

Brent R. Baker  
Aaron D. Lebenta  
**CLYDE SNOW & SESSIONS**  
201 South Main Street, Suite 1300  
Salt Lake City, Utah 84111  
Phone: (801) 322-2516  
Fax: (801) 521-6280  
[brb@clydesnow.com](mailto:brb@clydesnow.com)  
[adl@clydesnow.com](mailto:adl@clydesnow.com)  
*Attorneys for Petitioner*

Maranda E. Fritz  
**THOMPSON HINE**  
335 Madison Avenue, 12th Floor  
New York, New York 10017-4611  
Phone: (212) 344-5680  
Fax: (212) 344-6101  
[Maranda.Fritz@thompsonhine.com](mailto:Maranda.Fritz@thompsonhine.com)

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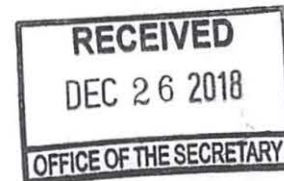
**UNITED STATES OF AMERICA**

**SECURITIES AND EXCHANGE COMMISSION**

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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

3-189179



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**ALPINE'S MOTION FOR AN INTERIM STAY AND INCORPORATED  
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

**[Oral Argument Requested]**

**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

I. INTRODUCTION AND BACKGROUND .....1

    A. Background of NSCC .....1

    B. Background of Alpine .....2

    C. Overview of the Required Deposit and its Effect .....3

    D. Components of the Required Deposit .....4

II. ARGUMENT .....9

    A. A Stay of the Illiquid Charge Should be Granted because there is a Strong Likelihood that Alpine will Prevail on the Merits, Alpine Faces Irreparable Harm Absent a Stay, There is No Prejudice in Entering a Stay to any Other Party, and the Public Interest Favors a Stay.....9

        1. Alpine has a Strong Likelihood of Success on the Merits in its Application for Review .....10

            a. NSCC’s Required Deposit Results in an Actual Limitation on Access ...11

            b. NSCC’s Required Deposit Violates the Exchange Act and the SEC’s Rules and Regulations .....12

            c. NSCC’s Required Deposit Affects Alpine’s Ability to Utilize One of NSCC’s Fundamentally Important Services .....15

        2. Alpine Faces Irreparable Injury if a Stay is not Granted .....15

        3. The Stay will not Result in Harm to Any Other Party .....18

        4. The Public Interest Favors a Stay .....18

    B. In the Alternative, NSCC’s Decision to Not Allow Alpine to Use the DTC Offset should be Stayed .....19

III. CONCLUSION AND RELIEF REQUESTED .....19

## TABLE OF AUTHORITIES

### Cases

<i>In re Application of Securities Industry and Financial Markets Association for Review of Action by Self Regulatory Organizations</i> SEC Release No. 72182, 2014 WL 1998525 (May 16, 2014).....	10, 16
<i>In the Matter of the Application of Michael Earl McCune</i> SEC Release No. 77921, 2016 WL 2997935 (May 25, 2016).....	9
<i>Pet Quarters, Inc. v. Depository Trust and Clearing Corp.</i> , 559 F.3d 772 (8th Cir. 2009).....	1
<i>Scattered Corp.</i> 52 S.E.C. 1314 (Apr. 28, 1997) .....	10, 15
<i>SEC. Indus. Fin. Mkts. Ass'n</i> SEC Release No. 72182, 2014 WL 1998525 (May 16, 2014).....	11

### **Statutes**

15 U.S.C. § 78q-1 .....	12, 14, 16
15 U.S.C. § 78q-(b).....	1
15 U.S.C. § 78s(f) .....	11, 13-16

### **Regulations**

17 C.F. R. § 17Ad-22.....	16
17 C.F.R. § 201.700.....	16
17 C.F.R. § 240.17Ad-22.....	14

### **Rules**

NSCC Rules and Procedures, Rule 1 .....	6, 8, 18
NSCC Rules and Procedures, Rule 2, § 1 .....	3
NSCC Rules and Procedures, Rule 2A, § 1(F) .....	3, 12
NSCC Rules and Procedures, Rule 2B, § 1 .....	3
NSCC Rules and Procedures, Rule 4, § 1 .....	3, 12
NSCC Rules and Procedure XV .....	3, 4-5, 6-7, 9, 15
SEC Release No. 34-82631.....	5
SEC Release No. 34-54457.....	7
SEC Release No. 72182.....	16
NCSS's Form 19b-4, SR-NCSS-2017-001 (March 22, 2017).....	5, 6, 8

Pursuant to Commission Rule of Practice 401, Petitioner Alpine Securities Corporation (“Alpine”), files this motion requesting an interim stay of the implementation and/or assessment by the National Securities Clearing Corporation (“NSCC”) of the “Illiquid Charge” or, alternatively, an interim stay of NSCC’s decision to not allow Alpine to utilize the Depository Trust Company’s (“DTC”) offset in calculating the applicable volume limitations for the Illiquid Charge, until Alpine’s Application for Review is considered and decided.

## **I. INTRODUCTION AND BACKGROUND**

Alpine has filed an Application for Review with the Securities and Exchange Commission (“SEC”), pursuant to Section 19(d) and (f) of Securities Exchange Act of 1934 (the “Exchange Act”), of certain “Required Deposit” charges imposed by NSCC, a registered clearing agency, which are onerous, discriminatory and otherwise inconsistent with the requirements of the Exchange Act, and which result in a denial or limitation of Alpine’s access to services at NSCC. For purposes of this Motion, Alpine is specifically requesting a stay on the NSCC’s imposition of Illiquid Deposit charges. In the alternative, Alpine requests a stay on NSCC’s decision to not allow Alpine to use the DTC offset.

### **A. Background of NSCC**

NSCC is a securities clearing agency registered with the Securities Exchange Commission under Section 17A(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q-(b). NSCC is a wholly owned subsidiary of the Depository Trust Clearing Corporation (“DTCC”), which also owns, *inter alia*, the DTC. NSCC provides centralized clearance and settlement services for its members, and clears and settles nearly all broker-to-broker trades of equity securities in the United States.<sup>1</sup> The NSCC interposes itself as central counterparty to each trade

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<sup>1</sup> See *Pet Quarters, Inc. v. Depository Trust and Clearing Corp.*, 559 F.3d 772, 776-77 (8<sup>th</sup> Cir. 2009) (stating that “NSCC provides centralized clearance, settlement and information services for virtually all securities transactions in the United States.”).

and guarantees both ends of the settlement of a trade – *i.e.*, the delivery obligations of every seller, and the payment obligations of every buyer – in the event of a default of one of the original buyers or sellers. The clearing systems requires integration between NSCC and DTC, such that NSCC’s clearing firm members are DTC participants that hold securities in depository accounts at the DTC. The actual settlement of trades takes place in the NSCC’s Continuous Net Settlement (“CNS”) System – an accounting and settling system for broker-dealer who are members of NSCC (“Clearing Members”).

DTCC’s board is comprised of representatives affiliated with large banking and brokerage firms. For example, the Non-Executive Chairman and Chairman of the Board Executive Committee of DTCC spent nearly 16 years at Citi.<sup>2</sup> Other board members include representatives from UBS, Morgan Stanley, Bank of America, JPMorgan Chase Bank, and TD Ameritrade.<sup>3</sup> There is not a single representative from a small brokerage firm. Without question, such representative interests factor into the policy choices and rules passed by the NSCC.

#### **B. Background of Alpine**

Alpine is a small, self-clearing broker-dealer, registered with the SEC. Alpine’s business primarily involves clearing and settlement services for microcap and over-the-counter (“OTC”) stock transactions for other brokerage firms.<sup>4</sup> Brokers who are not members of the registered clearing agency need the services of a clearing broker in order to clear and settle their own trades or the trades of their customers. A clearing broker provides clearing and settlement services for its correspondent clients (“correspondents” or “clients”), who are generally broker-dealers, and its clients’ non-broker-dealer customers (“customers”), who are the beneficial buyers and sellers of a security.

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<sup>2</sup> See <http://www.dtcc.com/about/leadership/board> (listing biographies of board members).

<sup>3</sup> *Id.*

<sup>4</sup> See Declaration of David Brant, at ¶ 3 (“Brant Decl.”), attached hereto as Ex. A.

To provide clearing and settlement services and function as a clearing firm for its correspondent firms, Alpine must be a member of NSCC and access its services. Alpine is a clearing broker member in good standing of the NSCC and a DTC participant.

### **C. Overview of the Required Deposit and its Effects**

As an ongoing condition to membership, and thus access to NSCC's clearance, settlement and other essential services, NSCC requires members to contribute to a "Clearing Fund," by making "Required Deposits."<sup>5</sup> According to NSCC's Rules and Procedures, the minimum Required Deposit to the Clearing Fund is \$10,000. In practice, however, members are required to deposit far more than the minimum amount. The actual amount of each member's Required Deposit is calculated by NSCC according to a complex and inscrutable formula, consisting of multiple discretionary and subjective components – which seemingly increase in number on a yearly basis – set forth in Procedure XV of NSCC's Rules.<sup>6</sup>

An examination of the components of the Required Deposit, and the manner in which they are actually calculated and applied by NSCC, demonstrates that they result in onerous, inequitable and arbitrary charges that *so far exceed the amount of the underlying transactions* to be cleared and settled that they cannot be credibly justified as necessary to protect NSCC from credit risk. Indeed, the amount of each one of the Illiquid Charge, OTC Volatility Charge or OTC Mark-to-Market Charge (discussed below) *alone* generally exceeds the amount of the underlying transaction by several factors; when assessed together, as they almost always are, Alpine is often required post margin amounts that exceed the underlying transaction value significantly, sometimes by hundreds of times.

These charges, as both designed and applied to microcap or OTC Stocks, impermissibly limit Alpine's access to NSCC's essential clearing and settlement services, and contravene the

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<sup>5</sup> NSCC Rules and Procedures, Rule 2, § 1, Rule 2A, § 1(F), Rule 2B, § 1, Rule 4, § 1.

<sup>6</sup> See NSCC Rules and Procedures, at Rule 4 and Procedure XV.

purposes and requirements of the Exchange Act. They impose an unreasonable and disproportionate burden on small clearing-broker members, such as Alpine, and reflect a discriminatory and anticompetitive policy towards a specific segment of the market – the microcap or OTC market – for which Alpine provides clearing services.

As a direct result of NSCC’s Required Deposit charges, the number of independent or small clearing broker members of NSCC providing clearing services for firms and investors holding microcap or OTC stocks is down significantly. Alpine is aware of only a handful of firms that currently provide clearing services for these types of stocks.<sup>7</sup> Alpine’s liquidation business alone is down approximately 75% due to the capital constraints necessary to fund the Required Deposit.<sup>8</sup> Commission intervention is necessary to prevent NSCC – which is helmed by a “Who’s Who” in major financial institutions – from destroying its small broker-dealer constituents and choking off a significant, lawful segment of the market through the imposition of onerous and unjust factors to calculate and impose the Required Deposit charges.

#### **D. Components of the Required Deposit At Issue**

The formula used to calculate the Required Deposit, set forth in Procedure XV, is itself long (spanning 16 pages), complex and confusing, incorporating numerous discretionary and interwoven components and fact-specific variables. For example, for CNS Transactions alone, NSCC calculates and cumulatively imposes (or has discretion to impose) many separate charges based on a variety of components, including the following components at issue in Alpine’s Petition for Review:

***Volatility Component:*** NSCC calculates and imposes a “volatility” charge purportedly “designed to measure market price volatility” and to “capture market price risk associated with

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<sup>7</sup> Brant Decl., at ¶¶ 34-35, Ex. A.

<sup>8</sup> *Id.* at ¶¶ 33, 40, Ex. A.

each Member's portfolio at a 99<sup>th</sup> percentile level of confidence.”<sup>9</sup> The standard volatility formula is complex, to say the least, but essentially imposes a “Value at Risk” charge that is based on the highest of a “core parametric estimation,” a “gap risk measure,” and “the portfolio margin floor.”<sup>10</sup> NSCC has discretion to impose a different volatility charge for microcap stocks (below \$5/share) or OTC or pink sheet issues (“OTC Volatility Charge”) consisting of a multiple of “the absolute value of such positions [and] a percentage designated by [NSCC], which percentage shall not be less than 10% . . . .”<sup>11</sup>

***Mark-To-Market Component:*** NSCC calculates and imposes a mark-to-market charge generally based on the net of each day's difference between the contract price of the net positions and the current market price for such positions.<sup>12</sup> Thus, this component could result in either a debit or a credit, if applied as written, based upon the direction in which the current market price fluctuates.

***Illiquid Charge Component:*** NSCC calculates and imposes a charge on “Illiquid Positions.” An “Illiquid Position” means “a Net Unsettled Position in an Illiquid Security that exceeds applicable volume thresholds. For net buy positions in an Illiquid Security, the volume thresholds shall be no greater than 100 million shares based on the Member's rating on the Credit Risk Rating Matrix. For net sell positions in an Illiquid Security, the volume threshold shall be no greater than 1 million shares on an absolute value basis, and based on both the Member's excess net capital and the Member's rating on the Credit Risk Rating Matrix.” Additionally, “[i]n determining if the volume threshold is met with respect to a net sell position in Illiquid

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<sup>9</sup> See SEC Release No. 34-82631, File No. SR-NSCC-2017-808, at 6. The volatility charge formula is set forth at Procedure XV, § 1(A)(1)(a)(i), page 287-290 of the NSCC Rules and Procedures.

<sup>10</sup> See SEC Release No. 34-82631, File No. SR-NSCC-2017-808, at 2 (summarizing charges and components).

<sup>11</sup> See NSCC Rules and Procedures, Procedure XV, § 1(A)(1)(a)(ii), at p. 288. NSCC purports to justify the different discretionary charge based on positions in these stocks on the basis that they are “less amenable to statistical analysis.” *Id.* NSCC also sometimes refers to this OTC Volatility Charge as a “haircut margin charge.” See NSCC's Form 19b-4, SR-NSCC-2017-001 (March 22, 2017) (Illiquid Charge), at 4, n. 3, and 5.

<sup>12</sup> See NSCC Rules and Procedures, Procedure XV, § 1(A)(1)(b) and (c), at p. 290.



Securities, [NSCC] shall apply an offset against shares of Illiquid Securities in the Member's inventory at DTC to the quantity of shares in a Member's Illiquid Position. Such offset shall not be applied to (1) net buy positions in Illiquid Securities, or (2) Members that have the weakest rating on the Credit Risk Rating Matrix."<sup>13</sup> The conditional offset is known as the "DTC Offset."

An "Illiquid Security" is defined as "a security . . . that either (i) is not traded on or subject to the rules of a national securities exchange registered under the Securities Exchange Act of 1934, as amended; or (ii) is an OTC Bulletin Board or OTC Link issue."<sup>14</sup> Different calculations apply depending on whether the "Illiquid Position" is net "buy" or "sell" position. For "buy positions in sub-penny Illiquid Securities," the Illiquid Charge is "the aggregate shares in such positions multiplied by \$.01." For "sell positions," if the current market price is "equal to or below \$1.00," the Illiquid Charge is "the product of the aggregate quantity of Illiquid Securities in the position and either (i) the One Month High Price, or (ii) the Current Market Price of the Illiquid Securities in the position multiplied by a factor of between 2 and 10,<sup>15</sup> based on the minimum share price, which shall not be less than \$0.01."<sup>16</sup> Thus, for net-sell positions in sub-penny securities, NSCC imposes a price of \$.01 to calculate the Illiquid Charge, regardless of the actual price of the stock. NSCC will use the *lesser* of the "One Month High Price" and "Current Market Price" if the share quantity in the position is less than 100% and greater than or equal to 25% of the average daily trading volume ("ADV"), and the *greater* of One Month High

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<sup>13</sup> See NSCC Rules and Procedures, Rule 1, at p. 10 (emphasis added).

<sup>14</sup> *Id.*

<sup>15</sup> NSCC appears to have discretion in determining which number to use between 2 and 10 as a multiplier. However, in its Form 19b-4 for the Illiquid Charge, NSCC indicated that "[g]enerally, the factor would be 10 where the market price is less than \$0.10"; 5 where the market price is between \$0.10 and \$0.20; and 2 where the market price is between \$0.20 and \$1.00. See NSCC Form 19b-4 (Illiquid Charge), SR-NSCC-2017-001, at 8 n. 14.

<sup>16</sup> See NSCC Rules and Procedures, Procedure XV, § 1(A)(1)(h), at p. 291. Although not applied as frequently to Alpine because Alpine generally focuses on clearing liquidation transactions with share prices below \$1.00, for Illiquid sell positions with a current market price above \$1.00, NSCC calculates the "Illiquid Charge as the "product of the aggregate quantity of Illiquid Securities in the position and either (i) the One Month High Price, or (ii) the Current Market Price of the Illiquid Securities in the position rounded up to the next \$0.50." *Id.*

Price and Current Market Price if the share quantity in the position is greater than or equal to 100% of the ADV.<sup>17</sup>

***Excess Net Capital Premium Component:*** NSCC calculates and imposes an excess net capital premium (“ENCP”) charge where “a Member’s contribution to the Clearing Fund,” including Illiquid Charges, Volatility Charges, Mark-to-Market Charges, and CNS Fail Charges, “when divided by its excess net capital or capital . . . is greater than 1.0 (the ‘Excess Net Capital Ratio’). In such circumstances, NSCC “may require” the member to deposit an ENCP as part of the Required Deposit that is “equal to the product of (a) the amount by which the Calculated Amount exceeds its excess net capital or capital . . . multiplied by (b) its Excess Capital Ratio.”<sup>18</sup> In practice, this means that if the member has a clearing fund requirement of \$11.4 million and excess net capital of \$10 million, its clearing fund requirement would exceed its excess net capital by \$1.4 million, its Excess Net Capital Ratio would be 1.14 (or 114%), and thus the applicable ENCP would be 114% of \$1.4 million or \$1,596,000. If the same member had a clearing fund requirement of \$20 million, its Excess Net Capital Ratio would be 2.0 (or 200%) and the applicable ENCP would be 200% of \$10 million, or \$20 million.<sup>19</sup> NSCC has discretion whether to collect the ENCP.<sup>20</sup>

***Credit Risk Rating Matrix Component:*** NSCC’s CRRM rating is not an express component of the Required Deposit formula. However, it directly impacts several of the components, including whether the member will face an Illiquid Charge. For example, as indicated, the Illiquid Charge only applies on net sell positions when a member exceeds certain volume thresholds in Illiquid Securities. For a member with a CRRM rating between 1-4, the

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<sup>17</sup> See *id.*

<sup>18</sup> See NSCC Rules and Procedures, Procedure XV, § 1(B)(2), at p. 297.

<sup>19</sup> See SEC Release No. 34-54457, File Nos. SR-FICC-2006-03 and SR-NSCC-2006-03, at 3-5 (September 15, 2006) (using these sample calculations).

<sup>20</sup> See NSCC Rules and Procedures, Procedure XV, § 1(B)(2), at p. 297

volume threshold is 1 million shares when the net sell position is equal to or greater than 25% of the ADV in those shares. For members with a CRRM rating between 5-7, who have the same net sell position in the same securities, the applicable volume threshold is 500,000 shares if that member's excess net capital exceeds \$10 million. For members with a CRRM rating between 5-7 whose excess net capital is equal to or less than \$10 million, the applicable volume threshold is 100,000 shares.<sup>21</sup> Additionally, members with the weakest CRRM rating cannot utilize the DTC Offset to get below the applicable volume threshold.<sup>22</sup>

NSCC's CRRM rating is based on a mix of objective and subjective factors that NSCC assesses in a manner that it has been withheld from the industry on the basis that it is "proprietary."<sup>23</sup> According to the information available, the formula includes consideration of quantitative factors (size, i.e., total excess net capital; capital, leverage, liquidity and profitability) and qualitative factors (market position and sustainability, management quality, capital and liquidity management, geographic and business/product diversity, and access to funding).<sup>24</sup> It is unclear what weight NSCC ascribes to each individual factor within the larger quantitative and qualitative categories to arrive at a CRRM rating for a member. It bears no relationship to a firm's actual credit rating or, apparently, whether the firm has ever defaulted on any obligation to NSCC.

In addition to these components, NSCC imposes, or has discretion to impose a variety of additional margin charges in connection with the Required Deposit,<sup>25</sup> including a second discretionary volatility charge.<sup>26</sup>

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<sup>21</sup> See NSCC's Form Rule 19(b)(4) (Illiquid Charge), SR-NSCC-2017-001, at 7.

<sup>22</sup> See NSCC Rules and Procedures, Rule 1, at p. 10.

<sup>23</sup> Brant Decl., at ¶ 17, Ex. A.

<sup>24</sup> See NSCC Rules and Procedures, Rule 1, at p. 5.

<sup>25</sup> For example, NSCC also calculates and imposes a charge for (a) a Member's "aggregate CNS Fails Positions" by multiplying the current market value for such positions by . . . 20% for Members [such as Alpine] rated 7 on the CRRM," NSCC Rules and Procedures, Procedure XV, § 1(A)(1)(e); a "margin requirement differential component charge," *id.* at § 1(A)(1)(f); and a "coverage component charge," *id.* at § 1(A)(1)(g).

Although NSCC's calculation and assessment of the Illiquid Charge, OTC Volatility Charge, OTC Mark-to-Market, ENCP and CRRM are all at issue in Alpine's Application for Review, for the purposes of this Motion, Alpine requests an interim stay of NSCC's assessment of the Illiquid Charges component or, in the alternative, a stay of NSCC's decision to not allow Alpine to use the DTC Offset until Alpine's Application for Review is addressed and decided by the Commission. A stay of the foregoing components will allow Alpine to continue to operate its business while the Application for Review is considered by the Commission.<sup>27</sup>

## II. ARGUMENT

### A. **A Stay of the Illiquid Charge Should be Granted because there is a Strong Likelihood that Alpine will Prevail on the Merits, Alpine Faces Irreparable Harm Absent a Stay, There is No Prejudice in Entering a Stay to any Other Party, and the Public Interest Favors a Stay.**

The Commission weighs four factors in deciding whether to grant a stay: (1) "whether there is a strong likelihood that the moving party will succeed on the merits of the appeal"; (2) "whether the moving party will suffer irreparable harm without a stay"; (3) "whether any person will suffer substantial harm as a result of a stay"; and (4) "whether a stay is likely to serve the public interest." *In the Matter of the Application of Michael Earl McCune*, SEC Release No. 77921, 2016 WL 2997935, at \* 1 (May 25, 2016). However, the factors are "not accorded equal weight" as "a stay may be granted where there is a high probability of irreparable harm, but a lower probability of success on the merits, or vice versa." *Id.*; *see also Scattered Corp.*, 52 S.E.C. 1314, 1315 (Apr. 28, 1997) (the petitioner need only show "a substantial case on the merits" if the other three factors "strongly favor a stay"). Here, all four factors strongly support a stay.

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<sup>26</sup> See NSCC Rules and Procedures, Procedure XV, § 1(A)(1)(d), at p. 290 (stating NSCC may also impose a "special charge" upon "Members in view of price fluctuations in or volatility or lack of liquidity of any security." No formula is identified for calculating this charge. Rather, NSCC states that it "shall make any such determination based on such factors as the Corporation determines to be appropriate from time to time.").

<sup>27</sup> See Brant Decl., at ¶ 41, Ex. A.

1. **Alpine has a Strong Likelihood of Success on the Merits in its Application for Review.**

Sections 3, 17A and 19 of the Exchange Act impose mandatory requirements with which NSCC, as a registered clearing agency and SRO, must comply in designing, implementing and applying its rules and procedures, and in calculating and imposing charges. For example, Section 17A(b) requires, as a condition to registration, that a clearing agency's rules meet certain standards, such as fair and reasonable allocation of fees and nondiscriminatory purpose and effect. Section 19(g) similarly requires all SROs to comply with the Exchange Act, and Section 19(f) requires, *inter alia*, that any fee constituting a limitation on access be consistent with the Exchange Act. Sections 17A, 19 and 3(f) all proscribe clearing agency rules with an unnecessary anticompetitive burden and effect. Section 3(f) also requires the SEC, in reviewing an SRO rule, to determine whether the action promotes "efficiency" and "capital formation."

Based on the foregoing mandatory requirements, the Commission has identified three primary considerations that determine whether an SRO's actions, including imposition of a fee, improperly limits access to an essential services: (a) there must be an "actual limitation of access";<sup>28</sup> (b) "the applicant must assert a basis that, if established, would lead the Commission to conclude that the fees violate Exchange Act Section 19(f)",<sup>29</sup> and (c) the denial or limitation must be to the "applicant's ability to utilize one of the fundamentally important services offered by the SRO."<sup>30</sup> Alpine has a strong likelihood of success on each of the foregoing factors considered by the Commission.

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<sup>28</sup> *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 \*8 (May 16, 2014).

<sup>29</sup> *Id.*, at \*9.

<sup>30</sup> *Id.*

a. ***NSCC's Required Deposit Results in an Actual Limitation on Access.***

Section 19(f) requires the Commission to set aside an SRO action denying or limiting access to services if it does not find, *inter alia*, that the SRO's "rules are, and were applied in a manner, consistent with the purposes" of the Exchange Act, or if it finds the prohibition or limitation on access "imposes any burden on competition not necessary or appropriate."<sup>31</sup> Excessive fees and charges can constitute a denial of access to services.<sup>32</sup> The burden is on NSCC to demonstrate that its rules and actions are consistent with the Exchange Act and the SEC's rules.<sup>33</sup>

In this matter, there is an "actual limitation of access" to "fundamentally important services offered by the SRO."<sup>34</sup> As detailed in the Declaration of David Brant, NSCC's calculation and application of the specified Required Deposit components to Alpine substantially limits Alpine's access to NSCC's essential clearing and settlement services. Alpine primarily clears liquidation (or sale-side) microcap or OTC stock transactions, including, frequently, stocks with a price less than \$.01/share. To clear such trades, NSCC imposes the Required Deposit, including the challenged components, as "margin."<sup>35</sup> These "margin" charges, taken individually or collectively, are astronomical, exceeding the market value of the underlying transaction by many times, and are particularly egregious when a sub-penny stock is involved because NSCC imposes a fictional price of \$.01/share in calculating the Required Deposit.<sup>36</sup> The challenged components of the Required Deposit are so onerous they often required Alpine to turn

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<sup>31</sup> 15 U.S.C. § 78s(f).

<sup>32</sup> See *Sec. Indus. Fin. Mkts. Ass'n*, SEC Release No. 72182, 2014 WL 1998525, at \*8 (May 16, 2014).

<sup>33</sup> See Section 19(f), 15 U.S.C. § 78s(f) and Rule of Practice 700, 17 C.F.R. § 201.700. See also *Sec. Indus. Fin. Mkts. Ass'n*, 2014 WL 1998525, at \*9 n. 88.

<sup>34</sup> *In re SIFMA*, *supra*, at \*8-9.

<sup>35</sup> NSCC Rules & Procedures at Rule 2A, § 1(F), Rule 4, §§ 1, 8.

<sup>36</sup> Brant Decl., at ¶¶ 19, 22, Ex. A for examples of charges, and Rulemaking Petition, at pp. 18-25, for a full discussion of the challenged components.

down transactions due to regulatory capital constraints,<sup>37</sup> even though Alpine's runs its operations in a manner that should allow it to avoid at least the Illiquid Charge.<sup>38</sup> As a direct result of these charges, Alpine's liquidation business is down approximately 75%. See Brant Decl., at ¶¶ 33, 40, Ex A.

Alpine, and other small broker-dealers play a critical role in providing liquidity for securities of small companies that have no other access to capital, such as through loans. Large investment bank members do not typically serve this market segment. Without firms willing and able to process these transactions, like Alpine, these small companies will be cut-off from the capital markets to raise money to grow their businesses. In this regard, the challenged components do not just have an anti-competitive and discriminatory effect, they also impermissibly limit access to services by Alpine's actual and potential customers, in violation of Section 17A(b)(6).<sup>39</sup>

**b. NSCC's Required Deposit Violates the Exchange Act and the SEC's Rules and Regulations.**

Section 19(f) requires the Commission to set aside an SRO action denying or limiting access to services if it does not find, *inter alia*, that the SRO's rules are, and were applied in a manner, consistent with the purposes" of the Exchange Act, or if it finds the prohibition or limitation on access "imposes any burden on competition not necessary or appropriate." 15

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<sup>37</sup> Brant Dec., at ¶¶ 36, 38, 40, Ex. A, and Alpine's Rulemaking Petition, pp. 12-18, for detailed discussion of the damage from the charges.

<sup>38</sup> As discussed in Alpine's Rulemaking Petition, at p. 11, NSCC imposes the Illiquid Charge on transactions involving OTC or microcap stocks that exceed volume thresholds based on a firm's CRRM rating, which NSCC sets from an undisclosed formula. In determining whether the volume threshold is met, NSCC generally offsets the quantity of shares in the member's sell position against the number of those shares held by the member at DTC (the DTC offset); if the DTC offset places the member below the applicable volume threshold, no Illiquid Charge will be assessed. Alpine almost always has sufficient shares at DTC to avoid the Illiquid Charge completely. Brant Decl., at ¶¶ 13, 23, Ex. A. However, without providing any rationale, NSCC has determined to make the DTC offset unavailable to members with the weakest CRRM rating, such as Alpine. *Id.* at ¶¶ 13, 17, Ex. A.

<sup>39</sup> See 15 U.S.C. § 78q-1(b)(6) ("No registered clearing agency shall prohibit or limit access by any person to services offered by any participant therein.").

U.S.C. 78s(f). As discussed in further detail in Alpine’s Rulemaking Petition, at pages 20-26, NSCC’s Required Deposit violates multiple provisions of the Exchange Act, SEC Rules.

First, Section 17A(b)(3)(D) requires that the “rules of the clearing agency provide for the equitable allocation of reasonable dues, fees and other charges among its participants.”<sup>40</sup> This statute thus imposes two requirements: (1) fees, dues and charges must be “reasonable,” and (2) they must be “equitabl[y] allocated. NSCC’s rules with respect to the Required Deposit, and the resultant charges that NSCC imposes on Alpine under these rules, meets neither requirement. The challenged components of the Required Deposit combine to impose margin charges on Alpine that are exponentially greater than the underlying transaction amount. This is facially unreasonable for a number of reasons, including: (a) the sheer amount of the charge, (b) the lack of adequate justification to require margin that is so disproportionately high compared to the transaction, and (c) the chilling effect this has upon Alpine’s ability to provide clearing services to its customers, including the number of transactions it can clear per day, and upon the OTC and microcap markets in general.

Second, promoting competition and capital formation are each central to the purpose of the Exchange Act. As Congress noted in amending the Exchange Act in 1975, which added Sections 17A and 19 to the Exchange Act, “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.”<sup>41</sup> The goal is not to hinder, but to “enhance competition” and to “allow economic forces, **interacting in a fair regulatory field**, to arrive at appropriate variations in practices and services.”<sup>42</sup> Following these directives, the Commission should set aside the challenged components of the Required Deposit as they have a blatantly

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<sup>40</sup> 15 U.S.C. § 78q-1(b)(3)(D)

<sup>41</sup> S. Rep. 94-75, at 8.

<sup>42</sup> *Id.* (emphasis added).



anticompetitive effect as applied, and serve to limit, rather than promote capital formation. Each component is designed to impose, and results in, additional charges and restrictions being applied to smaller, less capitalized members who provide clearing services in the OTC and microcap markets. This directly affects competition and capital formation of those member firms subject to the restrictions because they must use NSCC to provide clearing services, which gives those member firms who do not face these restrictions an unfair competitive advantage. As a direct result of these charges, as indicated, Alpine is able to process only a handful of trades at a time and its liquidation business is down 75%.<sup>43</sup>

Third, Section 17A(b)(3)(F) requires, *inter alia*, that the “rules of the clearing agencies are designed” to “protect investors and the public interest,” and “are not designed to permit unfair discrimination in the protection of admission of participants or among participants in the use of the clearing agency . . . .”<sup>44</sup> The challenged components disproportionately impact only those small members who focus on the OTC and microcap markets and those issuers and investors in that market segment.

Fourth, Section 17A(d) and Section 19(g) require NSCC to comply with the rules and regulations promulgated by the SEC.<sup>45</sup> The challenged components violate several provisions of these standards. For example, NSCC’s CRRM rating system, which as indicated employs a secret formula to weigh a variety of undefined factors, clearly fails to comply with transparency requirements found in Subsection (e)(1).<sup>46</sup>

Finally, Section 19(g) requires every SRO to “comply with . . . its own rules . . . .”<sup>47</sup>

Alpine can find no support in NSCC’s Rules or Procedure XV for its practice of imposing OTC

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<sup>43</sup> See Brant Decl., at ¶¶ 33, 40, Ex. A.

<sup>44</sup> 15 U.S.C. § 78q-1(b)(3)(F).

<sup>45</sup> See 15 U.S.C. § 78q-1(d) and 15 U.S.C. § 78s(g).

<sup>46</sup> See 17 C.F.R. § 240.17Ad-22(e)(1).

<sup>47</sup> 15 U.S.C. § 78s(g).

Volatility Charges or OTC Mark to Market charges that equal or exceed the underlying transaction amount just because a microcap or OTC stock is involved.<sup>48</sup>

*c. NSCC's Required Deposit Affects Alpine's Ability to Utilize One of NSCC's Fundamentally Important Services.*

The third factor the Commission considers is whether the denial impacts the “applicant’s ability to utilize one of the fundamentally important services offered by the SRO.” *In re SIFMA, supra*, at \*9. This element is clearly met. NSCC requires Alpine to pay the Required Deposit, including any applicable Illiquid or ENCP Charges, on a daily basis. Failure to pay all required amounts results in a member default and an inability to utilize NSCC’s clearing and settlement services. This is *the most* fundamentally important service NSCC offers, and it is essential to Alpine’s business.

**2. Alpine Faces Irreparable Injury if a Stay is Not Granted.**

A stay is merited when the petitioner would otherwise lose the benefit of a successful appeal. *See Scattered Corp.*, 52 S.E.C. at 1320 (staying a firm's expulsion, an executive's bar, and their respective fines "pending the resolution of this case on the merits" because "[t]he benefit of any possible reduction of [the] bar and fines . . . would be lost, absent a stay at this juncture").

Alpine will suffer irreparable damages if the stay is not entered as a result of the financial burden placed every day upon Alpine through the Illiquid Deposit charges. As stated above, Alpine’s liquidation business alone is down approximately 75% due to the capital constraints necessary to fund the Required Deposit.<sup>49</sup> Simply, the challenged components of the Required Deposit, particularly as applied in the aggregate, result in arbitrary, onerous and unreasonable charges that impermissibly limit Alpine’s access to NSCC’s services, unnecessarily stifle

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<sup>48</sup> See NSCC Rules and Procedures, Procedure XV, § 1(A)(1)(a)(ii), (b) and (c).

<sup>49</sup> Brant Decl., at ¶¶ 33, 40, Ex. A

competition, and unfairly discriminate against small broker-dealers in the OTC or microcap market in violation of the Exchange Act.

First, as stated in detail above, there is an “actual limitation of access” to “fundamentally important services offered by the SRO.”<sup>50</sup> As detailed in the Declaration of David Brant, NSCC’s calculation and application of the specified Required Deposit components to Alpine substantially limits Alpine’s access to NSCC’s essential clearing and settlement services. *See* p. 11, *supra*.

Second, NSCC’s calculation and imposition of the Required Deposit violates the Exchange Act in a number of ways.<sup>51</sup> The CRRM and the charges at issue, and the rules on which they are based: (a) are arbitrary and unsupported by any adequate rationale; (b) result in charges that are onerous and facially unreasonable in relation to the value of the underlying transaction; and (c) impose an unnecessary discriminatory and anticompetitive burden by targeting smaller NSCC members in the OTC and microcap markets.<sup>52</sup>

By way of example, consider the following trades processed by Alpine for clearing through NSCC’s CNS system for its client, Bezalel, on November 23, 2018 and November 26, 2018.<sup>53</sup> The trade involved a contract to sell 198,000 total shares (99,000 on 11/23/2018 and 99,000 on 11/26/2018) of PMCB at a price of \$0.020 for total proceeds of \$4,016.64. To process this approximately \$4,016.64 trade for clearing through NSCC, however, ***Alpine was required to deposit \$928,175.84***, including a total illiquid charge of \$903,756.60, total volatility charge of

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<sup>50</sup> *See 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 \*8-9 (May 16, 2014).

<sup>51</sup> Specifically, as detailed in Alpine’s Rulemaking Petition, at pp. 18-25, the challenged components violate Section 17A, 15 U.S.C. § 78q-1(b)(3)(D), (F) and (I), and (b)(6); Section 19(f), 15 U.S.C. § 78s(f); and 17 C.F.R. § 17Ad-22(e)(1), (23) (requiring transparency); *id.* at (e)(4), (6) and (7) (requiring NSCC’s margin systems and procedures be “reasonably designed,” and produce margin levels “commensurate with” the risk).

<sup>52</sup> *In re SIFMA*, at \*9 (stating, “the applicant must assert a basis that, if established, would lead the Commission to conclude that the fees violate Exchange Act Section 19(f),” and holding that allegations that SRO fees were “onerous” and “supracompetitive” and violated the Exchange Act sufficient for Commission review).

<sup>53</sup> This trade is detailed in the Brant Decl., at ¶ 19, Ex. A.

\$23,222.40, and total Mark-to-Market charge of \$1,196.84. These two trades resulted in an NSCC deposit trade proceeds multiple of 231.08 (that is, 231 times the value of the underlying trade). The OTC Volatility Charge and Illiquid Charge exceeded the value of the transaction by several multiples.

These charges are patently unreasonable and frankly absurd. Yet, Alpine now faces similarly egregious and disproportionate Required Deposit charges involving these component charges every single day, particularly when processing a sub-penny stock trade for clearance and settlement through NSCC's CNS system. Several additional examples of similar charges, as applied to recent trades, are set forth in the attached Declaration, including charges exceeding the underlying transaction value by over 200 times or 20,000%.<sup>54</sup>

Even under NSCC's methodology, Alpine could have reduced the impact by avoiding the Illiquid Charge on the BLPG trade and almost every other transaction, except that NSCC does not permit Alpine to avail itself of the DTC Offset. With respect to OTC securities that Alpine processes, Alpine requires that the security position be deposited, cleared and settled at DTC before entering liquidating trades on a regular way basis.<sup>55</sup> As a result, if the DTC Offset were available to Alpine, it would eliminate the Illiquid Charge completely on the sample transaction, and many, if not all, other transactions, because it would take Alpine below the minimum volume threshold.<sup>56</sup> However, because NSCC has arbitrarily assigned Alpine the weakest CRRM Rating of a "7" – even though Alpine has not defaulted on any of its obligations to NSCC under current ownership and has no understanding of the basis for its rating, as discussed *infra* –

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<sup>54</sup> See Brant Decl., at ¶ 19, 22, 38, Ex. A.

<sup>55</sup> See *id.* at ¶¶ 13, 23, Ex. A.

<sup>56</sup> See *id.*

Alpine is not able to utilize the DTC Offset.<sup>57</sup>

Alpine is adversely impacted by the rules, and the charges imposed by application of the rules, on a continuous and ongoing basis. As a direct result of the Required Deposit, specifically the Illiquid Deposit charges, Alpine's liquidation business is down approximately 75%.<sup>58</sup>

Alpine's business is being irreparably harmed due to the financial stress that the Required Deposit has caused. However, Alpine would be able to continue to operate as a business if the Illiquid Charge is not applied or assessed or, in the alternative, if Alpine were able to apply the DTC Offset when applicable.<sup>59</sup>

**3. The Stay will not Result in Harm to Any Other Party.**

As detailed above, the Illiquid Deposit charges are arbitrary, unreasonable, and are not rationally related to any calculable potential damages. Thus, a stay of Illiquid Deposit charges will not result in any damages to any other party. Moreover, a stay of NSCC's decision to not allow Alpine to use the DTC Offset would likewise not result in any harm to any other party. If Alpine were allowed to use the DTC Offset, it would forgo the Illiquid Deposit charges on almost every transaction. Alpine is only denied the benefit of the DTC Offset because NSCC has given Alpine a lower CRRM rating, without any explanation as to how its CRRM rating is calculated. Alpine's use of the DTC Offset, when it applies based on the volume of share at DTC, notwithstanding its CRRM rating, would not result in any harm to any other party.

**4. The Public Interest Favors a Stay.**

The public interest favors a stay because of the impact of the Illiquid Deposit charges on the market and Alpine's access to NSCC. The cumulative impact of these margin requirements

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<sup>57</sup> See *id.* at ¶¶ 10, 16, Ex. A (identifying Alpine's CRRM Rating from NSCC of a "7", and confirming that Alpine has not defaulted on its obligations to NSCC under current ownership – in place since at least 2011 when Alpine was purchased by current ownership); see also NSCC Rules and Procedures, Rule 1, at p. 10

<sup>58</sup> Brant Decl., at ¶¶ 33, 40, Ex. A.

<sup>59</sup> *Id.* at ¶¶ 13, 23, 41, Ex. A.

creates a self-propelling downward cycle. Alpine must devote additional capital to post the Required Deposit each day in order to process trades through NSCC's CNS system, including the onerous Illiquid Charges. Because of this, Alpine must limit the volume of trades it can process per day, both due to capital constraints and to avoid ENCP charges. This, in turn, limits Alpine's ability to raise additional capital through its clearing business, and effectively pull out of the cycle. As a direct result, as would be expected, Alpine's liquidation business is down almost 75% due to the artificial restraints on the number of liquidation transactions it can clear through NSCC per day and attrition of customers who leave or go out of business because they cannot clear their transactions through Alpine.<sup>60</sup> See Brant Decl., at ¶¶ 34-35, 42, Ex. A, regarding the impact of the Illiquid charges on other broker dealers and ripple effect on small companies in the market.

**B. In the Alternative, NSCC's Decision to Not Allow Alpine to Use the DTC Offset should be Stayed.**

As detailed above, Alpine would be able to continue its business without irreparable harm if the NSCC's decision to not allow Alpine to use the DTC Offset is stayed pending consideration of Alpine's Application for Review.<sup>61</sup> Such a decision would negate the Illiquid Deposit charges but only when the offset calculation was met thereby ensuring that no harm could come to any other person or entity as a result of Alpine's use of the DTC Offset.

**III. CONCLUSION AND RELIEF REQUESTED**

Alpine requests an interim stay of the implementation and/or assessment by NSCC of the Illiquid Charge or, alternatively, an interim stay of NSCC's decision to make the DTC's Offset unavailable to Alpine in calculating the applicable volume limitations for the Illiquid Charge, until Alpine's Application for Review is considered and decided.

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<sup>60</sup> Brant Decl., at ¶¶ 33, 40, Ex. A.

<sup>61</sup> See *id.*, at ¶ 41, Ex. A.

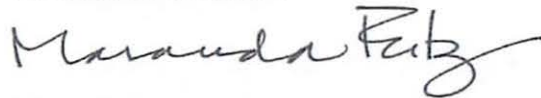
DATED this 19th day of December, 2018.

**CLYDE SNOW & SESSIONS**



Brent R. Baker  
Aaron D. Lebenta

**THOMPSON HINE**



Maranda E. Fritz

*Attorneys for Petitioner*

**ATTORNEY CERTIFICATION**

Pursuant to Rule 154(c) of the Commission's Rules of Practice, I hereby certify that the foregoing document contains 6,612 words, exclusive of the tables of contents and authorities.

A handwritten signature in blue ink, appearing to read "Brent R. Baker", with a long horizontal flourish extending to the right.

Brent R. Baker



**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of December, 2018, I caused the foregoing to be served by U.S. Mail Certified, Return Receipt Requested, on the following:

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

Office of Deputy General Counsel  
Attn: Nikki Poulos  
National Securities Clearing Corporation  
55 Water Street  
New York, NY 10041



Brent R. Baker  
*Counsel for Alpine Securities Corporation*

# **EXHIBIT A**

## **DECLARATION OF DAVID BRANT**

**I, David Brant, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury under the laws of the United States of America that the following statements are true and correct:**

**1. My name is David Brant and I am a resident of Salt Lake County, Utah, am over 18 years of age, and make the statements herein based on my personal knowledge.**

**2. I am the Chief Financial Officer at Alpine Securities Corporation (“Alpine”) in Salt Lake City, Utah.**

**3. Alpine is a small, self-clearing broker-dealer, registered with the Securities and Exchange Commission (“SEC”). Alpine’s business primarily involves clearing and settlement services for microcap and over-the-counter (“OTC”) stock transactions for itself and for other brokerage firms.**

**4. I am familiar with Alpine’s Application for Review and Rulemaking Petition with respect to certain actions, practices and rules of the National Securities Clearing Corporation (“NSCC”) and submit this Declaration in support of that Petition.**

**5. A clearing broker, such as Alpine, provides clearing and settlement services for itself and for its correspondent clients (“correspondents” or “clients”), who are generally broker-dealers, and its clients’ non-broker-dealer customers (“customers”), who are the beneficial buyers and sellers of a security.**

**6. In order for Alpine to provide clearing and settlement services and function as a clearing firm for its correspondent firms, Alpine must be a member of NSCC. Alpine is a clearing broker member in good standing of the NSCC and a Depository Trust Company (“DTC”) participant.**

**7. As an ongoing condition to membership, and thus use of NSCC’s clearance,**

settlement and other essential services for Alpine and its customers, NSCC requires members, including Alpine, to contribute to a "Clearing Fund," by making "Required Deposits."

8. The formula used to calculate the Required Deposit charges is very complex and includes many discretionary and fact-specific variables set forth in Procedure XV of the NSCC's Rules and Procedures.

9. As detailed below, certain components of NSCC's Required Deposit charges have resulted in extremely high and onerous charges that so far exceed the amount of the underlying transactions to be cleared and settled that they cannot be credibly justified, which has limited and denied Alpine's access to NSCC's essential clearance and settlement services and caused Alpine to lose a significant amount of its liquidation business.

10. While the Required Deposit has many separate components, the ones that are the most onerous, and impose the greatest hardship on Alpine and limitation of Alpine's access to NSCC's clearance and settlement services in connection with its liquidation or sale-side clearance and settlement of OTC and microcap market transaction for its correspondent brokers and other clients, are: (a) the "Illiquid Charge"; (b) the Excess Net Capital Premium ("ENCP"); (c) the Volatility Charge for microcap and OTC stock transactions (the "OTC Volatility Charge"), particularly as applied to sub-penny stock transactions; (d) the Mark-to-Market Charge as applied to sub-penny stock OTC or microcap stock transactions ("OTC Mark-to-Market Charge"); and (e) NSCC's Credit Risk Rating Matrix ("CRRM"), pursuant to which NSCC assigns to members ratings between 1 and 7, with a rating of "7" being the weakest. I have reviewed the description and discussion of these Required Deposit components in the Rulemaking Petition, and agree with and adopt them herein.

11. I note that the CRRM is not itself a charge imposed on members by the NSCC.

However, it is my understanding that it directly factors into the NSCC's calculation of the Illiquid Charge, and is thus a component of the Required Deposit. In particular, in calculating and determining the applicability of the Illiquid Charge to a particular transaction, it is my understanding that NSCC imposes different volume thresholds based upon a member's CRRM rating, with members with better CRRM ratings being able to larger net sell positions in the so-called "Illiquid Securities" than members with weaker CRRM ratings. Importantly for Alpine, in determining these volume thresholds, NSCC will first generally "offset" the quantity of shares in a member's sell position against the number of shares in the same security held by the member at DTC. NSCC calls this the "DTC Offset." Thus, if certain members have offsetting shares at DTC, they could fall below the applicable volume threshold after the offset and would not be subject to the Illiquid Charge. However, NSCC has taken the position that the DTC Offset is not available to members with the weakest CRRM Rating.

12. NSCC has assigned Alpine the weakest CRRM Rating – a "7," and thus does not allow Alpine to utilize the DTC Offset.

13. This is critically important, because Alpine, as a matter of policy and operations, requires that securities positions on a liquidation transaction be cleared and settled at DTC before entering liquidating trades on a regular way basis. As a result, Alpine almost always would be able to avoid the Illiquid Charge, if it were able to utilize the DTC Offset. I have not heard or located any explanation from NSCC or its representatives as to why NSCC determined to make the DTC Offset unavailable to certain members but not others.

14. Because Alpine's CRRM Rating is critical to the Required Deposit amounts it will have to post, particularly the Illiquid Charge, Alpine has attempted to understand how its CRRM rating is calculated. However, NSCC has not disclosed to the industry the basis for its

calculation of the CRRM rating.

15. According to the information available, the formula includes consideration of quantitative factors (size, i.e., total excess net capital; capital, leverage, liquidity and profitability) and qualitative factors (market position and sustainability, management quality, capital and liquidity management, geographic and business/product diversity, and access to funding). It is unclear what weight NSCC ascribes to each individual factor within the larger quantitative and qualitative categories to arrive at a CRRM rating for a member. The CRRM rating bears no relationship to a firm's actual credit rating or, apparently, whether the firm has ever defaulted on any obligation to NSCC.

16. Under current ownership that has been in place since 2011, for example, Alpine has not defaulted on its obligations to NSCC to my knowledge.

17. I have personally participated in several telephonic conferences with representatives of NSCC to discuss Alpine's CRRM rating, including how it is calculated and how it could be improved, and to request relief from the Required Deposit charges at issue from NSCC. In one such conversation occurring on or around September 6, 2018, a representative of NSCC told me that the CRRM rating is based on a mix of objective and subjective factors that NSCC assesses, but that NSCC will not disclose how each individual factor is weighed or assessed on the basis that such information is "proprietary." During this conversation, NSCC was also not receptive to Alpine's requests for waiver or other relief from the deleterious impacts of the Required Deposit charges at issue in the Rulemaking Petition and Petition for Review.

18. As a result of NSCC's implementation of the Required Deposit charges and components at issue, I believe that Alpine's and its correspondent customers' businesses have been unfairly targeted with excessive and arbitrary charges which are non-conducive to entering

into a trade and thus inhibit and discourage market access and participation.

19. By way of example, consider the following trades processed by Alpine for clearing through NSCC's CNS system.

- a. The first trade involved a contract to sell 99,000 shares of PMCB on November 23, 2018, valued at \$0.020, for a total proceeds amount of \$2,008.32. To process this \$2,008.32 trade for clearing through NSCC, however, *Alpine was required to deposit \$40,803.00*, including:
  - i. Illiquid Charge: \$34,956.60.
  - ii. OTC Volatility Charge: \$5,846.40 (NSCC's rules indicate that the OTC Volatility Charge shall be, at NSCC's discretion, a haircut of not less than 10% of the position. Here, however, the Volatility Charge was 100% of the transaction amount. Although I am not certain of NSCC's precise method of calculation, because a sub-penny stock was involved, I believe that NSCC imposed a fictional \$.01/share price to calculate the Volatility Charge.
  - iii. OTC Mark-to-Market Charge: \$116,179.78 (although this charge can either be a debit or credit based on the closing price of the security pending settlement, in this case NSCC appears to have used the fictional \$.01/share price so it created a mark-to-market-loss charge).
- b. The second trade involved a contract to sell another 99,000 shares of PMCB on November 26, 2018, valued at \$0.020, for the same total proceeds amount of \$2,008.32. To process this \$2,008.32 trade for clearing through NSCC, however, *Alpine was required to deposit \$887,372.84*, including:

- i. Illiquid Charge: \$868,800.00.
- ii. OTC Volatility Charge: \$17,376.00.
- iii. OTC Mark-to-Market Charge: \$1,196.84.

20. Although the entire exposure associated with the above trades totaled \$4,016.64, NSCC's methodology resulted in Alpine being required to deposit a total of \$928,175.84 to access NSCC's (CNS) clearance and settlement services. These two trades resulted in an NSCC deposit trade proceeds multiple of 231.08 (that is, 231 times the value of the underlying trade). The OTC Volatility Charge and Illiquid Charge exceeded the value of the transaction by several multiples.

21. Even under NSCC's methodology, the Illiquid Charge would have been minimal or non-existent on this sample transaction except, as indicated above, NSCC does not permit Alpine to avail itself of the DTC Offset based on Alpine's CRRM rating.

22. Below are additional recent trades from Alpine's customers wherein the Required Deposit charges are similarly arbitrary and grossly and unfairly disproportionate to the value of the transaction:

- a. Client: Power Up; trade date: 11/29/2018 and 11/30/2018; Symbol: TSOI;  
Description: Therap Sol
  - i. 4,347,826 total shares traded over the two days (3,085,100 on 11/29/2018 and 1,262,726 on 11/30/2018), valued at \$0.003, resulting in a total trade value of \$12,710.64 with a total illiquid charge of \$262,118.21, total volatility charge of \$14,865.85, total Mark-to-Market charge of \$51,192.51, and an NSCC deposit trade proceeds multiple of 25.82.



- b. **Client: La Jolla; trade date: 11/29/2018; Symbol: VGID; Description: V Group Inc.**
- i. **1,800,000 shares valued at \$0.00033, resulting in a trade value of \$587.20, with an illiquid charge of \$18,000.00, volatility charge of \$3,600.00, Mark-to-Market charge of \$17,280.00, and an NSCC deposit trade proceeds multiple of 66.21.**
- c. **Client: Silver Rock; trade date: 11/19/2018 and 11/20/2018; Symbol: PMCB; Description: Pharmacyte**
- i. **942,319 total shares traded over the two days (400,000 on 11/19/2018 and 542,319 on 11/20/2018), valued at \$0.045, resulting in a total trade value of \$42,138.09 with a total illiquid charge of \$68,439.11, total volatility charge of \$11,604.73, total Mark-to-Market charge of \$317.68, and an NSCC deposit trade proceeds multiple of 1.91.**

23. **If Alpine were able to utilize the DTC Offset, it would have avoided the large applicable Illiquid Charges, on these transactions as well.**

24. **Alpine receives Notices of Daily Margin Statements from NSCC imposing similar charges each business day. The daily cumulative Illiquid Charges alone generally range from \$500,000 to \$1.5 million on transactions that are a fraction of that amount. Upon request, I can provide many more examples of similarly onerous and disproportionate Require Deposit charges.**

25. **When a transaction involves stocks that are below \$.01/share, it is my understanding that NSCC generally does not use the actual stock price in calculating the Illiquid Charge, Volatility Charge and Mark-to-Market. Instead, it is my understanding that NSCC**

commonly uses a fictional “minimum” price per share of \$.01 in its calculations of these components. It is my belief that use of a “rounded up” share value instead of the actual share value results in Required Deposit charges that are grossly disproportionate to the transaction value. By simple illustration, changing a share value from \$.001 to \$.01 in a formula results in a tenfold increase in the resultant product. Similarly, it almost invariably ensures that there will be a Mark-to-Market charge, instead of a credit, because the current market price will be artificially increased in comparison to the transaction amount. Although it is not completely clear for all the occasions that NSCC’s uses a fictional share price in the calculating the Illiquid Charge, OTC Volatility or Mark-to-Market to Alpine, and appears to be inconsistent, I believe that this practice explains some of the more disproportionate charges. Based on my review of NSCC’s rules and Procedure XV, I do not see any authorization for NSCC to use a fictional price per share in calculating the OTC Volatility Charges or Mark-to-Market.

26. I also note that NSCC indicates that it has discretion to impose a different formula for calculating Volatility for OTC and microcap stocks (sub-penny stocks are not mentioned) than for shares traded on registered exchanges or which exceed \$5/share. NSCC Rules and Procedures, Procedure XV, § 1(A)(1)(a)(ii). NSCC indicates that to calculate the OTC Volatility Charge it will impose a “haircut” based on the multiple of the absolute value of such positions and a percentage that NSCC designates that shall not be less than 10%. From these descriptions, I would expect the OTC Volatility Charge to be a fraction of the underlying transaction – i.e., a “haircut.” However, as indicated above, in actual practice NSCC’s OTC Volatility Charge to Alpine, particularly when sub-penny stocks are involved, is frequently equal to or in excess of the actual value of the transaction, sometimes by many orders of magnitude. This, particularly when combined with the Illiquid Charge and OTC Mark-to-Market Charge, has a devastating

impact on Alpine's available regulatory capital and access to NSCC's CNS system for customer transactions, and thus, Alpine's business, as explained further below.

27. Alpine did not incur an "Excess Net Capital Premium" or "ENCP" charge with respect to the sample transactions above. In fact, Alpine rarely incurs that charge. However, this is for a very specific reason: Alpine has been forced to limit its business – to turn down customer transactions – in order to avoid paying this onerous charge.

28. Given that the trades Alpine processes have a relatively low dollar-value, Alpine should have sufficient net capital for Alpine to provide clearing services for all of its correspondents' potential liquidation transactions. Alpine currently has excess net capital of approximately \$2.8 million. Prior to November of 2018, its excess net capital was \$1.1 million.

29. However, because the Required Deposit charges are added to the absolute value of the transaction, and require a deposit of funds significantly higher than the underlying transaction amount (particularly when a sub-penny stock is involved), Alpine is forced to artificially limit the number of transactions it can clear for its customers per day, including to avoid the ENCP charge.

30. Alpine also believes, based on discussions with NSCC in which I have participated, that NSCC would take a negative view of a member that was continuously required to post ENCP charges, and that doing so may result in adverse action against Alpine such as a downgrade in CRRM rating, or other more adverse actions.

31. Alpine makes a relatively small amount of money per transaction it processes, particularly in comparison to the Required Deposit amounts. Given this, Alpine neither has the ability nor the motive to post the potentially astronomical ENCP charges and potentially incur further adverse consequences from NSCC. To operate its business, of course, Alpine has no

choice but to post the Illiquid Charge, OTC Volatility Charge and OTC Mark-to-Market Charges, where applicable. But, as indicated and discussed further below, Alpine is forced to limit its business as a result because it simply does not have all of the available regulatory capital necessary to fund the Required Deposit for all of its transactions brought to it by its customers.

32. Alpine has attempted to employ creative solutions to avoid the deleterious impact of these Required Deposit charges. For example, for a time, Alpine was able to use ex-clearing contra-party clearing partnerships to perform clearance and settlement service manually and thereby avoid clearing trades through NSCC's CNS system altogether. However, once the last of those ex-clearing partnerships expired at the end of April 2018, Alpine was forced to again utilize NSCC's CNS system to clear transactions, and to post the Illiquid Charge and the other onerous components at issue of the Required Deposit.

33. The cumulative impact of these margin requirements creates a self-propelling downward cycle. Alpine must devote additional capital to post the Required Deposit each day in order to process trades through NSCC's CNS system when sub-penny stocks are involved. Because of this, Alpine must limit the volume of trades it can process per day, both due to capital constraints necessary to post the Required Deposit and to avoid ENCP charges. This, in turn, limits Alpine's ability to raise additional capital through its clearing business, and effectively pull out of the cycle. As a direct result, as would be expected, Alpine's liquidation business is down almost 75% s due to the artificial restraints on the number of liquidation transactions it can clear through NSCC per day (due to the Required Deposit) and attrition of customers who leave or go out of business because they cannot clear their transactions through Alpine.

34. Further, it is my understanding that the number of NSCC members who are independent or small clearing brokers providing clearing services for firms and investors holding

microcap or OTC stocks is down significantly, as a result of the Required Deposit charges targeted at the microcap and OTC markets. I am aware of only a few firms that currently provide clearing services for OTC microcap stocks.

35. The impact is not felt by Alpine alone; I believe it affects all participants in the OTC and microcap market – from brokers to issuers to investors. To my knowledge, very few small clearing firms exist today that serve the OTC and microcap securities market, which are most adversely affected by the Required Deposit charges at issue. Indeed, the Illiquid Charges, and the use of the fictional \$.01 price-per-share to exponentially increase the Illiquid Charge and OTC Volatility and OTC Mark-to-Market Charges, appear to be intentionally targeted at the OTC and microcap securities markets. Although larger NSCC members – banks, Wall Street firms and online discount firms – likely have sufficient net capital to avoid the ENCP charges or illiquid charges (including through use of the DTC Offset), to my knowledge, very few of these firms are willing to work with OTC stocks and microcap stock, let alone accept certificates or newly issued securities for microcap issuers, leaving but a handful of firms that operate in this space. To my knowledge, in addition to Alpine, the list of firms that operate in this space includes Wilson Davis Securities, Lek Securities, and Wedbush Securities. I am not aware of any other firms providing clearing services for OTC microcap stocks.

36. As a direct result of the Required Deposit charges, it is my understanding that the small firms that do serve this segment of the market, such as Alpine, must also charge additional fees to try to offset the immense burden of devoting capital to post the challenged components of the Required Deposit, which cumulatively reduces the value of the trade for all involved.

37. Given the disproportionately high amount of the Required Deposit in comparison to the underlying value of the trade, many of Alpine's correspondent broker clients (or their

customers – the underlying buyers or sellers – to whom the correspondent brokers pass the fees) are often unwilling or unable to pay the additional amounts to sell the shares, leaving the shares effectively untradeable, and worthless.

38. Below are recent proposed trade transactions that Alpine could not complete, either due to capital constraints associated with the Required Deposit or because the customers decided to not trade due to the Required Deposit, and the resultant processing fees (below are the estimates of Alpine's calculation of the Required Deposit fees):

- a. Client: Betty Cam; trade date: 11/20/2018; Symbol: COBI
  - i. 1,000,000 shares valued at \$0.0005 would result in a trade value of \$500.00 with an illiquid charge of \$2,000.00, volatility charge of \$9,500.00, Mark-to-Market charge of \$95,000.00, and an NSCC deposit trade proceeds multiple of 213.
- b. Client: Black Ridge; trade date: 11/23/2018; Symbol: TGRO
  - i. 100,000 shares valued at \$0.0052 would result in a trade value of \$520.00 with an illiquid charge of \$34,100.00, volatility charge of \$2,200.00, Mark-to-Market charge of \$7,590.00, and an NSCC deposit trade proceeds multiple of 84.
- c. Client: EMA; trade date: 11/21/2018; Symbol: ZNGY
  - i. 4,900,000 shares valued at \$0.0003 would result in a trade value of \$1,470.00 with a volatility charge of \$8,000.00, Mark-to-Market charge of \$38,800.00, and an NSCC deposit trade proceeds multiple of 32.
- d. Client: EMA; trade date: 11/21/2018; Symbol: BGFT



42. It is also my belief, that the Required Deposit charges at issue also have a profound adverse effect on small companies whose stock trades in the OTC and microcap markets. Microcap companies depend on issuance of shares to obtain services and finance their growth. Alpine, and other small broker-dealers in this segment of the market, play a critical role in providing liquidity for securities of small companies. A substantial part of Alpine's customer base consists of institutional lenders to small companies and the key service providers/ professionals to small companies – i.e., lawyers, accountants, transfer agents, advisors, etc. Without firms willing and able to process these transactions, like Alpine, and without correspondent brokers or investors willing or able to pay increased transaction fees, professionals and investors will be unwilling to accept stock and these small companies will be cut-off from the capital markets to raise money to grow their businesses.

WHEREFORE, I declare under penalty of perjury that the foregoing is true and correct.

DATED this 19th day of December, 2018.



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David Brant