**Administrative Proceeding**
**File No. 3-20238**

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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 | **STATEMENT OF FACSIMILE FILING** |

PLEASE TAKE NOTICE that, pursuant to Rule 151(d) of the Commission's Rules of Practice, the undersigned hereby gives notice that Petitioner's Reply Memorandum in support of its Motion for an Interim Stay, was filed by means of facsimile transmission to the following parties on March 17, 2021:

1. By facsimile directed to Vanessa Countryman at the Office of the Secretary of the U.S. Securities and Exchange Commission, at 202-772-9324.

2. By facsimile directed to Gregg M. Mashberg, Margaret A. Dale, and Benjamin J. Catalano, of Proskauer Rose LLP, at 212-969-2900.

Petitioner's Reply Memorandum in support of its Motion for an Interim Stay was also submitted to the following parties via email, on March 17, 2021:

1. By email to apflings@sec.gov, pursuant to the Order entered by the SEC on March 18, 2020, directing filings to the foregoing email address, and as a courtesy to secretarys-office@sec.gov.

2. By email to gmashberg@proskaruer.com; mdale@proskauer.com; and bcatalano@proskauer.com, pursuant to an agreement with NSCC's legal counsel for service by email.

DATED this 17th day of March 2021.

**PARSONS BEHLE AND LATIMER**

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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, counsel for Alpine Securities Corporation ("Alpine"), hereby certifies pursuant to Rule 151(d) of the Commission's Rules of Practice that, on March 17, 2021, he served on National Securities Clearing Corporation ("NSCC"), along with this Certificate of Service, Alpine's Reply Memorandum in Support of its Motion for an Interim Stay, by the following means:

1. By the U.S. Postal Service, by means of certified mail, return receipt requested, directed to Vanessa Countryman 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 Vanessa Countryman at the Office of the Secretary of the U.S. Securities and Exchange Commission, at 202-772-9324.

3. By email to apflings@sec.gov, pursuant to the Order entered by the SEC on March 18, 2020, directing filings to the foregoing email address, and as a courtesy to secretarys-office@sec.gov.

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

5. By email to gmashberg@proskaruer.com; mdale@proskauer.com; and bcatalano@proskauer.com, pursuant to an agreement with NSCC's legal counsel for service by email.

DATED this 17th day of March 2021.

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**Administrative Proceeding**
**File No. 3-20238**

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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 | Admin. Proc. File. No. 3-20238 |

# ALPINE'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR INTERIM STAY AND RESPONSE TO OBJECTION OF RESPONDENT NATIONAL SECURITIES CLEARING CORPORATION

**Oral Argument Requested**

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Alpine Securities Corporation ("Alpine") submits this Reply Memorandum in Support of its Motion for Interim Stay ("Motion to Stay") and Response to National Securities Clearing Corporation's ("NSCC")'s Objection.

## INTRODUCTION

On February 1, 2021, NSCC increased Alpine's Required Deposit margin charges so significantly that Alpine can no longer afford to process all of its customer orders to sell their stock. Because NSCC's imposition of these new margin charges, purportedly pursuant to a rule change NSCC began implementing on February 1, 2021 ("Rule Change"), constitutes an impermissible limitation of Alpine's access to NSCC's essential clearance and settlement services in a manner that contravenes the purposes and requirements of the Exchange Act, Alpine filed this Application for Review and Motion for an Interim Stay.[1]

As detailed in Alpine's Motion, NSCC has made these charges so excessive in relation to the value of the position to be cleared that they are unreasonable and cannot be justified to guard against any purported risk to NSCC from a failure to deliver or default by a member. The fact of the matter is that that NSCC's "risk" justification for imposing disproportionately astronomical margin charges on net sell positions in OTC and microcap stocks is itself illusory in relation to Alpine, and many (if not all) clearing brokers who service these markets, because Alpine and its customers are always long the shares at the Depository Trust Corporation ("DTC") to cover the

[1] The specific practices at issue are (a) implementing an onerous New Volatility Charge for sell (short) positions in over-the-counter ("OTC") and microcap stocks ("New OTC Volatility Charge"); (b) using an artificial price per-share of $.01 to calculate and assess Alpine's Required Deposit for positions in sub-penny securities; (c) implementing substantive changes to the Margin Requirement Differential ("MRD") charge, Coverage Component ("CC") charge and Backtesting charge that were not approved by the Commission; (d) continuing to use the "Illiquid Charge" component to calculate the CC charge; and (e) retroactively applying the Rule Change in its "historical lookbacks" forecasting and/or backtesting when calculating and assessing Alpine's Required Deposit. *See* Alpine's Motion for a Stay, at 1.

trade *before* the customers' orders to sell their stock are submitted to NSCC. NSCC thus faces no central counterparty exposure to the buyer from having to locate the shares, or to buy-in the shares in the market at potentially increased prices, to close the net sell position in these circumstances. Even if the remote possibility of member default in the two-day window between trade date and settlement date came to pass, NSCC can simply acquire the shares from its sister corporation, DTC. NSCC continues to ignore reality, and refuses to consider any alternatives, even as it continues to limit access to its services to trade by demanding the outlay of more and more capital.[2]

In its response, NSCC chose not to address the merits of any of Alpine's arguments. *It does not deny any of the violative conduct alleged in Alpine's Application and Motion.* Instead, NSCC filed an "Objection," arguing that the Commission should dismiss Alpine's Application and deny its Motion for a Stay on the basis that the Commission does not have jurisdiction over Alpine's Application. NSCC's arguments should be rejected for the following reasons:

*First,* NSCC's Objection, and its attempt to reserve for itself a second bite at the apple to respond to Alpine's Motion for a Stay, is procedurally improper. NSCC had an opportunity to respond to all of Alpine's arguments, and it chose only to raise ill-conceived jurisdictional arguments. To avoid both inefficiency and prejudice to Alpine, the Commission should treat NSCC's Objection for what it is: a brief in opposition to Alpine's Motion for a Stay, and rule on Alpine's Motion based on the existing record.

*Second,* NSCC's assertion that Alpine's current Application for Review and Motion to Stay is identical to its Application for Review and stay motion Alpine filed in December of 2018 ("First

[2] As set forth in the Declaration of Christopher Doubek, filed in conjunction with Alpine's Motion for a Stay on March 5, 2021, NSCC has refused to entertain alternatives to margin that would serve to better guard any conceivable risk to NSCC, including immediately releasing the shares from Alpine's account at DTC to NSCC's account on trade date. *Id.* at ¶¶ 36-37.

Application") is baseless and irrelevant. Although both proceedings challenge NSCC's imposition of facially unreasonable and excessive Required Deposit margin charges, in circumstances where there is no risk because the shares to cover the position are already at DTC, Alpine's current Application and Motion clearly arise from NSCC's new actions in purporting to implement the Rule Change on February 1, 2021. Further, Alpine's First Application remains pending, and none of Alpine's arguments therein have been addressed on their merits.

*Third*, NSCC's convoluted claim that the Commission lacks jurisdiction over Alpine's Application under Section 19(d) because NSCC's clearing and settlement services are not "charges," but are an integral part of NSCC's services, is meritless. NSCC cites no authority for its argument, and it is inconsistent even with its own rules, which plainly refer to each of the Required Deposit components at issue as "charges."

Moreover, NSCC's contention that the Required Deposit can never be a limitation on access makes no sense. NSCC does not dispute that Alpine must pay all of the discretely-calculated Required Deposit charges that NSCC assesses upon it in order to access NSCC's clearance and settlement services to clear trades for its customers. Nor has NSCC disputed Alpine's evidence that NSCC has continued to increase those margin charges so dramatically, particularly since February 1, 2021, that Alpine has been forced to frequently decline customer orders to sell their stock because Alpine lacks the capital to post the margin for the trades, costing the customer essential choice of when to sell and potentially millions of dollars depending on the trade, and causing Alpine to lose substantial revenue, customers and goodwill. NSCC is effectively wielding its margin charges like a poll tax to discriminatorily restrict market access by individuals holding OTC and microcap stocks; specifically, to restrict the ability of individuals

from selling these stocks. This is an actionable limitation of access within the plain language of Section 19(d), and as interpreted by SEC precedent.

*Fourth,* NSCC's conclusory assertion that Alpine was required to seek judicial review of the Order Approving Rule Change under Section 25(a) of the Exchange Act to challenge NSCC's unapproved modifications to the MRD, CC and Backtesting Charges lacks any support. NSCC does not contest that it did not receive SEC approval to alter these components, *or* that it has in fact modified its application of these components to substantially increase Alpine's margin charges (by at least 450%) thereunder, frequently beyond what Alpine can afford to pay. Given the impact to Alpine's and its customers' ability to access NSCC's clearing and settlement services, such unauthorized rule changes are appropriately addressed under Section 19(d), particularly as compared to an appeal from the Order under Section 25(a).

*Finally,* Alpine's Application was timely filed because it was filed within 30 days of the date NSCC first implemented the Rule Change and first applied the Required Deposit charges at issue to Alpine. NSCC's assertions that Alpine had notice of the impact of these rules changes, and thus could have sought review at an earlier point, based on actions NSCC took *before the rule change was approved* are immaterial, nonsensical, and wholly unsupported.[3]

Accordingly, NSCC's jurisdictional arguments fail. The Commission should grant Alpine's Motion for a Stay until Alpine's Application can be fully considered on its merits, because NSCC has not refuted any of Alpine's numerous arguments demonstrating that NSCC's actions contravene the Exchange Act, or Alpine's arguments that NSCC's actions are causing irreparable harm to Alpine and its customers, and that a balancing of the equities favors a stay.

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[3] For this proposition, NSCC cites its notice of proposed rule change in March of 2020, and a white paper sent to Alpine several years ago detailing potential impacts from the potential rule change. (NSCC Objection, at 5 n. 17).

## ARGUMENT

### I. NSCC'S "OBJECTION" IS PROCEDURALLY IMPROPER AND SHOULD BE TREATED AS NSCC'S OPPOSITION TO ALPINE'S MOTION TO STAY.

Alpine filed its Motion for a Stay pursuant to Rules 154 and 401 of the Commission's Rules of Practice.[4] Under Rule 154(b), NSCC had an opportunity to file a "brief in opposition" to Alpine's Motion within five days.[5] However, neither Rule 154, Rule 401, nor any other Rule of Practice of which Alpine is aware, authorizes what NSCC has purported to do: filing an "Objection" to Alpine's Motion and Application for Review, while reserving the right to file another brief "addressing all substantive issues" posed by Alpine's Motion if the Commission rejects its jurisdictional arguments. (NSCC Objection, at 5). Indeed, NSCC even purports to reserve a further opportunity to brief arguments, such as timeliness, that it raised in its Objection and already spent hundreds of words addressing. (*Id.* at 6).

NSCC offers no reason why it should be permitted to stall these proceedings and rewrite the applicable rules to get two bites at the apple. NSCC has had a chance to address all of Alpine's arguments; that it has instead only argued that Alpine's Motion for a Stay "should be denied" for jurisdictional reasons was its strategic choice. (*Id.* at 2, 5 – asserting that Alpine's Motion "should be denied" because "there is no likelihood Alpine will succeed on the merits"). NSCC's tiered approach, in addition to being unauthorized, is both inefficient and prejudicial. Not only is it unduly costly, but NSCC has *not* disputed that Alpine and its customers are facing harm *now*. They are currently being limited in their ability to sell stock through NSCC because of excessive margin charges that NSCC is imposing on a discriminatory and anticompetitive basis – because

[4] *See* SEC Rules 154(a), 401(a), 17 C.F.R. §§ 201.154, 201.401

[5] *Id.*, at Rule 154(b).

they are OTC/microcap stocks – without any valid risk-based justification, and in contravention of the Exchange Act.

The Commission should apply its Rules of Practice, consider NSCC's Objection for what it is – an opposition to Alpine's Motion to Stay – and rule upon Alpine's Motion on the briefing provided. After all, NSCC has identified no harm or risk of harm that would result to itself, other members or the public from addressing Alpine's Application while a stay is in place, particularly because *it is undisputed that Alpine and its customers are long the stock at DTC to cover every sale of stock Alpine clears, before its submits the trade to NSCC.*

## II. NSCC'S CLAIM THAT ALPINE'S APPLICATION FOR REVIEW AND MOTION TO STAY ARE IDENTICAL TO ITS PRIOR APPLICATION AND MOTION IS MERITLESS.

NSCC's assertion that Alpine's current Application for Review and Motion to Stay are identical to its previous Application for Review and Motion to Stay filed in December of 2018 ("First Application") flatly inaccurate.

One need only compare the First Application to the current Application to recognize they involve distinct challenges. Alpine's First Application and Motion involved NSCC's calculation and assessment of the "Illiquid Charge," then-existing volatility charge, Excess Net Capital Premium ("ENCP") and its use of the secret Credit Risk Rating Matrix ("CRRM").[6] Alpine's new Application and Motion concerns NSCC's new assessment of margin charges on Alpine based on different components – the New OTC Volatility Charge, MRD, CC and Backtesting Charge – after it began implementing the Rule Change on February 1, 2021. Surely NSCC does not take the

[6] *See* Alpine's First Application, Admin Proc. No. 3-18979, at p. 1

position that Alpine's First Application implicitly incorporates its challenges to the NSCC's new actions following the Rule Change, such that Alpine did not need to file a new Application.[7]

It is true that both proceedings concern NSCC's impermissible efforts to restrict Alpine's and its customers' access to NSCC's clearing services by imposing unreasonably excessive and unjustified margin charges on Alpine because it clears OTC and microcap stocks. That similarity in focus is not the result of duplication by Alpine, however; it is because NSCC's actions following the Rule Change represent NSCC's continued and ongoing efforts to choke the OTC and microcap markets by making it too expensive for the small limited-capital clearing brokers who still serve these markets to afford to clear trades in this space, notwithstanding the undisputed lack of risk to NSCC where Alpine is long the stock to cover the position at DTC.[8]

It must be emphasized that it is not just Alpine that is being harmed through the irreparable loss of significant revenue, goodwill and customers due to NSCC's application of the new margin charges since February 1, 2021. As detailed in Alpine's Motion and supporting declaration, these margin charges are so excessive that they are preventing Alpine's customers from selling stock that they own and that is in Alpine's account at DTC because Alpine lacks the capital to post the margin for the trades. These onerous margin charges impact far more than Alpine; by making the costs to trade too expensive, they also limit a stock owner's fundamental right to sell her stock when she wants to realize a return on investment, devaluing the desire to invest in small businesses,

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[7] Indeed, if this were NSCC's position, its argument that Alpine's New Application is untimely, already meritless for the reasons detailed below, becomes even more so.

[8] Certainly, there is some overlap in issues in the two proceedings. For example, in both proceedings, Alpine asserts that NSCC has failed to establish that the purported risk of member default that NSCC has used to try to justify the excessive margin charges on OTC and microcap positions does not "not exist in fact," 15 U.S.C. §78s(f), where Alpine is long the stock at DTC. In the Rule Change, NSCC also failed to justify its continued practice of using a fictional price per-share of $.01 to calculate margin on sub-penny securities. However, as detailed immediately below, the Commission has never addressed either of these issues on their merits.

and thus the ability of the small businesses to attract investors and raise needed liquidity. NSCC completely disregards that the Exchange Act also prohibits NSCC from limiting the right of "any person," such as customers or issuers, from accessing NSCC's clearing services through Alpine.[9]

Finally, and more to the point, it is unclear what NSCC hopes to accomplish by claiming the two applications are the same. Alpine's First Application remains pending. Moreover, Alpine's motion for a stay in connection with that First Application was not considered on its merits, but was denied on procedural grounds: because the Commission preliminarily determined that NSCC had been applying the rules at issue there for more than 30 days before Alpine filed its Application.[10] That is not the case here. If the Commission wishes to consolidate the two proceedings to consider the totality of NSCC's actions over time, however, Alpine has no objection.

## III. THE COMMISSION HAS JURISDICTION OVER ALPINE'S APPLICATION AND MOTION BECAUSE ALPINE HAS ALLEGED, AND PROVIDED EVIDENCE TO ESTABLISH, AN ACTUAL LIMITATION OF ACCESS TO NSCC'S ESSENTIAL CLEARING AND SETTLEMENT SERVICES.

NSCC claims that Alpine's Application and Motion for a Stay are "jurisdictionally invalid under Section 19(d)" because the Required Deposit charges at issues are "an integral part of NSCC's services . . . not fees or charges for delivering those services." (NSCC' Objection, at 4-5). "Ultimately," NSCC contends, "Alpine is objecting to components of NSCC's services, not a limitation on access to them." (*Id.* at 5). Notably, NSCC offers no authority supporting its

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[9] *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."); *In re International Power Group, Ltd.,* SEC Release No. 66611, 2012 WL 892229 at **4, 6 (March 15, 2012).

[10] Order Denying Stay and Motion for Protective Order (November 22, 2019), SEC Release No. 87599, Admin. Proc. No. 3-18979, at 10 (resolving the likelihood of success element based on a preliminary determination that Alpine's Application was untimely); at 17 (finding no irreparable harm from delay in bringing the challenge); at 18 (finding remaining stay factors not satisfied because, *inter alia,* the length of time the rules at issue there had been in effect and applied).

convoluted and restrictive reading of the scope of Section 19(d), which is not surprising, as it is completely meritless.

In the first instance, NSCC's semantic assertion that the Required Deposit *margin charges* are "not fees or charges" is intellectually disingenuous. NSCC itself refers to the components at issue as "charges" in its Rules and rulemaking: describing the New OTC Volatility Charge as the "haircut-based volatility *charge*";[11] the "margin requirement differential component *charge*";[12] a "coverage component *charge*";[13] the "Backtesting *Charge*."[14] That Rule 24 of NSCC's Rules also references other "charges" that NSCC may impose does not make the Required Deposit any less of a "charge." (*See* NSCC's Objection, at fn. 16).

Nomenclature aside, NSCC's contention that the Required Deposit can never be a limitation on access makes no sense. NSCC's does not, and cannot, dispute that the Required Deposit serves precisely to limit and proscribe access to essential "services," i.e, NSCC's CNS clearance and settlement services. NSCC has formulated and imposes unique charges on Alpine that it must post if it wants to access NSCC' s clearance and settlement services for its own business and for its customers. Where NSCC continues to increase those margin charges to the point that they become so onerous that Alpine or other similarly situated members cannot pay them, they operate like a poll tax to restrict market access by Alpine and its customers, and thereby effect a limitation of access cognizable under Section 19(d).

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[11] *See, e.g.,* SR-NSCC-2020-003, SEC Release No. 34-88474, 85 F.R. 17910, 17915-17 (March 31, 2020) ("NSCC's Rule Change Notice"). NSCC uses the term "charge" 98 separate times in its Rule Change Notice. *See id.*

[12] NSCC's Rules & Procedures, Procedure XV, at § 1(A)(1)(f).

[13] *Id.,* Procedure XV, § 1(A)(1)(g).

[14] *Id.,* Procedure XV, § 1(B)(3).

As Alpine detailed in its Application, and supported by declaration, since the Rule Change, NSCC has significantly raised Alpine's Required Deposit (from an average of $2.5 million to an average of $3.2 million), even though the volume and value of the trades/positions has not materially increased.[15] These charges are wildly excessive in comparison to the underlying trades to be cleared and settled through NSCC, have not been shown to correspond to any actual risk, and artificially restrict the number of trades that Alpine can process every day. Alpine has had to deny customer trades, and lost customers and revenue, due to the capital necessary to fund the Required Deposit and, as indicated, the harms are felt even more acutely by Alpine's customers who are being restricted in their ability to sell stock they own and which is already at DTC at the time their orders to sell must be declined because Alpine lacks the capital to post the margin for the trades.[16] ***NSCC has not addressed, let alone refuted, any of this.*** It simply cannot be Congress' intent in Section 19(d) and (f) that NSCC's margin charges can never be limitations on access in these circumstances because they purport to be "components" of the service.

NSCC's unsupported assertion that an increase in "Alpine's cost of doing business" is not justiciable under Section 19(d),[17] not only mischaracterizes the impact on Alpine and its customers, it also flatly ignores that Section 19(d) applies to "limitations" on access as well as outright prohibitions. In fact, the Commission has explicitly recognized that a "loss or increased cost of doing business" could be remedied as a denial of access under Section 19(d). [18]

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[15] Doubek Decl., at ¶¶ 18-25.

[16] *Id.*, ¶¶ 17, 28-33 38-40.

[17] NSCC's Objection, at 5.

[18] *In re International Power Group, Ltd.,* SEC Release No. 66611, 2012 WL 892229 at *4 (March 15, 2012) (stating, "loss of or increased costs of doing business" or "difficulties in fulfilling market-making obligations" were "negative impacts" on a "Broker-Dealer Participant" that "could be remedied by challenging DTC's denial of the Participant's access to services").

Given the broad language of the statute, it is unsurprising that the Commission has consistently refused to read the "limitation of access" language in the statute in the restrictive manner advanced by NSCC. For example, in *Bloomberg, L.P.*, the Commission held that NYSE's "imposition and enforcement of" certain restrictions relating to the dissemination of depth-of-book data "effected a denial of access to Bloomberg" of services because NYSE "would not provide Bloomberg access to [that] data unless it disseminated and continue[ d] to disseminate" it in accordance with the restrictions.[19] Similarly, the Commission exercised jurisdiction to institute "denial of access" proceedings under Sections 19( d) and (t) to review the NYSE's denial of a member's request to install an unrestricted phone line on the floor of the Exchange to contact customers.[20] Certainly the excessive margin charges imposed by NSCC as a condition of clearing a trade likewise constitute a denial or limitation of access.

Finally, NSCC's puzzling assertion that Section 19(d) does not provide "an avenue to modify" charges imposed on services offered by an SRO is equally baseless. (NSCC Objection, at 5). Section 19(f) expressly requires the Commission to "***set aside the action***" of the SRO that effects a limitation on access *"*unless" the Commission finds that: "(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," and imposes no "burden on competition [that] is not necessary or appropriate in furtherance of the purposes of the [Exchange] Act."[21] In its Motion, Alpine detailed the numerous ways in which NSCC has failed to comply with those requirements in calculating and assessing

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

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

[21] *In re Bloomberg, L.P.*, 2004 WL 67566, at *3 (emphasis added); *see also* 15 U.S.C. § 78s(f).

Alpine's Required Deposit following the Rule Change.[22] The Commission has jurisdiction, and a statutory obligation, to consider these issues under Section 19, even though NSCC ignored them.

## IV. NSCC'S UNAUTHORIZED CHANGES TO THE CC, MRD AND BACKTESTING COMPONENTS ARE REVIEWABLE UNDER SECTION 19(D).

As set forth in Alpine's Motion to Stay, since it began implementing the Rule Change on February 1, 2021, NSCC has significantly increased its assessment of the MRD, CC and Backtesting Charges on Alpine, even though the nature and value of Alpine's trading activity did not materially change on February 1, 2021.[23] Alpine has asserted that these increases result from unauthorized changes that NSCC has made to these components, without approval by the SEC, and by impermissibly retroactively applying the New OTC Volatility Charge in its "historical look-backs" and forecasting to calculate these components.[24]

NSCC does not dispute that it has changed its implementation of these components, or respond to any Alpine's arguments or law demonstrating the unlawfulness of NSCC's conduct in that regard. Instead, in a footnote, NSCC summarily declares that it "disagrees with Alpine's assertion" that the "Commission did not consider all aspects of the changes made pursuant to the amendments." (NSCC Objection, at 4 n. 13). NSCC then blithely asserts that Alpine's only recourse for these unauthorized changes is to appeal the Order Approving the Rule Change under Section 25(a) of the Exchange Act, 15 U.S.C. § 78y.

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[22] *See* Alpine's Motion to Stay, at 16-22.

[23] *See Id.*, at 11-12, 15, 20-21.

[24] *Id.* at 9-10, 20-21.

NSCC is incorrect. Because NSCC *did not disclose* that it intended to modify these components, or receive approval from the SEC to do so,[25] an appeal from the Order, or of the process the Division of Trading and Market used in approving the Rule Change, does not provide an appropriate vehicle of review. Simply put, this is not an asserted procedural error by the SEC appearing in the Order, it involves conduct by NSCC outside of the Rule Change that did not become apparent until NSCC purported to apply the Rule Change on February 1, 2021.[26]

Given the significance of the increase, and its undisputed limitation on Alpine's ability to utilize NSCC's clearing and settlement services, NSCC's application of its unlawfully modified rules is reviewable under Section 19(d), which, as indicated, requires the Commission to consider, *inter alia,* whether NSCC's "rules are and were applied in a manner that is consistent with the purposes of the Exchange Act."[27] Changing the MRD, CC and Backtesting charges without approval violates Section 19(b)(1) of the Exchange Act, and Rule 19b-4 thereunder.[28] Notably, the Commission confronted this exact situation in *Bloomberg,* where it held that the SRO's unapproved rule changes were unenforceable, and set aside the SRO's actions as an impermissible

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[25] Alpine invites the Commission to review NSCC's Rule Change Notice, and the Order Approving Rule Change, SEC Release No. 34-90502 (November 24, 2020), to confirm that changes to the MRD, CC and Backtesting components, and retroactive application of the New OTC Volatility Charge, were neither discussed nor approved.

[26] Even if this issue could be raised in a direct appeal from the Order under Section 25(a), NSCC has provided no authority suggesting that it cannot also be raised in an application for review under Section 19(d).

[27] 15 U.S.C. § 78s(f).

[28] As set forth in Alpine's Motion (at 21-22), established law separately precludes the retroactive application of rule changes to conduct that occurred before the amendments became effective. *See,e.g, Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 215 (1988); *Kresock v. Bankers Tr. Co.*, 21 F.3d 176, 179 (7th Cir. 1994) (addressing the impermissibility of the retroactive application of SRO rules).

limitation on access under Sections 19(d) and (f).[29] The Commission should follow that approach here by entering an order staying NSCC's implementation of the unlawfully modified MRD, CC and Backtesting Charges pending review of Alpine's Application.

## V. ALPINE'S APPLICATION IS TIMELY.

In a lengthy footnote at the end of its application, NSCC claims that Alpine's Application is untimely, purportedly because NSCC "described the effects the amendments *well in advance* of the implementation date" – allegedly, when NSCC proposed the rule change in March of 2020, and when NSCC provided a white paper to Alpine and other members of the potential impacts when it first considered the rule change years ago. (NSCC Objection, at 6 (emphasis in original)). Of course, NSCC provides no authority to support its position that Alpine was required to file its application ***before the Rule Change was approved,*** let alone implemented, and it would lead to patently absurd results. Among other things, the Commission would be fielding appeals based on rules that may never be passed, and persons actually impacted by a rule change would lose any right of review unless they filed preemptive petitions. The Commission should reject this argument out of hand.

To be timely, the Application must be filed "within thirty days after receiving notice of the action."[30] Alpine met these requirements. Alpine filed its Application on March 2, 2021, within 30 days of the date (February 1, 2021) that NSCC first implemented and applied the Rule Change and sent Alpine notices of its daily charges associated with its Required Deposit. Significantly, in denying Alpine's motion to stay in connection with its First Application, the Commission made

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[29] *In re Bloomberg*, 2004 WL 67566, at **4-5.

[30] *See Orbixa Techs., Inc.*, Exchange Act Release No. 70893, 2013 WL 6044106, at *3 & n.12 (Nov. 15, 2013); *see also* 15 U.S.C § 78s(d)(2); SEC Rule of Practice, Rule 420(b).

clear that a challenge to a "Rule Change brought within 30 days of the first time the rule was applied" is timely filed.[31]

Moreover, Alpine needed to wait to until the rule was implemented to file its Application in order to gain an understanding of the manner in which NSCC was applying the Rule Change to calculate Alpine's Required Deposit, and its impacts on Alpine's ability to access NSCC's clearing and settlement services. To be certain, Alpine could not have brought its challenges to NSCC's new assessment of the MRD, CC and Backtesting Charge before they were implemented because, as indicated, NSCC did not disclose or receive approval for changes to these components. Accordingly, Alpine's Application and Motion were timely filed.[32]

## CONCLUSION

For the foregoing reasons, NSCC's challenges to the Commission's jurisdiction over Alpine's Application and Motion to Stay, and NSCC's attempt to reserve a further response to Alpine's Motion, should be rejected. Further, because NSCC chose not to address, let alone rebut, the merits of any of Alpine's arguments, the Commission should grant Alpine's Motion to Stay,

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[31] *See* Order Denying Stay and Denying Motion for Protective Order, SEC Release No. 97599, at p. 12 (November 22, 2019), Admin Proc. File No. 3-18979 ("because Alpine waited more than a year after it had notice of the application to it of the rules it challenges, it has not demonstrated that it timely filed its application for review within the 30-day period mandated by Section 19(d)."); *see also id.,* at 12 n. 62 ("A challenge to the Illiquid Charge Rule Change brought within 30 days of the first time the rule was applied to Alpine would not suffer from this same defect [untimeliness] because Alpine would be challenging the rule itself …").

[32] To the extent NSCC claims that its failure to file notices with the Commission of its daily Required Deposit charges on Alpine affects the timeliness or applicability of Section 19(d), the argument must be rejected. The Commission has repeatedly confirmed that "the failure of an SRO to file the required notice does not prevent Commission review," and that it can review any action where the SRO was obligated to file notice, regardless of whether it complied with that obligation. *See MFS Sec. Corp*., Exchange Act Release No. 47626, 2003 WL 1751581, at *6 n.13 (Apr. 3, 2003) ("[T]he failure of an SRO to file the required notice does not prevent Commission review" because "Section I 9(d)(2) grants the Commission the authority to review any SRO action 'with respect to which a self-regulatory organization is required ... to file notice ... , whether or not such notice is filed." (emphasis added); *In re Higgins*, 51 Fed.Reg. at 6188, 1986 WL 89969 (same).

until Alpine's Application for Review is decided, on the basis that it is unopposed.

DATED this 17th day of March, 2021.

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## ATTORNEY CERTIFICATION

Pursuant to Rule 154(c) of the Commission's Rules of Practice, I hereby certify that the foregoing document contains 5,067 words, exclusive of the tables of contents and authorities.

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