following the initial twelve-month period beginning upon the commencement of trading of the Shares, there are fewer than 50 record

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<sup>6</sup> See SR-CBOE-2007-21, Amendment No. 1. CBOE explained in its proposed rule change that the American Stock Exchange (“Amex”) had filed a proposed rule change seeking to add “Commodity Pool ETFs” to the types of securities on which it lists equity options, and that in Section 1(a) of Amex’s filing, the term “Commodity Pool ETFs” is defined to include, but is not limited to, Trust Issued Receipts, Partnership Units and other entities. See Securities Exchange Act Release No. 55187 (January 29, 2007), 72 FR 5467 (February 6, 2007) (Notice of Filing of Proposed Rule Change Relating to Options Based on Commodity Pool ETFs). CBOE noted that it did not have a definition of Partnership Units and was proposing to add one, as Phlx is doing now. The definition Phlx is proposing to add is the same as that proposed by CBOE. CBOE’s proposal was approved in Securities Exchange Act Release No. 55630 (April 16, 2007), 72 FR 19993 (April 20, 2007).

and/or beneficial holders of the Shares for 30 or more consecutive trading days; (2) the value of the index or, pursuant to new language being added to the Commentary by this proposed rule change, the value of the non-U.S. currency, portfolio of commodities including commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities, or portfolio of securities on which the Shares are based is no longer calculated or available; or (3) such other event occurs or condition exists that in the opinion of the Exchange makes further dealing on the Exchange inadvisable. Additionally, the Shares shall not be deemed to meet the requirements for continued approval, and the Exchange shall not open for trading any additional series of option contracts of the class covering such Shares, if the Shares are halted from trading on their primary market, or if the Shares are delisted in accordance with the terms of Phlx Rule 1010, or the value of the index or portfolio on which the Shares are based is no longer calculated or available.

The Exchange further proposes to amend Phlx Rule 1022 to ensure that the specialist and Registered Options Traders handling the Shares provide the Exchange with all necessary information relating to their trading in the applicable physical commodities, physical commodity options, commodity futures contracts, options on commodity futures contracts, any other derivatives based on such commodity. In addition, the revision to Phlx Rule 1022 will prohibit a specialist or Registered Options Trader from engaging in trading activities in physical commodities, physical commodity options, commodity futures contracts, options on commodity futures contracts, any other derivatives based on such commodity from trading in an account which has not been reported to the Exchange.

The Exchange also proposes to amend Commentary .02 to Rule 1022 to require Specialists and Registered Options Traders in commodity futures contracts, options on

commodity futures contracts or any other derivatives based on such commodity, to make available to the Exchange such books, records or other information pertaining to transactions in the applicable physical commodity, physical commodity options, commodity futures contracts, options on commodity futures contracts, or any other derivatives on such commodity, as may be requested by the Exchange.

This proposal is necessary to enable the Exchange to list and trade options on an expanding range of Commodity Pool ETFs currently approved for trading. The Exchange notes that The DB Commodity Index Tracking Fund (the “DBC Fund”), the United States Oil Fund, L.P. (the “Oil Fund”), and the PowerShares DB G10 Currency Harvest Fund (the “DBV Fund”) are listed and traded on the American Stock Exchange. The DBC Fund is a Commodity TIR and tracks the performance of the Deutsche Bank Liquid Commodity Index TM -- Excess Return, while the Oil Fund is a Partnership Unit and tracks the spot price of West Texas Intermediate light, sweet crude oil delivered to Cushing, Oklahoma.

The DBC Fund is a “feeder fund” that invests substantially all of its assets in the DB Commodity Index Tracking Master Fund, and the Master Fund in turn maintains a portfolio of exchange-traded futures on aluminum, gold, corn, wheat, heating oil and light, sweet crude oil. The Index is derived from the prices of those futures contracts. The Master Fund's portfolio is managed on an ongoing basis by DB Commodity Services LLC, a registered CPO and CTA, so that the value of the portfolio closely tracks the value of the Index over time.

The DBV Fund is a “feeder fund” that invests substantially all of its assets in the PowerShares DB G10 Currency Harvest Master Fund, and the Master Fund in turn maintains a portfolio of exchange-traded futures on foreign currencies that comprise the G-10 countries. The Index is derived from the prices of those futures contracts. The Master Fund's portfolio is

managed on an ongoing basis by DB Commodity Services LLC, a registered CPO and CTA, so that the value of the portfolio closely tracks the value of the Index over time.

Unlike the DBC and DBV Funds, the Oil Fund does not invest through a master-feeder structure but rather trades directly in futures on crude and heating oil, natural gas, gasoline and other petroleum-based fuels, options on such futures contracts, forward contracts on oil and other over-the-counter derivatives based on the price of oil, other petroleum-based fuels, the futures contracts described above, and the indexes based on any of the foregoing. The Oil Fund's portfolio is managed by Victoria Bay Asset Management LLC with the aim of tracking the West Texas Intermediate light, sweet crude oil futures contract listed and traded on the New York Mercantile Exchange.

The Exchange believes that it is reasonable to expect other types of Commodity Pool ETFs to be introduced for trading in the near future and also believes that the proposed amendment to the Exchange's listing criteria for options on Commodity TIRs and Partnership Units is necessary to ensure that the Exchange will be able to list options on Commodity Pool ETFs that have been recently launched as well as any other similar Commodity Pool ETFs that may be listed and traded in the future.

The Exchange represents that it has an adequate surveillance program in place for options based on Commodity Pool ETFs. The Exchange may obtain trading information via the Intermarket Surveillance Group ("ISG") from other exchanges who are members or affiliates of the ISG and expects that it will enter into numerous comprehensive surveillance sharing agreements with various commodity futures exchanges worldwide. Prior to listing and trading options on Commodity Pool ETFs, the Exchange represents that it will either have the ability to obtain specific trading information via ISG or through a comprehensive surveillance sharing

agreement with the primary exchange or exchanges where the particular commodity futures and/or options on commodity futures are traded.

The Exchange also added rule text relating to the prevention of misuse of material nonpublic information. Under the proposed rules, members and member organizations must establish, maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of the member's business, to prevent the misuse of material nonpublic information relating to, among other things, options on Commodity Pool ETFs.

The addition of Commodity Pool ETF options will not have any effect on the rules pertaining to position and exercise limits<sup>7</sup> or margin.<sup>8</sup>

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>9</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>10</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were either solicited or received.

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<sup>7</sup> See Phlx Rules 1001 and 1002.

<sup>8</sup> See Phlx Rule 722.

<sup>9</sup> 15 U.S.C. 78f(b).



### III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-Phlx-2007-35 on the subject line.

#### Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2007-35. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx.

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<sup>10</sup> 15 U.S.C. 78f(b)(5).

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2007-07 and should be submitted on or before [insert date 21 days from the date of publication in the Federal Register].

#### IV. Commission Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to a national securities exchange<sup>11</sup> and, in particular, the requirements of Section 6 of the Act.<sup>12</sup> Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>13</sup> which requires, among other things, that the rules of a national securities exchange be designed to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

#### Surveillance

The Commission notes that the Exchange has represented that it has an adequate surveillance program in place for options based on Commodity Pool ETFs. The Exchange may obtain trading information via the ISG from other exchanges who are members or affiliates of the ISG and expects that it will enter into numerous comprehensive surveillance sharing agreements with various commodity futures exchanges worldwide. Prior to listing and trading options on Commodity Pool ETFs, the Exchange represented that it will either have the ability to

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<sup>11</sup> In approving this proposal, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>12</sup> 15 U.S.C. 78f.

<sup>13</sup> 15 U.S.C. 78f(b)(5).

obtain specific trading information via ISG or through a comprehensive surveillance sharing agreement with the primary exchange or exchanges where the particular commodity futures and/or options on commodity futures are traded. In addition, the Exchange represented that the addition of Commodity Pool ETF options will not have any effect on the rules pertaining to position and exercise limits<sup>14</sup> or margin.<sup>15</sup>

#### Listing and Trading of Options on Commodity Pool ETFs

The Commission notes that, pursuant to the proposed rule change, a Commodity Pool ETF will be subject to the provisions of Exchange Rules 1009 and 1010. These provisions include requirements regarding initial and continued listing standards, as well as the creation/redemption process for Commodity Pool ETFs. All Commodity Pool ETFs must be traded through a national securities exchange or through the facilities of a national securities association and reported as a national market system security.

The Commission believes that this proposal is necessary to enable the Exchange to list and trade options on an expanding range of Commodity Pool ETFs currently approved for trading and that it is reasonable to expect other types of Commodity Pool ETFs to be introduced for trading in the future. This proposal would help ensure that the Exchange will be able to list options on Commodity Pool ETFs that have been recently launched, as well as any other similar Commodity Pool ETFs that may be listed and traded in the future thereby offering investors greater option choices.

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<sup>14</sup> See Phlx Rules 1001 and 1002.

<sup>15</sup> See Phlx Rule 722.

### Acceleration

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>16</sup> for approving the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice in the Federal Register. The Commission notes that the proposal is consistent with previously approved proposals to enable the listing and trading of options on interests in Commodity Pool ETFs that trade directly or indirectly commodity futures products.<sup>17</sup> Therefore, the Commission does not believe that the proposed rule change, as amended, raises novel regulatory issues. Consequently, the Commission believes that it is appropriate to permit investors to benefit from the flexibility afforded by trading these products without delay.

### V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-Phlx-2007-35), as amended, is hereby approved on an accelerated basis.<sup>18</sup>

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>19</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>16</sup> 15 U.S.C. 78s(b)(2).

<sup>17</sup> See Securities Exchange Act Release Nos. 55547 (March 28, 2007), 72 FR 16388 (April 4, 2007) (SR-Amex-2006-110); 55630 (April 13, 2007), 72 FR 19993 (April 20, 2007) (SR-CBOE-2007-21); and 55635 (April 16, 2007), 72 FR 19999 (April 20, 2007) (SR-ISE-2007-16).

<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</sup> 17 CFR 200.30-3(a)(12).