

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-69831; File No. TP 13-03)

June 21, 2013

Order Granting Limited Exemptions from Exchange Act Rule 10b-17 and Rules 101 and 102 of Regulation M to ALPS ETF Trust, the VelocityShares Tail Risk Hedged Large Cap ETF, and the VelocityShares Volatility Hedged Large Cap ETF

By letter dated June 21, 2013 (the “Letter”), as supplemented by conversations with the staff of the Division of Trading and Markets, counsel for ALPS ETF Trust (the “Trust”) on behalf of the Trust, the VelocityShares Tail Risk Hedged Large Cap ETF and the VelocityShares Volatility Hedged Large Cap ETF (each a “Fund” and, collectively, the “Funds”), any national securities exchange on or through which shares issued by the Funds (“Shares”) may subsequently trade, ALPS Distributors, Inc., and persons or entities engaging in transactions in Shares (collectively, the “Requestors”) requested exemptions, or interpretive or no-action relief, from Rule 10b-17 of the Securities Exchange Act of 1934, as amended (“Exchange Act”) and Rules 101 and 102 of Regulation M in connection with secondary market transactions in Shares and the creation or redemption of aggregations of Shares of at least 50,000 shares (“Creation Units”).

The Trust is registered with the Commission under the Investment Company Act of 1940, as amended (“1940 Act”), as an open-end management investment company. Each Fund seeks to track the performance of a particular underlying index (“Index”), which for each Fund is comprised of shares of exchange traded products (“ETPs”). Each Fund’s underlying index reflects the performance of a portfolio consisting of an exposure to a large cap equity portfolio, consisting of three underlying ETFs which track the S&P 500 index (“Underlying Large-Cap ETFs”) and a volatility strategy to hedge “tail risk” events (which are market events that occur rarely but may have severe consequences when they do occur), consisting of two underlying ETFs which reflect leveraged or inverse positions on the S&P 500 VIX Short-Term Futures

Index (“Underlying Volatility ETFs”). The underlying index, at each monthly rebalance, consists of an 85% allocation to the Underlying Large-Cap ETFs and a 15% allocation to the Underlying Volatility ETFs. The Funds intend to operate as “ETFs of ETFs” by seeking to track the performance of the respective underlying Index by investing at least 80% of their assets in the ETPs that comprise each Index. Each Fund also intends to enter into swap agreements designed to provide exposure to (a) the Underlying Volatility ETFs and/or (b) leveraged and/or inverse positions on the S&P 500 VIX Short-Term Futures Index directly. Except for the fact that the Funds will operate as ETFs of ETFs and intend to enter into swaps to obtain the leveraged and/or inverse exposure to the Underlying Volatility ETFs and/or the S&P 500 VIX Short-Term Futures Index, the Funds will operate in a manner identical to the ETPs that comprise each Index.

The Requestors represent, among other things, the following:

- Shares of the Funds will be issued by the Trust, an open-end management investment company that is registered with the Commission;
- The Trust will continuously redeem Creation Units at net asset value (“NAV”) and the secondary market price of the Shares should not vary substantially from the NAV of such Shares;
- Shares of the Funds will be listed and traded on the NYSE Arca (the “Exchange”) or other exchange in accordance with exchange listing standards that are, or will become, effective pursuant to Section 19(b) of the Exchange Act;

- All ETPs that are invested in by the Funds will meet all conditions set forth in a relevant class relief letter,<sup>1</sup> will have received individual relief from the Commission, or will be able to rely on individual relief even though they are not named parties;
- At least 70% of each Fund is comprised of component securities that meet the minimum public float and minimum average daily trading volume thresholds under the "actively-traded securities" definition found in Regulation M for excepted securities during each of the previous two months of trading prior to formation of the relevant Fund; provided, however, that if the Fund has 200 or more component securities, then 50% of the component securities must meet the actively-traded securities thresholds;
- All the components of each Index will have publicly available last sale trade information;
- The intra-day proxy value of each Fund per share and the value of each Index will be publicly disseminated by a major market data vendor throughout the trading day;
- On each business day before the opening of business on the Exchange, the Funds' custodian, through the National Securities Clearing Corporation, will make available the list of the names and the numbers of securities and other assets of each Fund's portfolio that will be applicable that day to creation and redemption requests;
- The Exchange or other market information provider will disseminate every 15 seconds throughout the trading day through the facilities of the Consolidated Tape Association an

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<sup>1</sup> Letter from Catherine McGuire, Esq., Chief Counsel, Division of Market Regulation, to the Securities Industry Association Derivative Products Committee (November 21, 2005); Letter from Racquel L. Russell, Branch Chief, Division of Market Regulation, to George T. Simon, Esq., Foley & Lardner LLP (June 21, 2006); Letter from James A. Brigagliano, Acting Associate Director, Division of Market Regulation, to Stuart M. Strauss, Esq., Clifford Chance US LLP (October 24, 2006); Letter from James A. Brigagliano, Associate Director, Division of Market Regulation, to Benjamin Haskin, Esq., Willkie, Farr & Gallagher LLP (April 9, 2007); or Letter from Josephine Tao, Assistant Director, Division of Trading and Markets, to Domenick Pugliese, Esq., Paul, Hastings, Janofsky and Walker LLP (June 27, 2007).

amount representing on a per-share basis, the current value of the securities and cash to be deposited as consideration for the purchase of Creation Units;

- The arbitrage mechanism will be facilitated by the transparency of the Funds' portfolio and the availability of the intra-day indicative value, the liquidity of securities and other assets held by the Funds, the ability of the Funds and arbitrageurs to acquire such securities, as well as the arbitrageurs' ability to create workable hedges;
- The Funds will invest solely in liquid securities;
- The Funds will invest in securities that will facilitate an effective and efficient arbitrage mechanism and the ability to create workable hedges;
- The Requestors believe that arbitrageurs are expected to take advantage of price variations between each Fund's market price and its NAV; and
- A close alignment between the market price of Shares and each Fund's NAV is expected.

### Regulation M

While redeemable securities issued by an open-end management investment company are excepted from the provisions of Rule 101 and 102 of Regulation M, the Requestors may not rely upon that exception for the Shares.<sup>2</sup>

### Rule 101 of Regulation M

Generally, Rule 101 of Regulation M is an anti-manipulation rule that, subject to certain exceptions, prohibits any "distribution participant" and its "affiliated purchasers" from bidding for, purchasing, or attempting to induce any person to bid for or purchase any security which is the subject of a distribution until after the applicable restricted period, except as specifically

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<sup>2</sup> ETFs operate under exemptions from the definitions of "open-end company" under Section 5(a)(1) of the 1940 Act and "redeemable security" under Section 2(a)(32) of the 1940 Act. The ETFs and their securities do not meet those definitions.

permitted in the rule. Rule 100 of Regulation M defines “distribution” to mean any offering of securities that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods. The provisions of Rule 101 of Regulation M apply to underwriters, prospective underwriters, brokers, dealers, and other persons who have agreed to participate or are participating in a distribution of securities. The Shares are in a continuous distribution and, as such, the restricted period in which distribution participants and their affiliated purchasers are prohibited from bidding for, purchasing, or attempting to induce others to bid for or purchase extends indefinitely.

Based on the representations and facts presented in the Letter, particularly that the Trust is a registered open-end management investment company that will continuously redeem at the NAV Creation Units of Shares of the Funds and that a close alignment between the market price of Shares and the Funds’ NAV is expected, the Commission finds that it is appropriate in the public interest, and consistent with the protection of investors, to grant the Trust an exemption from Rule 101 of Regulation M, pursuant to paragraph (d) of Rule 101 of Regulation M with respect to transactions in the Funds as described in the Letter, thus permitting persons who may be deemed to be participating in a distribution of Shares of the Funds to bid for or purchase such Shares during their participation in such distribution.<sup>3</sup>

#### Rule 102 of Regulation M

Rule 102 of Regulation M prohibits issuers, selling security holders, and any affiliated purchaser of such person from bidding for, purchasing, or attempting to induce any person to bid

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<sup>3</sup> Additionally, we confirm the interpretation that a redemption of Creation Units of Shares of the Funds and the receipt of securities in exchange by a participant in a distribution of Shares of the Funds would not constitute an “attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period” within the meaning of Rule 101 of Regulation M and therefore would not violate that rule.

for or purchase a covered security during the applicable restricted period in connection with a distribution of securities effected by or on behalf of an issuer or selling security holder.

Based on the representations and facts presented in the Letter, particularly that the Trust is a registered open-end management investment company that will redeem at the NAV Creation Units of Shares of the Funds and that a close alignment between the market price of Shares and the Funds' NAV is expected, the Commission finds that it is appropriate in the public interest, and consistent with the protection of investors, to grant the Trust an exemption from Rule 102 of Regulation M, pursuant to paragraph (e) of Rule 102 of Regulation M with respect to transactions in the Funds as described in the Letter, thus permitting the Funds to redeem Shares of the Funds during the continuous offering of such Shares.

#### Rule 10b-17

Rule 10b-17, with certain exceptions, requires an issuer of a class of publicly traded securities to give notice of certain specified actions (for example, a dividend distribution) relating to such class of securities in accordance with Rule 10b-17(b). Based on the representations and facts in the Letter, in particular that the concerns that the Commission raised in adopting Rule 10b-17 generally will not be implicated if exemptive relief, subject to the conditions below, is granted to the Trust because market participants will receive timely notification of the existence and timing of a pending distribution,<sup>4</sup> we find that it is appropriate in the public interest, and consistent with the protection of investors, to grant the Trust a conditional exemption from Rule 10b-17.

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<sup>4</sup> We also note that timely compliance with Rule 10b-17(b)(1)(v)(a) and (b) would be impractical in light of the nature of the Funds. This is because it is not possible for the Funds to accurately project ten days in advance what dividend, if any, would be paid on a particular record date.

## Conclusion

IT IS HEREBY ORDERED, pursuant to Rule 101(d) of Regulation M, that the Trust is exempt from the requirements of Rules 101 with respect to transactions in the Shares of the Funds as described in the Letter, thus permitting persons who may be deemed to be participating in a distribution of Shares of the Funds to bid for or purchase such Shares during their participation in such distribution as described in the Letter.

IT IS FURTHER ORDERED, pursuant to Rule 102(e) of Regulation M, that the Trust is exempt from the requirements of Rule 102 with respect to transaction in the Shares of the Funds as described in the Letter, thus permitting the Funds to redeem Shares of the Funds during the continuous offering of such Shares as described in the Letter.

IT IS FURTHER ORDERED, pursuant to Rule 10b-17(b)(2), that the Trust, subject to the conditions contained in this order, is exempt from the requirements of Rule 10b-17 with respect to transactions in the Shares of the Funds as described in the Letter.

This exemption from Rule 10b-17 is subject to the following conditions:

- The Trust will comply with Rule 10b-17 except for Rule 10b-17(b)(1)(v)(a) and (b); and
- The Trust will provide the information required by Rule 10b-17(b)(1)(v)(a) and (b) to the Exchange as soon as practicable before trading begins on the ex-dividend date, but in no event later than the time when the Exchange last accepts information relating to distributions on the day before the ex-dividend date.

This exemption is subject to modification or revocation at any time the Commission determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. Persons relying upon this exemption shall discontinue transactions involving the Shares of the Funds under the circumstances described above and in the Letter in the event that

any material change occurs with respect to any of the facts presented or representations made by the Requestors. In addition, persons relying on this exemption are directed to the anti-fraud and anti-manipulation provisions of the Exchange Act, particularly Sections 9(a) and 10(b), and Rule 10b-5 thereunder. Responsibility for compliance with these and any other applicable provisions of the federal securities laws must rest with the persons relying on this exemption. This order should not be considered a view with respect to any other question that the proposed transactions may raise, including, but not limited to the adequacy of the disclosure concerning, and the applicability of other federal or state laws to, the proposed transactions.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>5</sup>

Jill M. Peterson  
Assistant Secretary

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<sup>5</sup> 17 CFR 200.30-3(a)(6) and (9).