UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 98867 / November 6, 2023

Admin. Proc. File No. 3-20238

In the Matter of the Application of

ALPINE SECURITIES CORPORATION

For Review of Action Taken by the

NATIONAL SECURITIES CLEARING CORPORATION

ORDER DENYING MOTION FOR STAY AND SETTING BRIEFING SCHEDULE

On March 2, 2021, Alpine Securities Corporation filed an application for review of a rule that governs the deposits, *i.e.*, margin, it must post with the National Securities Clearing Corporation ("NSCC"). Alpine is a registered broker-dealer that specializes in providing clearing and settlement services for trades in microcap securities and is a member of NSCC. NSCC is a self-regulatory organization ("SRO") and a registered clearing agency that provides central counterparty services for U.S. equity securities and requires its members to post deposits to address the risk NSCC takes on as a result of this role. Alpine argues that elements of the required deposit charges are reviewable under Section 19(d) of the Securities Exchange Act of 1934 as prohibitions or limitations of access to NSCC services because they prevent Alpine from clearing all the transactions that it wants to submit to NSCC.[1] Alpine contends further that, as part of that review, the charges it challenges should be set aside because they are excessive and discriminate against smaller NSCC members specializing in microcap securities.[2]

This is the second application that Alpine has filed challenging NSCC's rules. Alpine's first application principally challenged the Illiquid Charge—a deposit that NSCC previously required its members to post to clear certain net unsettled positions in securities that NSCC considers illiquid, such as microcap securities.[3] Although Alpine also filed a motion for a stay of

1 *See* 15 U.S.C. § 78s(d) (authorizing Commission review of an SRO action that "prohibits or limits any person in respect to access to services offered by" the SRO).

2 *See* 15 U.S.C. § 78s(f) (setting forth standard of review applicable to SRO prohibitions or limitations of access to SRO services and authorizing Commission to set them aside).

3 As indicated below, NSCC's rules describe the capitalized terms that we use in this order.

the Illiquid Charge, the Commission denied the motion because Alpine had not established that any of the elements traditionally applicable to motions for preliminary relief supported a stay.[4]

On November 24, 2020, the Commission approved an NSCC rule change that eliminated the Illiquid Charge and substantially modified the Volatility Charge—a component of the margin NSCC requires its members to post that NSCC uses to cover potential market price volatility for members' portfolios.[5] The Commission's order approving the rule change stated that NSCC had provided its members information about the effect of the rule change before submitting it to the Commission in March 2020, and Alpine later stated that NSCC had informed it in March 2019 that the rule change would increase its required deposit by approximately 200%. Despite opposition to the rule change by Alpine and others, no one appealed the Commission's order approving it, and the rule change took effect on February 1, 2021.[6]

In its second application for review, Alpine now challenges that NSCC rule change under Exchange Act Section 19(d). In connection with this application, Alpine filed a motion to stay the revised Volatility Charge as it applies to illiquid securities.[7] Alpine also asserts that NSCC has: (1) improperly changed how it assesses other deposit charges without Commission approval, (2) continued to rely on the repealed Illiquid Charge when calculating another component of the required deposit, and (3) impermissibly applied the rule change retroactively.

Today, we issue two orders concerning Alpine's two applications for review. First, in a separate opinion and order, we dismiss Alpine's first application for review because Exchange Act Section 19(d) is not available as a means to challenge the generally applicable rules Alpine seeks to challenge and because the rule change challenged here moots Alpine's earlier challenge.

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4 *Alpine Sec. Corp.*, Exchange Act Release No. 87599, 2019 WL 6251313, at *1, *5, *13 (Nov. 22, 2019).

5 *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 Approval Order"); *see also Notice of No Objection to Advance Notice 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. 90367, 85 Fed. Reg. 73,099 (Nov. 16, 2020).

6 The Commission approved the rule change by an order issued pursuant to delegated authority. Alpine could have sought Commission review of the order approving the rule change by delegated authority, and could have appealed subsequent adverse final Commission orders to a U.S. Court of Appeals. *See infra* notes 29 and 49 and accompanying text.

7 Subsequently and separately, but as part of this second application for review, Alpine filed an emergency motion to stay NSCC's imposition of a specific charge on Alpine. We denied that motion. *Alpine Sec. Corp.*, Exchange Act Release No. 96293, 2022 WL 16839451 (Nov. 9, 2022).

Second, in this order, we deny the stay request Alpine filed with its second application for review because Alpine has not established that it is entitled to that extraordinary relief. Based on the record and briefing to date, Alpine is not likely to succeed on the merits of its application. Exchange Act Section 19(d) is not available as a means for Alpine to pursue its challenge because Alpine challenges a generally applicable rule change addressing the Volatility Charge, rather than "'limits [on] any *person*' with regard to accessing [NSCC]'s services," within the scope of Section 19(d).[8] Alpine also has not established that it is likely to prevail on its alternative formulation of its claims as challenging various alleged unauthorized actions by NSCC. Nor has Alpine demonstrated that it will suffer irreparable harm in the absence of a stay. And granting a stay could provide Alpine an unfair advantage over competing NSCC members and hamper NSCC's ability to mitigate risk. For all of these reasons, Alpine's motion is denied.[9]

I. Background

A. Alpine is a small broker-dealer and a member of NSCC, a registered clearing agency.

Alpine is a small, self-clearing broker-dealer that is engaged primarily in clearing microcap or over-the-counter ("OTC") stock transactions for other firms, including stocks with a price less than $0.01 a share. Alpine characterizes its primary mission as providing liquidity to the microcap OTC market. As an NSCC member, Alpine submits trades to NSCC for clearing.

NSCC is a clearing agency registered with the Commission pursuant to Exchange Act Section 17A, and because it provides central counterparty ("CCP") services, NSCC is a covered clearing agency as defined in Exchange Act Rule 17Ad-22(a).[10] NSCC provides CCP services with respect to equity securities transactions in the United States.[11] For settlement purposes,

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[8] *NASDAQ Stock Mkt. v. SEC*, 961 F.3d 421, 428 (D.C. Cir. 2020) (quoting 15 U.S.C. § 78s(d)(1) (emphasis added in court opinion)); *see also Alpine Sec. Corp.* (Nov. 6, 2023), https://www.sec.gov/litigation/opinions (dismissing Alpine's prior challenge to generally applicable rules under Section 19(d) on the ground that review is not available under that section).

[9] Alpine's request for oral argument on its motion is also denied because it would not significantly aid the decisional process. *See* Rule of Practice 451(a), 17 C.F.R. § 201.451(a).

[10] 15 U.S.C. § 78q-1; 17 C.F.R. § 240.17Ad-22(a)(5); *Definition of "Covered Clearing Agency,"* Exchange Act Release No. 88616, 85 Fed. Reg. 28,853, 28,855 n.21 (May 14, 2020); *Standards for Covered Clearing Agencies*, Exchange Act Release No. 78961, 81 Fed. Reg. 70,786, 70,788 n.20 (Oct. 13, 2016); *see also* Clearing Agencies, https://www.sec.gov/tm/clearing-agencies (listing registered clearing agencies); *Alpine Sec. Corp.*, 2019 WL 6251313, at *2 & nn.6-11 (discussing obligations of registered clearing agencies and covered clearing agencies).

[11] National Securities Clearing Corporation: Disclosure Framework for Covered Clearing Agencies and Financial Market Infrastructures, at 5, 8 (Mar. 2023), https://www.dtcc.com/-/media/Files/Downloads/legal/policy-and-compliance/NSCC_Disclosure_Framework.pdf

(continued . . .)

NSCC becomes the counterparty of each of its members' netted transactions for a particular settlement date.[12] NSCC thus assumes the obligations of members that are receiving securities to receive and pay for them and of members that are delivering securities to deliver them.[13]

To address the risk that it assumes from its CCP status, NSCC maintains a Clearing Fund that consists of Required Fund Deposits made by each of its members, *i.e.*, margin.[14] NSCC collects a Required Fund Deposit from each of its members to mitigate potential losses to NSCC associated with the liquidation of the member's portfolio in the event of a member default.[15] NSCC would access the Clearing Fund if a defaulting member's Required Fund Deposit was insufficient to satisfy NSCC's losses upon liquidation of the defaulting member's portfolio.[16]

NSCC determines the Required Fund Deposit and assesses the charges on its members by using a risk-based margin methodology reflected in its rules.[17] NSCC collects Required Fund Deposits in order to satisfy regulatory requirements that it cover its credit exposure to its members by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market, including the microcap and OTC securities in which Alpine typically transacts.[18] The Required Fund Deposit applies to a member's open positions pending before NSCC.[19] NSCC adjusts the amount of each member's Required Fund Deposit at least once a day

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("Disclosure Framework"). We take official notice of the contents of the Disclosure Framework pursuant to Commission Rule of Practice 323 as a matter that "might be judicially noticed by a district court of the United States." 17 C.F.R. § 201.323; *see also* Fed. R. Evid. § 201(b)(2) (stating that a court may take judicial notice of a "fact that is not subject to reasonable dispute" because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"); *Mangiaracina v. Penzone*, 849 F.3d 1191, 1193 n.1 (9th Cir. 2017) (taking judicial notice of applicable rules and regulations).

12 Disclosure Framework at 10.

13 *Id.*

14 *Id.* at 48; *see also* NSCC Rule 1 (defining "Clearing Fund" and "Required Fund Deposit" by reference to NSCC Rule 4, which governs the amount of each member's contribution toward the Clearing Fund), http://www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf (version effective October 2, 2023).

15 *Order Approving a Proposed Rule Change to Enhance National Securities Clearing Corporation's Haircut-Based Volatility Charge Applicable to Municipal Bonds*, Exchange Act Release No. 88191, 85 Fed. Reg. 9,843 (Feb. 20, 2020).

16 *Id.*

17 *See generally* NSCC Rule 4, Sec. 1 (defining the Required Fund Deposit as the deposit "determined by [NSCC] in accordance with Procedure XV and other applicable Rules and Procedures"); Disclosure Framework at 48, 57.

18 17 C.F.R. § 240.17Ad-22(e)(6)(i).

19 Disclosure Framework at 48, 57.

to reflect the status of its open positions,[20] and provides daily notices of the amount of the Required Fund Deposit to its members.[21] The margin deposits that NSCC members post are credited back to NSCC members when the open positions to which they pertain close.[22]

B. Alpine filed an application for review challenging the Illiquid Charge, a component of the Required Fund Deposit, and moved to stay its assessment.

On December 26, 2018, Alpine filed an application for review challenging certain components of the Required Fund Deposit, including the Illiquid Charge.[23] Alpine also challenged NSCC's Credit Risk Rating Matrix ("CRRM") as it related to the Illiquid Charge, and the Excess Capital Premium, Volatility Charge, and Mark-to-Market Charge.[24] Alpine also filed a motion to stay the Illiquid Charge or require NSCC to provide Alpine an offset for shares deposited with the Depository Trust Company ("DTC"), an affiliate of NSCC, when determining the applicability of the Illiquid Charge. At the time, this DTC Offset was not available to Alpine because NSCC had assigned Alpine the weakest CRRM rating.[25] Alpine claimed that it would generally avoid incurring the Illiquid Charge if the DTC Offset were available to it.

On November 22, 2019, the Commission denied Alpine's motion to stay the Illiquid Charge.[26] The Commission found that Alpine had failed to establish that it was likely to prevail

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20 *Id.* at 57.

21 *Id.*

22 *Alpine Sec. Corp.*, 2019 WL 6251313, at *7.

23 The Illiquid Charge has been repealed. *See supra* note 5; *see also* Volatility Rule Change Approval Order, 85 Fed. Reg. at 77,282 (defining "Illiquid Charge"). According to NSCC, it was designed to address a situation where a defaulting member has a relatively large position in an Illiquid Security, which would increase the risk that NSCC might face losses when liquidating the member's position in these securities due to the securities' lack of marketability and other characteristics. Volatility Rule Change Approval Order, 85 Fed. Reg. at 77,282.

24 *See generally* NSCC Procedure XV (setting forth rules governing elements of Required Fund Deposit, including the Excess Capital Premium); Disclosure Framework at 57-58 (identifying and describing certain components of the Required Fund Deposit, including the Volatility Charge and Mark-to-Market Charge). Alpine challenged these same components in a petition for Commission rulemaking that it attached to its application. *See Request for Rulemaking with Respect to Certain Actions, Practices and Rules of a Certain Clearing Agency*, File No. 4-738 (Dec. 19, 2018) (citing 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."); 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.")), https://www.sec.gov/rules/petitions/2018/petn4-738.pdf. That petition is pending.

25 *Alpine Sec. Corp.*, 2019 WL 6251313, at * 3 & n.33 (defining "DTC Offset").

26 *Id.* at *1, *5, *13.

on the merits of its application for review.[27] The Commission explained that Alpine had received notice of, and an opportunity to comment on, the rules it challenged before they were approved.[28] After providing input, Alpine could have sought Commission review of any orders approving the rules pursuant to delegated authority, and could have appealed subsequent adverse final Commission orders to a U.S. Court of Appeals.[29] Alpine did not do so.

C. NSCC filed with the Commission a proposed rule change eliminating the Illiquid Charge and substantially revising the Volatility Charge.

On March 16, 2020, NSCC filed with the Commission a proposed rule change eliminating the Illiquid Charge and substantially modifying the Volatility Charge, including as it applied to Illiquid Securities.[30] The Volatility Charge is a component of the Required Fund Deposit that is designed to capture the market price risk associated with each NSCC member's portfolio at a 99% level of confidence.[31] In its submission, NSCC stated that the rule change was designed to provide it with a more appropriate and complete measure of the risks presented by unsettled positions.[32] NSCC explained that the rule change would clarify and enhance its methodology for identifying Illiquid Securities, enhance the calculation of the Volatility Charge as applied to positions in Illiquid Securities, and eliminate the Illiquid Charge because the revised Volatility Charge would address the risk the Illiquid Charge was designed to address.[33] The rule change also provided that, in calculating applicable margin charges for securities with a price below $0.01, NSCC would round the securities' price up to $0.01.[34]

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27 *Id.* at *6.

28 *Id.* at *9 n.74.

29 *See generally* Rules of Practice 430 and 431, 17 C.F.R. §§ 201.430, .431 (addressing appeal of delegated authority orders to the Commission); Exchange Act Section 25(a), 15 U.S.C. § 78y(a) (providing for appellate court review of final Commission orders).

30 *Notice of Filing of 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. 88474, 85 Fed. Reg. 17,910, 17,910 (Mar. 31, 2020) ("Volatility Rule Change Notice"); *see also Notice of Filing of Advance Notice 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. 88615, 85 Fed. Reg. 21,037 (Apr. 15, 2020).

31 Disclosure Framework at 58.

32 Volatility Rule Change Notice, 85 Fed. Reg. at 17,920.

33 *Id.* at 17,910.

34 Text of Proposed NSCC Rule Change SR-NSCC-2020-002, https://www.sec.gov/rules/sro/nscc/2020/34-88474-ex5.pdf, at 80 of 87 n.5 ("The Current Market Price of each sub-penny security is deemed to be one cent."); *see also* Volatility Rule Change Notice, 85 Fed. Reg. at 17,915 & n.40 (similar).

Alpine submitted comments to the Commission opposing the proposed rule change.[35] In its comments, Alpine asserted that the net effect of the proposed rule change was "to destroy the microcap securities market and small firms like Alpine that service this space by increasing the costs, and thus the amount of necessary capital, to provide clearing services in this space to an unsustainable level." Alpine stated that, in March 2019, it had received an email from an affiliate of NSCC that outlined the proposed changes and estimated that, under them, Alpine would have experienced an "increase of approximately 198%" in its daily clearing fund requirement. In its comments, Alpine asserted that NSCC relied on "an unproven mathematical theory" to support the rule change. And Alpine reiterated its pending challenges to NSCC's deposit rules and attached previously filed "key documents" to its comments.

D. The Commission approved NSCC's proposed rule change eliminating the Illiquid Charge and substantially revising the Volatility Charge.

On November 24, 2020, the Commission approved NSCC's proposed rule change (the "Volatility Rule Change") by an order issued pursuant to delegated authority.[36] The order found that the rule change was consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to NSCC.[37] In support of its findings, the approval order cited backtesting results provided by NSCC. Backtesting is "an ex-post comparison of actual outcomes with expected outcomes derived from the use of margin models."[38] The order explained that the "volatility component is designed to reflect the amount of money that could be lost on a portfolio over a given period within a 99% confidence level."[39] But NSCC's backtesting analysis showed that, under the methodology in place before the Volatility Rule Change, NSCC was "not achieving its 99% targeted confidence level" for Illiquid Securities.[40] Short positions in securities priced at less than one cent and securities priced between one cent

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35 Letter from Christopher R. Doubek, CEO, Alpine Securities Corporation, to Vanessa Countryman, Office of the Secretary (Apr. 21, 2020), https://www.sec.gov/comments/sr-nscc-2020-003/srnscc2020003-7113312-215951c.pdf.

36 *See supra* note 5 (citing Volatility Rule Change Approval Order).

37 Volatility Rule Change Approval Order, 85 Fed. Reg. at 77,285.

38 Rule 17Ad–22(a)(1), 17 C.F.R. § 240.17Ad–22(a)(1); *accord* Volatility Rule Change Approval Order, 85 Fed. Reg. at 77,286 n.54; *see also* Rule 17Ad–22(e)(6)(vi), 17 C.F.R. § 240.17Ad–22(e)(6)(vi) (requiring NSCC to "establish, implement, maintain and enforce written policies and procedures reasonably designed to" "[c]over . . . its credit exposures to its participants by establishing a risk-based margin system" that "[i]s monitored by management on an ongoing basis and is regularly reviewed, tested, and verified by" backtesting).

39 Volatility Rule Change Approval Order, 85 Fed. Reg. at 77,282.

40 *Id.* at 77,286; *see also* NSCC Procedure XV, Sec. I.(B)(3) (referring to "99 percent backtesting coverage target"); Volatility Rule Change Approval Order, 85 Fed. Reg. at 77,291 n.89 (recognizing that "NSCC has established a 99% target backtesting confidence level"); Disclosure Framework at 49-50, 60.

and one dollar exhibited the lowest average backtesting coverage of 96.2%.[41] In contrast, under the Volatility Rule Change, NSCC's results showed backtesting coverage of 99.5%.[42]

NSCC acknowledged that the Volatility Rule Change might cause an increase in the Required Fund Deposit for members effecting transactions in Illiquid Securities and higher margin costs overall for members concentrated in Illiquid Securities, relative to members with more diversified portfolios.[43] Nevertheless, the Commission concluded that the Volatility Rule Change would better enable NSCC to collect margin commensurate with the levels of risk that members pose as a result of their trading activity in Illiquid Securities.[44]

The Commission's approval order also discussed NSCC's outreach efforts with respect to the Volatility Rule Change.[45] NSCC represented that it had provided members with details of its proposal for two years before the proposal and that, in 2019 and 2020, it distributed three rounds of impact studies to affected members.[46] The order also discussed NSCC's Risk Client Portal, which provides members access to detailed information regarding components of the Required Fund Deposit and the ability to view and analyze certain risks relating to their portfolio.[47] The order added that NSCC had posted a Risk Margin Component Guide ("Guide") describing some Required Fund Deposit components, and that it had committed to update the Guide to reflect changes set forth in the rule change proposal.[48] Neither Alpine nor anyone else challenged the order approving the Volatility Rule Change,[49] and it became effective on February 1, 2021.[50]

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41 Volatility Rule Change Approval Order, 85 Fed. Reg. at 77,286.

42 *Id.*

43 *Id.* at 77,294 n.136.

44 *Id.* at 77,286; *see also* Rule 17Ad–22(e)(4)(i), 17 C.F.R. § 240.17Ad–22(e)(4)(i) (providing that "[e]ach covered clearing agency shall establish, implement, maintain and enforce written policies and procedures reasonably designed to" "[e]ffectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by" "[m]aintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence").

45 Volatility Rule Change Approval Order, 85 Fed. Reg. at 77,294.

46 *Id.*

47 *Id*.

48 *Id.*

49 *See* Rules of Practice 430, 431(e), 17 C.F.R. §§ 201.430, .431(e) (providing for review of action taken by delegated authority and generally for automatic stay of such action after notice of intention to seek review is filed until the Commission orders otherwise); Exchange Act Section 25(a), 15 U.S.C. § 78y(a) (providing for appellate court review of final Commission orders).

50 *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Establish Implementation Date of National Securities Clearing Corporation's Enhancements to the Haircut-Based Volatility Charge Applicable to Illiquid Securities and UITs and Making Certain Other Changes to Procedure XV*, Exchange Act Release No. 90606 (Dec. 8, 2020), 85 Fed. Reg.

(continued . . .)

E. After the Volatility Rule Change took effect, Alpine challenged it pursuant to Exchange Act Section 19(d) by filing a second application for review and stay motion.

On March 2, 2021, Alpine filed the application for review at issue here. According to Alpine, Exchange Act Section 19(d) provides a means for it to obtain Commission review of the Volatility Rule Change and associated Required Fund Deposit charges. Alpine contends that, as part of the Commission's review under Section 19(d), the charges should be set aside as "onerous, discriminatory and otherwise inconsistent with the requirements of the Exchange Act."

In connection with its application for review, Alpine also seeks preliminary relief in the form of a stay of various actions that NSCC "purportedly [took] pursuant to" the rule change. For example, Alpine seeks a stay of the implementation of the revised Volatility Charge with respect to Illiquid Securities and its application to securities trading at less than one cent.[51] Alpine argues that, because NSCC rounds up the price of sub-penny securities to one cent, it imposes excessive deposits applicable to their sale.

Alpine also alleges that NSCC has substantively altered the Margin Requirement Differential ("MRD"),[52] Coverage Component ("CC"),[53] and Backtesting charges[54] without Commission approval, and seeks a stay of these alleged actions.[55] Alpine avers that when the Volatility Rule Change became effective on February 1, 2021, NSCC "increased Alpine's MRD and CC charges 450%, from a steady approximate amount of $200,000 to approximately $900,000." Alpine asserts that this increase was improper because there had been no appreciable increase in the value of trading activity. Alpine also avers that on March 1, 2020, NSCC "imposed a significant ($1.1 million) Backtesting Charge, which it ha[d] not done before."

80,852 (Dec. 14, 2020) (notice issued pursuant to delegated authority providing that rule change would be implemented by February 28, 2021); *Important Notice: Implementation Date of the Enhancements to the Haircut-Based Volatility Charge Applicable to Illiquid Securities and UITs and Making Certain Other Changes to Procedure XV*, https://www.dtcc.com/-/media/Files/pdf/2021/1/13/a8954.pdf (setting February 1, 2021 effective date).

51 Alpine moved for an extension of the word limit applicable to its stay motion, which NSCC did not oppose. In an exercise of our discretion, we grant Alpine's motion.

52 Disclosure Framework at 48 (stating that the MRD charge "is designed to help mitigate the risks posed to NSCC by day-over-day fluctuations in a [m]ember's portfolio").

53 *Id.* (stating that the CC charge "is designed to mitigate the risks associated with a [m]ember's Required Fund Deposit being insufficient to cover projected liquidation losses").

54 *Id.* at 49-50 (stating that the Backtesting charge "may require a [m]ember to make an additional deposit to mitigate exposures that may not be adequately captured by the volatility model as needed to achieve a 99 percent . . . back testing coverage target").

55 We use these terms to refer to the corresponding charge components referenced by the parties and provided for in NSCC Procedure XV and discussed in its Disclosure Framework.

Alpine avers further that, after the Volatility Rule Change became effective, its average daily Required Fund Deposit increased from $2.5 million (in December 2020 and January 2021) to $3.2 million (between February 1, 2021 and March 1, 2021). Relying on language from the Guide, Alpine also contends that, after the Volatility Rule Change became effective, NSCC continued to incorporate the Illiquid Charge in calculating the CC charge. Finally, Alpine asserts that it "appear[ed]" NSCC was impermissibly applying the Volatility Rule Change retroactively when calculating Alpine's Required Fund Deposit. Alpine states that, as a condition of a stay, it would stipulate to certain practices to ensure there is "no risk" to NSCC in clearing its positions.

NSCC opposes Alpine's stay request on the ground that Exchange Act Section 19(d) is not available as a means to challenge the actions Alpine seeks to have stayed.

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).[56] A stay is an "extraordinary remedy," and the moving party has the burden of establishing that relief is warranted.[57] In deciding whether to grant a stay, we consider whether: (i) there is a strong likelihood that the movant will eventually succeed on the merits of the appeal; (ii) the movant will suffer irreparable harm without a stay; (iii) no other person will suffer substantial harm as a result of a stay; and (iv) a stay is likely to serve the public interest.[58] The first two factors are the most critical, but a stay decision rests on the balancing of all four factors.[59] Thus, a stay may be warranted even if the movant has not shown a strong likelihood of success, as long as the movant raises a "serious legal question on the merits" and shows that the other factors weigh decidedly in his favor.[60] Alpine has not established that any of the four factors favors relief, so we deny its motion for a stay.

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56 17 C.F.R. § 201.401(d)(1); 15 U.S.C. § 78s(d).

57 *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).

58 *Potomac Cap. Markets, LLC*, Exchange Act Release No. 91172, 2021 WL 666510, at *2 (Feb. 19, 2021).

59 *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 (stating that "[t]he 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).

60 *Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *6 (Nov. 27, 2017) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011)).

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

1. Under *NASDAQ Stock Market v. SEC*, Section 19(d) is not available as a means for Alpine to challenge the Volatility Rule Change.

a. *NASDAQ Stock Market* controls our analysis here.

Alpine requests that we stay the Volatility Rule Change, but it has not shown that it is likely to establish that Exchange Act Section 19(d) is available as a means to challenge that rule. In *NASDAQ Stock Market v. SEC*, the D.C. Circuit held that "Section 19(d) is not available as a means to challenge the reasonableness of generally-applicable fee rules."[61] The court explained that "Section 19(d)'s text does not contemplate challenges to generally-applicable fee rules, and the remedy and notice provisions are incompatible with a challenge to fee rules that do not target specific individuals or entities."[62] The court concluded that because "Section 19(d) speaks to 'limits [on] any *person*' with regard to accessing the SRO's services,"[63] it "contemplates action targeted at individuals," rather than generally applicable fee rules.[64] The court thus vacated our opinion in *Securities Industry and Financial Markets Association*, which had set aside under Section 19(d) certain generally applicable fees charged by national securities exchanges.[65]

The reasoning of *NASDAQ Stock Market* controls here. We see no basis to distinguish between generally applicable fee rules and generally applicable rules governing clearing fund deposits, such as the Volatility Rule Change, for purposes of Section 19(d). Like generally applicable fee rules, the generally applicable rules governing a clearing agency's margin requirements, here NSCC's clearing fund deposits, do not target specific individuals or entities. Rather, the challenged rule change applies to any NSCC member that deals in Illiquid Securities, and as noted above, NSCC proposed —and the Commission approved—the Volatility Rule Change to address backtesting deficiencies so that NSCC collects margin commensurate with the levels of risk that members pose as a result of their trading activity in Illiquid Securities, consistent with NSCC's regulatory requirements.[66] Accordingly, under *NASDAQ Stock Market*, 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).[67]

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61 961 F.3d at 424.

62 *Id.*

63 *Id.* at 428 (quoting 15 U.S.C. § 78s(d) with emphasis added in opinion).

64 *Id.* at 430.

65 *Sec. Indus. & Fin. Mkts. Ass'n*, Exchange Act Release No. 84432, 2018 WL 5023228, at *11, *34 (Oct. 16, 2018) (finding that challenged fees "[we]re limitations of access to exchange services" and setting them aside as inconsistent with the purposes of the Exchange Act).

66 NSCC is required to manage its credit exposure to its members by collecting sufficient financial resources to do so. *E.g.*, 17 C.F.R. §§ 240.17Ad-22(e)(4), (e)(6).

67 Limitations of access reviewable under Section 19(d) typically involve revocations of membership or denials of services after individualized determinations or adjudicatory

(continued . . .)

The Exchange Act's structure supports this conclusion with even greater force than in *NASDAQ Stock Market*.[68] The fee rules at issue in *NASDAQ Stock Market* were not subject to Commission approval prior to their effectiveness, so the Commission did not have to issue an order approving them, which would have been subject to judicial review.[69] Here, by contrast, the Commission reviews rules governing clearing fund deposits under Section 19(b), which provides that the Commission "shall approve" such rules if they are consistent with the Exchange Act and the applicable rules and regulations thereunder.[70] Alpine commented on the Volatility Rule Change, and the Commission approved the Volatility Rule Change after considering the record as a whole, including Alpine's comments; Alpine (or other aggrieved persons) could have sought review of the approval order but did not do so.[71] It would make little sense to allow parties to challenge the rule under Section 19(d) as a limitation of access when the statute already expressly provides for Commission review under Section 19(b) and judicial review of a Commission approval order under Section 25(a). And it would make even less sense to argue that review under Section 19(d) should follow the culmination of the Section 19(b) review process; this would result in Commission review (under Section 19(d)) following Commission approval (under Section 19(b)).

The remedies available to the Commission if it finds that an SRO has improperly limited access to the SRO's services reinforce our conclusion that Alpine may not use Section 19(d) to challenge the Volatility Rule Change. As noted in *NASDAQ Stock Market*, the remedy for a

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proceedings against specific member firms, not the assessment of fees or charges under generally applicable rules. *See MFS Sec. Corp. v. New York Stock Exch., Inc.*, 277 F.3d 613, 620 (2d Cir. 2002) ("The NYSE's revocation of MFS's membership and its actions to cut off phone service manifestly limited MFS's access to services."), *cited with approval in NASDAQ Stock Mkt.*, 961 F.3d at 428-29; *Tower Trading, L.P.*, Exchange Act Release No. 47537, 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"); *Scattered Corp.*, Exchange Act Release No. 37249, 1996 WL 284622, at *2 (May 29, 1996) (finding that "the Exchange's determination not to process Scattered's application for registration as a market maker limits the firm's access to the CHX's services"); *Leon Greenblatt III*, Exchange Act Release No. 34953, 1994 WL 640090, at *1 (Nov. 9, 1994) ("We believe that the action taken by the [Chicago Stock Exchange denying access to the trading floor] constitutes a denial of Greenblatt's access to services offered by the Exchange."), *cited in MFS Sec. Corp.*, 277 F.2d at 619; *William J. Higgins*, Exchange Act Release No. 24429, 1987 WL 757509, at *5 (May 6, 1987) (concluding that "denial of a member's request to be permitted to communicate from the Exchange floor with non-members located off-floor would constitute a prohibition of, or limitation on, access to services"). NSCC's Rules provide for similar proceedings before, among other things, limiting a participant's access to its services. *See* NSCC Rules 45, 46.

68 *NASDAQ Stock Market*, 961 F.3d at 429 (the "structure of the Exchange Act" supports the conclusion that the generally applicable fee rules are not reviewable under Section 19(d)).

69 *Id.* at 425.

70 15 U.S.C. § 78s(b)(2)(C)(i).

71 *See supra* notes 6, 30, and 49 and accompanying text.

successful challenge is to set aside the action of the SRO and grant the aggrieved person access to the SRO's services.[72] But if the Commission were to set aside the Volatility Rule Change, it is unclear on what terms the Commission could grant access to NSCC's CCP services or how NSCC could provide that access consistent with its own regulatory requirements.[73] NSCC would seemingly have to provide access to its services without imposing any charge designed to capture the market price risk associated with a member's portfolio. At the least, it would be unclear what charge NSCC could impose. The impracticality of such a scenario further supports the conclusion that Section 19(d) is not available to challenge the Volatility Rule Change.[74]

b. Alpine's efforts to distinguish *NASDAQ Stock Market* are unavailing.

Alpine contends that *NASDAQ Stock Market* does not apply because Alpine challenges components of the Required Fund Deposit that are imposed against just a few market participants, and NSCC assesses these charges against Alpine on a daily basis. But the fact that the Volatility Rule Change may impact members that deal in microcap securities more than members that do not deal in them does not establish that the Volatility Rule Change constitutes a reviewable limitation of access to services under Section 19(d). The fact that Alpine is a member of a class to which the rules apply does not convert a generally applicable rule into a reviewable limitation of access. Alpine must show, at a minimum, that the rules target it *specifically* for those rules to be reviewable under Section 19(d), and it has not done so.[75] Indeed, the rules at issue in *NASDAQ Stock Market* were not reviewable under Section 19(d) even though they impacted certain market participants more than others.[76]

NSCC's daily assessment on Alpine of the Required Fund Deposit also does not render the Volatility Rule Change reviewable under Section 19(d). The fact that a rule is applied in

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[72] 961 F.3d at 430 (citing 15 U.S.C. § 78s(f)).

[73] As noted above, NSCC is required to manage its credit exposure to its members by collecting sufficient financial resources to do so. *E.g.*, 17 C.F.R. §§ 240.17Ad-22(e)(4), (e)(6).

[74] *See NASDAQ Stock Market*, 961 F.3d at 430 (noting that "allow[ing] challenges to generally-applicable fee rules would be incompatible with the statutory remedy" because the available remedy would appear to require that the Commission set aside the rules and have the SROs grant access to their services without charging any fee at all).

[75] *See id.* at 427-28 ("[W]e 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 428 ("Even assuming, however, that some fees are challengeable under Section 19(d), the text indicates that they must at least be targeted at specific people.").

[76] *See Sec. Indus. & Fin. Mkts. Ass'n*, 2018 WL 5023228, at *30 (showing that NYSE Arca fee rule imposed per subscriber fees on firms that differed based on user's status as a professional or nonprofessional and capped the amount of a firm's total professional fees); *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Rule 7019*, Exchange Act Release No. 62907, 75 Fed. Reg. 57,314, 57,314 (Sept. 20, 2010), https://www.gpo.gov/fdsys/pkg/FR-2010-09-20/pdf/2010-23385.pdf (specifying method for calculating fees for Nasdaq data based on particular use of data and class of securities at issue).

specific circumstances does not establish that the rule is targeted at the entity to which it is applied. In *NASDAQ Stock Market*, the D.C. Circuit provided an example of a fee that did target a single entity specifically: a decision by an SRO "to impose a fee after one-on-one negotiations with the only subscriber that would have paid the fee."[77] Here, NSCC does not assess the Required Fund Deposit after one-on-one negotiations with Alpine, its rules governing these charges do not apply only to Alpine, and Alpine is not the only entity that has to pay such charges. For example, Alpine requests that the Commission stay NSCC's ability to implement its revised "Volatility Charge for Illiquid Securities" and its methodology for assessing Alpine's Required Fund Deposit for positions in sub-penny securities. But this rule change applies to the calculation of charges on NSCC's members generally and does not target Alpine specifically.[78]

Indeed, the statutory scheme for review of limitations of access is a poor fit for review of individual deposit charges, for reasons the court explained in *NASDAQ Stock Market*. The court declined to construe Section 19(d) "to mean that every generally-applicable fee rule could be a 'limit[ation]'on 'access to services'" because doing so would mean the notice requirements of Section 6(d) would apply and those requirements would be "unworkable" with regard to generally-applicable fee rules.[79] The same logic applies here. If the assessment of individual deposit charges were a limitation of access, it would require NSCC to provide notice of, and "an opportunity to be heard upon, the specific grounds for" the charges, "keep a record" of the proceeding, provide "a statement setting forth the specific grounds" on which the charge is based, and file with the Commission notice of the charges imposed.[80] Requiring that NSCC satisfy these requirements for every individual charge imposed pursuant to the Volatility Rule Change would be as unworkable as *NASDAQ Stock Market* found it to be for fees. [81]

Because Alpine has not shown that it challenges anything other than generally applicable NSCC rules, it has not established that it is likely to prevail on its challenge.

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77 *NASDAQ Stock Market*, 961 F.3d at 429 (citing *NASD v. SEC*, 801 F.2d 1415, 1417, 1419-21 (D.C. Cir. 1986)).

78 *See supra* note 30 and accompanying text (discussing rule text).

79 *NASDAQ Stock Mkt.*, 961 F.3d at 429-30.

80 Exchange Act Section 17A(b)(5)(B), 15 U.S.C. § 78q–1(b)(5)(B); Exchange Act Section 19(d)(1), 15 U.S.C. § 78s(d)(1); *see also* Exchange Act Section 17A(b)(3)(H), 15 U.S.C. § 78q–1(b)(3)(H) (requiring clearing agency rules to provide fair procedures with respect to "the prohibition or limitation by the clearing agency of any person with respect to access to services").

81 Should Alpine be in default in the delivery of any funds or securities to NSCC, NSCC could suspend, prohibit, or limit Alpine's access to NSCC's services with notice and opportunity for a hearing. NSCC Rule 46. Such a decision would be appealable under Exchange Act section 19(d), and Alpine could raise any arguments it has to the application of NSCC's rules in that proceeding.

2. Alpine has not established that it is likely to prevail regarding its challenge to particular NSCC actions that it contends are unauthorized.

Alpine also challenges particular NSCC actions that it contends are not authorized by NSCC's rules. For the same reasons that Exchange Act section 19(d) is not available to challenge generally applicable SRO rules, there are good reasons to believe that Section 19(d) likewise does not permit Commission review of NSCC's actions that Alpine seeks to challenge, including margin calculations.[82]

a. Alpine has not shown a likelihood of success on its claim that NSCC has implemented rule changes that the Commission did not approve.

Alpine challenges NSCC's implementation of what it terms "substantive changes" to the MRD, CC, and Backtesting charges that it contends needed to be approved by the Commission but were not. According to Alpine, NSCC has "effectively changed" these components by using the new Volatility Charge to calculate them. Alpine argues that Exchange Act Section 19(b)(1) prohibits NSCC from doing so because it generally requires that SROs submit proposed rule changes for the Commission's approval before they may take effect.[83]

At this stage of the proceeding, Alpine has not shown that it is likely to prevail on this claim because it has not shown that NSCC was required to formally amend—and seek the Commission's approval of changes to—the MRD, CC, and Backtesting charges.[84] The rules

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[82] The remedy and notice issues associated with finding that challenges to the reasonableness of generally applicable fee rules, *see NASDAQ*, 961 F.3d at 424, 429-30, would seem to apply with equal force to the application of the MRD, CC, Backtesting and other charges which Alpine challenges, which pursuant to NSCC Rules are calculated and if applicable, assessed at least once a day. *See supra* p. 6.

[83] *See* 15 U.S.C. § 78s(b)(1) (providing for filing of proposed rule changes with the Commission and stating that "[n]o proposed rule change shall take effect unless approved by the Commission or otherwise permitted"); *see also ABN AMRO Clearing Chicago, LLC*, Exchange Act Release No. 83849, 2018 WL 3869452, at *2 (Aug. 15, 2018) (stating that Section 19(b)(1) "generally requires an SRO's rules to be filed with and approved by the Commission").

[84] The Commission first approved the rules governing these charges in 2016. *Order Granting Approval of Proposed Rule Change To Accelerate Its Trade Guaranty, Add New Clearing Fund Components, Enhance Its Intraday Risk Management, Provide for Loss Allocation of "Off-the-Market Transactions," and Make Other Changes*, Exchange Act Release No. 79598, 81 Fed. Reg. 94,462 (Dec. 23, 2016); Text of Proposed NSCC Rule Change SR-NSCC-2016-005, https://www.sec.gov/rules/sro/nscc/2016/34-79245-ex5.pdf; *Order Granting Approval of Proposed Rule Changes To Describe the Backtesting Charge and the Holiday Charge That May Be Imposed on Members*, Exchange Act Release No. 79167, 81 Fed. Reg. 75,883 (Nov. 1, 2016); Text of Proposed NSCC Rule Change SR-NSCC-2016-004, https://www.sec.gov/rules/sro/nscc/2016/34-78808-ex5.pdf. Since 2016, there have been no substantive changes to the rules governing these components other than to remove references to charges that have been repealed from the rule governing the CC charge. *Notice of Filing of*

(continued . . .)

governing these charges define them, in part, by reference to the Volatility Charge.[85] But 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. Put differently, Alpine has not shown that NSCC must apply the now-repealed definition of the Volatility Charge when calculating the MRD, CC, and Backtesting charges unless and until NSCC separately amends those charges to account for the revised definition of the Volatility Charge.[86]

b. Alpine has not shown a likelihood of success on its claim that NSCC has continued to use the Illiquid Charge to calculate the CC charge.

Alpine also contends that, despite the fact that the Volatility Rule Change eliminated the Illiquid Charge, NSCC continues to use the "'Illiquid Charge' component to calculate the CC charge." While Alpine does not contend that NSCC continued to separately *assess* the Illiquid Charge after it was eliminated, it maintains that NSCC continues to rely on the Illiquid Charge when calculating the CC charge. Alpine cites the Guide, which states that the CC charge is calculated by comparing the simulated liquidation profit and loss of a member's portfolio against the sum of the "(i) volatility charge; (ii) MRD charge; and (iii) illiquid charge." Alpine contends

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Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Enhance the Calculation of the Volatility Component of the Clearing Fund Formula That Utilizes a Parametric Value-at-Risk Model and Eliminate the Market Maker Domination Charge, Exchange Act Release No. 82781, 83 Fed. Reg. 9042 (Mar. 2, 2018); Text of Proposed NSCC Rule Change SR-NSCC-2017-020, https://www.sec.gov/rules/sro/nscc/2018/34-82494-ex5.pdf, at 127 of 132 (showing elimination of reference to Market Marker Domination charge); Volatility Rule Change Approval Order; Text of Proposed NSCC Rule Change SR-NSCC-2020-002, https://www.sec.gov/rules/sro/nscc/2020/34-88474-ex5.pdf, at 81 of 87 (showing removal of reference to Illiquid Charge from rule governing CC charge).

[85] *See* NSCC Procedure XV, Sec. I.(A)(1)(d) (defining the MRD Charge to depend on, among other things, the "volatility component [i.e., the Volatility Charge]"); NSCC Procedure XV, Sec. I.(A)(1)(e) (defining the CC Charge to depend on, among other things, the Volatility Charge and MRD charge); NSCC Procedure XV, Sec. I.(B)(3) (providing that NSCC may require a member to make an additional deposit to mitigate exposures to NSCC "caused by settlement risks that may not be adequately captured by [its] portfolio volatility model").

[86] *See Ehm v. Nat'l R.R. Passenger Corp.*, 732 F.2d 1250, 1252 (5th Cir. 1984) (noting that because Congress amended the definition of "agency" in the Freedom of Information Act, and because the Privacy Act defines "agency" by cross-reference to the definition of agency in the Freedom of Information Act, "the amended definition also applies to the Privacy Act"). *Fiero v. FINRA*, 660 F.3d 569 (2d Cir. 2011), which Alpine cites, does not support Alpine's position. *Fiero* held that, where a rule allowing FINRA to collect fines was never properly promulgated because it had been designated improperly as an immediately effective "house-keeping" rule that did not require Commission approval, FINRA could not apply the rule. *Id.* at 579. *See generally ABN AMRO*, 2018 WL 3869452, at *7 (discussing the house-keeping exception). Neither party has contended that the "house-keeping rule" exception is relevant to Alpine's claim.

that using this method to calculate the CC charge is improper because the Volatility Rule Change deleted the reference to the Illiquid Charge from the rule governing the CC charge.[87]

Alpine has not shown a likelihood of success on the merits on this claim. Alpine cites only language in the Guide for its assertion that NSCC continues to consider the Illiquid Charge; it offers no evidence that NSCC has in fact continued to assess CC charges using the Illiquid Charge.[88] The language of the Guide, standing alone, does not establish that NSCC is actually incorporating the Illiquid Charge when it calculates the CC Charge. The Guide refers members "to the NSCC Rules for a complete statement of NSCC procedures, rights, obligations, and requirements," and explains that those "Rules and Procedures"—not the Guide—"govern[] in all respects the relationship between NSCC and its [m]embers." Thus, because NSCC's rules and not the Guide control the calculation of the CC charge, and the Volatility Rule Change eliminated the Illiquid Charge, Alpine has not shown a likelihood of success on the claim that NSCC is violating its rules by using the Illiquid Charge when calculating the CC Charge.

c. Alpine has not shown a likelihood of success on its claim that NSCC is improperly applying the Volatility Rule Change as part of its backtesting.

Finally, Alpine requests a stay to prevent NSCC from "retroactively applying the [Volatility] Rule Change in performing forecasting and/or backtesting when calculating and assessing Alpine's Required Deposit." Alpine has not shown that it is likely to prevail on the merits on this claim because it has not presented evidence that NSCC has imposed charges based on a retroactive application of the Volatility Rule Change. Alpine avers that NSCC assessed a significant Backtesting charge on March 1, 2021, and that NSCC had not previously imposed such a charge. But that does not show that NSCC applied the Volatility Rule Change retroactively. March 1, 2021 was one month after the Volatility Rule Change took effect.

Even if Alpine had shown that NSCC applied the Volatility Rule Change to past events to determine current charges, it has not shown that doing so would be impermissible. The cases that Alpine cites to support its retroactivity argument are inapposite. In both *Bowen v. Georgetown University Hospital*,[89] and *Kresock v. Bankers Trust Company*,[90] courts held that rules could not be applied retroactively to conduct that occurred before the rules had taken

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87 *See supra* note 84.

88 Alpine asserts that "NSCC's CC component formula is extremely convoluted and relies on information that is not disclosed to Alpine, so it is difficult to determine all of the factors that NSCC actually uses to calculate this charge." But Alpine does not identify any information that was not disclosed to it or explain why the formulas provided in NSCC's rules and Guide do not allow it to show that NSCC continues to apply the Illiquid Charge in calculating the CC charge.

89 488 U.S. 204 (1988).

90 21 F.3d 176 (7th Cir. 1994).

effect.[91] Here, by contrast, Alpine does not allege that NSCC is applying new rules to require Alpine to post additional deposits for past transactions. Rather, Alpine alleges that NSCC considers past transactions when it determines under its current rules the deposits that a member must post with respect to new open positions. But a rule "'is not made retroactive merely because it draws upon antecedent facts for its operation.'"[92] Thus, Alpine must do more to establish that NSCC is improperly applying the Volatility Rule Change retroactively.

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

To establish irreparable harm, a movant "must show an injury that is 'both certain and great' and 'actual and not theoretical"' and "'that the alleged harm will directly result from the action which the movant seeks to [stay].'"[93] A stay "will not be granted against something merely feared as liable to occur at some indefinite time"; the injury complained of must be "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm."[94] Alpine fails to establish that it will suffer irreparable harm in the absence of a stay.

First, Alpine contends that the Volatility Rule Change pushes it into a "self-propelling downward cycle." According to Alpine, it lacks the capital to post additional margin for trades and must turn trades away at least daily.[95] And Alpine says that it cannot earn additional capital necessary to post higher deposits from lost transactions. But a movant must "substantiate the

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91 In *Bowen*, the Supreme Court held that the Department of Health and Human Services could not attempt to recoup $2 million in reimbursements it paid to hospitals for Medicaid expenses by recalculating the reimbursement amounts under a new rule enacted after the reimbursements had been paid. In *Kresock*, the Seventh Circuit held that a rule requiring arbitration of employment disputes could not be applied where it took effect more than two years after the plaintiff had been terminated by her employer and nearly a year after she had filed suit.

92 *Landgraf v. USI Film Products*, 511 U.S. 244, 269 n.24 (1994) (quoting *Cox v. Hart*, 260 U.S. 427, 435 (1922)); *see also Ass'n of Accredited Cosmetology v. Alexander*, 979 F.2d 859, 865 (D.C. Cir. 1992) (finding that challenged regulations were not retroactive where they "merely require[d] the Department [of Education] to look at schools' past default rates in determining future eligibility for [federal guaranteed student loan] program participation," and concluding that "this requirement [w]as no different in substance than a lender's rule against extending credit to applicants with negative credit histories").

93 *Zipper*, 2017 WL 5712555, at *4 (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)).

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

95 Although Alpine asserts that it has lost a certain amount of revenue over an unidentified period, Alpine does not quantify the extent to which the Volatility Rule Change has caused it to turn away transactions. Nor has Alpine quantified any difference between the number of trades it purports to have turned away under the Volatility Rule Change and trades turned away under NSCC's previous rules. *See Alpine Sec. Corp.*, 2019 WL 6251313, at *7 (reflecting Alpine's assertions that NSCC's previous rules required it to turn away trades).

claim that irreparable injury is 'likely' to occur."[96] Although Alpine alleges that its inability to satisfy deposit requirements for all trades it wishes to clear is "unsustainable," Alpine does not show that this inability will cause its business to fail,[97] or otherwise imminently cause certain and great injury at a definite time.[98] Indeed, its filing suggests that between February 1 and March 1, 2021 (the first month after the Volatility Rule Change became effective), it continued to engage in approximately the same level of trading activity as in the two months before the change.

Second, Alpine contends that it has suffered irreparable injury because it has "lost customers and business to competitors" and suffered "significant" injury to its reputation and a loss of goodwill because it cannot clear all trades that it seeks to submit to NSCC for its customers. But Alpine fails to substantiate this argument because it does not identify any lost customers[99] or particular competitors to which it lost them.[100] Alpine also does not explain why the rule change would cause its customers to take their business to competitors when those competitors are also subject to the Volatility Rule Change.[101]

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96 *Wis. Gas Co.*, 758 F.2d at 674 (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.3 (D.C. Cir. 1977)).

97 *Id.* (stating that monetary loss that "threatens the very existence of the movant's business" may constitute irreparable harm); *see also Zipper*, 2017 WL 5712555, at *4 n.26 (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)).

98 *See supra* notes 93, 94, and 96 and accompanying text.

99 Alpine asserts that it can identify lost customers but chose not to do so in a public filing. Alpine did not move to submit this information under seal.

100 *See Watkins Inc. v. Lewis*, 346 F.3d 841, 846 (8th Cir. 2003) (rejecting claim that plaintiffs suffered irreparable harm because "their customer relationships [we]re being irreparably harmed" and "their goodwill [wa]s being permanently diminished," where plaintiffs identified only one customer and described the others in general terms only); *see also Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1249 (9th Cir. 2013) (rejecting claim of irreparable harm based on "loss of control over business reputation and damage to goodwill," because court's finding of such harm was "grounded in platitudes rather than evidence"); *DFO, LLC v. Denny Bar Co., LLC*, No. 2:18-cv-02226-JAM-KJN, 2018 WL 5880813, at *2 (E.D. Cal. Nov. 8, 2018) (holding that declaration submitted by plaintiff's employee was insufficient to establish likelihood of harm to business goodwill because it was based only on the declarant's opinion and experience regarding the relevant market, and therefore "fail[ed] to present any concrete evidence that a loss of control of [plaintiff's] business reputation has occurred or is likely to occur at all"); *Worldwide Diamond Trademarks, Ltd., v. Blue Nile, Inc.*, No. 14-cv-03521, 2014 WL 7933941, at *3-4 (S.D.N.Y. Nov. 6, 2014) (finding no irreparable injury where plaintiff could not substantiate its claims of lost business and goodwill with evidence).

101 *Cf. Bloomberg L.P.*, Exchange Act Release No. 83755, 2018 WL 3640780, at *10 (July 31, 2018) (finding irreparable injury under "unusual circumstances" where expected imminent loss of customers would likely be permanent in light of substantial switching costs).

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

Alpine also fails to establish that the final two factors—the likelihood of harm to others from a stay and a stay's impact on the public interest—favor relief. Alpine asserts that granting a stay "will not result in harm to any other party" and would pose "no risk" to NSCC because Alpine deposits the securities that it submits for clearing with NSCC. But the Volatility Rule Change is part of the integrated risk management system NSCC applies to Alpine and its other members. Staying the application of the rule change to Alpine could provide it an unfair advantage over competing NSCC members—particularly members operating in the microcap sector. Granting a stay thus could disrupt competition among NSCC's members and substantially harm NSCC's ability to mitigate risk. As noted above, the Commission approved the Volatility Rule Change in part because it concluded that the Volatility Rule Change would better enable NSCC to collect margin commensurate with the levels of risk that members pose as a result of their trading activity in Illiquid Securities.[102] Staying the application of the rule change to Alpine could leave NSCC without the resources necessary in the event Alpine defaulted and could lead to those losses being unfairly borne by NSCC's other members.

Granting a stay could also disrupt NSCC's ability to mitigate risk by preventing it from assessing charges authorized under its rules for that purpose. Indeed, if Alpine could obtain relief from the Volatility Rule Change, presumably other NSCC members could also obtain relief from charges imposed pursuant to NSCC's generally applicable rules for the purposes of ensuring sufficient margin. Undermining NSCC's ability to collect margin to manage risk pursuant to its rules could have significant ramifications for the securities markets and the public.

Alpine also argues that a stay would vindicate its substantive attacks on the Volatility Rule Change—*e.g.*, that the rule change injures investors, competition, and the microcap market and also disadvantages smaller firms—and thus serve the public interest. But Alpine did not pursue its arguments through the SRO rule approval process established by the Exchange Act by seeking Commission review (with the potential for subsequent judicial review) of the order approving the Volatility Rule Change issued by delegated authority, and granting the relief it seeks effectively would stay that order in substantial part. The public interest favors compliance with the statutory scheme established by Congress for consideration and approval of SRO rules.

Alpine has not established that the final two elements favor relief.

*** * ***

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 it is further

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102 *See supra* note 44 and accompanying text.

ORDERED that, pursuant to Rule of Practice 450(a),[103] a brief in support of the petition for review shall be filed by December 6, 2023. A brief in opposition shall be filed by January 5, 2024, and any reply brief shall be filed by January 19, 2024;[104] and it is further

ORDERED that, in addition to any matters the parties choose to raise, the parties shall address the following issues and explain the basis for their conclusions with respect to them:

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?

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.[105] The parties' attention is directed to the most recent amendments to the Commission's Rules of Practice, which took effect on April 12, 2021, and which include new e-filing requirements.[106]

By the Commission.

Vanessa A. Countryman
Secretary

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[103] 17 C.F.R. § 201.450(a).

[104] 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.

[105] *See* 17 C.F.R. § 201.180(c).

[106] *Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 90442, 2020 WL 7013370 (Nov. 17, 2020), 85 Fed. Reg. 86,464, 86,474 (Dec. 30, 2020), https://www.sec.gov/rules/final/2020/34-90442a.pdf; *Instructions for Electronic Filing and Service of Documents in SEC Administrative Proceedings and Technical Specifications*, https://www.sec.gov/efapdocs/instructions.pdf. The amendments impose other obligations such as a new redaction and omission of sensitive personal information requirement. *Amendments to the Commission's Rules of Practice*, 85 Fed. Reg. at 86,465-81.