

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-68995; File No. TP 13-04]

### Order Granting Limited Exemptions From Exchange Act Rule 10b-17 and Rules 101 and 102 of Regulation M to ALPS ETF Trust and U.S. Equity High Volatility Put Write Index Fund Pursuant to Exchange Act Rule 10b-17(b)(2) and Rule 101(d) and 102(e) of Regulation M

February 27, 2013.

By letter dated February 27, 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 U.S. Equity High Volatility Put Write Index Fund (the "Fund"), any national securities exchange or association on or through which shares issued by the Fund ("Shares") may subsequently trade, 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 at least 100,000 Shares ("Creation Units").

The Trust was organized on September 13, 2007, as a Delaware business trust. 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. The Trust currently consists of approximately ten investment series or portfolios. The Requestors request relief related to the Fund, a newly created series of the Trust. The Fund's investment objective is to seek investment results that correspond generally to the performance, before the Fund's fees and expenses, of an index called the NYSE Arca U.S. Equity High Volatility Put Write Index (the "Index"). The Index is an index that measures the return of a hypothetical portfolio consisting of exchange-traded put options which have been sold on each of 20 stocks and a cash position.<sup>1</sup> The

20 stocks on which options are sold are those 20 stocks from a selection of the largest capitalized (over \$5 billion in market capitalization) stocks which also have listed options and which have the highest volatility, as determined by the index provider, the NYSE Arca, Inc.

The Requestors represent, among other things, the following:

- Shares of the Fund 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 Fund will be listed and traded on a national securities exchange or national securities association (each being an "Exchange");
- The Fund will hold 20 or more portfolio securities with no one portfolio security constituting more than 25% of the Fund;
- The Fund will be managed to track a particular index, all the components of which have publicly available last sale trade information;
- The intra-day indicative value of the Fund per share and the value of the Index will be publicly disseminated by a major market data vendor throughout the trading day;
- On each business day before commencement of trading in Shares on the Exchange, the Fund will disclose on its Web site the identities and quantities of the Fund's options positions as well as the Treasury bills and other cash instruments held by the Fund that will form the basis for the calculation of the Fund's NAV at the end of the business day;
- 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 amount representing on a per-share basis, the current value of the cash to be deposited as consideration for the purchase of Creation Units;
- The arbitrage mechanism will be facilitated by the transparency of the Fund's portfolio and the availability of the intra-day indicative value, the liquidity of securities and other assets held by the Funds, the ability to access the options sold by the Fund, as well as

cash position is also decreased by a deemed cash distribution paid following each 60-day period, currently targeted at the rate of 1.5% of the value of the Index. However, if the options premiums generated during the period are less than 1.5%, the deemed distribution will be reduced by the amount of the shortfall.

the arbitrageurs' ability to create workable hedges;

- The Fund will invest solely in liquid securities;
- The Fund will invest in securities that will facilitate an effective and efficient arbitrage mechanism and the ability to create workable hedges; and
- The Requestors believe that arbitrageurs are expected to take advantage of price variations between the Fund's market price and its NAV.

### 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 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 Unit size aggregations of the Shares of the Fund and that a close alignment between the market price of Shares and the Fund's NAV is expected, the Commission finds that it is appropriate in the public interest, and consistent with the protection of

<sup>1</sup> The cash position starts at a base of 1000. The cash position is increased by options premiums generated by the options positions comprising the Index and interest on the cash position at an annual rate equal to the three-month Treasury-bill rate. The cash position is decreased by cash settlement on options which finish in-the-money (*i.e.*, where the closing price of the underlying stock at the end of the 60-day period is below the strike price). The

<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.

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 the Fund, thus permitting persons who may be deemed to be participating in a distribution of Shares of the Fund 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 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 Fund and that a close alignment between the market price of Shares and the Fund's 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 the Fund, thus permitting the Fund to redeem Shares of the Fund 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.

#### 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 the Fund, thus permitting persons who may be deemed to be participating in a distribution of Shares of the Fund to bid for or purchase such Shares during their participation in such distribution as described in its letter dated February 27, 2013.

*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 the Fund, thus permitting the Fund to redeem Shares of the Fund during the continuous offering of such Shares as described in its letter dated February 27, 2013.

*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 Fund as described in its letter dated February 27, 2013.

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 Fund 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

days in advance what dividend, if any, would be paid on a particular record date.

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>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94-409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, March 7, 2013 at 2:00 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Aguilar, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting will be:

- institution and settlement of injunctive actions;
- institution and settlement of administrative proceedings; and
- other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 551-5400.

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

<sup>3</sup> Additionally, we confirm the interpretation that a redemption of Creation Unit size aggregations of Shares of the Fund and the receipt of securities in exchange by a participant in a distribution of Shares of the Fund 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.

<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 Fund. This is because it is not possible for the Fund to accurately project ten