UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 87599 / November 22, 2019

Admin. Proc. File No. 3-18979

In the Matter of the Application of

ALPINE SECURITIES CORPORATION

For Review of Action Taken by the

National Securities Clearing Corporation

ORDER DENYING STAY AND DENYING MOTION FOR PROTECTIVE ORDER

Alpine Securities Corporation, a registered broker-dealer that specializes in providing clearing and settlement services for trades in microcap securities, filed an application for review of action taken by the National Securities Clearing Corporation ("NSCC"). NSCC is a registered clearing agency that provides central counterparty services for U.S. equity securities. As part of those services, NSCC requires its members to make certain deposits with it in connection with the trades they clear through it. Alpine, a member of NSCC, argues that the required deposits are subject to challenge as prohibitions or limitations of access to NSCC's clearing services under Section 19(d) of the Securities Exchange Act of 1934 because these required deposits prevent Alpine from clearing through NSCC all transactions in microcap securities that it seeks to clear.[1]

With its application, Alpine filed a motion for a stay of the implementation or assessment of the Illiquid Charge—a deposit that NSCC requires to clear net unsettled positions in illiquid securities that exceed applicable volume thresholds. In May 2017, the Commission approved an NSCC rule change codifying its procedures regarding the Illiquid Charge, and a related rule change addressing the calculation of NSCC member risk ratings. Although no one appealed the Commission's approval orders, Alpine now contends that the Illiquid Charge is excessive and unjustified. Alpine also asserts that it would "almost always" avoid the Illiquid Charge if it could apply an offset against the volume thresholds used to determine the applicability of the Illiquid Charge that is generally available to sellers of illiquid securities deposited with the Depository Trust Company ("DTC").[2] But Alpine is ineligible for this offset under NSCC rules because NSCC assigned Alpine the weakest member credit rating.

1 15 U.S.C. § 78s(d).

2 DTC is a registered clearing agency that provides central securities depository services.

Based on these assertions, 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 offset unavailable to Alpine. NSCC opposes Alpine's motion. Because we find that Alpine has failed to establish that it is entitled to the relief that it seeks, we deny Alpine's motion for a stay, deny its related request for confidential treatment of certain information, and set a briefing schedule for this appeal.[3]

I. Background

A. Alpine is a small broker-dealer that specializes in providing clearing and settlement services for microcap stocks.

Alpine is a small, self-clearing registered broker-dealer. Its business primarily involves providing clearing and settlement services for microcap and over-the-counter stock transactions, generally with respect to the sale of those securities.[4] Alpine provides clearing and settlement services for itself and for its correspondent clients, who are generally broker-dealers, and its clients' customers, who are the beneficial buyers and sellers of a security. Alpine submits trades for clearing through NSCC and is an NSCC member and is also a DTC participant.

B. NSCC is a registered clearing agency regulated by the Commission.

NSCC is a clearing agency registered with the Commission pursuant to Exchange Act Section 17A.[5] It is subject to the specific requirements of Exchange Act Section 17A(b)(3) applicable to clearing agencies.[6] It is subject further to the general requirements of Exchange Act Section 19 applicable to self-regulatory organizations ("SROs").[7]

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[3] We also deny Alpine's request for oral argument on its motion. Oral argument would not significantly aid our decisional process. *See* Rule of Practice 451(a), 17 C.F.R. § 201.451(a).

[4] *See generally* Microcap Stock: A Guide for Investors (Sept. 18, 2013), https://www.sec.gov/reportspubs/investor-publications/investorpubsmicrocapstockhtm.html (Investor Publication providing an overview of issues related to microcap stocks).

[5] 15 U.S.C. § 78q-1; *see also* Clearing Agencies, https://www.sec.gov/tm/clearing-agencies (listing registered clearing agencies).

[6] 15 U.S.C. § 78q-1(b)(3) (providing that a "clearing agency shall not be registered [with the Commission] unless the Commission determines that" it meets specified requirements).

[7] 15 U.S.C. § 78s (pertaining to SRO registration, responsibilities, and oversight).

NSCC is also a covered clearing agency.[8] Accordingly, NSCC is subject to the additional requirements set forth in Exchange Act Rule 17Ad-22(e).[9] Pursuant to that rule, NSCC is required to "[e]ffectively identify, measure, monitor, and manage its credit exposures to participants"[10] and "establish[] a risk-based margin system."[11]

NSCC provides central counterparty services to its customers with respect to equity securities transactions in the United States.[12] NSCC's core services include its Continuous Net Settlement ("CNS") System.[13] Under the CNS System, all of a member's eligible transactions in a security for a particular settlement date are netted into one net long (buy), net short (sell), or flat position, which in turn is netted against positions in the same security that remain open after their originally scheduled settlement date.[14] NSCC becomes the contra-party of these netted positions for settlement purposes. Thus, it assumes the obligation of members that are receiving securities to receive and pay for those securities, as well as the obligation of members that are delivering securities to make the delivery.[15]

C. NSCC maintains a Clearing Fund consisting of Required Fund Deposits.

NSCC addresses the risk it incurs as a result of its contra-party status from a member's potential inability to meet its obligations to NSCC by maintaining a Clearing Fund. The Clearing Fund is financed by members, who must make their own Required Fund Deposit.[16] A member's Required Fund Deposit "operate[s] as the [m]ember's margin, and the aggregate of all such [m]embers' deposits is, collectively, the Clearing Fund, which operates as NSCC's default fund."[17] Clearing Fund requirements "are calculated systemically for each NSCC Member at the

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8 *See* Exchange Act Rule 17Ad-22(a)(5) & (6), 17 C.F.R. § 240.17Ad-22(a)(5) & (6); Standards for Covered Clearing Agencies, Exchange Act Release No. 78961 (Sept. 28, 2016), 81 Fed. Reg. 70,786, 70,788 n.20 (Oct. 13, 2016), *available at* https://www.govinfo.gov/content/pkg/FR-2016-10-13/pdf/2016-23891.pdf.

9 17 C.F.R. § 240.17Ad-22(e).

10 17 C.F.R. § 240.17Ad-22(e)(4).

11 17 C.F.R. § 240.17Ad-22(e)(6).

12 National Securities Clearing Corporation: Disclosure Framework for Covered Clearing Agencies and Financial Market Infrastructures, at 5 (Dec. 2018), http://www.dtcc.com/~/media/Files/Downloads/legal/policy-and-compliance/NSCC_Disclosure_Framework.pdf ("Disclosure Framework").

13 Disclosure Framework at 8.

14 *Id.* at 9.

15 *Id.*

16 *See* NSCC Rule 4, Sec. 1 (defining Required Fund Deposit as the deposit "determined by [NSCC] in accordance with Procedure XV and other applicable Rules and Procedures"), *available at* http://www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.

17 Disclosure Framework at 56.

end of each day," and at times more frequently.[18] NSCC uses a risk-based margin methodology "to identify the risks posed by a [m]ember's unsettled portfolio and to quickly adjust and collect additional deposits as needed to cover those risks."[19]

The Required Fund Deposit has a number of components,[20] one of which is the Illiquid Charge.[21] The Illiquid Charge applies to certain positions in Illiquid Securities, which NSCC defines as securities not issued by an NSCC member or its affiliate that are either (1) not traded on or subject to the rules of a registered national securities exchange; or (2) that are an OTC Bulletin Board or OTC Link issue.[22] NSCC filed a declaration in this proceeding stating that it has assessed the Illiquid Charge for approximately 15 years.[23] Nonetheless, the Illiquid Charge was not specifically included in NSCC's written rules until May 2017.[24] NSCC "designed the Illiquid Charge to mitigate the market risk that NSCC faces when liquidating securities that lack marketability, . . . [that] may have low and volatile share prices" after a member default.[25]

NSCC assesses the Illiquid Charge on Illiquid Positions.[26] Illiquid Positions are net unsettled positions in Illiquid Securities that exceed certain volume thresholds.[27] As relevant here, a net sell position is an Illiquid Position when it (1) is greater than or equal to 25 percent of the average daily volume ("ADV") for the security over the most recent twenty business days,[28]

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18 *Id.* at 35, 46.

19 *Id.* at 46-47, 56.

20 *See* NSCC Procedure XV.

21 NSCC Procedure XV, I.(A)(1)(h).

22 NSCC Rule 1, Definitions of Illiquid Security, Family-Issued Security.

23 *See also* Notice of Filing of a Proposed Rule Change to Describe the Illiquid Charge That May Be Imposed on Members, Exchange Act Release No. 80260 (Mar. 16, 2017), 82 Fed. Reg. 14,781, 14,782 n.8 (Mar. 22, 2017) ("Illiquid Charge Notice," and such proposed rule change, "Illiquid Charge Rule Change") (containing NSCC statement that "[t]he methodology for calculating the Illiquid Charge has been effective for many years"), *available at* https://www.govinfo.gov/content/pkg/FR-2017-03-22/pdf/2017-05606.pdf.

24 Order Approving Proposed Rule Change To Describe the Illiquid Charge That May Be Imposed on Members, Exchange Act Release No. 80597 (May 4, 2017), 82 Fed. Reg. 21,863, 21,863 (May 10, 2017) ("Illiquid Charge Approval Order"), *available at* https://www.govinfo.gov/content/pkg/FR-2017-05-10/pdf/2017-09425.pdf; *see also id.* (stating that NSCC proposed the rule change resulting in the Illiquid Charge Approval Order "to codify NSCC's current practices with respect to the assessment and collection of the Illiquid Charge").

25 Illiquid Charge Approval Order, 82 Fed. Reg. at 21,863.

26 NSCC Procedure XV, I.(A)(1)(h).

27 NSCC Rule 1, Definition of Illiquid Position. For net sell positions, the volume threshold is generally subject to an offset for securities deposited with DTC as described below.

28 Illiquid Charge Approval Order, 82 Fed. Reg. at 21,864 n.17.

and (2) exceeds the applicable volume threshold.[29] The volume threshold in turn depends on the member's Credit Risk Rating Matrix ("CRRM") rating and, if a member has a weaker CRRM rating, its excess net capital ("ENC").[30] "[T]he CRRM is a risk measurement tool used by [NSCC] to help assess the credit risk presented by [its] various members."[31] Those members with stronger CRRM ratings (ratings 1-4) have higher volume thresholds than members with weaker CRRM ratings (ratings 5-7). NSCC calculates the Illiquid Charge with respect to net sell Illiquid Positions by multiplying the aggregate number of shares in the position by a calculated value that depends on, among other things, recent market prices and the percentage of the ADV that the Illiquid Position represents.[32]

Generally, in determining if the volume threshold is met with respect to a net sell position in Illiquid Securities, NSCC applies "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" ("DTC Offset").[33] Thus, an NSCC member generally can avoid the Illiquid Charge by offsetting a net sell position through a DTC deposit of an equal number of shares. Because the DTC Offset can reduce the size of an unsettled sell position for purposes of comparison against the volume threshold, the availability of the DTC Offset may determine whether the Illiquid Charge is assessed on a seller. But the DTC Offset is not available to members, like Alpine, to whom DTC has assigned the weakest CRRM rating (7 rating).[34]

On May 4, 2017, the Division of Trading and Markets approved by delegated authority the Illiquid Charge Rule Change, including the provisions regarding the DTC Offset.[35] The Commission received no comments before the approval.[36] Neither Alpine nor anyone else

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29 *Id.*, 82 Fed. Reg. at 21,864; *see also* NSCC Rule 1, Definition of Illiquid Position ("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.").

30 Illiquid Charge Approval Order, 82 Fed. Reg. at 21,864.

31 Order Approving Proposed Rule Changes To Enhance the Credit Risk Rating Matrix and Make Other Changes, Exchange Act Release No. 80734 (May 19, 2017), 82 Fed. Reg. 24,177, 24,179 (May 25, 2017) ("CRRM Approval Order"), *available at* https://www.govinfo.gov/content/pkg/FR-2017-05-25/pdf/2017-10690.pdf.

32 Illiquid Charge Approval Order, 82 Fed. Reg. at 21,864.

33 NSCC Rule 1, Definition of Illiquid Position.

34 *Id.*; *see also* Illiquid Charge Notice, 82 Fed. Reg. at 14,783.

35 Illiquid Charge Approval Order, 82 Fed. Reg. at 21,865-66; *see also supra* notes 23 & 24 (explaining that Illiquid Charge Rule Change was intended to formalize the Illiquid Charge).

36 Illiquid Charge Approval Order, 82 Fed. Reg. at 21,863; *see also* Illiquid Charge Notice, 82 Fed. Reg. at 14,785 (inviting interested persons "to submit written data, views and arguments [to the Commission] concerning the [Illiquid Charge Rule Change], including whether the proposed rule change is consistent with the Act").

appealed the Illiquid Charge Approval Order to the Commission; the Commission also did not review the Illiquid Charge Approval Order on its own motion.[37] When issued, the delegated authority action had "immediate effect and [was] deemed the action of the Commission."[38] And because Commission review was not sought or initiated, the Illiquid Charge Approval Order became the final action of the Commission for all purposes.[39] Neither Alpine nor anyone else sought review in a court of appeals.[40] The record before us shows that, beginning in May 2017, Alpine has been subject to the Illiquid Charge hundreds of times before Alpine filed its application for review.

D. NSCC assigns members risk ratings using its Credit Risk Rating Matrix.

The NSCC rules that memorialize the method it uses to calculate the Illiquid Charge refer in several places to NSCC's CRRM. A separate NSCC rule change, approved by the Division of Trading and Markets in May 2017 pursuant to delegated authority after it received no comments, added a formal definition of the CRRM to NSCC rules (the "CRRM Rule Change").[41] Under those rules, NSCC calculates a member's CRRM rating "based on factors determined to be relevant by [NSCC] from time to time, which factors are designed to collectively reflect the financial and operational condition of a [m]ember," including both qualitative and quantitative

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37 *See* Rule of Practice 430, 17 C.F.R. § 201.430 (authorizing persons aggrieved by actions taken by delegated authority to seek Commission review by filing timely notice and petition); Rule of Practice 431(c), 17 C.F.R. § 201.431(c) (providing for Commission review of actions taken by delegated authority on the Commission's own initiative).

38 *See* Rule of Practice 430(c), 17 C.F.R. § 201.430(c).

39 *See* Exchange Act Section 4A(c), 15 U.S.C. § 78d-1(c) (providing that unless Commission reviews action taken by delegated authority it "shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission"); Rule of Practice 430(b), 17 C.F.R. § 201.430(b) (setting forth procedure for seeking review of actions taken by delegated authority); Rule of Practice 431(c), 17 C.F.R. § 201.431(c) (setting forth applicable periods for Commission to order review of actions taken by delegated authority on its own motion).

40 *See* Exchange Act Section 25(a), 15 U.S.C. § 78y(a) (providing for direct review of certain Commission orders in United States Courts of Appeals).

41 *See supra* note 31; *see also* Notice of Filing of Proposed Rule Change To Enhance the Credit Risk Rating Matrix and Make Other Changes, Exchange Act Release No. 80381 (Apr. 5, 2017), 82 Fed. Reg. 17,475 (Apr. 11, 2017), *available at* https://www.govinfo.gov/content/pkg/FR-2017-04-11/pdf/2017-07180.pdf.

factors.[42] Before the May 2017 rule change, NSCC used a CRRM model that considered only quantitative factors.[43]

The CRRM Approval Order concluded that the CRRM Rule Change was consistent with the Exchange Act, finding that, among other things, it was "imperative" that NSCC "have a strong understanding of the credit risk presented by [its] members," and that the CRRM Rule Change would enable NSCC "to measure more effectively the credit risk presented by many members."[44] No one appealed the CRRM Approval Order to the Commission or a court.

E. NSCC assigns Alpine the weakest CRRM rating.

In June 2017, NSCC downgraded Alpine's CRRM rating to the weakest CRRM rating (7), making it ineligible to apply the DTC Offset.[45] Alpine asserts that, for a time, it avoided the Illiquid Charge by using ex-clearing relationships to clear trades without NSCC's assistance, but that the last of these ex-clearing relationships expired in April 2018.[46]

Alpine retained the weakest CRRM rating until sometime in June 2018 when NSCC assigned it the second weakest rating (6). But by August 2018, NSCC had again assigned Alpine a 7 rating. Alpine says that it discussed its CRRM rating with NSCC in several telephonic conferences, including one on September 6, 2018, and unsuccessfully requested relief from the Illiquid Charge and other elements of the Required Fund Deposit.

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42 NSCC Rule 1, Definition of Credit Risk Rating Matrix; Disclosure Framework at 47.

43 CRRM Approval Order, 82 Fed. Reg. at 24,177 (stating that before the rule amendment, NSCC "assign[ed] a credit rating based on certain quantitative factors"); *id.* at 24,177 n.5 (explaining that NSCC at the time considered quantitative factors of "size (i.e., total excess net capital), capital, leverage, liquidity, and profitability" when determining CRRM ratings for U.S. broker-dealers); *see also id.* at 24,178 (stating that "[i]nstead of relying primarily on quantitative data, as do the current CRRM models, the proposed enhancement [to the CRRM] would modify the CRRM models to blend qualitative factors with quantitative factors").

44 CRRM Approval Order, 82 Fed. Reg. at 24,179.

45 NSCC does not purport to provide the basis for its downgrade of Alpine's CRRM rating, but it appears that NSCC's action followed the Commission's institution of an enforcement action against Alpine in the federal district court. *See* SEC Charges Brokerage Firm with Failing to Comply with Anti-Money Laundering Laws, Litigation Release No. 23853 (June 5, 2017), *available at* https://www.sec.gov/litigation/litreleases/2017/lr23853.htm (referencing Civil Action No. 7:17-CV-4179 (S.D.N.Y. filed June 5, 2017)).

46 *See* Collection Practices Under Section 31 of the Exchange Act, Exchange Act Release No. 49928 (June 28, 2004), 69 Fed. Reg. 41,060, 41,063 n.45 (July 7, 2004) ("An 'ex-clearing transaction' is a securities transaction that is not reported to a designated clearing agency and clears and settles otherwise than through a designated clearing agency.").

F. Alpine challenges certain components of the Required Fund Deposit and seeks a stay with respect to the Illiquid Charge and DTC Offset.

On December 26, 2018, Alpine filed an application for review with the Commission asserting that through the Required Fund Deposit, including the Illiquid Charge and CRRM system, NSCC had impermissibly denied or limited Alpine's access to NSCC's clearing services.[47] In particular, Alpine alleged that the Required Fund Deposit required it to post excessive and onerous deposits with respect to relatively small value trades and thus limited its ability to clear other trades. Alpine also asserted that NSCC rules unfairly discriminated against small broker-dealers in the microcap market as compared to larger broker-dealers trading exchange-listed securities. Alpine attached a separate petition for Commission rulemaking with respect to NSCC, which addresses the same NSCC rules and practices challenged in its application for review.[48] Alpine also moved to stay NSCC's implementation and assessment of the Illiquid Charge until this proceeding is resolved.[49]

II. Analysis

Under Rule of Practice 401(d)(1), an aggrieved person may move to stay an SRO action reviewable under Exchange Act Section 19(d).[50] A stay is an "extraordinary remedy," and the

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47 *See* Exchange Act Sections 19(d) and (f), 15 U.S.C. § 78s(d) and (f) (making reviewable certain prohibitions or limitations of access to SRO services). Alpine also challenges what it characterizes as NSCC's "Excess Net Capital Premium," "OTC Volatility Charge," and "OTC Mark-to-Market Charge," but does not seek to stay their imposition pending resolution of this proceeding. *See* Disclosure Framework at 47 (referencing clearing fund components). NSCC has long required members to contribute to its clearing fund. *See, e.g.*, *Order Approving Proposed Rule Change by National Sec. Clearing Corp.*, Exchange Act Release No. 20563, 1984 WL 470023, at *1, n.5 (Jan. 13, 1984) (discussing "clearing fund contribution . . . required . . . under NSCC Rule 4").

48 Request for rulemaking with respect to certain actions, practices and rules of a certain clearing agency, File No. 4-738 (Dec. 19, 2018), *available at* https://www.sec.gov/rules/petitions/2018/petn4-738.pdf.

49 We deny Alpine's request in its reply brief that we allow it to conduct discovery because Alpine presents no legal basis for it. *See* Rule of Practice 154(a), 17 C.F.R. § 201.154(a) (providing that a motion "shall be accompanied by a written brief of the points and authorities relied upon"); *cf. Eric David Wanger*, Exchange Act Release No. 79008, 2016 WL 5571629, at *5 n.47 (Sept. 30, 2016) (denying request for subpoena of FINRA because "[a]lthough Wanger invokes Rule of Practice 232, that rule does not permit Wanger to engage in the discovery he seeks"); 17 C.F.R. § 201.232 (allowing for document subpoena "in connection with any hearing ordered by the Commission").

50 17 C.F.R. § 201.401(d)(1); 15 U.S.C. § 78s(d).

moving party has the burden of establishing that relief is warranted.[51] In deciding whether to grant a stay, the Commission traditionally considers the following four factors: (i) the likelihood that the moving party will eventually succeed on the merits of the appeal; (ii) the likelihood that the moving party will suffer irreparable harm without a stay; (iii) the likelihood that another party will suffer substantial harm as a result of a stay; and (iv) a stay's impact on the public interest.[52] The first two factors are the most critical, but a stay decision rests on the balancing of all four factors.[53] Not all four factors must favor a stay for relief to be granted.[54] Because Alpine has not established that any of the four factors favors relief, we deny its motion.

A. Alpine fails to establish that it is likely to prevail on the merits.

To prevail on a challenge to an SRO's prohibition or limitation of access to SRO services, an applicant must establish that it timely filed its challenge to the SRO's action or that there are circumstances justifying a failure to timely file. Specifically, "a party that chooses to appeal an SRO action pursuant to Section 19(d)(2) must file an application for review with the Commission within thirty days after receiving notice of the action."[55] "The Commission will not extend this 30-day period, absent a showing of extraordinary circumstances."[56]

Because Alpine seeks relief in a stay motion before full development of the record, our analysis is based on the arguments and evidence before us, and we emphasize that "[f]inal

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[51] *See Nken v. Holder*, 556 U.S. 418, 432-34 (2009); *accord, e.g.*, *Mark E. Laccetti*, Exchange Act Release No. 79138, 2016 WL 6137057, at *2 & n.10 (Oct. 21, 2016); *Mitchell T. Toland*, Exchange Act Release No. 71875, 2014 WL 1338145, at *2 (Apr. 4, 2014).

[52] *See, e.g.*, *Kenny A. Akindemowo*, Exchange Act Release No. 78352, 2016 WL 3877888, at *2 (July 18, 2016); *Toland*, 2014 WL 1338145, at *2; *see also Nken*, 556 U.S. at 434 (outlining similar four-factor test).

[53] *See, e.g.*, *Harding Advisory LLC*, Securities Act Release No. 10330, 2017 WL 1163327, at *1 (Mar. 29, 2017); *see also Nken*, 556 U.S. at 434 ("The first two factors of the traditional standard are the most critical."); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) (warning that "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course[,]" and emphasizing that "the balance of equities and consideration of the public interest[ ] are pertinent" to the assessment).

[54] *See, e.g.*, *Michael Earl McCune*, Exchange Act Release No. 77921, 2016 WL 2997935, at *1 (May 25, 2016) (citing *Elec. Transaction Clearing, Inc.*, Exchange Act Release No. 73698, 2014 WL 6680112, at *1 (Nov. 26, 2014)); *Am. Petroleum Inst.*, Exchange Act Release No. 68197, 2012 WL 5462858, at *2 (Nov. 8, 2012).

[55] *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).

[56] Rule of Practice 420(b), 17 C.F.R. § 201.420(b).

resolution must await the Commission's determination of the merits of [Alpine's] appeal."[57] As explained below, Alpine has not demonstrated on the current record that it complied with the 30-day filing period or that extraordinary circumstances excuse its untimeliness. Because Alpine has not established that it is likely to prevail on the merits for this reason, we do not reach NSCC's other arguments regarding why Alpine's application for review is not likely to succeed.[58]

1. Alpine has not established that it challenges any NSCC action of which it received notice in the 30 days before it filed its application for review.

In determining whether an applicant has complied with the statutory filing deadline specified in Exchange Act Section 19(d), we consider whether the applicant "challenge[s] any SRO action of which [it] received notice in the thirty days before it filed the application."[59] Alpine filed its application for review on December 26, 2018, so Alpine must show that it challenges NSCC action of which it received notice in the 30 days before December 26, 2018. Based on the current record before the Commission, Alpine has not established that it is likely to succeed in a final resolution on the merits with respect to the timeliness of its claims.

Alpine argues that it complied with Exchange Act Section 19(d)'s 30-day filing period because it challenges NSCC's assessment of the Illiquid Charge on multiple occasions in the 30 days before December 26, 2018. But Alpine has not shown that these charges constitute the alleged prohibition or limitation of access to NSCC services that it challenges through its application for review. Rather, it appears that Alpine's claims arise out of its challenges to two groups of events that occurred more than 30 days before Alpine filed its application for review.[60]

First, Alpine challenges NSCC's denial of the DTC Offset. Alpine asserts that it "almost always would be able to avoid the Illiquid Charge, if it were able to utilize the DTC Offset." But Alpine concedes that the denial of the DTC Offset is simply the consequence of NSCC assigning Alpine the weakest CRRM rating. NSCC assigned Alpine a 7 rating, causing it to lose eligibility

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57 *Se. Invs., N.C., Inc.*, Exchange Act Release No. 86097, 2019 WL 2448245, at *2 (June 12, 2019) (quoting *Harry W. Hunt*, Exchange Act Release No. 68755, 2013 WL 325333, at *4 (Jan. 29, 2013)).

58 In August 2019, the parties made supplemental filings concerning this proceeding that largely reiterate previous arguments. The only new matter addressed in these filings is Alpine's claim in a footnote that NSCC had increased Alpine's "minimum Clearing Fund Requirement by 130%." Neither party argues that this assertion is relevant to our consideration of whether to stay the Illiquid Charge, and their arguments regarding the alleged adjustment do not aid our resolution of the instant motion.

59 *Orbixa Techs.*, 2013 WL 6044106, at *1.

60 NSCC also argues that the Illiquid Charge is not subject to review as a prohibition or limitation of access to NSCC's services under Exchange Act Section 19(d). Because we conclude that Alpine has not established that it is likely to show that its claims are timely, and thus has not shown that it is likely to succeed on the merits of its claims, we need not address NSCC's arguments that those claims are not cognizable even if they were asserted timely.

for the DTC Offset, in June 2017, and again by August 2018. Alpine knew of NSCC's actions through notices Alpine received of daily charges associated with its Required Fund Deposit and concedes that it discussed its low CRRM rating with NSCC at least as early as September 6, 2018. Accordingly, the record indicates that Alpine received notice that it was not eligible for the DTC Offset more than 30 days before it filed its application for review.

Second, Alpine challenges the Illiquid Charge Rule Change and the CRRM Rule Change in its application for review and claims that it is "adversely impacted" by them. But, as discussed above, Alpine had notice that these rules had been approved and applied by June 2017. Because it filed its application for review in December 2018, Alpine has not shown that it challenged the rules within 30 days of receiving notice of them.

Alpine also has not shown that it seeks relief with respect to the Illiquid Charges assessed in the 30 days before it filed its application for review. Rather, Alpine's challenges to the Illiquid Charge Rule Change, the CRRM Rule Change, and its CRRM rating form the crux of the relief that it seeks in its stay motion. Alpine requests that we stay NSCC's ability to assess the Illiquid Charge or its decision to assign Alpine the lowest CRRM rating. The Illiquid Charges that Alpine identifies in the 30 days before it filed its application for review are, essentially, the automatic consequences of the Illiquid Charge Rule Change and its CRRM rating. Indeed, Alpine contends that it is the formula NSCC rules provide to calculate the Illiquid Charge that produces excessive charges that limit Alpine's ability to clear trades through NSCC.

Once Alpine received notice that the challenged rules had been approved and applied and that NSCC had assigned it the weakest CRRM rating, Alpine became aware of the alleged prohibitions or limitations of access to NSCC's services that it challenges. It knew that future transactions would be subject to these charges, how they would be calculated, and their effect on its business. Indeed, Alpine acknowledges that it sought to avoid the effect of the Illiquid Charge Rule Change and its CRRM rating by using ex-clearing relationships to clear trades without assistance from NSCC until April 2018. It thus appears that Alpine knew of the limits it contends NSCC rules place on its ability to clear transactions well before the specific instances of the imposition of the Illiquid Charge in the 30 days before it filed its application for review.

Alpine's stay motion effectively challenges actions NSCC took well more than 30 days before Alpine filed its application for review, rather than the Illiquid Charges imposed during that 30-day period. Indeed, it does not appear that granting the relief Alpine seeks—a stay of the Illiquid Charge—would affect those charges. NSCC applies the Illiquid Charge to qualifying open positions in Illiquid Securities. Because transactions settle in a matter of days, the open positions to which NSCC applied the Illiquid Charge Rule Change before December 26, 2018 have now closed. Moreover, past assessments of the Illiquid Charge are credited back to NSCC members when the open positions to which they pertain close. Thus, Alpine has been credited the Illiquid Charge deposits that it made in the 30 days before it filed its application for review. To the extent Alpine contends in support of its request for a stay that the Illiquid Charge caused it to turn away transactions during that time period, "[w]e do not have authority to award damages" in a proceeding to review an allegedly improper prohibition or limitation of access to

an SRO's services.[61] Accordingly, Alpine has not shown that granting the relief it seeks in its stay motion, i.e., barring NSCC from applying its rules to Alpine in the future, would have any effect on the Illiquid Charges assessed within the 30 days of the filing of this appeal, despite its reliance on these charges to establish the timeliness of its application for review.[62]

We reject Alpine's argument that *Weaver v. Federal Motor Carrier Safety Administration*[63] and similar authority establish that it may challenge the Illiquid Charge Rule Change now by contesting the particular Illiquid Charges assessed on it in the 30 days before it filed its application for review. These cases hold that, under certain circumstances, a litigant who has failed to challenge an agency's adoption of a rule may nonetheless challenge the rule on non-procedural grounds in a different proceeding when the agency subsequently applies it against the litigant. But assuming that these authorities excuse Alpine's failure to participate in rule approval proceedings under Exchange Act Section 19(b), Alpine would still need to file a timely application for review challenging NSCC's rules as prohibitions or limitations of access under Section 19(d).[64] As explained above, 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). The authority that Alpine cites does not excuse its delay.

Alpine also argues that its application for review is timely because Exchange Section 19(f) requires us to determine if a prohibition or limitation of access properly challenged under Section 19(d) "is in accordance with the rules" of the SRO that imposed it and whether "such rules are, and were applied in a manner, consistent with the purposes" of the Exchange Act. Alpine argues that the charges NSCC assessed in the 30 days before Alpine filed its application for review are prohibitions or limitation of access to NSCC's services, and thus Section 19(f) requires the Commission to determine whether NSCC's rules comply with the Exchange Act. But Alpine must first show that its challenge to a prohibition or limitation of access is timely or

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61 *Citadel Sec. LLC*, Exchange Act Release No. 78340, 2016 WL 3853760, at *3 (July 15, 2016), *aff'd sub nom. Chicago Bd. Options Exch. v. SEC*, 889 F.3d 837 (7th Cir. 2018); *see also id.* at *3 n.5 (collecting authority); *John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 WL 5445514, at *5 (Oct. 22, 2019) ("We have previously found that we lack statutory jurisdiction under Section 19(d) to consider an application for review that 'seeks relief that is incongruous with, and exceeds our remedial authority to address, a claim of improper limitation or prohibition of access to services.'" (quoting *Citadel*, 2016 WL 385370, at *3)).

62 *Cf. W.C.W. W. Canada Water Enters., Inc.*, Exchange Act Release No. 27254, 1989 WL 992833, at *1 (Sept. 18, 1989) (dismissing appeal where "there is no longer any denial of access"). 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 because Alpine would be challenging the rule itself and not the specific charges assessed as part of that first application.

63 744 F.3d 142 (D.C. Cir. 2014).

64 *See, e.g.*, *NLRB Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 196 (D.C. Cir. 1987) (explaining that subsequent action challenging rule in enforcement proceeding after expiration of limitations period for a direct challenge still must be "properly brought").

establish that extraordinary circumstances excuse a belated filing. As discussed above, it does not appear that Alpine's application is timely or that extraordinary circumstances excuse its delay. Alpine did not seek relief within 30 days of either the approval of the Illiquid Charge Rule Change or the first time the Illiquid Charge was applied to it. Because the Section 19(f) standard of review applies only after a timely application has been made, it has no bearing on the timeliness of an application.[65]

2. Alpine fails to establish that extraordinary circumstances exist to excuse the late filing of its application for review.

Alpine asserts that "extraordinary circumstances" exist to excuse the late filing of its application for review. Because "strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief," the extraordinary circumstances exception to the 30-day filing deadline "is to be narrowly construed and applied only in limited circumstances."[66] In applying the exception, we consider whether "the failure timely to file was beyond the control of the applicant."[67] For example, we consider whether "attorney misconduct or mental incapacity . . . prevented the party from making a timely filing."[68] We also consider whether the applicant "promptly arranged for the filing of the appeal as soon as reasonably practicable thereafter."[69] Alpine makes three arguments in support of its contention that extraordinary circumstances exist, but it has not established, on the current record, that any of them is likely to succeed in a final Commission determination on the merits of Alpine's appeal.

First, Alpine argues that extraordinary circumstances exist because its application for review "raises novel issues." Alpine argues that the Commission has not analyzed the Illiquid Charge as a denial or limitation of access under Exchange Act Section 19(d) and (f), and that the orders approving the NSCC rules Alpine challenges did not examine the particular issues it raises in its application for review. But Alpine does not explain why the alleged novelty of the issues it

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65 *Cf. Kincaid*, 2019 WL 5445514, at *4 ("[A] petition for review must first satisfy the jurisdictional requirements in Section 19(d) before the Commission can review the action under Section 19(f)."); *see also id.* at *4 nn. 23 & 24 (collecting authority).

66 *Julio C. Ceballos*, Exchange Act Release No. 69020, 2013 WL 772515, at *3 (Mar. 1, 2013).

67 *PennMont Sec.*, Exchange Act Release No. 61967, 2010 WL 1638720, at *4 (Apr. 23, 2010), *petition dismissed*, 414 F. App'x 465 (3d Cir. 2011).

68 *Id*.

69 *Id*.

identifies resulted in a failure to timely file that was beyond its control,[70] and "the measure of whether an untimely application presents an extraordinary circumstance is not simply the relative weight of the arguments presented on appeal—otherwise, the 'extraordinary circumstances' requirement would be read out of Commission Rule of Practice 420."[71] Rather, "our decisions have rejected applications for review where applicants did not act promptly in pursuing their appeals."[72]

Second, Alpine argues that the "demonstrable impact of NSCC's charges" warrants Commission review because those charges threaten "to choke the entire microcap market." Alpine argues that because it is an important participant in the microcap sector we should accept its application for review "regardless of when [it] was filed." As explained above, however, we require applicants seeking to excuse untimely filings under the extraordinary circumstances exception to demonstrate that they were nonetheless diligent in bringing their claims to the Commission. Alpine waited approximately a year and a half after the Illiquid Charge Rule Change was approved and it first became ineligible for the DTC Offset before it filed its application for review. On the present record, Alpine has not shown that it is likely to establish that the claimed impact of the rules it challenges presents an extraordinary circumstance.[73]

Finally, Alpine suggests that extraordinary circumstances exist because otherwise it will be left without an avenue to present its challenges to NSCC rules. But Alpine could have

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[70] *Cf. Orbixa Techs.*, 2013 WL 6044106, at *4 (finding that applicant had not shown "extraordinary circumstances" necessary to permit a late appeal where applicant filed its application for review over a year after the NYSE actions it challenged); *Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 WL 2117161, at *4 (May 20, 2008) (finding no extraordinary circumstances where NASD "did not cause the fourteen-month delay between the issuance of the [underlying] decision and the filing of the petition before [the Commission]," but rather the delay "resulted from [applicant's] deliberate choice not to appeal").

[71] *PennMont Sec.*, 2010 WL 1638720, at *5; *accord 6D Glob. Techs, Inc.*, Exchange Act Release No. 81604, 2017 WL 4054123, at *4, *5 (Sept. 13, 2017) (citing *PennMont*); *cf. MFS Sec. Corp.*, Exchange Act Release No. 47626, 2003 WL 1751581, at *3 & n.17 (Apr. 3, 2003) (concluding that where court of appeals "asked for the Commission's views as to whether" an SRO's actions comported with relevant law *and* the application "present[ed] novel facts and legal issues," "this set of unusual circumstances constitute[d] 'extraordinary circumstances'"), *aff'd*, 380 F.3d 611 (2d Cir. 2004).

[72] *Manuel P. Asensio*, Exchange Act Release No. 62315, 2010 WL 2468111, at *6 (June 17, 2010); *cf. Sec. Indus. & Fin. Mkts. Ass'n*, Exchange Act Release No. 72182, 2014 WL 1998525, at *11 (May 16, 2014) (finding "extraordinary circumstances" where rule challenger filed its application for review within 30 days of court of appeals decision clarifying the availability of review under Exchange Act Section 19(d)).

[73] *Cf. Patrick H. Dowd*, Exchange Act Release No. 83710, 2018 WL 3584177, at *6 (July 25, 2018) (finding lack of extraordinary circumstances although applicant was barred from association with FINRA members); *McBarron Capital LLC*, Exchange Act Release No. 81785, 2017 WL 4335069, at *2 (Sept. 29, 2017) (same as to expulsion from FINRA membership).

challenged the Illiquid Charge Rule Change and CRRM Rule Change based on the information available about them at the rule approval stage.[74] Alpine also did not pursue its Section 19(d) challenges (assuming that they are cognizable) when NSCC applied the CRRM rule to Alpine to assign it the weakest CRRM rating, or in June 2017 when NSCC first assessed the Illiquid Charge on Alpine after assigning it the weakest CRRM rating. In any case, Alpine has raised the same concerns articulated in its application for review in a separate petition for Commission rulemaking.[75]

B. Alpine fails to show that it is likely to suffer irreparable harm without a stay.

To demonstrate irreparable harm, a movant must show that its injury is "both certain and great."[76] Injury also "must be actual and not theoretical."[77] A stay "will not be granted against something merely feared as liable to occur at some indefinite time"; rather, the party seeking a stay "must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm."[78] "Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to [stay]."[79]

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74 Before the challenged NSCC rule changes were approved, Alpine received public notice of their substance and nature through publication in the Federal Register, which sought public comment from interested parties. This request provided Alpine with an opportunity to provide its views on the rules it now challenges *before* they were approved. *Cf. Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930, 938 (D.C. Cir. 2006) ("Under the APA, notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." (internal citation, alteration, and quotation marks omitted)); *Nat'l Elec. Mfrs. Ass'n v. EPA*, 99 F.3d 1170, 1174 (D.C. Cir. 1996) (explaining that notice-and-comment requirements of the Administrative Procedure Act served "the objectives of ensuring public participation" and "of promoting informed agency action"). After providing such input, Alpine could have sought Commission review of delegated authority orders approving the rules, and a final Commission order rejecting such a challenge could be directly appealed to a U.S. Court of Appeals. *See generally* Rules of Practice 430 and 431, 17 C.F.R. § 201.430 and .431 (addressing appeal of delegated authority orders to the Commission); Exchange Act Section 25(a), 15 U.S.C. § 78y(a) (providing for appellate review of final Commission orders).

75 *See* Rule of Practice 192(a), 17 C.F.R. § 201.192(a) ("Any person desiring the issuance, amendment or repeal of a rule of general application may file a petition therefor with the Secretary.").

76 *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam).

77 *Id.*

78 *Id.* (citations and internal quotations omitted).

79 *Id.*

In seeking relief, Alpine contends that it "will suffer irreparable damages if a stay is not entered as a result of the financial burden placed every day upon Alpine" by the Illiquid Charge. According to Alpine, "its liquidation business alone is down approximately 75% due to the capital constraints necessary to fund" the Required Fund Deposit, and its revenues from commissions declined from $555,647 in November 2017 to $122,901 in November 2018. Alpine states that it could "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."

Alpine has not submitted evidence sufficient for us to conclude, as Alpine contends in its reply brief, that the Illiquid Charge puts "its survival on the line." Although courts and the Commission have recognized that monetary loss that "threatens the very existence of the movant's business" may constitute irreparable harm,[80] a movant must "substantiate the claim that irreparable injury is 'likely' to occur."[81] Alpine does not establish that it is likely to cease operations without a stay. Nor has it submitted information regarding, among other things, its expenses, level of profitability, or exhaustion of available resources that would allow us to reach such a conclusion. Alpine asserts only that its liquidation business, specifically its revenues from commissions, declined over a period before it filed its application for review. Yet Alpine apparently continues to provide clearance and settlement services for securities transactions, fails to present any evidence regarding inability to meet its financial obligations, and does not assert that it is losing money.

Alpine also has not established that it will suffer irreparable harm *as a result of* the Illiquid Charge. Alpine asserts that its income from commissions has declined by approximately 75% because it must make the Required Fund Deposit, which includes both the Illiquid Charge and other components that Alpine challenges in its application for review but does not seek to stay, and because it must limit the number of transactions that it processes to avoid Excess Net Capital Premium charges.[82] Despite attributing its financial situation to multiple factors, Alpine does not attempt to attribute any specific portion of the decline in its revenues to the Illiquid Charge.

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[80] *Id.* (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n. 2 (D.C. Cir. 1977)); *see also Bruce M. Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *4 n.26 (Nov. 27, 2017) (stating that "the Commission has said that 'the destruction of a business could provide a sufficient basis to support' a finding of irreparable harm") (quoting *Atlantis Internet Grp. Corp.*, Exchange Act Release No. 70620, 2013 WL 5519826, at *5 n.14 (Oct. 7, 2013)); *Scattered Corp.*, 52 SEC 1314, 1997 SEC LEXIS 2748, at *15 n.15 (Apr. 28, 1997) (stating that "[i]n rare circumstances, . . . the destruction of a business, absent a stay, is more than just 'mere' economic injury and rises to the level of irreparable injury"); *Bunker Ramo*, Exchange Act Release No. 14606, 1978 WL 197047, at *4 (Mar. 24, 1978) (finding substantial likelihood of irreparable harm based in part on determination that "petitioners could be forced out of [a particular] line of business" in the absence of relief).

[81] *Wis. Gas Co.*, 758 F.2d at 674 (quoting *Wash. Metro. Area Transit Comm'n*, 559 F.2d at 843 n.3).

[82] *See supra* note 47.

Even if we were to disregard the fact that Alpine also attributes its financial hardship to factors other than the Illiquid Charge, Alpine still has not established on this record that the Illiquid Charge directly caused its revenues to decline. Alpine relies on a decrease in its revenues between November 2017 and November 2018. But this comparison does not show the effect of the Illiquid Charge on Alpine because the starting point for the comparison follows, rather than predates, the changes Alpine challenges. The Commission approved NSCC's challenged rules in May 2017, well before the November 2017 starting point for Alpine's revenue comparison, and Alpine was ineligible to apply the DTC Offset in both the starting and ending months of comparison (November 2017 and November 2018) because it held the weakest CRRM rating. Comparing Alpine's revenues in two months after the changes it challenges took effect does not establish that those changes caused its revenues to decline.

Significantly, the record before us indicates that other factors may have contributed to the decline in Alpine's revenues. In April 2018, Alpine lost the ability to clear trades without using NSCC's services when the last of its ex-clearing relationships expired. Alpine does not explain when it started to use these relationships, why they expired, or whether it sought to renew them.

In any case, Alpine's decision to file its stay motion over eighteen months after the rules it challenges came into effect "vitiates much of the force of [its] allegations of irreparable harm."[83] Were Alpine truly at risk of closing because of the Illiquid Charge, we would expect it to have sought relief soon after it became ineligible for the DTC Offset in June 2017. But Alpine did not file its application for review until December 26, 2018. Alpine's claim of irreparable harm appears to be inconsistent with its extended delay in seeking relief, as well as its continued operations over the prolonged period during which it has been subject to the Illiquid Charge.[84] Under the circumstances, Alpine does not establish a risk of irreparable harm that would justify staying the applicability of generally applicable rules to it during the course of its appeal.

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[83] *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977); *see also Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) ("[T]he failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury." (citation and internal quotation marks omitted)); *Miller v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 544 (9th Cir. 1993) (stating that, although "[d]elay by itself is not a determinative factor in whether the grant of interim relief is just and proper," that the movant "tarried so long before seeking this injunction is nonetheless relevant in determining whether relief is truly necessary" (citations and quotation marks omitted)).

[84] *Cf. Akindemowo*, 2016 WL 3877888, at *2 ("Further weighing against Akindemowo's concern that he will suffer irreparable harm is that he did not seek a stay until five months after he initiated this review proceeding and more than two months after he filed his brief in support of his application for review."); *Atlantis Internet Grp.*, 2013 WL 5519826, at *5 ("Atlantis's claim of irreparable harm is undermined by the fact that it waited over two years from imposition of the Deposit Chill and almost one year from the imposition of the Global Lock to seek a stay.").

C. Alpine fails to demonstrate that the remaining factors favor a stay.

We also find that Alpine fails to establish that the final two elements favor relief. Those elements are the likelihood of harm to others from a stay and a stay's impact on the public interest. During the two years that the NSCC rules at issue have been in place, they have formed part of the integrated risk management system that NSCC applies to Alpine and its numerous other members. Staying those rules as to Alpine could have significant consequences. Barring NSCC from assessing the Illiquid Charge as to Alpine or providing that it will always receive the DTC Offset, as Alpine requests, could provide it an unfair advantage over competing NSCC members—particularly those members specializing in the microcap sector. Ordering NSCC to refrain from assessing the Illiquid Charge on any member also could have unanticipated, negative consequences that Alpine has not addressed. And granting Alpine's request for relief would limit NSCC's ability to respond appropriately and expeditiously to future events without first obtaining a modification of the stay. In other words, granting a stay could impact competition among NSCC's clearing members and NSCC's ability to mitigate risk. Accordingly, Alpine has not shown that the likelihood of harm to others and the public interest favor relief.

Finally, Alpine asks us to stay NSCC's implementation of rules that have been in effect since May 2017 and that required Alpine to post the Illiquid Charge deposit hundreds of times before it filed its application for review. But "the typical purpose of . . . a stay is to preserve the status quo."[85] Because granting the relief Alpine seeks in its stay motion would alter the status quo, the public interest weighs against Alpine.

III. Confidentiality

Alpine requests that we issue a protective order prohibiting the public disclosure of certain portions of NSCC's opposition brief, its supporting papers, and Alpine's reply brief. But Alpine did not seek a protective order when it filed its application for review, stay motion, and rulemaking petition in December 2018, although those filings addressed in detail NSCC's practices and the charges it assessed on Alpine. Rather, NSCC introduced the issue of confidentiality when it opposed Alpine's stay motion in January 2019. NSCC requested confidential treatment for certain portions of its filings that "may be deemed" to contain nonpublic information about Alpine, and stated that it would meet and confer with Alpine regarding the scope of this information and the need, if any, to protect it. Alpine subsequently

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[85] *Bloomberg L.P.*, Exchange Act Release No. 83755, 2018 WL 3640780, at *11 (July 31, 2018) (citing *Wash. Metro. Area Transit Comm'n*, 559 F.2d at 844) (equating the granting of "interim injunctive relief" to "[a]n order maintaining the status quo" and describing such release as "preventative, or protective")); *see also Millenia Hope, Inc.*, Exchange Act Release No. 42739, 2000 WL 511439, at *2 (May 1, 2000) ("Stays preserve the status quo pending review of the action stayed.") (citation omitted); *cf. Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (explaining that the "limited purpose" "of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held").

submitted a reply brief that redacted certain information and a supporting confidentiality application that stated that it also would meet and confer with NSCC about confidentiality.

The parties did not provide any additional information; accordingly, the Commission ordered them to do so.[86] The Commission directed the parties to "clearly identify which information [they] seek to protect" and "offer an explanation as to why the harm resulting from disclosure would outweigh the benefits of disclosure."[87] The Commission explained that "[a]greement of the parties regarding confidentiality does not bind the Commission."[88]

Because the parties have not established that any harm resulting from disclosure of the materials at issue exceeds the benefits of its disclosure, we decline to enter a confidentiality order. After the order seeking additional submissions was issued, NSCC did not seek protection of any information. In its supplemental filing, Alpine asserts that there are no benefits to disclosure of any redacted portion of the parties' filings. But Alpine ignores the value reflected in the presumption of disclosure under our rules,[89] which safeguard "the important public interest in conducting an open administrative proceeding."[90]

Alpine also asserts that disclosure of the materials at issue "would greatly harm" it by damaging its existing and potential business relationships. But Alpine does not provide a factual basis for its assertions of great harm.[91] Alpine requests that we hold confidential details relating to NSCC's assignment of the lowest CRRM rating to Alpine, many of which relate to NSCC's analysis of publicly available information such as pending litigation against Alpine. Alpine does not explain, however, why these details would affect its business relationships when the end result of NSCC's analysis, i.e., the assignment to Alpine of the weakest CRRM rating, is already known.[92] Moreover, the details discussed in the redacted materials largely relate to NSCC's June

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86 *Alpine Sec. Corp.*, Exchange Act Release No. 85245, 2019 WL 1033859, at *1 (Mar. 4, 2019).

87 *Id.* at *1 (quoting *Kabani & Co.*, Exchange Act Release No. 76266, 2015 WL 6447449, at *2 (Oct. 26, 2015) (citing Rule of Practice 322, 17 C.F.R. § 201.322)).

88 *Alpine Sec. Corp.*, 2019 WL 1033859, at *1.

89 *See* Rule of Practice 322(b), 17 C.F.R. § 201.322(b) ("Documents and testimony introduced in a public hearing are presumed to be public.").

90 *Kabani & Co.*, 2015 WL 6447449, at *1 & n.8; *see also Dominic A. Alvarez*, Exchange Act Release No. 53231, 2006 WL 328034, at *1 (Feb. 6, 2006) (stating that "[t]he Commission has long underscored the importance of conducting open administrative proceedings").

91 *See Alvarez*, 2006 WL 328034, at *1 (denying motion for confidentiality order where applicant had not provided sufficient factual basis to conclude that harm resulting from disclosure would outweigh the benefits); *see also Kabani & Co.*, 2015 WL 6447449, at *1 & n.9 (finding that "generalized concern" regarding "reputational harm" from disclosure did not outweigh benefit of disclosure).

92 *Cf. Kabani & Co.*, 2015 WL 6447449, at *1 & n.9 (denying motion for protective order where information sought to be protected was already publicly available).

2017 decision to assign Alpine the 7 CRRM rating. That decision occurred 18 months before Alpine filed its application for review. Alpine has not explained why a party considering doing business with it now would decline to do so based on such information, rather than base its decision on current available information regarding Alpine.[93]

We also decline to grant Alpine's request because it is inconsistent with our past confidentiality orders.[94] We have permitted disclosure of purportedly confidential information where necessary to address issues relevant to a proceeding.[95] This order cites to certain facts regarding Alpine's CRRM rating that Alpine contends should be protected as confidential, including the approximate dates that NSCC assigned Alpine the weakest CRRM rating. Alpine has not established that any harm from disclosure of these facts exceeds the benefit to the public from their open discussion herein.

Finally, Alpine suggests that it seeks to protect information beyond the redacted materials. To the extent that Alpine seeks a blanket confidentiality order without identifying specific information, we deny its request as insufficiently supported, overbroad, and vague.[96]

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93 *Cf. In re Cendant Corp.*, 260 F.3d 183, 196 (3d Cir. 2001) ("The strong presumption of public access forces district courts to be cognizant of when the reasons supporting sealing in a specific case (if any are found) have either passed or weakened, and to be prepared at that time to unseal bids and allow public access.").

94 Alpine argues that confidentiality requests "similar to" its own "are generally granted," but the cases it cites to support this proposition are distinguishable. Those cases granted protective orders to protect personal financial information, such as tax returns and standardized financial disclosures, generally submitted by respondents to support inability–to–pay defenses to the imposition of monetary sanctions in disciplinary proceedings. They did not concern a third party's analysis of largely public information. Moreover, in the Commission orders Alpine cites we reserved the right to disclose information that had been subject to the confidentiality order. *See, e.g.*, *Gregory O. Trautman*, Exchange Act Release No. 57475, 2008 WL 648535, at *1 (Mar. 11, 2008) ("The requirements of sealing and confidentiality shall not apply to any reference to the existence of the documents or to citation of particular information contained therein in testimony, oral argument, briefs, opinions, or in any other similar use directly connected with this action or any appeal thereof."). To the extent that the administrative law judge orders that Alpine cites do not contain this express limitation, they do not bind us. *See Rapoport v. SEC*, 682 F.3d 98, 105 (D.C. Cir. 2012) (recognizing that "ALJ order[s]" are "not . . . binding" on the Commission); *Absolute Potential, Inc.*, Exchange Act Release No. 71866, 2014 WL 1338256, at *8 n.48 (Apr. 4, 2014) (stating that the Commission is not bound by ALJ decisions).

95 *See, e.g.*, *Trautman*, 2008 WL 648535, at *1.

96 *Cf. Kabani & Co.*, 2015 WL 6447449, at *1 (finding that request for a "blanket, retroactive protective order" did not meet Rule 322 standard); *Alvarez*, 2006 WL 328034, at *1 (denying request for protective order regarding medical information where applicant failed to "identif[y] what information he would like to keep from disclosure").

* * *

Accordingly, IT IS ORDERED that the motion by Alpine Securities Corporation for a stay of action of the National Securities Clearing Corporation is denied; and that the motion by Alpine Securities Corporation for a confidentiality order is denied; and it is further

ORDERED that the parties shall file briefs of no more than 15 pages by December 23, 2019 addressing whether Alpine timely filed its application for review and, if so, whether the Commission has jurisdiction over it.[97] Each party shall file a responsive brief of no more than 10 pages by January 6, 2020.[98] Pursuant to Rule 180(c) of the Rules of Practice, failure to file a brief in support of the application may result in dismissal of this review proceeding.[99]

By the Commission.

Vanessa A. Countryman
Secretary

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97 *Cf. Citadel Sec. LLC*, Exchange Act Release No. 77501, 2016 WL 1272874, at *1 (Apr. 1, 2016) (ordering parties to brief issue of jurisdiction).

98 As provided by Rule 450(a), no briefs in addition to those specified in this schedule may be filed without leave of the Commission. Attention is called to Rules of Practice 150-153, 17 C.F.R. § 201.150-153, with respect to form and service, and Rule of Practice 450(b) and (c), 17 C.F.R. § 201.450(b) and (c), with respect to content and length limitations. Requests for extensions of time to file briefs will be disfavored.

99 *See* 17 C.F.R. § 201.180(c). Alpine requests that we order NSCC to file a certified record to aid our review of Alpine's application for review. *See* Rule of Practice 420(e), 17 C.F.R. § 201.420(e). NSCC argues that it is not required to file a record because it has taken no action reviewable under Exchange Act Section 19(d). Because we have ordered the parties to address the timeliness of NSCC's application for review and our jurisdiction over it, we decline to resolve Alpine's request at this time. *Cf. 6D Glob. Techs., Inc.*, Exchange Act Release No. 80492, 2017 WL 1397542, at *1 (Apr. 19, 2017) (granting motion to stay SRO's obligation to certify and file the record pending determination of timeliness of appeal).