

currently represent less than 0.04% of Phlx's total contract volume.<sup>27</sup> The Commission believes that, given the small percentage of Phlx's total contract volume represented by these seven products, the inclusion of data on these products in Phlx's TOPO product will not confer market power on Phlx to compel market participants to purchase the entire Phlx data feed. The Commission therefore believes that the inclusion of top-of-book data for these products in Phlx's TOPO product does not undermine the finding that Phlx was subject to significant competitive forces in setting the terms of its proposal.

In addition to the need to attract order flow, the availability of alternatives to TOPO product significantly affect the terms on which Phlx can distribute this market data.<sup>28</sup> In setting the fees for its TOPO product, Phlx must consider the extent to which market participants would choose one or more alternatives instead of purchasing its data.<sup>29</sup> The most basic source of information concerning the top-of-book generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds.<sup>30</sup> In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's market data product.<sup>31</sup> Further, other options exchanges can produce their own top-of-book products, and thus are sources of potential competition for Phlx.<sup>32</sup>

The Commission believes that there are a number of alternative sources of information that impose significant competitive pressures on Phlx in setting the terms for distributing its TOPO product. The Commission believes that the availability of those alternatives, as well as Phlx's compelling need to attract order flow, imposed significant competitive pressure on Phlx to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because Phlx was subject to significant competitive forces in setting

the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that the terms of the proposal fail to meet the applicable requirements of the Act or the rules thereunder. The Commission did not receive any comments on the proposal. Further, an analysis of the proposal does not provide such a basis. The Commission notes that the proposed fees for TOPO are lower for Internal Distributors than for External Distributors. Because Internal Distributors are by definition more limited in the scope of their distribution of TOPO data than External Distributors, it is reasonable to expect that Internal Distributors will provide TOPO data to a smaller number of internal subscribers.<sup>33</sup> The fees therefore do not unreasonably discriminate among types of subscribers, such as by favoring participants in the Phlx market or penalizing participants in other markets.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-Phlx-2009-54), be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>34</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-19569 Filed 8-14-09; 8:45 am]

**BILLING CODE 8010-01-P**

### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60460; File No. SR-NYSEArca-2009-55]

#### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of a Proposed Rule Change To List and Trade Shares of the Dent Tactical ETF

August 7, 2009.

On June 18, 2009, NYSE Arca, Inc. ("NYSE Arca" or "Exchange"), through its wholly owned subsidiary, NYSE Arca Equities, Inc. ("NYSE Arca Equities"), filed with the Securities and Exchange Commission ("Commission"), 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> a

<sup>33</sup> Conversely, External Distributors can reasonably be expected to distribute the TOPO data to a higher number of subscribers because they do not have the same limitation. Accordingly, the Exchange will charge a higher fee to External Distributors than to Internal Distributors. *See id.*

<sup>34</sup> 17 CFR 200.30-3(a)(12).

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

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

proposed rule change to list and trade shares ("Shares") of the Dent Tactical ETF ("Fund") under NYSE Arca Equities Rule 8.600. The proposed rule change was published in the **Federal Register** on July 8, 2009.<sup>3</sup> The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

#### I. Description of the Proposal

The Exchange proposes to list and trade the Shares of the Fund under NYSE Arca Equities Rule 8.600, which governs the listing of Managed Fund Shares.<sup>4</sup> The Shares will be offered by AdvisorShares Trust ("Trust"), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.<sup>5</sup> The investment advisor to the Fund is AdvisorShares Investments, LLC ("Advisor"), and the day-to-day portfolio management of the Fund is provided by the sub-advisor to the Fund, HS Dent Investment Management, LLC ("Sub-Advisor").<sup>6</sup> The Exchange represents that the Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600 and that the Fund will be in compliance with Rule 10A-3 under the Act,<sup>7</sup> as provided by NYSE Arca Equities Rule 5.3.

The Fund is a "fund of funds," which means that the Fund seeks to invest primarily in other exchange-traded funds that are registered under the 1940 Act and certain other exchange-traded products that are not registered as investment companies under the 1940 Act (collectively, "Underlying ETPs").<sup>8</sup> The Fund seeks to achieve its investment objective of long-term growth of capital by identifying, through

<sup>3</sup> See Securities Exchange Act Release No. 60195 (June 30, 2009), 74 FR 32678 ("Notice").

<sup>4</sup> See NYSE Arca Equities Rule 8.600.

<sup>5</sup> The Trust is registered under the Investment Company Act of 1940 ("1940 Act"). On June 9, 2009, the Trust filed with the Commission a registration statement on Form N-1A (File Nos. 333-157876 and 811-22110) ("Registration Statement").

<sup>6</sup> The Exchange represents that neither the Advisor nor the Sub-Advisor is affiliated with a broker-dealer. *See* Commentary .07 to NYSE Arca Equities Rule 8.600.

<sup>7</sup> 17 CFR 240.10A-3.

<sup>8</sup> Underlying ETPs include Investment Company Units (NYSE Arca Equities Rule 5.2(j)(3)); Index-Linked Securities (NYSE Arca Equities Rule 5.2(j)(6)); Portfolio Depositary Receipts (NYSE Arca Equities Rule 8.100); Trust Issued Receipts (NYSE Arca Equities Rule 8.200); Commodity-Based Trust Shares (NYSE Arca Equities Rule 8.201); Currency Trust Shares (NYSE Arca Equities Rule 8.202); Commodity Index Trust Shares (NYSE Arca Equities Rule 8.203); Trust Units (NYSE Arca Equities Rule 8.500); and Managed Fund Shares (NYSE Arca Equities Rule 8.600).

<sup>27</sup> *Id.*

<sup>28</sup> See NYSE Arca Order, *supra* note 11, at 74784.

<sup>29</sup> *Id.* at 74783.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* Information on transactions executed on Phlx is available through OPRA.

<sup>32</sup> In its filing, Phlx states that "ISE and CBOE are potential competitors because each exchange enjoys greater market share and thus the ability to offer a top-of-book product that would compete favorably with TOPO." *See* Notice, *supra*, note 4, at 32677.

Phlx also notes that although the TOPO data feed is separate from the core data feed made available by OPRA, all of the information made available in TOPO is included in the core data feed. Phlx states that the OPRA data is widely distributed and relatively inexpensive, thus constraining Phlx's ability to price TOPO. *See* Notice, *supra*, note 4, at 32677.

proprietary economic and demographic analysis, the overall trend of the U.S. and global economies, and then implementing investment strategies in asset classes that the Sub-Advisor believes will benefit from these trends. The Sub-Advisor will follow its model to determine how offensive or defensive the Fund portfolio will be, and then will select the securities to buy or sell. Except for Underlying ETPs that may hold non-U.S. issues, the Fund will not otherwise invest in non-U.S. issues.

Additional information regarding the Fund, the Shares, the Fund's investment objective, strategies, methodology, and restrictions, the investment Advisor and Sub-Advisor, risks, fees and expenses, creations and redemptions of Shares, availability of information, trading rules and halts, and surveillance procedures, among other things, can be found in the Registration Statement and in the Notice, as applicable.

## II. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act<sup>9</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>10</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>11</sup> which requires, among other things, that the Exchange's rules be 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.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act, which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers and investors of information with respect to quotations for and transactions in securities. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association ("CTA") high-speed line, and the Exchange will disseminate the Portfolio Indicative Value ("PIV") at least every 15 seconds during the Core

Trading Session through the facilities of the CTA. In addition, the Fund will make available on its Web site on each business day before commencement of the Core Trading Session the Disclosed Portfolio that will form the basis for the Fund's calculation of the net asset value ("NAV").<sup>12</sup> A basket composition file, which includes the security names and share quantities required to be delivered in exchange for Fund shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the New York Stock Exchange via the National Securities Clearing Corporation. The Fund's Web site will also include additional quantitative information updated on a daily basis relating to trading volume, prices, and NAV. Information regarding the market price and volume of the Shares will be continually available on a real-time basis throughout the day via electronic services, and the previous day's closing price and trading volume information for the Shares will be published daily in the financial sections of newspapers.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Commission notes that the Advisor and Sub-Advisor to the Fund are not affiliated with a broker-dealer.<sup>13</sup> The Commission also notes that the Exchange will obtain a representation from the Fund that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.<sup>14</sup> Additionally, if it becomes aware that

<sup>12</sup> The Advisor will disclose for each portfolio security or other financial instrument of the Fund the following information: Ticker symbol (if applicable), name of security or financial instrument, number of shares or dollar value of financial instruments held in the portfolio, and percentage weighting of the security or financial instrument in the portfolio. The NAV of the Fund will normally be determined as of the close of the regular trading session on the New York Stock Exchange (ordinarily 4 p.m. Eastern Time) on each business day.

<sup>13</sup> See Commentary .07 to NYSE Arca Equities Rule 8.600. The Commission notes that any additional sub-advisers to the Fund that are affiliated with a broker-dealer will be required to implement a fire-wall with respect to such broker-dealer regarding access to information concerning the composition of the portfolio. Commentary .07 to NYSE Arca Equities Rule 8.600 also requires that any personnel who make decisions on the Fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the portfolio.

<sup>14</sup> See NYSE Arca Equities Rule 8.600(d)(1)(B).

the NAV or the Disclosed Portfolio is not disseminated to all market participants at the same time, the Exchange will halt trading in the Shares until such information is available to all market participants. Further, if the PIV is not being disseminated as required, the Exchange may halt trading during the day in which the interruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.<sup>15</sup> Finally, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material non-public information regarding the actual components of the portfolio.<sup>16</sup>

The Exchange has represented that the Shares are equity securities subject to the Exchange's rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange's surveillance procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

(3) Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares and that Shares are not individually redeemable; (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (d) how information regarding the PIV is disseminated; (e) the requirement that

<sup>15</sup> See NYSE Arca Equities Rule 8.600(d)(2)(D). Trading in the Shares may also be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the financial instruments of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

<sup>16</sup> See NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

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

<sup>10</sup> In approving this proposed rule change the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>11</sup> 17 U.S.C. 78f(b)(5).

ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(4) The Fund will be in compliance with Rule 10A-3 under the Act.<sup>17</sup>

(5) Except for Underlying ETPs that may hold non-U.S. issues, the Fund will not otherwise invest in non-U.S. issues.

This approval order is based on the Exchange's representations.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>18</sup> and the rules and regulations thereunder applicable to a national securities exchange.

### III. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>19</sup> that the proposed rule change (SR-NYSEArca-2009-55) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**Florence E. Harmon,**  
*Deputy Secretary.*

[FR Doc. E9-19570 Filed 8-14-09; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60462; File No. SR-FINRA-2009-050]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to FINRA Rule 8312 (FINRA BrokerCheck Disclosure)

August 7, 2009.

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 July 24, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

FINRA is proposing to amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure) to retain and make publicly available in BrokerCheck certain information about former associated persons of a member who were the subject of a final regulatory action as defined in Form U4 that has been reported to the Central Registration Depository ("CRD" or "CRD System") via a uniform registration form.<sup>3</sup>

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

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

In its filing with the Commission, FINRA 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 IV below. FINRA 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

FINRA Rule 8312 governs the information FINRA releases to the public via BrokerCheck. FINRA established BrokerCheck (then known as the Public Disclosure Program) in 1988 to provide the public with information on the professional background, business practices, and conduct of FINRA members and their associated persons. Via BrokerCheck, FINRA releases to the public certain information reported on uniform registration forms to the CRD System. The primary purpose of BrokerCheck is to help investors make informed choices about the individuals and firms with which they may wish to do business.

Currently, as described in FINRA Rule 8312, BrokerCheck provides information

regarding current and former members, as well as current associated persons and persons who were associated with a member within the preceding two years. The proposed rule change would expand BrokerCheck with respect to former associated persons to provide public access to certain information about such persons, regardless of when they were associated with a member, if they were the subject of any final regulatory action as defined in Form U4 that has been reported to CRD via a uniform registration form.<sup>4</sup> For purposes of the proposed rule change, a final regulatory action as defined in Form U4 may include any final action, including any action that is on appeal, by the SEC, Commodity Futures Trading Commission, a federal banking agency, the National Credit Union Administration, another federal regulatory agency, a state regulatory authority, or a self-regulatory organization (as those terms are used in Form U4).<sup>5</sup> To illustrate, actions that are delineated in current Form U4 Questions 14C, 14D, or 14E would be considered "final regulatory actions." Similarly, actions that are detailed in current Form U5 Question 7D, and have a status of "final" or "on appeal," would be considered "final regulatory actions" as such actions are also addressed in Form U4.<sup>6</sup>

The proposed rule change would allow the public access to information about formerly registered persons who, although no longer in the securities industry in a registered capacity, may work in other investment-related industries or attain other positions of trust and about whom investors may wish to learn relevant disciplinary information. Specifically, FINRA would disclose through BrokerCheck

<sup>4</sup> Because the information disclosed through BrokerCheck is derived from the CRD System, BrokerCheck will only disclose information regarding regulatory actions that have been reported to CRD via a uniform registration form.

<sup>5</sup> A final regulatory action would not include any action limited to the revocation or suspension of an individual's authorization to act as an attorney, accountant or federal contractor (current Form U4 Question 14F).

<sup>6</sup> FINRA staff also will review responses to all Regulatory Action Disclosure questions and Disclosure Review Pages on the Forms U4 and U5 (including the predecessor questions in this area), as well as information filed on Form U6 to determine whether a former associated person is subject to a final regulatory action and should therefore be included in BrokerCheck pursuant to the proposed rule change. Under the proposed rule change, FINRA may disclose a final action that is reported by a regulator on a Form U6 even if that action has not been reported by an individual on a Form U4 because, for example, the individual was not registered at the time the final regulatory action was reported.

<sup>17</sup> See *supra* note 7.

<sup>18</sup> 15 U.S.C. 78f(b)(5).

<sup>19</sup> 15 U.S.C. 78s(b)(2).

<sup>20</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> The uniform registration forms are Form BD (Uniform Application for Broker-Dealer Registration), Form BDW (Uniform Request for Broker-Dealer Withdrawal), Form U4 (Uniform Application for Securities Industry Registration or Transfer), Form U5 (Uniform Termination Notice for Securities Industry Registration), and Form U6 (Uniform Disciplinary Action Reporting Form).