Administrative Proceeding
File No. 3-20238

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UNITED STATES OF AMERICA

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of ALPINE SECURITIES CORPORATION, a Utah limited liability company For Review of Adverse Action Taken By NATIONAL SECURITIES CLEARING CORPORATION	Admin. Proc. File. No. 3-20238

ALPINE'S BRIEF IN SUPPORT OF APPLICATION FOR REVIEW OF ACTION TAKEN BY NATIONAL SECURITIES CLEARING CORPORATION

Oral Argument Requested

OS Received 12/06/2023

Alpine Securities Corporation ("Alpine") submits this Brief in Support of its Application for Review of Action Taken by the National Securities Clearing Corporation's ("NSCC").

INTRODUCTION

This application concerns the second of three substantial increases to deposit requirements imposed by NSCC in recent years specifically targeting transactions in illiquid or low-priced securities. Alpine initially challenged NSCC's "Illiquid Charge." When NSCC then substantially modified the applicable charges, eliminating the Illiquid Charge and modifying the Volatility Charge,[1] and in the process also modifying the Market Requirement Differential ("MRD") Coverage Component ("CC") and Backtesting Charges by incorporating the amended Volatility Charge therein, Alpine filed this challenge under Section 19(d). Since then, NSCC has *once again* dramatically increased deposit requirements applicable to Alpine, this time increasing its minimum Excess Net Capital ("ENC") requirements to $5 million for a self-clearing firm and $10 million for a firm that clears for others.

Because these various requirements have the clear effect if not the purpose of limiting or preventing the ability of investors and firms to trade microcap or low-priced securities, Alpine has argued in each instance that the NSCC's requirements constitute an impermissible limitation of access to NSCC's essential clearance and settlement services and are subject to challenge under Section 19(d).

In this instance, Alpine's application presents two critical issues for the Commission's consideration. First, and as identified by the Commission as the threshold issue, is whether these

[1] *Order Approving a Proposed Rule Change to Enhance National Securities Clearing Corporation's Haircut-Based Volatility Charge Applicable to Illiquid Securities and UITs and Make Certain Other Changes to Procedure XV*, Exchange Act Release No. 90502, 85 Fed. Reg. 77,281 (Dec. 1, 2020), (issued for the Commission by the Division of Trading and Markets pursuant to delegated authority) ("Volatility Rule Change Order")

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requirements can be reviewed under Section 19(d). The Commission had previously issued a decision stating that it could review such requirements and the circumstances here certainly support the view that NSCC's actions constitute a targeted limitation on any person with regard to accessing NSCC's services, but the Commission here concluded that the decision in *NASDAQ Stock Market v. SEC*, 961 F.3d 421 (D.C. 2020) precludes that review. As discussed below, given the targeted and substantial nature of the NSCC's layers of deposit requirements, and its impact not only on firms but also on *every* security holder that seeks to liquidate a low-priced or thinly traded security, the Commission should find that the issue does constitute a reviewable limitation on access.

The *NASDAQ* decision involved a truly generic fee applicable to *all* who sought access to "depth-of-book" data. But that decision, and prior authority, also clarified that a "fee targeted at specific individuals or entities" may be challenged under Section 19(d). The charges at issue in this case present precisely that circumstance: because NSCC would obviously not be permitted to selectively impose exorbitant fees on certain firms, it has devised the mechanism at issue here of constructing charges that apply only against a *targeted kind of transaction and the people and firms* that still process those transactions. Instead of identifying the target of the "limitation to access" by name, it has carved out a category of investors and firms who are seeking to sell a particular type of security, and it has made the transaction cost-prohibitive.

Alpine has alleged that, by these machinations, NSCC is doing covertly what it may not do openly, dramatically limiting access to the markets in clear discriminatory fashion to those who are involved in microcap securities. Absent consideration by the Commission, the NSCC will continue to impose and likely increase the exorbitant costs on individuals who are seeking to liquidate these securities. Those who are willing to provide financing or services to start-up

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companies will be deprived of the ability to sell their own property and, sooner rather than later, those investors will become unwilling to assist those developmental stage companies. And that will occur even though, as discussed below, the investors are seeking to liquidate those securities under circumstances that pose ***no risk*** to NSCC.

With respect to the second issue, the permissibility of the NSCC requirements, it appears indisputable that NSCC's piling on of the charges and deposit requirements is unsupported, discriminatory and irrational. Succinctly stated, NSCC imposes those enormous requirements, interfering with the securities owners' ability to sell their stock, based on an obvious fiction, i.e., that it faces the risk of having to cover the sale if the seller defaults on deliver of the security. But that risk does not exist in relation to the transactions executed by Alpine. In every instance, the customer has already deposited his stock and that stock is already in the account at DTC. Alpine and its customers are always long the shares at the Depository Trust Corporation ("DTC") to cover the 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. There is no risk of seller default. And there is no rational basis on which NSCC should make the transaction prohibitively expensive for the customer or his broker.

Under those circumstances, where the customer has deposited the stock and the stock is held at DTC, the only risk that actually exists is not the seller's default but rather ***the risk that DTC will refuse to deliver the stock. And that has never happened.*** That circumstance is the only basis on which NSCC would face any exposure. But NSCC has created and is imposing margin requirements that are ***not properly based on that infinitesimal risk***.

NSCC also improperly calculates a risk associated with the transactions based on a T+2 settlement schedule. According to NSCC, its deposit requirements need to cover the risk of a potential default occurring at any time during that period. But there is no need for that delay to exist, and DTC is finally moving to T+1 in the first quarter of 2024. By definition, any theoretical risk is thereby reduced by a factor of roughly 60%, since the only risk that remains is that a default occurs during a one day, not a three day, period.

Further, NSCC's new charges combine the fiction of supposed risk with the fallacy that NSCC is not able to calculate margin requirements in relation to the actual price of sub-penny stocks. With respect to sub-penny stocks, NSCC ignores the actual share price and instead increases the share-price to $.01 to calculate the margin. That manipulation of the price invariably results in charges that exceed the value of the position, often by several orders of magnitude. And NSCC has made no attempt to justify this practice in the Rule Change, and it is contrary to NSCC's own schedules. Further, as stated in the Petition, NSCC also uses this fictional share price and the new Volatility Charge to substantively change the calculation of other components of the Required Deposit, including the MRD, CC and Backtesting Charge, without having sought Commission approval to do so under the Section 19(b) of the Exchange Act.

This is truly a circumstance where NSCC is engaging in unjustified conduct that is harming investors and the companies in which they invest. The Commission can and should readily confirm that NSCC ***does not actually*** face the risk of a seller default and prevent the imposition of massive cash requirements where there is no risk. This is an actionable limitation of access within the plain language of Section 19(d) and relevant authority. There is no reason to allow NSCC to continue to penalize investors who are providing critical funding and/or services to start-up companies.

Further, the Commission should review the fact that NSCC covertly altered its other financial requirements of the Required Deposit (NSCC's calculation of the MRD, CC and Backtesting Charge) without receiving SEC approval to do so. 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 Volatility Rule Change Order under Section 25(a), as the Order did not raise the issue of the alterations to these other Required Deposit components because NSCC gave no notice in its proposal to change the Volatility Charge of any impact on other charges. Those changes have never been reviewed or approved by the Commission, in direct contradiction to the Commission's obligation to supervise SROs, including to ensure that all substantive (non-housekeeping) SRO rules and rule changes receive Commission review and approval before they are implemented.

ISSUES ON WHICH FURTHER BRIEFING WAS ORDERED

In Order Denying Motion to Stay and Setting Briefing Schedule ("Order"), dated November 6, 2023, the Commission ordered further briefing on the following issues:

1. Should Alpine's challenge to the Volatility Rule Change be dismissed as unreviewable under Exchange Act Section 19(d)?

2. Is Exchange Act Section 19(d) available as a means for Alpine to pursue its alternative framing of its claim as discussed in Section II.A.2. above?

3. Should the record be supplemented under Rule of Practice 452, 17 C.F.R. § 201.452, to address the merits of Alpine's claims, if Exchange Act Section 19(d) is available as a means for Alpine to pursue some or all of them?

ARGUMENT[2]

I. The Commission has Jurisdiction Over Alpine's Application and Motion Because Alpine has Alleged, And Provided Evidence to Establish, A Targeted, Discriminatory and Baseless Limitation of Access to NSCC's Essential Clearing and Settlement Services.

The Commission based its denial of Alpine's motion for a stay on the conclusion that it lacked jurisdiction on the D.C. Circuit's *NASDAQ* decision, stating that "Alpine has not raised a serious legal question as to whether it may challenge the generally applicable rules governing deposit charges under Section 19(d)." Order, at 11. As discussed below, however, the charges at issue are not "generally applicable" but rather were developed and are implemented to target and limit or prohibit access to a specific types of investors and firms that seek to liquidate microcap securities. Because the charges at issue are crafted to accomplish a discriminatory and targeted limitation of access, NSCC's actions fall squarely within the language of Section 19(d) and the holding in *NASDAQ* does not alter that result.

In *NASDAQ*, an "industry group," Securities Industry and Financial Markets Association ("SIFMA"), filed a petition under Section 19(d) to challenge rule changes by NYSE Arca, Inc. and Nasdaq Stock Market, LLC (the "Exchanges") involving fees that the Exchanges charge to anyone who sought to acquire their "depth-of-book" data. 961 F.3d at 424-25. The Exchanges argued that "generally-applicable fee filings" cannot constitute prohibitions or limitations on access under Section 19(d) because that provision is limited to "review of actions targeting specific members." Id.. at 425. The Commission disagreed, and the Exchanges appealed. *Id.* On appeal, the D.C.

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[2] Alpine provided a detailed background discussion of Alpine, NSCC and the Required Deposit Charges at issue in its Application for Review and its Interim Motion to Stay. Given those filings and briefing, and in the interests of efficiency, Alpine assumes the Commission's familiarity with with the background and will not repeat that discussion here, except as necessary to address the issues on which the Commission ordered further briefing.

Circuit held that "Section 19(d) is not available to challenge the reasonableness of generally-applicable fee rules." *Id.* at 424.

In so holding, however, the Circuit confirmed:

> It is conceivable that a fee may act as a "limit" on access to services under Section 19(d). But not every fee is, by mere virtue of being a fee, challengeable as a "limit" on access to exchange services under Section 19(d). Rather, we hold that for a fee rule to be challengeable under Section 19(d), it must, at a minimum, ***be targeted at specific individuals or entities.***

Id. at 427-28 (emphasis added).

The court in the *NASDAQ* decision went on to underscore that, even when charges appear to be generally applicable, but are *in reality* targeted, review under Section 19(d) is available. As explained in the *NASDAQ* decision, the Commission in *National Ass'n of Securities Dealers, Inc. v. S.E.C.*, 801 F.2d 1415, 1419 (D.C. Cir. 1986), "quite properly concluded" that a securities information processor's challenged fee proposal "constituted an improper prohibition or limitation of access to services" under Section 11A(b)(5). *NASDAQ,* 961 F.3d at 429.

Here, too, the Required Deposit margin charges are not "generally-applicable fees rules," and are nothing like a general fee for a product. They are instead constructed so as to impact only a specific group of investors and the firms through which they trade. Nevertheless, the Order denying Alpine's Motion to Stay insists that the *NASDAQ* decision strips the Commission of jurisdiction under Section 19(d) on the basis that the Volatility Charge and other Required Deposit components at issue are not targeted specific individuals and entities because NSCC's rules do not address Alpine or any other person specifically, but "apply to any NSCC member that deals in Illiquid Securities." Order, at 11. But neither the statute nor the D.C. Circuit required such a

fantastic condition of having to be personally named in a rule.[3] Rather, "[t]he text [of Section 19(d)] contemplates ***action*** targeted at specific individuals." *NASDAQ,* 961 F.3d at 430 (emphasis added). The Volatility Charge and other Required Deposit components at issue are member specific; they are uniquely calculated and targeted at a specific member based on their individual characteristics and trading activity. Because of this, the daily Required Deposit charges, including the Volatility, MRD, CC and Backtesting Charges, imposed on Alpine are different than the Required Deposit charges that might be imposed on any other member. This is not the case for a generally applicable fee for a product, even if there are tiers to the pricing for the product.

Moreover, to interpret *NASDAQ* so broadly would render Section 19(d) meaningless, even for disciplinary actions, because both the SRO rules that form that basis for a violation in a disciplinary action, and the sanctions that may be imposed, are governed by rules applicable to all members. The SRO action is what controls – whether the action itself targeted at a specific member, not simply whether that SRO action at issue follows from a rule appliable to all members. *NASDAQ,* 961 F.3d at 430. To read the *NASDAQ* decision as preventing review of such targeted charges is contrary to the language of Section 19(d) and the decision in *NASDAQ*.

The distinctions do not stop there. For example, the Order seized on the *NASDAQ* Court's reference to incompatibility of the notice requirements of Section 19(d) to generally applicable fee rules. Order, at 14. But, the Order failed to recognize that NSCC members do get notice of their individualized daily Required Deposit Charges, and they also get specific margin calls to deposit more money to cover a specific purported deficiency arising from actual trading activity. Nor does

[3] Similarly, the D.C. Circuit's reference to "one-on-one negotiations" with the only subscriber that would have to pay the fee was included to provide an example where review would be appropriate, not to suggested that review of a fee was limited to only those circumstances. *See NASDAQ,* 961 F.3d at 429.

the same concern about the incompatibility with the statutory remedy exist with respect to Volatility Charge and other Required Deposit charges at issue. They could be set aside, and the limitation on access removed, without the concern of forcing an SRO to give a product away for free. To the extent the concern is how the Commission could then grant access to NSCC's services, that concern is overblown because reasonable, non-discriminatory, and non-anticompetitive margin charges could be implemented. As to Alpine, which is always long the stock at DTCC, as indicated above, there is no actual risk to NSCC for which the Required Deposit charges are necessary.

The policy based argument that it would make no "sense to argue that review under Section 19(d) should follow the culmination of the Section 19(b) review process" is also a poor reason to decline jurisdiction. Order, at 12. Not only is this assertion contrary to the SEC's position prior to *NASDAQ,* it fails to recognize that the scope of review is broader under Section 19(f) because it requires the SEC to also "find[]" that the SRO rules "are, and were ***applied*** in a manner, consistent with the purposes of" the Exchange Act. 15 U.S.C. § 78s(f) (emphasis added). The duty to ensure that a specific application of an SRO rule complies with Exchange Act is a critical feature of the Section 19(d)/(f) review process that is necessarily absent from the Section 19(b) review process that occurs before the rule is approved.

The suggestion in the Order (fn. 81) that Alpine might be able to pursue a challenge under Section 19(d) if NSCC were cease to act for Alpine, as may occur if Alpine were to decline to pay the charges, is also fundamentally flawed. While such action would undeniably be a denial of access or disciplinary action, Section 19(d) is broader than that, applying also to *limitations* on access. Moreover, an "enforcement action is not a prerequisite to challenging the law," and a

regulated party is not required to "bet the farm" and "expose [itself] to liability … to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 1118, 128-29 (2007).

Review of the Volatility Charge and other Required Deposit components under Section 19(d) is supported also by the decision in *in re Bloomberg, L.P.*, in which 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. *See In re Bloomberg, L.P.*, Release No. 49076, 2004 WL 67566 at *2 (Jan. 14, 2004). Similarly, the Commission exercised jurisdiction to institute "denial of access" proceedings under Sections 19(d) and (f) to review the NYSE's denial of a member's request to install an unrestricted phone line on the floor of the Exchange to contact customers. *Application of William Higgins*, 51 Fed.Reg. 6186-04, 1986 WL 89969 (Feb. 20, 1986); *see also Tower Trading, L.P.*, Exchange Act Release No. 47537, 56 SEC 270, 2003 WL 1339179, at *5 (Mar. 19, 2003) (concluding that "Tower's loss of its guaranteed participation fundamentally altered its access to services offered by CBOE")

The excessive margin charges imposed by NSCC as a condition of clearing a trade are designed to and in fact do constitute a denial or limitation of access that applies *only* to those who have acquired and are seeking to liquidate microcap securities.[4] These discriminatory 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 prevent investors from being able to sell

[4] Alpine relies on and incorporates its detailed analysis of the charges and their impact contained in its Motion to Stay at pages 7 to 14 and 17 to 20. Alpine has properly alleged that the development of the charges is based on discriminatory and anti-competitive efforts to curtail activity by investors and firms that participate in microcap transactions and it should be permitted to obtain further information on that issue of targeting and supplement the record.

the securities that they acquired. Alpine has had to deny customer trades, and lost customers and revenue, due to the capital necessary to fund the Required Deposit and 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. ***NSCC has not addressed, let alone refuted, any of this.***

II. NSCC's Unauthorized Changes to the CC, MRD and Backtesting Components are Reviewable Under Section 19(d).

NSCC did not dispute that it changed its implementation and calculation of the CC, MRD and Backtesting components when it implemented to the new Volatility Charge, nor did it dispute that it did not reference changes to these components in the Volatility Rule Change Order (or through any other proposal to alter these Required Deposit Components). Instead, in a footnote, NSCC summarily declared 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 asserted in a conclusory fashion that Alpine's only recourse for these unauthorized changes is to appeal the Volatility Rule Change Order under Section 25(a) of the Exchange Act, 15 U.S.C. § 78y.

The Order denying the motion to stay is similarly terse on both the reviewability of Alpine's challenges to the unapproved changes to the MRD, CC and Backtesting Charges, and to the lawfulness of the changes themselves. The Order addressed the 19(d) reviewability of the challenge to these components in summary and equivocal fashion, indicating only that there are "good reasons to believe Section 19(d) does not" provide for review. Order, at 15. On the merits, the Order simply concludes that "Alpine has not shown that Section 19(b)(1) requires NSCC to

amend the MRD, CC, and Backtesting charges simply because the Volatility Charge they reference has been amended." *Id.* at 16. Respectfully, Alpine submits that both conclusions are incorrect.

As detailed above, the conclusion in the Order that Section 19(d) does not apply to Volatility Charge is predicated on an incorrect and overly broad reading of the *NASDAQ* decision. It is even more so when applied to unapproved changes to the calculation and imposition of the MRD, CC and Backtesting Charges. Because NSCC *did not disclose* that it intended to modify these components when it altered the Volatility Charge, the changes to these components have never been reviewed, let alone approved, at any level. And, if Section 19(d) review is unavailable, then the charges would be effectively unreviewable, even though NSCC did not comply with the review and approval requirements of Section 19(b), and the significant increases that resulted from the unapproved changes to these components result in clear limitations on the ability of customers and firms to utilize NSCC's clearing and settlement services in relation to a carefully targeted type of transaction

An appeal from the Volatility Rule Change Order, or of the process the Division of Trading and Market used in approving the Volatility Rule Change, would not provide an appropriate vehicle of review because changes to the MRD, CC and Backtesting charges were not referenced in NSCC's proposed rule change filing for the Volatility Charge. 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. The SEC has a duty to supervise NSCC and other SROs, including to approve their rules and rules changes. *See* 15 U.S.C. §§ 78s(b), (c), (g) (h), 78q-1(b)(3). It cannot be the law that NSCC can avoid this through the simple trick of using an approved change to the Volatility Charge like a trojan horse to effect material changes to other components.

To be certain, the changes to the MRD, CC and Backtesting charges were material and substantive, which demonstrates that the conclusions in the Order that NSCC was not required to seek approval to amend these components is not correct. Order, at 16. As set forth in Alpine's Motion to Stay, once NSCC began implementing the new Volatility Charge, Alpine's MRD and CC charges spiked 450% overnight, from a steady approximate amount of $200,000 to approximately $900,000. NSCC also imposed a significant ($1.1 million) Backtesting Charge, which it had not done before. It is undisputed that the sudden spike resulted from NSCC's use of the new Volatility Charge in calculating these components.

Rather than considering the impact of these changes on their own terms, the Order simply concludes that Alpine has not shown that Section 19(b) requires NSCC to amend the MRD, CC and Backtesting charges simply because the Volatility Charge they reference has been amended. Order, at 16. In support, the Order cites a plainly distinguishable federal case, *Ehm v. National Rail Road Passenger Corp.,* 732 F.2d 1250 (5th Cir. 1984), dealing with an amended definition in a statute that cross-references other statutes. The conclusions in the order are incorrect for several reasons.

First, the Order repeatedly recognizes that NSCC "substantially modified" the Volatility Charge. Order, at 2, 6, 7. The Order does not suggest that such a substantial modification of the Volatility Charge did not require prior Commission approval under Rule 19(b)(1). And, it makes no sense that incorporating a substantially modified Volatility Charge to also substantially modify other Required Deposit components – and, as indicated, the changes to the calculation and impact of those charges was significant enough to cause a 450% increase – would not also require Commission approval under Section 19(b)(1).

Second, the Order ignores the *Bloomberg* decision, which Alpine cited in its briefing on the Motion to Stay. In that case, the Commission set aside under Section 19(d)/(f) certain restrictions that registered Exchanges applied without Commission approval. *In re Bloomberg,* 2004 WL 67566, *3. The restrictions at issue were additional restrictions that the Exchanges placed on top of an existing rule change that was approved, but were not part of the proposed rule change itself. *Id.* at *2. In so ruling, the Commission concluded that those restrictions were "rules" under the Exchange Act because they were stated "policies, practices and interpretations" that relate to "any material aspect of the operation of the facilities of the [SRO]" and a statement "made to persons seeking access to facilities" of the SRO. *Id.* (citing 15 U.S.C. § 78c(a)(27) *and* 17 C.F.R. § 240.19b-4) (internal quotations omitted). As a result, the restrictions were rule changes that required SEC approval, and could not provide a basis for Exchange "action" because they were not approved under Section 19(b), and were not "housekeeping" rules or otherwise subject to any exception. *Id.* at * 4.

Similarly, here, the MRD, CC and Backtesting Charges are plainly substantive NSCC rules. They are not housekeeping rules, but statements of policy, practice or interpretation that relate to a "material aspect" of the operations of the facilities of NSCC – i.e., its clearing and settlement services – and are also "statements made generally available to" members of NSCC "seeking access" to NSCC's clearing and settlement services that "change[] any standard, limit, or guideline with respect to," at least, "***[t]he meaning, administration or enforcement of an existing rule***." 17 C.F.R. § 240.19b-4(a)(6) (emphasis added). Under Rule 19b-4, and following the rationale of *Bloomberg,* the changes that NSCC effected to the MRD, CC and Backtesting Charges, by incorporating the changed Volatility Charge, were also rule changes that required Commission approval under Section 19(b)(1). *See* 17 C.F.R. § 240.19b-4(c) ("A stated policy, practice or

interpretation of the [SRO] shall be deemed a proposed rule change unless … it is reasonably and fairly implied by an existing rule of the [SRO].").

By substantively changing a component used to calculate the MRD, CC and Backtesting Charge, NSCC materially changed these charges in both operation (how it is determined) and effect (the amount of the charge). Indeed, with respect to Backtesting Charge, which relies on a look-back period, the new Volatility Charge was impermissibly applied retroactively to create a backtesting deficiency that *did not exist* prior to the use of the new Volatility Charge in the analysis.[5] The change in these components was not "reasonably and fairly implied" by any existing rule. This is readily apparent because the CC, MRD and Backtesting Charges only jumped once NSCC began implementing the new Volatility Charge rule.

The significant increases that resulted from these calculations result in clear limitations on the ability of customers and firms to utilize NSCC's clearing and settlement services in relation to a carefully targeted type of transaction.[6] NSCC's application of its unlawfully modified rules is therefore 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."[7] Changing the MRD, CC and Backtesting charges

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[5] It is for this reason that the Order's analysis on the Backtesting Charge is erroneous. The Backtesting Charge did not draw on "antecedent facts." Order, at 18 (quotation and citation omitted). Based on antecedent facts (i.e., Aline's trading history under the prior volatility charge) Alpine had no backtesting deficiency and no Backtesting Charge. NSCC instead used the newly modified Volatility Charge to change the backtesting calculation and thereby change the past facts in order to trigger the charge.

[6] Alpine relies on and incorporates the detailed discussion of those changes contained in its motion for a stay at 20 to 23 of its motion for a stay. Alpine has properly alleged that the NSCC improperly changed certain calculations without properly disclosing and seeking approval of those changes..

[7] 15 U.S.C. § 78s(f).

without approval violates Section 19(b)(1) of the Exchange Act, and Rule 19b-4 thereunder.[8] The Commission should follow the approach from *Bloomberg* here and prevent the covert and targeted limitations that are being imposed by NSCC through its multi-layered calculation of deposit requirements.

III. The Record Should be Supplemented to the Extent Necessary to Address the Merits of Alpine's Claims.

The third question posed in the Order was whether the record should be supplemented under Rule of Practice 452 if Section 19(d) is available. NSCC did not provide a record in the underlying proceeding, so it is difficult for Alpine to determine what may be in the record currently. However, to the extent that there is any dispute regarding changes to the MRD, CC and Backtesting components, or improper retroactive application of the Volatility Charge, Alpine should be permitted to obtain further information on that issue, including any necessary supplementation of the record, to address the merits of Alpine's claims.

CONCLUSION

For the foregoing reasons, the Commission should find that the targeted and discriminatory charges constructed by NSCC constitute a limitation on access that is reviewable under Section 19(d) and should further conclude that those charges are discriminatory and baseless.

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[8] 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).

DATED this 6th day of December 2023

CLYDE SNOW & SESSIONS

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ATTORNEY CERTIFICATION

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I, Aaron D. Lebenta, certify that this memorandum in opposition complies with the Commission's Rules of Practice by filing a memorandum that omits or redacts any sensitive personal information described in Rule of Practice 151(e)

/s/ Aaron D. Lebenta
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on the following on this 6th day of December 2023, in the manner indicated below:

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