

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56713; File No. SR-Amex-2007-74)

October 29, 2007

Self-Regulatory Organizations; American Stock Exchange LLC; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Listing and Trading of Shares of Funds of the Rydex ETF Trust

I. Introduction

On July 13, 2007, the American Stock Exchange LLC (“Amex” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder.² On July 31, 2007, Amex filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the Federal Register on August 14, 2007 for a 15-day comment period.³ The Commission received one comment letter regarding the proposal.⁴ This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

Amex Rules 1000A–AEMI and 1001A - 1005A provide standards for the listing of Index Fund Shares, which are securities issued by an open-end management investment company for exchange trading. These securities are registered under the Investment Company Act of 1940, as well as under the Act. Index Fund Shares are defined in Amex Rule 1000A–AEMI(b)(1) generally as securities based on a portfolio of stocks or fixed income securities that seek to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 56218 (August 7, 2007), 72 FR 45469 (“Notice”).

⁴ See letter to Nancy M. Morris, Secretary, Commission, from Melanie C. Maloney, Dickstein Shapiro LLP on behalf of ProFund Advisors LLC and ProShare Advisors LLC, dated August 28, 2007 (“ProFunds Letter”).

provide investment results that correspond generally to the price and yield of a specified foreign or domestic stock index or fixed income securities index. Amex Rule 1000A–AEMI(b)(2) permits the Exchange to list and trade Index Fund Shares that seek to provide investment results that exceed the performance of an underlying securities index by a specified multiple or that seek to provide investment results that correspond to a specified multiple of the inverse or opposite of the index’s performance.⁵

The Exchange proposes to list and trade under Amex Rule 1000A–AEMI shares (the “Shares”) of forty-five new funds of the Rydex ETF Trust (the “Trust”) that are designated as the Rydex Leveraged Funds (the “Leveraged Funds”), Rydex Inverse Funds (the “Inverse Funds”), and Rydex Leveraged Inverse Funds (the “Leveraged Inverse Funds,” and together with the Leveraged Funds and Inverse Funds, collectively, the “Funds”). Each of the Funds has a distinct investment objective by attempting, on a daily basis, to correspond to a specified multiple of the performance, or the inverse performance, of a particular equity securities index.

The Funds will be based on the following benchmark indexes: (1) the S&P 500 Index; (2) the S&P MidCap 400 Index; (3) the S&P Small Cap 600 Index; (4) the Russell 1000 Index; (5) the Russell 2000 Index; (6) the Russell 3000 Index; (7) the S&P 500 Consumer Discretionary Index; (8) the S&P 500 Consumer Staples Index; (9) the S&P 500 Energy Index; (10) the S&P 500 Financials Index; (11) the S&P 500 HealthCare Index; (12) the S&P 500 Industrials Index; (13) the S&P 500 Information Technology Index; (14) the S&P 500 Materials Index; and (15)

⁵ See Amex Rule 1000A–AEMI(b)(2)(iii) and Commentary .02 thereto (providing that the listing and trading of Index Fund Shares under paragraph (b)(2) thereof may not be approved by the Exchange pursuant to Rule 19b-4(e) under the Act (17 CFR 240.19b-4(e))).

the S&P 500 Utilities Index (each individually, an “Underlying Index,” and all Underlying Indexes collectively, the “Underlying Indexes”).⁶

The Leveraged Funds will seek daily investment results, before fees and expenses, that correspond to twice (200%) the daily performance of the corresponding Underlying Indexes. The net asset value (“NAV”) of the Shares of each of these Leveraged Funds, if successful in meeting its objective, should increase, on a percentage basis, approximately twice as much as the respective Fund’s Underlying Index gains when the prices of the securities in such Underlying Index increase on a given day, and should decrease approximately twice as much as the respective Underlying Index loses when such prices decline on a given day.

The Inverse Funds will seek daily investment results, before fees and expenses, that correspond to the inverse or opposite of the daily performance (-100%) of the Underlying Indexes. If each of these Inverse Funds is successful in meeting its objective, the NAV of the Shares of each Inverse Fund should increase approximately as much, on a percentage basis, as the respective Underlying Index loses when the prices of the securities in the Underlying Index decline on a given day, or should decrease approximately as much as the respective Underlying Index gains when the prices of the securities in the Underlying Index rise on a given day.

The Leveraged Inverse Funds will seek daily investment results, before fees and expenses, that correspond to twice the inverse (-200%) of the daily performance of the Underlying Indexes. If each of these Leveraged Inverse Funds is successful in meeting its

⁶ A detailed discussion of each of the Underlying Indexes, the investment objective of the Funds, the portfolio investment methodology, and the investment techniques, can be found in the Notice. See Notice, supra note 3, 72 FR at 45471-45474. See also Amex Rule 1002A(b)(i)(B) (providing that the Exchange will consider the suspension of trading in, or removal from listing of, a series of Index Fund Shares if, among other circumstances, the Underlying Index or portfolio is replaced with a new index or portfolio, subject to certain exceptions).

objective, the NAV of the Shares of each Leveraged Inverse Fund should increase approximately twice as much, on a percentage basis, as the respective Underlying Index loses when the prices of the securities in the Underlying Index decline on a given day, or should decrease approximately twice as much as the respective Underlying Index gains when the prices of the securities in the Underlying Index rise on a given day.

Rydex Investments is the investment advisor (the “Advisor”) to each Fund and is registered under the Investment Advisers Act of 1940. While the Advisor will manage each Fund, the Trust’s Board of Trustees (the “Board”) will have overall responsibility for the Funds’ operations. Rydex Distributors, Inc. (the “Distributor”), a broker-dealer registered under the Act, will act as the distributor and principal underwriter of the Shares. State Street Bank & Trust will act as the index receipt agent (the “Index Receipt Agent”) for which it will receive fees and will be responsible for transmitting the Deposit List (as defined below) to the National Securities Clearing Corporation (“NSCC”) and for the processing, clearance, and settlement of purchase and redemption orders through the facilities of the Depository Trust Company (“DTC”) and NSCC on behalf of the Trust. The Index Receipt Agent will also be responsible for the coordination and transmission of files and purchase and redemption orders between the Distributor and the NSCC.

Availability of Information about the Shares and Underlying Indexes

Quotations and last-sale information for the Shares will be disseminated through the facilities of the Consolidated Tape Association (“CT”).⁷ In addition, to provide updated information relating to each Fund for use by investors, professionals, and persons wishing to

⁷ E-mail from Nyieri Nazarian, Assistant General Counsel, Amex, to Edward Cho, Special Counsel, Division of Market Regulation, Commission, dated August 22, 2007 (confirming the information to be disseminated through the facilities of the CT).

create or redeem Shares, the Exchange will calculate and disseminate through the CT and Consolidated Quote High Speed Lines an Indicative Intra-Day Value (“IIV”) at least every 15 seconds throughout Amex’s trading day,⁸ the market value of a Share for each Fund, the most recent NAV for each Fund, the number of Shares outstanding for each Fund, and the estimated cash amount and total cash amount per Creation Unit (as defined below). The Exchange will make available on its Web site daily trading volume, the closing prices, the NAV, and the final dividend amounts to be paid for each Fund.

In addition, the value of each Underlying Index will be updated intra-day on a real-time basis as its individual component securities change in price. These intra-day values of each Underlying Index will be disseminated at least every 15 seconds throughout the trading day by Amex or another organization authorized by the relevant Underlying Index provider. Several independent data vendors also package and disseminate Underlying Index data in various value-added formats, including vendors displaying both securities and Underlying Index levels and vendors displaying Underlying Index levels only.

The Trust’s Internet Web site (www.rydexinvestments.com) will contain the following information for each Fund’s Shares: (1) the prior business day’s closing NAV, the reported closing price, and a calculation of the premium or discount of such price in relation to the closing NAV; (2) data for a period covering at least the four previous calendar quarters (or the life of a Fund, if shorter) indicating how frequently each Fund’s Shares traded at a premium or discount to NAV based on the daily closing price and the closing NAV, and the magnitude of such premiums and discounts; (3) its prospectus and product description; and (4) other quantitative information, such as daily trading volume. The prospectus and/or product description for each

⁸ A detailed discussion of the calculation methodology of the IIV for each of the Funds can be found in the Notice. See Notice, supra note 3, 72 FR at 45477.

Fund will inform investors that the Trust's Internet Web site has information about the premiums and discounts at which the Fund's Shares have traded.

Each Fund's total portfolio composition will be disclosed on the Web site of the Trust or another Internet Web site as determined by the Trust and/or the Exchange. The Trust will provide Web site disclosure of each Fund's portfolio holdings daily and will include, as applicable, the names and number of Shares held of each specific equity security, the specific types of Financial Instruments⁹ and characteristics of such Financial Instruments, and the cash equivalents and amount of cash held in the portfolio of each Fund. This public Web site disclosure of the portfolio composition of each Fund and the disclosure by the Advisor of the "IIV File" (as described below) and the portfolio composition file, or "PCF," will occur at the same time. Therefore, the same portfolio information (including accrued expenses and dividends) will be provided on the public Web site(s), as well as in the IIV File and PCF provided to Authorized Participants.¹⁰

Creation and Redemption of Shares¹¹

Each Fund will issue and redeem Shares only in aggregations of at least 50,000 (each aggregation, a "Creation Unit"). Purchasers of Creation Units will be able to separate the

⁹ The financial instruments to be held by any of the Funds may include stock index futures contracts, options on futures contracts, options on securities and indices, equity caps, collars and floors, as well as swap agreements, forward contracts, repurchase agreements, and reverse repurchase agreements (the "Financial Instruments"). See Notice, supra note 3, 72 FR at 45472 n.22.

¹⁰ An Authorized Participant is: (1) either (a) a broker-dealer or other participant in the continuous net settlement system of the NSCC, or (b) a DTC participant; and (2) a party to a participant agreement with the Distributor. See Notice, supra note 3, 72 FR at 45473 n.26.

¹¹ A detailed discussion of the procedures for creating and redeeming Shares with respect to each of the Funds, including a description of the relevant transaction fees, can be found in the Notice. See Notice, supra note 3, 72 FR at 45474-45476.

Creation Units into individual Shares. Once the number of Shares in a Creation Unit is determined, it will not change thereafter (except in the event of a stock split or similar revaluation). The initial value of a Share for each of the Funds is expected to be in the range of \$50-\$250.

At the end of each business day, the Trust will prepare the list of names and the required number of Shares of each Deposit Security (as defined below) to be included in the next trading day's Creation Unit for each Leveraged Fund (the "Deposit List"). The Trust will then add to the Deposit List the cash information effective as of the close of business on that business day and create a PCF for each Fund, which will be transmitted to NSCC before the open of business the next business day. The information in the PCF will be available to all participants in the NSCC system.

Because the NSCC's system for the receipt and dissemination to its participants of the PCF is not currently capable of processing information with respect to Financial Instruments, the Advisor has developed an "IIV File," which it will use to disclose the Funds' holdings of Financial Instruments. The IIV File will contain, for each Leveraged Fund (to the extent that it holds Financial Instruments) and Inverse and Leveraged Inverse Fund, information sufficient by itself or in connection with the PCF and other available information for market participants to calculate a Fund's IIV and effectively value such Fund. The IIV File, together with the applicable information in the PCF in the case of Leveraged Funds, will also be the basis for the next business day's NAV calculation.

Under normal circumstances, the Leveraged Funds will be created and redeemed either entirely for cash and/or for a deposit basket of equity securities ("Deposit Securities"), plus a "Balancing Amount." The Deposit Securities and the Balancing Amount collectively are

referred to as the “Creation Deposit.” The Balancing Amount is a cash payment designed to ensure that the value of a Creation Deposit is identical to the value of the Creation Unit. The Balancing Amount is an amount equal to the difference between the NAV of a Creation Unit and the market value of the Deposit Securities.¹² Under normal circumstances, the Inverse and Leveraged Inverse Funds will be created and redeemed entirely for cash. The IIV File published before the open of business on a business day will, however, permit NSCC participants to calculate (by means of calculating the IIV) the amount of cash required to create a Creation Unit and the amount of cash that will be paid upon redemption of a Creation Unit, for each Inverse and Leveraged Inverse Fund for that business day.

Criteria for Initial and Continued Listing

The Shares are subject to the criteria for initial and continued listing of Index Fund Shares under Amex Rule 1002A. A minimum of two Creation Units (at least 100,000 Shares) will be required to be outstanding at the start of trading. This minimum number of Shares required to be outstanding at the start of trading will be comparable to requirements that have been applied to previously listed series of Index Fund Shares. The Exchange believes that the proposed minimum number of Shares outstanding at the start of trading is sufficient to provide market liquidity. The Exchange, pursuant to Amex Rule 1002A(a)(ii), will obtain a representation from the Trust (for each Fund), prior to listing, that the NAV per Share for each Fund will be calculated daily and made available to all market participants at the same time. The

¹² While not typical, if the market value of the Deposit Securities is greater than the NAV of a Creation Unit, then the Balancing Amount will be a negative number, in which case the Balancing Amount will be paid by the Leveraged Fund to the purchaser, rather than vice-versa.

Exchange represents that the Trust is required to comply with Rule 10A-3 under the Act¹³ for the initial and continued listing of the Shares.

Amex Trading Rules and Trading Halts

The Shares are equity securities subject to Amex rules governing the trading of equity securities. The Exchange states that Amex Rule 154–AEMI(c)(ii)¹⁴ and Commentary .04 to Amex Rule 190¹⁵ apply to Index Fund Shares listed on the Exchange, including the Shares.

In addition to other factors that may be relevant, the Exchange may consider factors such as those set forth in Amex Rule 918C(b) in exercising its discretion to halt or suspend trading in Index Fund Shares. These factors include, but are not limited to, (1) the extent to which trading is not occurring in securities comprising an Underlying Index and/or the Financial Instruments of a Fund, or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In the case of Financial Instruments held by a Fund, the Exchange represents that a notification procedure will be implemented so that timely notice from the Advisor is received by the Exchange when a particular Financial Instrument is in default or shortly to be in default. Notification from the Advisor will be made by phone, facsimile, or e-mail. The Exchange would then determine on a case-by-case basis whether a default of a particular Financial Instrument justifies a trading halt of the Shares. Trading in Shares of the

¹³ 17 CFR 240.10A-3 (setting forth listing standards relating to audit committees).

¹⁴ Amex Rule 154–AEMI(c)(ii) provides that stop and stop limit orders to buy or sell a security, the price of which is derivatively priced based upon another security or index of securities, may be elected by a quotation. The Exchange states that the Shares are eligible for this treatment.

¹⁵ Commentary .04 states that nothing in Amex Rule 190(a) should be construed to restrict a specialist registered in a security issued by an investment company from purchasing and redeeming the listed security or securities that can be subdivided or converted into the listed security from the issuer as appropriate to facilitate the maintenance of a fair and orderly market.

Funds will also be halted if the circuit breaker parameters under Amex Rule 117 have been reached.

Amex Rule 1002A(b)(ii) sets forth the trading halt parameters with respect to Index Fund Shares. If the IIV or the Underlying Index value applicable to that series of Index Fund Shares is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the Underlying Index value occurs. If the interruption to the dissemination of the IIV or the Underlying Index value persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

Information Circular

The Exchange, in an Information Circular to Exchange members and member organizations, prior to the commencement of trading, will inform members and member organizations regarding the application of Commentary .06 of Amex Rule 1000A–AEMI to the Funds. The Information Circular will further inform members and member organizations of the prospectus and/or product description delivery requirements that apply to the Funds.

The Information Circular will also provide guidance with regard to member firm compliance responsibilities when effecting transactions in the Shares and highlighting the special risks and characteristics of the Funds and Shares as well as applicable Exchange rules. In particular, the Information Circular will set forth the requirements relating to Commentary .05 to Amex Rule 411 (Duty to Know and Approve Customers). Specifically, the Information Circular will remind members of their obligations in recommending transactions in the Shares so that members have a reasonable basis to believe that: (1) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial

situation, needs, and any other information known by such member; and (2) that the customer can evaluate the special characteristics, and is able to bear the financial risks, of such investment. In connection with the suitability obligation, the Information Circular will also provide that members make reasonable efforts to obtain the following information: (a) the customer's financial status; (b) the customer's tax status; (c) the customer's investment objectives; and (d) such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer. In addition, the Information Circular will disclose that the procedures for purchases and redemptions of Shares in Creation Units are described in each Fund's prospectus, and that Shares are not individually redeemable, but are redeemable only in Creation Unit aggregations or multiples thereof.

Surveillance

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Shares. Specifically, Amex will rely on its existing surveillance procedures governing Index Fund Shares. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

III. Comment Letter

The Commission received one comment letter, submitted on behalf of ProFund Advisors LLC and ProShare Advisors LLC (collectively referred to as "ProFunds"), which asserted that the listing and trading of the Shares of the Funds by the Exchange would infringe on ProFunds' intellectual property rights. In particular, ProFunds believes that it has a proprietary interest, through a pending patent application, in the process and system for calculating an intra-day indicative value relating to leveraged and inverse exchange traded funds to be purportedly used

by the Trust. As a result, the commenter requested that the Commission institute proceedings to disapprove the proposed rule change.¹⁶

IV. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁷ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁸ which requires that the rules of an exchange be designed, among other things, 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 notes that it has previously approved the original listing and trading of various fund shares that seek to provide investment results that correspond to a specified multiple of the performance, or the inverse of the performance, of an underlying portfolio of securities.¹⁹ The Commission also notes that it has previously approved the listing and trading of exchange-traded funds based on each of the Underlying Indexes.²⁰

¹⁶ See ProFunds Letter at 1-2, supra note 4.

¹⁷ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁸ 15 U.S.C. 78f(b)(5).

¹⁹ See Securities Exchange Act Release Nos. 55117 (January 17, 2007), 72 FR 3442 (January 25, 2007) (SR-Amex-2006-101) (approving the listing and trading of shares of funds of the Trust based on certain underlying indexes); 54040 (June 23, 2006), 71 FR 37629 (June 30, 2006) (SR-Amex-2006-41) (approving the listing and trading of shares of other funds of the Trust based on certain underlying indexes); and 52553 (October 3, 2005), 70 FR 59100 (October 11, 2005) (SR-Amex-2004-62) (approving the listing and trading of shares of funds of the xtraShares Trust based on certain underlying indexes).

²⁰ See Securities Exchange Act Release Nos. 31591 (December 11, 1992), 57 FR 60253 (December 18, 1992) (SR-Amex-92-18) (approving the listing and trading of portfolio

The Commission further believes that the proposal is consistent with Section 11A(a)(1)(C)(iii) of the Act,²¹ 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. As described above, quotations and last-sale information for the Shares will be disseminated over the CT. In addition, the Exchange will calculate and disseminate through the CT the IIV per Share for each Fund at least every 15 seconds throughout Amex's trading day, as well as other information regarding the value of the Shares. The value of each Underlying Index will also be updated intra-day on a real-time basis as its individual component securities change in price and will be disseminated at least every 15 seconds throughout the trading day. Finally, the Trust's Web site will include important information for each Fund's Shares.

Furthermore, the Commission 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. The Commission notes that the Exchange will obtain a representation from the Trust (for each Fund), prior to listing, that the NAV per Share for each Fund will be calculated daily and made available to all market participants at the same time.²² In addition, the

depository receipts ("PDRs"), including receipts based on the S&P 500 Index); 35534 (March 24, 1995), 60 FR 16686 (March 31, 1995) (SR-Amex-94-52) (approving the listing and trading of PDRs based on the S&P 400 Midcap Index); 35532 (March 24, 1995), 60 FR 16518 (March 30, 1995) (SR-CBOE-94-43) (approving the listing and trading of options on the S&P SmallCap 600 Index); 53191 (January 30, 2006), 71 FR 6111 (February 6, 2006) (SR-Amex-2005-061) (approving the listing and trading of options on the Russell Indexes, including the Russell 1000, 2000, and 3000 Indexes); and 40749 (December 4, 1998), 63 FR 68483 (December 11, 1998) (SR-Amex-98-29) (approving the listing and trading of certain Select SPDR exchange-traded funds).

²¹ 15 U.S.C. 78k-1(a)(1)(C)(iii).

²² See Amex Rule 1002A(a)(ii).

Exchange represents that the Web site disclosure of the portfolio composition of each Fund and the disclosure by the Advisor of the IIV File and the PCF will occur at the same time. Moreover, Commentary .02(b) to Amex Rule 1000A–AEMI provides for “fire wall” procedures with respect to personnel who have access to information concerning changes and adjustments to the Underlying Index and the implementation of procedures to prevent the use and dissemination of material non-public information regarding the Underlying Index. Further, Commentary .09 to Amex Rule 1000A–AEMI sets forth restrictions on members or persons associated with members who have knowledge of the terms and conditions of certain orders (the execution of which are imminent) to enter, based on such knowledge, an order to buy or sell a Share that is the subject of such orders, an order to buy or sell the overlying option class, or an order to buy or sell any related instrument.

The Commission also believes that the Exchange’s trading halt rules are reasonably designed to prevent trading in the Shares when transparency is impaired. Amex Rule 1002A(b)(ii) provides that the Exchange will halt trading in the Shares if the circuit breaker parameters of Amex Rule 117 have been reached. In exercising its discretion to halt or suspend trading in the Shares, the Exchange may consider factors such as those set forth in Amex Rule 918C(b) and other relevant factors. In addition, Amex Rule 1002A(b)(ii) provides that, if the IIV or the Underlying Index value applicable to that series of Index Fund Shares is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the Underlying Index value occurs. If the interruption to the dissemination of the IIV or the Underlying Index value persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption.

The Commission further believes that the trading rules and procedures to which the Shares will be subject pursuant to this proposal are consistent with the Act. The Exchange has represented that the Shares are equity securities subject to Amex's rules governing the trading of equity securities.

In support of this proposal, the Exchange has made the following representations:

- (1) The Exchange's surveillance procedures are adequate to properly monitor the trading of the Shares. Specifically, Amex will rely on its existing surveillance procedures governing Index Fund Shares.
- (2) Prior to the commencement of trading, the Exchange will inform its members and member organizations in an Information Circular regarding the application of Commentary .06 to Amex Rule 1000A–AEMI to the Funds and the prospectus and/or product description delivery requirements that apply to the Funds. The Information Circular will also provide guidance with regard to member firm compliance responsibilities when effecting transactions in the Shares and highlighting the special risks and characteristics of the Funds and Shares, as well as applicable Exchange rules. In addition, the Information Circular will disclose that the procedures for purchases and redemptions of Shares in Creation Units are described in each Fund's prospectus, and that Shares are not individually redeemable, but are redeemable only in Creation Unit aggregations or multiples thereof.

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

Finally, the Commission believes that the commenter's concerns over its proprietary interest in the process and system for calculating an intra-day indicative value relating to

leveraged and inverse exchange traded funds to be purportedly used by the Trust do not preclude the Commission from approving the proposed rule change. Specifically, to the extent that the commenter's argument raises a claim of misappropriation or infringement of a protected property right, the Commission believes it is inappropriate for the Commission to attempt to resolve these issues in a proceeding involving the approval of a proposed rule change by a national securities exchange under the federal securities laws. To take such delaying action whenever a third party claim is asserted could stifle Commission review of new products proposed by self-regulatory organizations. The plain language of the U.S. securities laws does not suggest that Congress intended that the Commission attempt, in the context of an approval proceeding for a securities product, to resolve intellectual property right claims that can be pursued elsewhere.²³

Accordingly, the commenter's assertions do not form a basis for the Commission to either disapprove or delay approval of the Exchanges' proposals.²⁴

²³ The Commission notes that Congress has enacted an elaborate statutory framework for the establishment, preservation, and protection of intellectual property rights and has established specific federal agencies to administer these laws. Separate state causes of action also may be available to the holders of these proprietary rights as well. The Commission is not required by the Act to make, and has not made, a legal determination of proprietary claims flowing from the Trust's application of the process and system for calculating an intraday indicative value for the Shares of each Fund. This is not to say, however, that the Commission might not separately have a federal interest in the outcome of any proceeding challenging a new product or be willing to express a view regarding such a proceeding in the event a subsequent action provides the Commission opportunity to address these matters, e.g., to protect investors and the public interest.

²⁴ See Securities Exchange Act Release Nos. 36070 (August 9, 1995), 60 FR 42205 (August 15, 1995) (SR-Amex-94-55 and SR-CBOE-95-01) (order approving the listing and trading of warrants on the Deutscher Aktien Index by Amex and the Chicago Board Options Exchange, Incorporated ("CBOE")); 28475 (September 27, 1990), 55 FR 40492 (October 3, 1990) (SR-Amex-89-16) (order approving the trading by Amex of options on the Japan Index); and 26709 (April 11, 1989), 54 FR 15280 (April 17, 1989) (SR-Phlx-88-07; SR-Amex-88-10; and SR-CBOE-88-09) (order approving the listing of index participations by Amex, CBOE, and the Philadelphia Stock Exchange, Inc.).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁵ that the proposed rule change (SR-Amex-2007-74), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

By the Commission.

Nancy M. Morris
Secretary

²⁵ 15 U.S.C. 78s(b)(2).