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**UNITED STATES OF AMERICA**

**SECURITIES AND EXCHANGE COMMISSION**

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| In the Matter of the Application of<br><br>ALPINE SECURITIES CORPORATION, a Utah limited liability company<br><br>For Review of Adverse Action Taken By<br><br>NATIONAL SECURITIES CLEARING CORPORATION | **PETITIONER'S BRIEF REGARDING THE TIMELINESS OF ALPINE'S APPLICATION FOR REVIEW AND COMMISSION JURISDICTION**<br><br>Admin. Proc. File No. 3-18979 |

Petitioner Alpine Securities Corporation ("Alpine"), though counsel of record, submits this Brief Regarding the Timeliness of Alpine's Application for Review of adverse action taken by the National Securities Clearing Corporation ("NSCC") and the jurisdiction of the Securities and Exchange Commission ("Commission") to consider that application.

## BACKGROUND AND INTRODUCTION[1]

On December 19, 2018, Alpine filed an Application for Review ("Application") with the Commission pursuant to Section 19(d) and (f) of Securities Exchange Act of 1934 (the "Exchange Act"), of NSCC's imposition of certain regulations and "Required Deposit" charges, which are being applied against Alpine improperly to deny and limit Alpine's access to services at NSCC.[2] Alpine also filed a Motion for Interim Stay of NSCC's application of the Illiquid Charge and refusal to allow Alpine to utilize the "DTC Offset" on December 19, 2018. Both Alpine's Application for Review and Motion to Stay were predicated the application and the impact of Required Deposit charges imposed by NSCC on Alpine within 30 days of December 19, 2018. *See* Application for Review, at 2 n. 11 and Ex. A thereto; *see also* Ex. A to the Motion for Stay.

On November 22, 2019, the Commission issued an order denying Alpine's Motion for Stay. *See* Order Denying Stay and Denying Motion for Protective Order. In that Order, the Commission did not address the merits of Alpine's Application for review. *Id.* at 9-15. Instead, Commission denied the Motion to Stay on the basis that Alpine had failed to demonstrate that it

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[1] Alpine provided a detailed background discussion of Alpine, NSCC, and the Required Deposit charges at issue in connection with its Application for Review and the Rulemaking Petition, attached as Exhibit B to the Application, and in connection with its Motion for Interim Stay, both of which were filed on December 19, 2018. In the interests of efficiency, Alpine will not repeat that discussion here, except as necessary to address the issues on which the Commission ordered further briefing in its November 22, 2019 Order Denying Stay and Denying Motion for Protective Order. In light of the November 22, 2019 Order, Alpine also assumes the Commission's familiarity with the terms used herein and the components of the Required Deposits at issue.

[2] These components include: (1) NSCC's imposition of "Illiquid Charges," including its decision to eliminate the Depository Trust Company ("DTC") inventory offset for members that NSCC claims have weak credit ratings; (2) NSCC's implementation of a secret "Credit Risk Matrix" or "CRRM Rating," which NSCC uses to determine whether to impose an Illiquid Charge, including whether the member qualifies for a DTC inventory offset; (3) NSCC's imposition of "Excess Net Capital Premium" ("ENCP"); (4) NSCC's calculation of the volatility charge for OTC and microcap stocks ("OTC Volatility Charge"), particularly as applied to sub-penny stocks; (5) OTC's calculation of mark-to-market charge for sub-penny microcap and OTC stocks ("OTC Mark-to-Market Charge"). These components are set forth in NSCC's Rules and Procedures, at Rules 1 (defining Illiquid Charge and CRRM). *and* 4 (discussing Required Deposit), and Procedure XV, at §§ 1(A)(1)(a)(ii) (volatility/haircut), (b) *and* (c) (mark-to-market), (h) (Illiquid Charge), and 1(B)(2) (ENCP).

is likely to prevail on the merits of its Application for the reason that Alpine failed to demonstrate that its Application was timely filed. *See id.* at 10. The Commission then directed the parties to file briefs "addressing whether Alpine timely filed its application for review and, if so, whether the Commission has jurisdiction over it." *Id.* at 21.

As demonstrated below, clear and consistent authority, including decisions of the Court of Appeals of the District of Columbia, confirm that Alpine's Application was timely filed. Under the applicable provisions of the Exchange Act, the Commission is authorized and directed to review challenges associated *not only* with the passage of a rule but also with the application of the rule, and a challenge to a rule's application can be made within 30 days of that application, regardless of whether a similar application of the rule had occurred previously. Here, the NSCC presently calculates and imposes the onerous and irrational Required Deposit charges at issue on Alpine on a daily basis, drastically limiting the number of transaction Alpine can process through NSCC's CNS system every day. These rules are, therefore, capable of "continuing application," and NSCC's evolving and continuing application of the rules has resulted in a denial and limitation of service that unquestionably occurred within 30 days of the date Alpine filed its application. Alpine does not, in this Application, seek review of, or compensation for, any limitations on access caused by NSCC's imposition of the Required Deposit charges more than 30 days before it filed its Application. Neither the fact that NSCC imposed these charges on Alpine in the past nor that NSCC has continued to impose similarly calculated Required Deposit charges on Alpine after the Application was filed deprives Alpine of the ability to obtain review of the NSCC's invalid application of the rules and the substantial injury to Alpine.

The fact that the NSCC originally proposed, and the SEC approved, the rules underlying the Required Deposit components at issue outside of the 30-day window does not render

Alpine's Application untimely. Alpine does not challenge those rules based on their issuance or on procedural grounds; in fact, Alpine could not have done so because the eventual impact of the combination of the rules at issue was not apparent at the time of their passage. The denial and limitation of critical services that is the subject of Alpine's application is a product of NSCC's use of undisclosed practices and interpretations of a combination of its rules that developed literally over years. Over time, through its accumulation and application of arbitrary and irrational interpretations of its rules, NSCC accomplished the denial and limitation of service, including applications of the rule that occurred in the period immediately prior to Alpine's application. Because Alpine then timely filed its application, the Commission is statutorily required to set aside NSCC's "action[s]" unless it finds, *inter alia,* both that the *limitation on access* is "in accordance with the rules" of NSCC *and, separately,* that NSCC "applied" its rules in a manner consistent with the purposes" of the *Exchange Act* in effecting the limitation on access. *See* 15 U.S.C. § 78s(f). Thus, Congress specifically gave the Commission both jurisdiction and an obligation to review any NSCC action that limits or prohibits access to NSCC's essential services regardless of when the underlying rule was passed.

## ARGUMENT

### I. The Commission has Jurisdiction Under Section 19(d) and (f) to Review Denials or Limitations on Access to Services by an SRO.

Pursuant to Section 19(d) of the Exchange Act, the Commission has jurisdiction to review, among other things, action by an SRO that "prohibits or limits "access to services offered by" the SRO to any person." 15 U.S.C. § 78s(d).[3] Under Section 19(d)(1), "[i]f any

[3] *See also In the Matter of the Application of Sec. Indus. & Fin. Markets Ass'n for Review of Actions Taken by Self-Regulatory Organizations,* Release No. 72182 (May 16, 2014) ("*In re* SIFMA") ("Exchange Act Section 19(d) requires the Commission, upon timely 'application by any person aggrieved,' to review, among other things, action by an SRO that 'prohibits or limits' 'access to services offered by' the SRO to any person.").

[SRO] . . . prohibits or limits any person in respect to access to services offered by such [SRO] or member thereof . . . the [SRO] shall promptly file notice thereof with" the SEC. *Id.* § 78s(d)(1). Under Section 19(d)(2), "[a]ny action with respect to which a [SRO] is required . . . to file notice shall be subject to review by [the SEC] . . . on its own motion, or upon application by any person aggrieved thereby filed within 30 days after the date such notice was filed with [the SEC] and received by such aggrieved person . . . ." *Id.* at § 78s(d)(2). It is, therefore, the date of the aggrieved person's notice of "any action" constituting a denial or limitation of service that governs the timeliness of Alpine's application.

The relevant standard of review is specified in Section 19(f). *See* 15 U.S.C. § 78s(f).[4] "Section 19(f) requires" that an SRO's action denying or limiting access to services "be set aside *unless* (i) the specific grounds on which the challenged action is based exist in fact; (ii) such action was taken in accordance with the rules of the SRO as approved by the Commission (or subject to an exception to such approval); and (iii) such rules are and were applied in a manner that is consistent with the purposes of the Exchange Act." *Bloomberg,* Release No. 49076 at *3 (emphasis added); *accord* 15 U.S.C. § 78s(f). "Section 19(f) further requires that [the Commission] set aside SRO action if it 'imposes any burden on competition not necessary or appropriate in furtherance of the purposes' of the Exchange Act. *Bloomberg,* Release No. 49076 at *3 (quoting 15 U.S.C. § 78s(f)).[5]

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[4] *See also In the Matter of the Application of Bloomberg L. P. for Review of Action Taken by the New York Stock Exch.*, Inc., Release No. 49076 at *3 (Jan. 14, 2004) ("Where action of a self-regulatory organization ("SRO"), such as the Exchange, constitutes a denial of access to services, the action is subject to review under Exchange Act Section 19(f)").

[5] *See also 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**.").

## II. Alpine's Application for Review was Timely Filed.

Under Section 19(d)(2), Alpine's Application for Review from NSCC's denial or limitation on access was required to be filed within 30 days of the date that NSCC provided notice of the Required Deposit charges that effected the denial or limitation on access. 15 U.S.C. § 78s(d)(2). Thus, under Sections 19(d) and (f), the time to seek review of a limitation on access runs from the point at which the notice of the limitation or prohibition occurs. That time period, in many instances, is triggered by the passage of the rule but equally plain is that a damaging and actionable limitation of service can result from the SRO's application of the rule.[6]

Here, the denial or limitation of service is a product of the agency's evolving and present application of its rules, and Alpine complied with the requirement that it file its Application within 30 days of the notification of that agency action. In this Application, Alpine is seeking review of NSCC's daily imposition of these charges to Alpine as a condition to access NSCC's CNS system, and the Application cites and complains of particular instances of harm and unlawful limitation of access that have occurred within the relevant time frame.[7] More specifically, Alpine filed the Application to review the calculation and imposition of specific Required Deposit charges applied to Alpine by NSCC within 30 days of the date Alpine received notice from NSCC, by way of a notice of daily margin charges of these specific Required Deposits, and asked the Commission to set aside these charges and any future Required Deposit charges calculated and imposed by NSCC on Alpine in a similar manner.[8] In fact, pursuant to

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[6] *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.*

[7] *See* Alpine's Application for Review, at 2, and Ex. A thereto ("Brandt Decl., at Brant Decl., at ¶¶ 19, 22, 38 (describing recent charges).

[8] *See id.; see also* Alpine's Application for Review.

Section 19(d)(2), the time period has not even begun to run because NSCC has conceded that it did not provide any such notice *to the SEC* of the improper aggregated application of the Required Deposit charges at issue.[9]

That Alpine's petition is timely, because it is based on a limitation of access caused by NSCC's application of its rules, is supported by both the Exchange Act and federal authorities interpreting analogous statutes imposing time limitations for seeking review. Specifically, 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." *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.*" *Id.* (emphasis added) (quotations and citation omitted). As the D.C. Circuit succinctly stated: "[A] party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule[,] even where the petitioner had notice and opportunity to bring a direct challenge within statutory time limits but failed to do so." *NextWave Pers. Commc'ns, Inc. v. FCC*, 254 F.3d 130, 141 (D.C.Cir.2001).[10]

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[9] *See* Alpine's Opposition to Motion for Interim Stay, at 11. The clear purpose of the requirement to provide notice to the SEC is to enable the SEC to exercise its right to review the SRO action at issue on "its own motion." 15 U.S.C. § 78s(d)(2).

[10] Similarly, in *Oppenheim v. Coleman*, 571 F.2d 660 (D.C.Cir.1978), the court permitted an indirect challenge to a 1946 Civil Service Commission decision brought thirty years later. The commission's 1946 decision had adversely affected Oppenheim's retirement benefits. Oppenheim did not challenge the decision at the time, but in 1974, when he retired, he filed a claim for more benefits and then a suit to overturn the commission's denial of his claim. The District of Columbia Circuit carefully noted that section 2401(a) barred any direct challenge to the commission's 1946 action. See id. at 662. Nonetheless, the court ruled that Oppenheim was not barred from bringing an APA challenge to the commission's current denial of benefits, because Oppenheim's action "seeks to set aside recent arbitrary agency action" (to the extent the 1946 decision was substantively wrong and reliance upon it would be arbitrary) rather than to recover damages from the government for its 1946 decision. *See id. at 663.* The court had in effect permitted a substantive challenge to the earlier decision because it was brought in the context of an adverse application of that decision.

The D.C. Circuit has explained the need and rationale for permitting a challenge to the continuing application of a rule: an aggrieved person plainly *could*, but is not and should not be required to contravene the rule and risk an enforcement action, in order to challenge. For that reason, the plaintiff in *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145–46 (D.C. Cir. 2014), was permitted to challenge *application* of a rule because it was being applied in a manner that conflicted with its statutory origins.

> The government is mistaken in its idea that a person in [petitioner's] position (affected by a rule that he has failed to timely challenge) can draw the validity of the rule in question only as a defense to an enforcement action. Where Congress imposes a statute of limitations on challenges to a regulation, running from a regulation's issuance, facial challenges to the rule or the procedures by which it was promulgated are barred. . . . But when an agency seeks to apply the rule, those affected may challenge that application on the grounds that it "conflicts with the statute from which its authority derives" . . . . Contrary to the government's claim (from which it somewhat retreated in its post-argument letter of December 9, 2013), the sort of "application" that opens a rule to such a challenge is not limited to formal "enforcement actions."

*Id.* at 145-46 (citing authorities).[11] Such a rationale makes sense. Certainly, Alpine could refuse to pay the Required Deposit charges, thereby triggering a disciplinary or other adverse membership action by NSCC, and bring its challenges to the invalidity of those charges as contrary to the purposes and requirements of the Exchange Act in defense to the enforcement action. But, Alpine should not be forced to imperil its business in order to make these challenges, and the law does not require such drastic action.

Other circuits have similarly distinguished the time limit for facial challenges to a regulation or agency action from a challenge to the precise and present application of a rule.

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[11] *Accord P & V Enterprises v. U.S. Army Corps of Engineers*, 516 F.3d 1021, 1026 (D.C. Cir. 2008) (recognizing that even if a "facial challenge" to a rule is "untimely," that "does not immunize the rule from all challenge: If [an agency] applies the rule to [the plaintiff] ..., then [the plaintiff] would be able to challenge the rule notwithstanding that the limitations period has run.") *Koi Nation of N. California v. United States Dep't of Interior*, 361 F. Supp. 3d 14, 38 (D.D.C. 2019) (stating, "the D.C. Circuit has 'frequently said that a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule, including claims that an agency lacked the statutory authority to adopt the rule, even where the petitioner had notice and opportunity to bring a direct challenge within statutory time limits.'" (citations omitted)).

The Ninth Circuit's discussion in *Wind River Mining Corporation v. United States,* 946 F.2d 710 (9th Cir. 1991) is instructive. There, the court observed that "[i]f a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action," or "a policy-based facial challenge to the government's decision," the "challenge must be brought within [the statutory limitations period] of the decision." *Id.* at 715. "If, however, a challenger contests the substance of an agency decision as exceeding constitutional or statutory authority, the challenger may do so later than [the statutory review period] following the decision by filing a complaint for review of the adverse application of the decision to the particular challenger." *Id.* "Such challenges, by their nature, will often require a more 'interested' person than generally will be found in the public at large." *Id. "The government should not be permitted to avoid all challenges to its actions, even if ultra vires, simply because the agency took the action long before anyone discovered the true state of affairs."* *Id.* (emphasis added).[12]

Notably, this "as applied" rationale is entirely consistent with, and supported by, Section 19(f) of the Exchange Act. As indicated, that statute requires the Commission to set aside an SRO action unless it finds that NSCC rules "are and were *applied* in a manner that is consistent with the purposes of the" Exchange Act. 15 U.S.C. § 78s(f) (emphasis added). By separately and affirmatively requiring the Commission to find both that a limitation on access is consistent with NSCC's own rules *and* that NSCC has "applied" its already-passed rules in a manner that is consistent with the Exchange Act, Congress expressly incorporated these principles and imposed a continuing obligation on the Commission. For, a rule can be applied at any time and its application can devolve in ways that were not readily apparent from its issuance, and neither the

[12] *See also Commonwealth Edison Co. v. U.S. Nuclear Regulatory Comm'n,* 830 F.2d 610, 614–16 (7th Cir. 1987)

date nor basis on which the rule was originally approved has any bearing on whether its application in any instance is consistent with the Exchange Act.

Alpine's Application fits easily within these standards. Alpine is not raising a procedural facial challenge to the manner in which NSCC proposed, or the SEC approved, the rules governing the Required Deposit charges at issue. Rather, Alpine has identified a number of Required Deposit charges that NSCC has applied to Alpine under its rules within 30 days of the filing of its Petition. Alpine has also detailed in the many ways in which NSCC's arbitrary and discriminatory application of those rules effects an impermissible denial of an essential service and so contravenes both specific provisions of the Exchange Act *and* SEC regulations.[13] The Application is therefore timely.

Alpine recognizes that the Commission, in denying Alpine's Motion to Stay, addressed and rejected similar, albeit less developed, arguments in the context of the stay motion. *See* Order Denying Motion to Stay at 11-12. However, Alpine respectfully submits that the Commission's analysis of these authorities was incorrect, and runs directly afoul of clear and compelling authority in this and other circuits. For instance, in addressing *Weaver* and other similar authorities that Alpine cited, the Commission ruled that even "assuming that these authorities excuse Alpine's failure to ***participate in rule approval proceedings*** under Exchange Act 19(b), Alpine would still need to file a timely application for review challenging NSCC's rules as prohibitions or limitations on access under Section 19(d)." *Id.* at 12 (emphasis added). But, as detailed above, Alpine did precisely that. It filed a timely application for review of the NSCC's application of the rule. As the D.C. Circuit has clearly and repeatedly held, "a party against whom a rule is applied may, ***at the time of application***, pursue substantive objections to

[13] *See* Alpine's Application for Review, at 2 n. 9 and Ex. B thereto at pp. 19-26; *see also* Alpine's Motion to Stay, at pp. 12-14; Reply Memorandum in Support of Motion to Stay, at pp. 1-8.

the rule[,] ***even where the petitioner had notice and opportunity to bring a direct challenge within statutory time limits*** but failed to do so." *NextWave,* 254 F.3d at 141 (emphasis added). These authorities provide an exception to the statutory limitations to challenge the application of a rule, irrespective of whether the aggrieved party participated in "rule approval proceedings" or had prior notice of the rule.[14]

Similarly, the fact that the NSCC applied the rule to Alpine in the past is not material, let alone decisive. While appearing to acknowledge that a rule may be challenged based on its application, the Commission suggested that a 30 day rule applied also to such a claim, and that Alpine was required to file its application within 30 days of the first instance of the application of the rule. That conclusion is unsupported and untenable. First, Alpine is plainly challenging the application of the rules that occurred in the period leading up to the filing of its Application. Alpine is not challenging those prior applications of the Required Deposit rules beyond the 30 day period, nor is it seeking compensation for the limitations of access caused by those (or any other) applications of NSCC's rules. Rather, it is asking the Commission to undertake its continuing and current obligation to ensure that NSCC's application of its rules, in calculating and imposing the Required Deposit charges at issue after November 19, 2018, is consistent with the Exchange Act. Had the NSCC taken action in a single instance, and only in a time frame more than 30 days prior to Alpine's application, then it would be able to avoid review. And

[14] Indeed, mounting a challenge within 30 days of the entry of the Orders approving the Required Deposit rules at issue would be difficult, if not impossible, because the Rule 19b-4 Forms and adopting releases issued by NSCC did not detail with any level of clarity how NSCC would calculate and apply the charges to the types of transactions processed by Alpine. No examples were provided showing the sheer disproportionate amount of the Illiquid Charge, for example, in comparison to the underlying transaction value, particularly where sub-penny stocks were involved, where NSCC uses a fictional share price of $.01 to calculate the margin. Similarly, NSCC did not provide any clarity as to how it would determine a CRRM rating in the adopting release. It was not until NSCC applied these rules to Alpine that the impact became known. But under the Commission's rationale in the Order Denying the Motion to Stay, Alpine's Application would have been untimely if it was filed even 31 days after the Order approving the rules.

certainly that is often the case with agency action: it occurs at a given time and cannot be challenged once the time for filing lapses. Here, however, NSCC is taking this action, and effecting a denial of services over and over against Alpine, and its determination to continue to engage in that impermissible application of the rule renders its conduct subject to challenge. Alpine is aware of no authority, and the Commission's November 22, 2019 Order cited none, to support the holding that a failure to challenge a past application of a rule precludes a challenge to a new or ongoing applications of the rule.

Thus, for the foregoing reasons, Alpine's Application for Review was timely filed.

## III. Extraordinary Circumstances Justify An Extension of the Time Period.

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."[15] 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.[16] For example, NSCC gave no rationale at all in its Form 19b-4 for making the DTC Offset unavailable to certain members.[17] Nor did the Form 19b-4s reveal the sheer amount of charges NSCC would impose

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

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

[17] 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

under these rules or detail the manner in which NSCC could "manually override" a credit rating to prevent a firm from relying on the DTC Offset. The Division of 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 unduly burden competitive activity and destroy the business, the livelihood of its employees, and the ability of its customers to engage in trading in the microcap market. Given these extraordinary circumstances, the Commission should review these issues, regardless of when the Application was filed

## IV. The Commission has Jurisdiction Over Alpine's Petition.

In the Order Denying the Stay, the Commission directed the parties to address whether Alpine's Application was timely and, if so, "whether the Commission has jurisdiction over it." Order Denying Stay, at 21. As Alpine has demonstrated, the Commission possesses jurisdiction: the Required Deposit charges at issue constitute a denial or limitation of access to NSCC's essential CNS clearing services subject to Commission review. Alpine provided analysis and

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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)).

evidentiary support detailing the amount of the charges, and the manner in which the application of these charges has limited its access to NSCC's services in manner that is inconsistent with the provisions of Section 19(f).[18] As detailed above, where Alpine's Application was timely filed, the Commission has jurisdiction over it pursuant to Sections 19(d) and (f).

## CONCLUSION

For the foregoing reasons, Alpine's Application for Review was timely filed, or any untimeliness should be excused, and the Commission has jurisdiction over it pursuant to Sections 19(d) and (f) of the Exchange Act.

DATED this 17th day of January 2020.

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[18] *See* Application for Review and Exs. A and B thereto; *see also* Motion to Stay, at 10-15; Reply Memorandum in Support of Motion to Stay, at 2-12.

**Administrative Proceeding**
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**SECURITIES AND EXCHANGE COMMISSION**

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| In the Matter of the Application of<br><br>ALPINE SECURITIES CORPORATION, a Utah limited liability company<br><br>For Review of Adverse Action Taken By<br><br>NATIONAL SECURITIES CLEARING CORPORATION | **STATEMENT OF FACSIMILE FILING** |

PLEASE TAKE NOTICE that, pursuant to Rule 152(d) of the Commission's Rules of Practice, the undersigned hereby gives notice that Alpine's Brief on Timeliness and Jurisdiction was filed by means of facsimile transmission to the Office of the Secretary of the Commission at (202) 772-9325, on January 17, 2020.

DATED this 17th day of January 2020.

**CLYDE SNOW & SESSIONS**

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| In the Matter of the Application of<br><br>ALPINE SECURITIES CORPORATION, a Utah limited liability company<br><br>For Review of Adverse Action Taken By<br><br>NATIONAL SECURITIES CLEARING CORPORATION | **CERTIFICATE OF SERVICE** |

AARON D. LEBENTA, HEREBY CERTIFIES PURSUANT to Rule 151(d) of the Commission's Rules of Practice that, on January 17, 2020, he served, along with this Certificate of Service, Alpine's Brief on Timeliness and Jurisdiction, by the following means:

1. By the U.S. Postal Service, by means of certified mail, directed to Brent J. Fields at the Office of the Secretary for the U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

2. By facsimile directed to Brent J. Fields at the Office of the Secretary of the U.S. Securities and Exchange Commission, at 202-772-9325.

3. By the U.S. Postal Service, by means of certified mail, directed to Gregg M. Mashberg, Benjamin J. Catalano, and Brian A. Hooven of Proskauer Rose LLP, at 11 Times Square, New York, NY 10036.

4. By facsimile directed to Gregg M. Mashberg, Benjamin J. Catalano, and Brian A. Hooven of Proskauer Rose LLP, at 212-969-2900.

DATED this 17th day of January 2020.

**CLYDE SNOW & SESSIONS**

Aaron D. Lebenta
Brent R. Baker