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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-78332; File No. TP 16-10]

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

July 14, 2016

By letter dated July 14, 2016 (the “Letter”), as supplemented by conversations with the staff of the Division of Trading and Markets, counsel for Janus Detroit Street Trust (the “Trust”) on behalf of the Trust, the Janus Velocity Tail Risk Hedged Large Cap ETF and the Janus Velocity Volatility Hedged Large Cap ETF (each a “New Fund” and, collectively, the “New Funds”), any national securities exchange on or through which shares issued by the New 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 New Fund seeks to track the performance of a particular underlying index (“Index”), which for each New

Fund is comprised of shares of exchange-traded products (“ETPs”). As a result of the Trust and the ALPS ETF Trust<sup>1</sup> entering into an Agreement and Plan of Reorganization and Termination, the Janus Velocity Tail Risk Hedged Large Cap ETF and the Janus Velocity Volatility Hedged Large Cap ETF will acquire the VelocityShares Tail Risk Hedged Large Cap ETF and the VelocityShares Volatility Hedged Large Cap ETF, respectively, in exchange for shares of such New Fund (or cash in exchange for any fractional shares of an Existing Fund) and the assumption by each New Fund of all of the respective corresponding Existing Fund’s liabilities, if any, as of the closing date. In return, the Existing Funds will distribute the shares of the New Funds to the Existing Funds’ shareholders, and the Existing Funds will terminate. Immediately after the reorganization, each former shareholder of each Existing Fund will own shares of the corresponding New Fund that will be approximately equal to the value of that shareholder’s full shares of such Existing Fund as of the closing date. Thus, Requestors represent that although the New Funds will effectively be the continuation of the Existing Funds, and will be substantially identical in all material respects to the Existing Funds, they cannot rely on the terms and conditions of the Existing Relief because the Trust and the New Funds are legal entities different and distinct from the ALPS ETF Trust and the Existing Funds.

The Requestors represent that each New Fund’s underlying index will reflect 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

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<sup>1</sup> On June 21, 2013, the Division of Trading and Markets granted ALPS ETF Trust exemptive relief (the “Existing Relief”) for the VelocityShares Tail Risk Hedged Large Cap ETF and the VelocityShares Volatility Hedged Large Cap ETF (each an “Existing Fund” and, collectively, the “Existing Funds”). Exchange Act Release No. 69831 (June 21, 2013).

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 New 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. Substantially identical in all material respects to the Existing Funds, the Requestors represent that they intend to enter into swap agreements for each New Fund 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 New Funds will operate as ETFs of ETFs and the Requestors represent that they intend to enter into swaps for each New Fund 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 Requestors represent that the New Funds will operate in a manner identical to the ETPs that comprise each Index and will effectively be the continuation of the Existing Funds.

The Requestors represent, among other things, the following:

- Shares of the New 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 New 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 in which the New Funds invest will meet all conditions set forth in a relevant class relief letter,<sup>2</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 New Fund will be 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 New Fund; provided, however, that if the New Fund has 200 or more component securities, then 50% of the component securities will 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 New 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 New 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 New Fund’s portfolio that will be applicable that day to creation and redemption requests;

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<sup>2</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).

- 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 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 New Funds' portfolio and the availability of the intra-day indicative value, the liquidity of securities and other assets held by the New Funds, the ability of the New Funds and arbitrageurs to acquire such securities, as well as the arbitrageurs' ability to create workable hedges;
- The New Funds will invest solely in liquid securities;
- The New 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 New Fund's market price and its NAV; and
- A close alignment between the market price of Shares and each New 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>3</sup>

### Rule 101 of Regulation M

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<sup>3</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.

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 Units of Shares of the New Funds and that a close alignment between the market price of Shares and the New 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 New Funds as described in the Letter, thus

permitting persons who may be deemed to be participating in a distribution of Shares of the New Funds to bid for or purchase such Shares during their participation in such distribution.<sup>4</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 New Funds and that a close alignment between the market price of Shares and the New 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 New Funds as described in the Letter, thus permitting the New Funds to redeem Shares of the New 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

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<sup>4</sup> Additionally, we confirm the interpretation that a redemption of Creation Units of Shares of the New Funds and the receipt of securities in exchange by a participant in a distribution of Shares of the New 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.

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>5</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 transactions in the Shares of the New Funds as described in the Letter, thus permitting persons who may be deemed to be participating in a distribution of Shares of the New 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 New Funds as described in the Letter, thus permitting the New Funds to redeem Shares of the New 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 New Funds as described in the Letter.

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<sup>5</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 New Funds. This is because it is not possible for the New Funds to accurately project ten days in advance what dividend, if any, would be paid on a particular record date. Further, the Commission finds, based upon the representations of the Requestors in the Letter, that the provision of the notices as described in the Letter would not constitute a manipulative or deceptive device or contrivance comprehended within the purpose of Rule 10b-17.

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 exemptive relief 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. This exemption is based on the facts presented and the representations made in the Letter. Any different facts or representations may require a different response. Persons relying upon this exemption shall discontinue transactions involving the Shares of the New Funds, pending presentation of the facts for the Commission's consideration, in the event that any material change occurs with respect to any of the facts or representations made by the Requestors, and as is the case with all preceding letters, particularly with respect to the close alignment between the market price of Shares and the New Fund's NAV. 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>6</sup>

Jill M. Peterson  
Assistant Secretary

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

