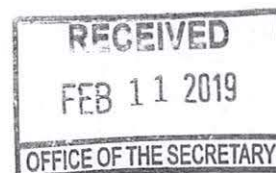


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UNITED STATES OF AMERICA

SECURITIES AND EXCHANGE COMMISSION

| | |
|--|---|
| <p>In the Matter of the Application of ALPINE SECURITIES CORPORATION, a Utah limited liability company For Review of Adverse Action Taken By NATIONAL SECURITIES CLEARING CORPORATION</p> | <p>ALPINE SECURITIES CORPORATION'S APPLICATION FOR CONFIDENTIAL TREATMENT</p> <p>3-18979</p> |
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Alpine Securities Corporation (“Alpine”) submits this Application for Confidential Treatment along with its Reply Memorandum in Support of its Motion for an Interim Stay (“Stay Application”). The National Securities Clearing Corporation’s (“NSCC”) filed an Application for Confidential Treatment along with its Memorandum in Opposition to the Stay Application. The parties met and conferred regarding NSCC’s Application for Confidential Treatment and reached an agreement on the redacted language. Likewise, Alpine’s Reply Memorandum follows the same standards for redaction as applied in NSCC’s Memorandum in Opposition. Alpine’s Reply Memorandum contains non-public information regarding Alpine’s business. As such, non-public information has been redacted from the Reply Memorandum. Alpine will meet

and confer with counsel for the NSCC to discuss the scope of the redactions and address any issues thereto.

Accordingly, pursuant to SEC Rule of Practice 190(a), Alpine is filing its Reply Memorandum under seal.

DATED this 4th day of February 2019.

CLYDE SNOW & SESSIONS

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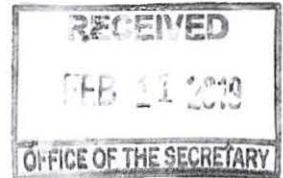
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A handwritten signature in black ink, appearing to be 'Maranda Fritz' in a cursive script.

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UNITED STATES OF AMERICA

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

ALPINE SECURITIES CORPORATION, a
Utah limited liability company

For Review of Adverse Action Taken By

NATIONAL SECURITIES CLEARING
CORPORATION

3-18979

**ALPINE'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR AN
INTERIM STAY**

[Oral Argument Requested]

[Subject to Pending Application for Confidential Treatment]

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ARGUMENT

I. ALPINE HAS RAISED SERIOUS LEGAL QUESTIONS AND ESTABLISHED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS PETITION FOR REVIEW

A. The NSCC Has Failed to Articulate an Adequate, Rational Justification for its Imposition of the Oppressive Required Fund Deposit Charges At Issue, Including the Illiquid Charge, Relating to the Transactions of Alpine.

In its motion for a stay, Alpine described a host of margin charges that are imposed by the NSCC in relation to Alpine transactions, oftentimes hundreds of times more than the transaction or position value, and demonstrated that those charges, particularly in the aggregate, violate the Exchange Act because they are unreasonable and onerous, irrational, redundant and not merely anti-competitive and discriminatory, but affirmatively and gratuitously destructive to the microcap market. In response, NSCC attempts to demonstrate that Alpine's Petition will not succeed on the merits by focusing exclusively on matters related to the Illiquid Charge, claiming that the Illiquid Charge is justified by the need to mitigate the risks confronting NSCC in its role as central counter party ("CCP").¹ NSCC's purported rationale for the Illiquid Charge, however, substantially undermines any claim that the Illiquid Charge is even justified, much less essential to NSCC's risk management regime. NSCC's Opposition, as a whole, confirms that Alpine has demonstrated a substantial likelihood of success on the merits, and certainly "raised a serious legal question on the merits" sufficient to warrant a stay.²

¹ NSCC appears to contend that the "substantial likelihood of success" element should be determined from a single component of the Required Fund Deposit, the Illiquid Charge, because that is the component as to which Alpine seeks a stay. However, that singular focus is not appropriate. Alpine's Petition for Review challenges numerous components of the Required Deposit, asserting these charges are irrational and invalid, not only when considered individually, but primarily when NSCC applies them collectively to extract exorbitant and unnecessary margin payments from Alpine. Alpine limited its stay request to the Illiquid Charge because it is, at this point, the most damaging and the least justified of the various charges, and a stay of that charge would allow Alpine to conduct some additional trading and obtain those revenues while this matter is pending. By not even attempting to justify its actions on the other components at issue, NSCC has failed to show it would prevail on Alpine's Petition.

² See, e.g., *Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *6 (Nov. 27, 2017) (stating that a movant need not necessarily establish that it is likely to succeed on the merits if it raises a "serious legal question on the merits" and the other factors weigh heavily in its favor. Here, as demonstrated below, the irreparable harm, lack of prejudice to NSCC, and public interest clearly weigh in favor of a stay.

1. NSCC Failed to Demonstrate That There is Any Statistically Significant Risk that It Will Be Unable to Access Stock at DTC to Close Net Sell Positions.

According to the NSCC, the Illiquid Charge (*and* the Volatility Charge) are necessary to mitigate the following risk: that Alpine could enter into certain sell transactions on behalf of a client, in relation to stock that it holds at DTC, and communicate that trade through CNS on day 1; that on day 2 some event could occur that would interrupt the operations of Alpine; that at the exact same time, something would occur that would prevent DTC from delivering the stock to NSCC on the pending trade; that NSCC, rather than taking appropriate steps to arrange to obtain the stock from DTC, would then go into the market to buy that same stock to cover the delivery obligation; *and* that the price of the stock in the meantime could have “skyrocketed” causing the NSCC to incur costs at exponential multiples of the transaction price. Opp. at 7. The flaws in that rationale are abundant and apparent.

First, it should be noted that not even the NSCC actually asserts that it has ever or would ever be unable to access stock held at DTC. Its Opposition speaks only in terms of a hypothetical possibility that, in the event of Alpine’s default or insolvency, NSCC “could” or “may” be unable to access the stock.³ Such a speculative “may” or “might” possibility, put forth to justify a demand for Illiquid Charge margin payments that alone frequently exceed \$ 1 million per day, fails to satisfy the Exchange Act requirement that NSCC demonstrate that “the *specific grounds* on which [NSCC] based its action *exist in fact*.”⁴

Second, NSCC has failed to offer any support for the notion that there is any statistically significant risk that it would not be able to access stock held at DTC to deliver to the buyer. Contrary to the NSCC’s assertions, DTC’s obligations to deliver securities it holds in a member’s account to NSCC to close out a selling member’s open position is not interrupted

³ Opp. at 6 (stating that “liquidation could be difficult or delayed” and the share price “could skyrocket” in NSCC is forced to buy in positions”); Opp. at 15 (“in the event of an enforcement or insolvency proceeding against an NSCC member, NSCC may not be able to obtain access” to the stock at DTC); Opp. at 19 (NSCC “might be required” to pay more than transaction price”). *See also* Cuddihy Dec. at ¶ 30.

⁴ *See, e.g., MFS Sec. Corp.*, Exchange Act Release No. 47626, 2003 WL 1751581, at *4 (Apr. 3, 2003) (emphasis added) (stating that Section 19(f) requires the Commission to set aside an SRO’s action unless the SRO proves, *inter alia*, that the “specific grounds on which the [SRO] based its action exist in fact”); *see also* 15 U.S.C. § 78s(f).

because of a member default or even a bankruptcy. NSCC has arrangements and contracts, including cross-guaranty and netting contracts, designed to “permit transactions to flow smoothly between DTC’s system and the CNS system in a collateralized environment.”⁵ NSCC’s rules confirm that, even where NSCC has “ceased to act” for a member, it can “continue to instruct [DTC] . . . to deliver CNS Securities from such Member’s account at [DTC] to [NSCC’s] account in respect to such Member’s Short Position.”⁶ NSCC confirmed its ability to close contracts, regardless of insolvency or default of a member, in its Disclosure Framework.⁷

The exceptions and safe harbors contained in FDICIA, the Bankruptcy Code, SIPA, FDIA and Title II of Dodd-Frank that support the finality of securities transactions and the closeout of the insolvent Member’s open positions provide NSCC with a high degree of certainty as to the effectiveness of its risk management and default management rules and procedures.⁸

Similarly, DTCC – which of course owns and controls both DTC and NSCC – is obligated to ensure the efficient and smooth workings of the markets and remains able to direct and to ensure appropriate and efficient cooperation as between its subsidiaries in the event of any default event. And that appears to be exactly what has occurred in the past. NSCC dealt with

⁵ National Securities Clearing Corporation, *Disclosure Framework for Covered Clearing Agencies and Financial Market Infrastructures*, at p. 40 (December 2018) (“NSCC Disclosure Framework”); *see also* NSCC’s Rules & Procedures, Rule 11, § 3 (stating, in connection with CNS operation for a selling (delivering) member, that NSCC “will instruct the Qualified Securities Depository [DTC] . . . to deliver to the Corporation’s account at the Qualified Securities Depository on each Settlement Date CNS Securities”). Further, NSCC’s rules confirm that once “securities are delivered” to NSCC pursuant to CNS transactions, NSCC has “all of [the] ownership rights” in the securities. NSCC Rules & Procedures, Rule 11, § 1(e).

⁶ NSCC’s Rules & Procedures, Rule 18, § 5.

⁷ NSCC identified numerous exceptions and safe harbors in the FDICIA, Bankruptcy Code and SIPA that confirm that NSCC’s netting and other agreements with DTC “shall not be stayed, avoided or otherwise limited by any state or federal law.” NSCC Disclosure Framework, at 18 (also stating that Section 404(h) of the FDICIA confirms the enforceability of NSCC’s contracts with DTC, “notwithstanding that a Member is a failed Member,” and that “no stay, injunction, avoidance, moratorium or similar proceeding or order, whether issued or granted by a court, administrative agency, or otherwise, *shall limit or delay* application of otherwise enforceable netting contracts.” (emphasis added)); *see also id.* at 19 and fns. 23 and 24 (describing exceptions and safe harbors in the Bankruptcy Code and SIPA that “support the finality of securities transactions processed through securities clearing agencies and the clearing agency’s closeout of the insolvent member’s open positions,” including exceptions to the automatic stay, and for SIPC members in particular, that confirm the right “to offset or net termination values, payment amounts, or other transfer obligations arising under or in connection with one or more of such contracts or agreements.”). NSCC also confirmed in its Disclosure Framework that “protective decrees often recite many of the stay exceptions and safe harbors found in the Bankruptcy Code and SIPA and also contain additional stay exceptions and safe harbors not contained in the Bankruptcy Code and SIPA, including those designed *to enable clearing agencies to timely effectuate a closeout.*” *Id.* at 19, fn. 24 (emphasis added).

⁸ *Id.* at 20.

the collapse of Lehman Brothers, and that event further undermines the NSCC's assertions here. NSCC experienced no inability to deliver stock held by DTC on pending contracts. DTCC in fact announced on October 30, 2008 that it had "successfully closed out over \$500 billion in market participant's exposure including ensuring that \$1.9 billion in securities held at DTC were "used to satisfy open trades at NSCC." As a result of DTC's release of the securities, "NSCC did not need to go to the marketplace to purchase securities to complete those trades."⁹ In fact, in December of 2018, NSCC confirmed that "[t]o date, including through the 2008 well-publicized broker-dealer closeouts, NSCC has never invoked its membership loss allocation procedures."¹⁰ The clear realities of the operational integration of DTC and NSCC ensure that NSCC will not be deprived of stock held by DTC that is subject to a locked-in pending trade.

In fact, NSCC has acknowledged that its risks arise where a defaulting firm has open positions that are net *buy* positions – not sell positions covered by stock held at DTC – and NSCC would be required to deliver payment to the seller. According to NSCC, it faces "liquidity needs" which "are driven by the requirement to complete *end-of day money settlement*, on an ongoing basis, in the event of a failure of a Member."¹¹ The risk management regime of NSCC, including the various margin charges, are designed and intended to provide "protection" against a buyer defaulting on its payment obligation.¹² The exorbitant margin NSCC is charging Alpine on its sales-side transactions is plainly unsupported by NSCC's avowed need to offset the risk that the *buying member will fail to deliver payment*.¹³

⁹ BusinessWire Release, *DTCC Successfully Closes Out Lehman Brothers Bankruptcy*, dated October 30, 2008.

¹⁰ NSCC Disclosure Framework, at 12.

¹¹ *Id.*, at 65 (emphasis added); *id.* at 66 (stating "long (receive) positions drive the potential liquidity risk that is posed to NSCC, since NSCC would be responsible for the payment of cash required to settle those purchases.").

¹² *Id.* at 79 (stating "collection of risk based margin to NSCC's Clearing fund, maintenance of liquidity resources, and the on-going credit risk monitoring of members" are intended to provide "protection" to the delivering (selling) member against the buyer's default on its payment obligation).

¹³ The absence of any real risk that NSCC can acquire shares from DTC to close out a *selling* member's open position is precisely why NSCC allows selling members to use the DTC Offset to avoid the Illiquid Charge in the first place. When the shares to cover the position are held at DTC, there is no risk that NSCC will have to go into the market to purchase the so-called "Illiquid Shares" in order to fulfill its CCP obligation to the contra-party. Its justification for allowing this Offset to large members but denying it to small members, such as Alpine, on transactions in the same securities based on a self-assigned "credit" rating is both discriminatory and specious.

Third, the irrationality and redundancy of the Illiquid Charge is, to an extent, admitted by NSCC. It states that the Volatility Charge is intended to capture the risk associated with price volatility to a 99% level of confidence. (Opp., at 5, n. 15.) But NSCC cites as the basis for the Illiquid Charge the exact same risk of *stock price volatility* – a risk plainly addressed by the Volatility Charge. NSCC even admits it is in the process of eliminating the Illiquid Charge, in favor of the Volatility Charge, once it “tweaks” the calculation of that charge.¹⁴ Given its own admission that the two charges are duplicative, NSCC cannot claim any significant risk or hardship if the Illiquid Charge is stayed pending a resolution of Alpine’s Petition.

Once NSCC’s risk-based justification for the Illiquid Charge is properly exposed as illusory, it is further evident that the imposition of this enormous charge, particularly in combination with the Volatility and other charges, is unsupported by any adequate justification and is contrary to the provisions of the Exchange Act. The Illiquid Charge is itself baseless, and is being arbitrarily and discriminatorily applied to Alpine as a tax on OTC securities based, apparently, [REDACTED]. Further, because the NSCC charges severely limit the number of transactions that Alpine can process per day for its customers, those charges impermissibly and unnecessarily burden competition between the national exchanges and the OTC market, and between Alpine and larger NSCC members who can avoid the charge altogether through the DTC Offset.¹⁵

2. NSCC Has Failed to Offer any Justification for its Refusal to Permit the DTC Offset Only Where NSCC Has Assigned a Credit Rating of 7

NSCC is refusing to permit use of the DTC offset, and so imposing that Illiquid Charge on Alpine, based on its assignment to Alpine of its lowest credit rating, a 7. That credit rating, according to the NSCC, is based on a host of factors that are input into a model which then generates the credit rating. But, in Alpine’s case, [REDACTED] based on [REDACTED]

¹⁴ Cuddihy Decl., at ¶¶ 20-21.

¹⁵ Alpine refers the Commission to its Petition for Rulemaking, at pp. 19-26, attached as Ex. B to Alpine’s Petition for Review, for a detailed discussion of the Exchange Act provisions, and SEC Rules, violated by NSCC’s practices.

“subjective criteria.” Cuddihy Decl., at ¶19. NSCC provided no evidence or adequate explanation [REDACTED]

[REDACTED]

[REDACTED] The NSCC does not even attempt to explain that discrepancy or the arbitrariness of its actions.

At a more fundamental level, NSCC offers no rational explanation for its decision to refuse to permit the DTC offset to be applied to firms to which it has assigned the lowest credit rating. It has put forth no basis on which to distinguish a credit rating of 6 from a credit rating of 7; in fact, it has applied both to Alpine during the past year. It has failed to offer any support for the view that a credit rating of 6 somehow materially alters the risk posed by transactions in Illiquid Securities. To the contrary, larger better capitalized firms may have substantially larger positions in illiquid stocks and so the risk posed by the need to cover a position with a “skyrocketing” stock price would be far greater. NSCC’s practices with respect to formulation and application of the CRRM are thus also woefully deficient.

3. NSCC Has Failed to Offer Any Justification for the Completely Arbitrary Practice of “Rounding Up” Share Price

NSCC acknowledges – but does not even attempt to justify the fact – that when calculating the Illiquid Charge, it “rounds up the price of the security to \$0.01.” According to

[REDACTED]

the NSCC, there are sophisticated formulae used to calculate the Illiquid Charge on a net sell position of a stock that has a market price of less than \$1.00.¹⁷ All of those calculations are abandoned, however, when the stock price is less than \$0.01. For no articulated reason, the NSCC substitutes the minimum share price of \$0.01.

That substitution of a fictional share price is unexplained, unjustified and enormously impactful. The NSCC does not, and hopefully could not claim that its system is incapable of running calculations at the actual share price, nor does it argue that the alteration of the share price serves any particular risk management purpose. It simply arbitrarily and discriminatorily penalizes a firm and its customers in any transaction involving sale of a stock that is priced below \$0.01, exponentially increasing the margin charges on those positions. The resulting charges thus do not conform to the Exchange Act's requirements of reasonableness, prohibitions on discrimination, or mandate to preserve competition between firms and markets.

B. Alpine's Petition for Review is Not Procedurally Infirm.

In its effort to avoid scrutiny of the overlapping, arbitrary and redundant components of the Required Deposit, NSCC contends that there are procedural barriers that deprive the Commission of the power to review NSCC's imposition of these charges. Each of NSCC's procedural arguments lacks merit.

1. NSCC Limited Alpine's Access to NSCC's Essential Clearing and Settlement Services by Imposing Onerous and Discriminatory Margin Charges.

NSCC does not contest that its CNS clearance and settlement services are "fundamentally important" services and "central to the function" of NSCC.¹⁸ In fact, it has been granted virtually monopolistic control of settlement of trades. NSCC also does not contest that Alpine is required to post the Required Deposit – including, *inter alia*, the Illiquid Charge, Mark to Market

¹⁷ Under that formula, NSCC multiplies the volume of shares by the greater of the highest price over 20 trading days (Order at 7) or a factor set by NSCC; where the market price is less than \$0.10, that factor is 10.

¹⁸ See, e.g., *In re Application of Securities Industry and Financial Markets Association for Review of Action by Self Regulatory Organizations ("In re SIFMA")*, SEC Release No. 72182, 2014 WL 1998525, at *9 (May 16, 2014) (explaining that a denial or limitation of access subject to review under Section 19 must go to "the applicant's ability to utilize one of the fundamentally important services offered by the SRO").

Charges, Volatility Charges – which is calculated and assessed by NSCC on a daily basis, in order to access NSCC’s CNS clearing and settlement services.

Nevertheless, NSCC claims the “Illiquid Charge” cannot be “a prohibition or limitation on access to services as contemplated by Section 19(d)” because it is not a “fee” but “a component of the service itself.” (NSCC Opp., at 11.) That claim is nonsensical semantics, and unsupported by any authority. The Required Deposit serves precisely to limit and proscribe access to essential “services,” i.e, NSCC’s CNS clearance and settlement services. NSCC has formulated and imposes charges that Alpine must post if it wants to access NSCC’s clearance and settlement services for its own business and for its customers. Indeed, under NSCC’s rationale, NSCC could require Alpine to post any amount – for example, a billion dollars in margin to clear a thousand dollars in trades – and it could never be a limitation on access under Section 19. While an extreme example, this is a logical extension of NSCC’s position, and is not what Congress intended in by protecting SRO access rights in Section 19.

As Alpine has alleged in its Petition, and supported by declaration, these charges, particularly in the aggregate, are wildly excessive in comparison to the underlying transactions or positions to be cleared and settled through NSCC, have not been shown to correspond to any actual risk, and artificially restrict the number of trades that Alpine can process every day. Further, NSCC has confirmed that Alpine provides clearing for the majority of all microcap stock in the country and so these excessive microcap margin charges also impermissibly restrict the entire microcap market’s – issuers and traders – ability to access services at NSCC that are necessary to trade.¹⁹ These factors are more than sufficient to demonstrate a limitation on access

¹⁹ Both Sections 19 and 17A of the Exchange Act also protect nonmembers’ indirect rights to access a registered clearing agency’s essential services, with Section 19 providing for Commission review of such denials or limitations of access. *See* 15 U.S.C. § 78q-1(b)(6) (prohibiting a registered clearing agency from prohibiting or limiting access by any person to services offered by one of its participants); 15 U.S.C. § 78s(d)(1) (creating a right to Commission review of any SRO action that “prohibits or limits any person in respect to access to services offered by such organization [SRO] or member thereof.” (emphasis added); *cf. also In re International Power Group, Ltd.*, SEC Release No. 66611, 2012 WL 892229 at ** 4, 6 (March 15, 2012) (holding that an issuer, though not a member of DTC, was entitled to protection under Sections 19(d) and (f) against a limitation on access to services at DTC “even if those services are not provided directly to the issuer,” because Congress provided protection to “‘any person’ . . . ‘with respect to access to services’” in Section 19(f)).

subject to review under Section 19.²⁰

In this regard, the Required Deposit functions like the fees found to be an impermissible limitation on access in *in re SIFMA* because, in both cases, the SRO conditioned access to its services on the outlay of money.²¹ Moreover, contrary to NSCC's insinuation that only a requirement to pay a "fee" could be a restriction on access, the Commission has never interpreted the phrase "limitation of access" so restrictively. For example, in *Bloomberg, L.P.*, the Commission held that NYSE's "imposition and enforcement of" certain restrictions relating to the dissemination of depth-of-book data "effected a denial of access to Bloomberg" of services because NYSE "would not provide Bloomberg access to [that] data unless it disseminated and continue[d] to disseminate" it in accordance with the restrictions.²² Similarly, the Commission exercised jurisdiction to institute "denial of access" proceedings under Sections 19(d) and (f) to review the NYSE's denial of a member's request to install an unrestricted phone line on the floor of the Exchange to contact customers.²³ Certainly the excessive margin charges imposed by NSCC as a condition of clearing a trade likewise constitute a denial or limitation of access.

NSCC also puts forth the circular and baseless argument that if the "Required Fund Deposit were a prohibition or limitation on access," it would be required to file a notice before imposing the charge, and because it does not file a notice, it cannot be a prohibition or limitation on access. The Commission has repeatedly confirmed that "the failure of an SRO to file the required notice does not prevent Commission review." The Commission can review any action as to which the SRO was obligated to file notice, regardless of whether it complied with that

²⁰ See *In re Int'l Power*, 2012 WL 892229 at *4 (stating, "loss of or increased costs of doing business, or difficulties in fulfilling market-making obligations" were "negative impacts" on a "Broker-Dealer Participant" that "could be remedied by challenging DTC's denial of the Participant's access to services").

²¹ See *In re SIFMA*, 2014 WL 1998525, at *8 and n. 76 (holding that SIFMA members could establish an "actual limitation on access" by submitting declarations that they "purchase the depth-of-book products and explaining that those members are aggrieved because the level of the prices charged for those products is so high as to be outside a reasonable range of fees under the Exchange Act," or, alternatively, "showing that they were unable to purchase depth-of-book products due to alleged supracompetitive pricing violating the Exchange Act").

²² See *In re Bloomberg, L.P.*, Release No. 49076, 2004 WL 67566 at *2 (Jan. 14, 2004).

²³ *Notice of Application of William Higgins*, 51 Fed.Reg. 6186-04, 1986 WL 89969 (Feb. 20, 1986).

obligation.²⁴ If anything, NSCC's failure to file the required notices serves to further undermine its argument that Alpine's Petition is untimely.

2. Commission Review Under Section 19(d) and 19(f) is Not Limited to SRO Rules Adopted Under Section 19(b)(3).

NSCC next argues that review under Section 19(d) is only available for an SRO rule adopted under Section 19(b)(3) (an immediately effective rule) but not for a rule approved under Section 19(b)(2). This assertion finds no support in the statutory scheme of Section 19 and, not surprisingly, NSCC cited no statutory or decisional authority to support its position.

Not one provision in Section 19(d) or 19(f) purports to condition the right to review upon the manner in which the SRO rule is proposed or approved under Section 19(b). *See* 15 U.S.C. §§ 78s(d), (f). To the contrary, the statutes make clear that the right to review is triggered by the type of action taken by the SRO, irrespective of how or when a rule is passed, i.e. a disciplinary sanction, a denial of membership, or, relevant here, SRO action that "prohibits or limits any person in respect to access to services offered by such organization or member thereof." *See id.* § 19(d)(1), (d)(2), (f). In fact, NSCC completely ignores that Section 19(f) requires the Commission to set aside an SRO action that limits access *unless* the Commission finds, *inter alia*, that the "prohibition or limitation is in accordance with the rules of the self-regulatory organization, *and that such rules* are, and *were applied in a manner*, consistent with the purposes of this chapter," and do not impose an undue "burden on competition." 15 U.S.C. § 78s(f) (emphasis added). By requiring the Commission to find that NSCC "applied" its rules in a manner consistent with the Exchange Act in effecting a limitation on access, and to separately weigh the limitation's effect on competition, Congress plainly made the manner in which those

²⁴ *MFS Sec. Corp.*, Exchange Act Release No. 47626, 2003 WL 1751581, at *6 n.13 (Apr. 3, 2003) ("[T]he failure of an SRO to file the required notice does not prevent Commission review" because "Section 19(d)(2) grants the Commission the authority to review any SRO action 'with respect to which a self-regulatory organization is required ... to file notice..., **whether or not such notice is filed.**' (emphasis added); *In re Higgins*, 51 Fed.Reg. at 6188, 1986 WL 89969 (same); *In re SIFMA*, 2014 WL 1998525, at *10 (rejecting SRO argument that review is not appropriate where SRO does not know whether to "provide notice to the Commission pursuant to Exchange Act Section 19(d)(1) that the fee constitutes a prohibition or limitation on access to services," because "such uncertainty and potential failure to file do not determine whether an application under Section 19(d) is valid, since we have held that 'the failure of an SRO to file the required notice does not prevent Commission review.'" (citation omitted)).

rules were passed irrelevant. The Commission has confirmed this time and again.²⁵

Rather than cite any actual authority confirming its position, NSCC engages in a convoluted analysis of *In re SIFMA*, arguing that this case limits review to rules passed under Section 19(b)(3). The *SIFMA* case does nothing of the sort. Rather, in that case, the Commission only analyzed the availability of Section 19(d) and (f) review for a rule made pursuant to Section 19(b)(3) in order to reject an argument by the SRO that Dodd-Frank stripped the Commission of jurisdiction to review an immediately effective rule filing.²⁶ The Commission never stated that Section 19(d) and (f) review was limited to rules passed under Section 19(b)(3). Nor could it, given the language of the statute and precedent cited above.

3. Alpine's Petition is Not Untimely.

NSCC argument that Alpine's Petition is untimely should be rejected for two primary reasons. First, the NSCC charges constitute continual action and impose a limitation on Alpine's access to clearing services each and every day. Under Sections 19(d) and (f), the time to seek review of a limitation on access runs from the point at which the limitation occurs, whether the limitation is based on the rule itself or on the SRO's application of the rule.²⁷ In this Petition, Alpine is not seeking review of NSCC's daily imposition of these charges to Alpine as a condition to access NSCC's CNS system, and the Petition cites and complains of particular instances of harm and unlawful limitation of access that have occurred within the relevant time frame.²⁸ That Alpine's petition is timely where it is based on a limitation of access caused by

²⁵ See, e.g., *Higgins*, 51 Fed.Reg. at 6188-89, 1986 WL 89969 (“[S]ection 19(f) provides that an SRO may prohibit access to services offered by an SRO or member thereof only if: (1) The ‘specific grounds’ for such prohibition ‘exist in fact,’ (2) the prohibition ‘is in accordance with the rules of the [SRO],’ (3) those rules ‘**were applied in a manner consistent with the purposes of [the Act].**’ and (4) the **prohibition** does not impose ‘any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].’ **If the prohibition fails to meet any of these standards, the Commission is directed by the Act to ‘set aside’ the SRO action.**” (emphasis added); *In re MFS*, 2003 WL 1751581, at *4 (same).

²⁶ See *In re SIFMA*, 2014 WL 1998525, at *10 (stating *inter alia*, that “we find it compelling that nothing in the Dodd-Frank Act removed jurisdiction under Section 19(d) for challenges to fee rules at the enforcement stage.”).

²⁷ See 15 U.S.C. § 78s(f) (requiring the Commission to find, *inter alia*, the SRO “applied” its rules in manner consistent with the Exchange Act or it must set aside the SRO's actions); see also *id.* § 78(d)(2) (stating the time period runs from the date the SRO provides notice of the limitation of access to the Commission and the aggrieved person; here, Alpine receives daily notices of margin charges from NSCC); see also *fn. 25, supra*.

²⁸ Alpine acknowledges that it could not challenge margin charges imposed more than 30 days before it filed its Petition for Review, and it is not attempting to do so here.

NSCC's application of its rules is supported by both the Exchange Act and the federal authorities cited by Alpine in its Petition (and ignored by NSCC) holding that statutory timelines "do not foreclose subsequent examination of a rule" brought for review of "further . . . action applying it," because rules "are capable of continuing application."²⁹

Second, even if the time to seek review ran from the entry of the orders approving the rules, the Commission has the authority to extend this time period for "extraordinary circumstances."³⁰ Extraordinary circumstances exist here. This Petition raises novel issues; Alpine is aware of no Commission decision analyzing the validity of NSCC's calculation and imposition of the challenged Required Deposit charges as a denial or limitation of access under Sections 19(d) and (f). Further, as detailed in Alpine's Petition for Rulemaking, in approving the NSCC rules underlying the charges at issue, the Division of Market Regulation conducted no *analysis* of the economic, competitive or discriminatory impacts of those charges.³¹ For example, NSCC gave no rationale at all in its Form 19b-4 for making the DTC Offset unavailable to certain members.³² Nor did the Form 19b-4s reveal the sheer amount of charges NSCC would impose under these rules or detail the manner in which NSCC could [REDACTED] [REDACTED] to prevent a firm from relying on the DTC Offset. The Division of

²⁹ *N.L.R.B. Union v. F.L.R.A.*, 834 F.3d 191, 196 (D.C. Cir. 1987) (the Court continued: "For unlike ordinary adjudicative orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity."); *see also Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145-46 (D.C. Cir. 2014) (observing that, where "Congress imposes of statute of limitations on challenges to regulations . . . those affected may challenge that application on the grounds that it 'conflicts with the statute from which its authority derives.'" (citation omitted)); *accord Commonwealth Edison Co. v. U.S. Nuclear Regulatory Comm'n*, 830 F.2d 610, 614-16 (7th Cir. 1987); *Murphy Exploration & Prod. Co. v. Dep't of Interior*, 270 F.3d 957, 958-59 (D.C.Cir.2001); *Geller v. FCC*, 610 F.2d 973, 978 (D.C.Cir.1979).

³⁰ *See* 17 C.F.R. § 201.420(b); *see also in re SIFMA*, 2014 WL 1998525, at *11 and fn. 104.

³¹ *See* Alpine's Petition for Rulemaking, pp. 26-28, attached as Ex. B to Alpine's Petition for Review.

³² The Opposition NSCC filed to Alpine's Motion to Stay is the first time NSCC has attempted to justify its practice of making the DTC Offset unavailable to members (like Alpine) with a CRRM rating of "7." This cannot be understated: NSCC had to submit a declaration outside of the administrative record to try to invent a justification for the practice. Not only is NSCC's justification – that it may not be able to access Alpine's shares at DTC in the event of a default – spurious for the reasons stated above, but by straying from the record NSCC has confirmed the need for the Commission to review NSCC's actions in this regard, and to stay NSCC's practice with respect to the DTC Offset while that review proceeds. As it stands, no one at the SEC has ever analyzed whether the "specific grounds on which the [NSCC] based its action exist in fact." *In re MFS*, 2003 WL 1751581, at *4 (citing 15 U.S.C. §78s(f)).

Market Regulation therefore had no opportunity to consider critical components of the rule or evaluate the real impact of NSCC charges.

The demonstrable impact of NSCC's charges also warrants Commission review. The ongoing charges being applied by NSCC threaten not only to destroy Alpine's business, but also to choke the entire microcap market. NSCC's Opposition confirms that Alpine is a keystone of the microcap market – depositing 61% of all sub-penny stocks at DTC in 2017. Any limitation that restricts trading at Alpine restricts the entire microcap market. The sheer magnitude of the margin charges has already significantly reduced trading of microcap stocks through Alpine, to the point where its liquidation business is down 75%. *See Brant Decl.*, at ¶¶ 33-42. If this trend continues, if Alpine were to in fact fail because of the unnecessarily excessive margin charges, it would be catastrophic to the microcap market. Given these extraordinary circumstances, the Commission should review these issues, regardless of when the Petition was filed.

II. A STAY IS NECESSARY TO AVOID IRREPARABLE HARM TO ALPINE AND THE MICROCAP INDUSTRY AND WILL PROMOTE PUBLIC INTEREST BY STRENGTHENING THE MICROCAP MARKET

Alpine's Petition for Review demonstrated both the enormity of the margin charges and the devastating impact they are having on its business. Indeed, the chart attached to Mr. Cuddihy's declaration demonstrates how substantial the margin charges have become, with the Illiquid Charges alone generally exceeding \$1 million per day since April of 2018. The irreparable harm to Alpine from these charges is manifest, and frankly undisputed.

Alpine recognizes that the issues raised in its Petition are complex and that a thorough review by the Commission will take time. Alpine thus sought an interim stay of only the Illiquid Charge, and has even offered to settle for the lesser alternative of a stay limited to NSCC's refusal to allow Alpine to utilize the DTC Offset, which would allow Alpine to avoid the Illiquid Charge because Alpine nearly always has sufficient shares at DTC to cover its positions.³³

Alpine seeks the same right enjoyed by nearly every other NSCC member on transactions

³³ *Brant Decl.*, at ¶¶ 11-13, 21, 23, 28-29, 41. The chart attached to Mr. Cuddihy's declaration proves this as well. When NSCC, for undisclosed reasons, moved Alpine to a CRRM rating of 6 in July 2018, the chart shows that Alpine was able to avoid the Illiquid Charge. *See Ex. 1 to the Cuddihy Decl.*

involving the same securities, and a right that even the NSCC afforded to Alpine during 2018 when it increased its credit rating to a 6. A temporary reprieve from the Illiquid Charge will prevent further and irreparable harm to Alpine and to the microcap market. Conversely, the relief sought poses no actual prejudice or risk to NSCC. This is evident not only because NSCC truly is protected through the DTC Offset, but also NSCC is in the process of eliminating the Illiquid Charge and agrees that it in large part duplicates the Volatility Charge.

Remarkably, NSCC claims Alpine's request for a stay should be denied because financial harm is not irreparable harm. NSCC misstates the issue. This is not a matter of mere "financial detriment." Alpine has provided testimony that its survival is on the line; the Illiquid Charge itself is astronomical and threatens to destroy Alpine's business.³⁴ That is, unquestionably, irreparable harm. As the Commission has previously held, "the destruction of a business, absent a stay, is more than just 'mere' economic injury, and rises to the level of irreparable injury."³⁵

The interests of, and continuing harm to, the issuers and customers in the microcap market that Alpine services must also be considered. As Congress stated: "it is in the public interest to assure . . . fair competition among brokers and dealers, *among markets and between exchange markets and over-the-counter markets.*"³⁶ NSCC has confirmed Alpine's critical significance to the effective functioning of this market (61% of all sub-penny microcap stock at DTC), and validated Alpine's concerns regarding both the burdens on competition and discriminatory impact from the margin charges. Given Alpine's role in this market, the public interest is best served by avoiding further and irreparable harm to Alpine.

³⁴ This is not a matter, as NSCC flippantly asserts, of [REDACTED]. The capital constraints that prevent Alpine from increasing its business and its profitability are caused by the excessive amounts of capital Alpine must devote to pay the unnecessary margin charges to clear trades, including the approximately \$1 million per day in Illiquid Charges *that Alpine should be able to avoid through the DTC Offset.*

³⁵ See, e.g., *Scattered Corp.*, 52 S.E.C. 1314, 1997 SEC LEXIS 2748, at *15 (Apr. 28, 1997); see also *Wash. Metro. Area Transit Comm'n*, 559 F.2d at 843 (stating that the destruction of a business constituted "irreparable injury" for purposes of stay of permanent injunction). The Commission granted a stay of the FINRA decision against John Hurry based, in part, on this same rationale. *In re Scottsdale Capital Advisors, John J. Hurry, et al.*, SEC Release No. 83783, at 5 (August 6, 2018).

³⁶ S. Rep. 94-75, 1975 U.S.C.C.A.N 179, at p. 8 (emphasis added).

III. IN THE ALTERNATIVE, NSCC'S OPPOSITION DEMONSTRATES THE NEED FOR EXPEDITED DISCOVERY.

NSCC's assertion that Alpine has failed to establish its entitlement to a stay is predicated almost entirely on a series of factual assertions, discussed above, that are not borne out by its presentation and that would need to be considered and resolved in connection with the consideration of Alpine's motion. Most critically, NSCC relies almost entirely on the claim that the enormous charges imposed in relation to a sale of stock are justified by the risk that it would be unable to access stock held at DTC. Striking, though, is that NSCC has provided no support for that assertion, and its claim appears to be contrary to both historical experience and pertinent regulations. In the event that the SEC is considering denial of Alpine's request for a stay on the present record, Alpine asks that the SEC direct expedited discovery as to the NSCC's basis for the claim, so that the claim can be evaluated.

The same issue arises in relation to NSCC's acknowledgement of the selective treatment of Alpine, and its claim that its manipulation of Alpine's CRRM rating is somehow justified. Those assertions are made by NSCC without any of the necessary information regarding its model generated rating; [REDACTED]; the NSCC's increase and then the decrease of Alpine's credit rating in 2018, and whether Alpine is the only firm prevented from relying on the DTC Offset. Further, the purported issues regarding Alpine's relationship with its settling bank are disputed and also warrant discovery. The SEC cannot evaluate whether the actions of NSCC were rational without further information concerning its process and the seemingly arbitrary fluctuation of the credit rating and so should direct expedited discovery as to these narrow but critical issues.

CONCLUSION

For the foregoing reasons, Alpine's Motion to Stay should be granted.

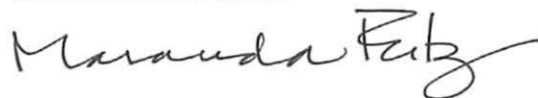
DATED this 4th day of February, 2019.

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ATTORNEY CERTIFICATION

Pursuant to Rule 154(c) of the Commission's Rules of Practice, I hereby certify that the foregoing document contains 6,997 words, exclusive of the tables of contents and authorities.

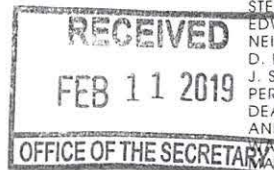


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Via U.S. Certified Mail

February 4, 2019

The Office of the Secretary
Attn: Brent J. Fields, Director
U.S. Securities and Exchange Commission
100 F. Street NE
Washington, D.C. 20549

3-18979

Re: In the Matter of Alpine Securities Corporation

Dear Mr. Fields:

Please find enclosed the following for the above-entitled matter on behalf of Alpine Securities Corporation: (1) Reply Memorandum in Support of Alpine Securities Corporation's Motion for an Interim Stay, and (2) Application for Confidential Treatment.

Sincerely,

CLYDE SNOW & SESSIONS

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Aaron D. Lebenta

THOMPSON HINE

Maranda Fritz