Admin. Proc. File No. 3-20238

UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION
January 5, 2024

In the Matter of	:
ALPINE SECURITIES CORPORATION, a Utah limited liability company	:
For Review of Adverse Action Taken By	:
NATIONAL SECURITIES CLEARING CORPORATION	:
	:

OPPOSITION OF NATIONAL SECURITIES CLEARING CORPORATION TO ALPINE'S APPLICATION FOR REVIEW

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SRO AND ADMINISTRATIVE MATERIALS

By application for review dated March 2, 2021 (the "Application"[1]), Alpine[2] commenced this proceeding challenging the National Securities Clearing Corporation's ("NSCC") SEC-approved Required Fund Deposit rules, which require NSCC members to post sufficient margin to enable NSCC to manage the risk incurred in processing its members' transactions. Alpine challenges an NSCC rule change that modified the Volatility Charge and eliminated the Illiquid Charge that was subject to notice and comment and ultimately approved by the Commission by delegated authority on November 24, 2020, pursuant to Exchange Act Section 19(b)(2).[3] Alpine also challenges the implementation of purported "changes" to the margin requirement differential ("MRD"), coverage component ("CC"), and Backtesting charges (together with the Volatility Charge, the "Challenged Margin Components").[4]

On the heels of its application, Alpine sought an interim stay of implementation of the Volatility Rule Change during the pendency of this proceeding.[5] The SEC denied the Interim Stay Motion, ruling that Alpine had not established a likelihood of success on the merits in large part because (i) Section 19(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), is not available as a means for Alpine to challenge the Volatility Rule Change in accordance with *NASDAQ Stock Mkt., LLC v. SEC*, 961 F.3d 421 (D.C. Cir. 2020) ("*NASDAQ*"), and (ii) Alpine had not shown in its alternative framing of its claim discussed in Section II.A.2 of the Order

[1] Application for Review, *In re Alpine Securities Corporation, a Utah limited liability company, for Review of Adverse Action Taken by National Securities Clearing Corporation* ("*Alpine II*"), Admin. Proc. File No. 3-20238 (Mar. 2, 2021) ("*Alpine II* Application").

[2] Capitalized terms used, but not otherwise defined, shall have the meaning ascribed to them in the Order Denying Motion to Stay and Setting Briefing Schedule, Admin. Proc. File No. 3-20238, Release No. 98867 (Nov. 6, 2023) ("Order Denying Stay").

[3] *See Alpine II* Application at 1.

[4] *See id*. at 2.

[5] Alpine's Motion for an Interim Stay and Incorporated Memorandum of Points and Authorities in Support, Admin. Proc. File No. 3-20238 (Mar. 5, 2021) ("Interim Stay Motion").

Denying Stay that NSCC was required to formally amend—or seek the Commission's approval of the purported "changes" to—the MRD, CC, and Backtesting charges.[6] The SEC further directed the parties to file briefs addressing whether (1) Alpine's challenge to the Volatility Rule Change should be dismissed as unreviewable under Section 19(d); (2) Section 19(d) is available as a means for Alpine to pursue its alternative framing; and (3) the record should 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.[7] As discussed below, the answer to all three questions is unquestionably no.

BACKGROUND

Alpine is a small, self-clearing, registered broker-dealer whose business focuses on transactions in microcap securities. Alpine is a member of NSCC.

NSCC is a registered clearing agency pursuant to Section 17A(b) of the Exchange Act[8] and subject to the specific conditions and requirements under Section 17A(b)(3)[9] and Exchange Act Rule 17Ad-22(e).[10] NSCC is also a self-regulatory organization ("SRO") subject to Section 19 of the Exchange Act.[11]

As a registered clearing agency, NSCC has promulgated rules, approved by the SEC pursuant to Section 19(b)(2) of the Exchange Act, requiring NSCC members to make a Required Fund Deposit to NSCC's Clearing Fund, which operates as NSCC's default fund in the event

[6] Order Denying Stay at 11-16,

[7] *Id.* at 21.

[8] 15 U.S.C. § 78q-1.

[9] *Id.* § 78q-1(b)(3).

[10] 17 C.F.R. § 240.17Ad-22(e).

[11] 15 U.S.C. § 78s.

NSCC is required to settle open positions as a result of a member default.[12] The Required Fund Deposit for each member is based, among other things, on the nature of the member's securities transactions submitted to NSCC for clearance and settlement as well as its financial condition, as prescribed by NSCC rules.[13]

There is no dispute that the Volatility Rule Change was approved in accordance with Section 19(b)(2), and applied to Alpine as part of Alpine's daily Required Fund Deposit. 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 to address better the risk the Illiquid Charge had previously targeted.[14] In the Volatility Rule Change Notice, the NSCC explained that the rule change would, among other things, "enhance the calculation" of the Volatility Charge as applied to positions in Illiquid Securities and "eliminate the existing Illiquid Charge" because the revised Volatility Charge would manage "the risk [the Illiquid Charge] was designed to address."[15] As was evident from the text of the proposed rule change, the "Illiquid Charge" was to be excluded from the calculation of margin components,

[12] Order Denying Stay at 3–5 (describing NSCC and its risk management program).

[13] *See generally* NSCC Rules & Procedures, Procedure XV.

[14] *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*, Release No. 88474 (Mar. 25, 2020), 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*, Release No. 88615 (Apr. 9, 2020), 85 Fed. Reg. 21,037 (Apr. 15, 2020).

[15] Volatility Rule Change Notice, 85 Fed. Reg. at 17,910.

including the CC charge.[16] The rule 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.[17]

On April 1, 2020, Alpine submitted its comment letter to the SEC regarding the proposed Volatility Rule Change.[18] Despite opposition to the Volatility Rule Change by Alpine and others, the SEC approved the rule change by delegated authority on November 24, 2020,[19] no one appealed the Commission's order approving it, and the rule change took effect on February 1, 2021.[20] On March 2, 2021, Alpine submitted its Application for Review.

Alpine was on notice of the adoption and assessment of the Volatility Rule Change and its impact on the MRD, CC, and Backtesting charges based upon public filings, NSCC Important Notices, and daily charges associated with its Required Fund Deposit.[21] In addition, NSCC provided members with details of its proposal for the two years preceding its publication, and in 2019 and 2020, NSCC distributed three rounds of impact studies to impacted members.[22] For

[16] Volatility Rule Change Notice, Ex. 5 at 81, 86, *available at* https://www.sec.gov/rules/sro/nscc/2020/34-88474-ex5.pdf

[17] *Id.* at 80 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).

[18] 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 ("Alpine Comment Letter").

[19] *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*, 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").

[20] *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*, Release No. 90606 (Dec. 8, 2020), 85 Fed. Reg. 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).

[21] *See, e.g.*, nn.14, 18–19, *supra*.

[22] Volatility Rule Change Approval Order at 77,294.

example, as Alpine noted in its Comment Letter, in March 2019 it received a NSCC White Paper outlining the proposed changes to the volatility component along with correspondence informing Alpine that "the estimated impact of the change is a daily clearing fund requirement increase of approximately 198% . . . ."[23] Finally, NSCC posts a Risk Margin Component Guide describing the Required Fund Deposit components, which it updates on a regular basis.[24]

ARGUMENT

I. Section 19(d) Does Not Provide the SEC with Jurisdiction to Evaluate the Volatility Charge.

A. *The Volatility Charge Is Not a Prohibition or Limitation of Access.*

Consistent with NSCC's position and the position the Commission adopted in addressing Alpine's prior challenge to its Required Fund Deposit in *Alpine I*, and across two different stay applications in this proceeding,[25] Alpine's Application is jurisdictionally invalid under Section 19(d).[26] Section 19(d) only allows an SRO member to bring a challenge when the SRO "prohibits or limits" the member's access to the SRO's services,[27] and as the Commission has repeatedly determined, margin components are not prohibitions or limitations of access.[28]

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[23] Alpine Comment Letter at 2.

[24] DTCC, *NSCC Risk Margin Component Guide* ("Guide") (Oct. 2, 2023) *available at* https://dtcclearning.com/products-and-services/equities-clearing/nscc-risk-management.html.

[25] In addition to the Interim Stay Motion, Alpine also filed an Emergency Stay Motion challenging the imposition of a backtesting charge. *See* Alpine's Motion for an Emergency Interim Stay and Other Appropriate Commission Relief, *Alpine II*, Admin Proc. File No. 3-20238 (Oct. 28, 2022). As with the Interim Stay Motion, the SEC denied Alpine's requested emergency stay, reasoning that Alpine was unlikely to succeed on the merits because Section 19(d) was not available as a means to challenge the generally applicable rules governing member margin requirements, including those concerning backtesting. *See* Order Denying Motion for Stay, *Alpine II*, Admin. Proc. File No. 3-20238, Release No. 96293, at 4–8 (Nov. 9, 2022) ("Order Denying Emergency Stay").

[26] *See In re Alpine Sec. Corp.*, Release No. 98868, 2023 WL 7379401, at *5–9 (Nov. 6, 2023) ("*Alpine I* Order Dismissing Application"); Order Denying Stay at 11-15; Order Denying Emergency Stay at 4–8.

[27] 15 U.S.C. § 78s(d)(1).

[28] *See* n.26, *supra*.

As a registered clearing agency, NSCC assesses the elements of the Required Fund Deposit to generate the margin necessary to manage the risk to NSCC and its members that a member default or insolvency will prevent the completion of transactions. The margin requirement challenged by Alpine is fundamental to NSCC's clearance and settlement services and required by the SEC for NSCC to offer those services.

Though Alpine characterizes increases to its margin charges as denials or limitations on service, in reality Alpine has used NSCC's services continuously, enjoying access to NSCC's clearance and settlement free of the counterparty risk that NSCC uses Required Fund Deposits to address. Alpine is not being denied services or having those services limited by having to pay increased margin charges. It simply wants to pay less in margin to access NSCC's services (while putting the additional risk associated with its business on NSCC and its other members).[29] The Commission has long recognized that clearing agency members or prospective members are not entitled to services they cannot afford by virtue of the agency's financial or other requirements, and the inability to satisfy those requirements is not an undue limitation on services.[30] Alpine's

[29] While Alpine also peppers its briefing with merits claims regarding whether its Required Fund Deposit is truly necessary to cover the risk posed by its trading activity, *see, e.g.*, Brief at 4, 11—claims that are far outside the scope of the requested jurisdictional briefing—these claims fail to provide the full picture. For example, Alpine repeatedly asserts that, because Alpine purportedly has all of the stock necessary to clear its positions on deposit at the DTC, Alpine poses no default risk. But this argument ignores the fact that the SEC has considered and approved rule changes getting rid of the Required Fund Deposit offset against stock on deposit at the DTC to which Alpine is effectively claiming to be entitled. *See* Volatility Rule Change Approval Order at 77,281; *see also Order Approving Proposed Rule Change to Describe the Illiquid Charge That May Be Imposed on Members*, Release No. 80597 (May 4, 2017), 82 Fed. Reg. 21,863, 21,864 (May 10, 2017) (discussing DTC inventory offset and lack of availability to members with lowest credit risk rating matrix score). And in any event, NSCC does not have a lien on DTC holdings, meaning that their collection is not guaranteed in the event of a member's default. Further, *even if* NSCC had recourse against securities held for Alpine at DTC, such access could be subject to legal challenges, requiring alternative means of settling pending transactions at risk of loss to NSCC and its members. Accordingly, though Alpine attempts to gloss over this issue, *see* Brief at 3, Alpine's DTC holdings cannot effectively offset the risks posed by its trading positions.

[30] *See, e.g.*, *Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Changes to Institute a Clearing Fund Premium Based Upon a Member's Clearing Fund Requirement to Excess Capital Ratio*, Release No. 34-54457 (Sept. 15, 2006), 71 Fed. Reg. 55,239, 55,242 (Sept. 21, 2006) (approving clearing fund premium on NSCC and FICC members whose clearing fund requirements exceed their regulatory excess capital, and observing

challenge to the Volatility Charge rule in pursuit of that goal is far outside the scope of review created by Section 19(d).

The SEC denied Alpine's nearly identical challenge to margin components under Section 19(d) in *Alpine I*, finding that NSCC's margin rules, including the Illiquid Charge, which the modified Volatility Charge effectively replaced, cannot be challenged under Section 19(d) as prohibitions or limitations of access to SRO services.[31] As with the margin charges at issue in *Alpine I*, the Volatility Charge is a "generally applicable rule," which "form[s] part of the integrated risk management system that NSCC applies to Alpine and its numerous other members."[32] Therefore, Alpine's request that the SEC entertain this challenge is manifestly inconsistent with the SEC's prior order.

Alpine's erroneous invocation of *In re Bloomberg, L.P.*, Release No. 49076, 2004 WL 67566 (Jan. 14, 2004) ("*Bloomberg*") does not undermine this conclusion. In *Bloomberg,* the Commission found that Bloomberg L.P. was denied access to certain services due to the NYSE's imposition of material restrictions on the use of NYSE data without proper foundation in the NYSE's rules.[33] Indeed, in *Bloomberg*, the Commission agreed with the petitioner that the NYSE failed to obtain proper approval for the rule required by the Exchange Act and ordered that the rule be set aside.[34] Thus, the gravamen of the case was that the limitation was not in accordance with the SRO's rules, not that a restriction imposed by a properly made rule was an undue limitation

"[a]ffected firms have a choice to raise excess regulatory capital or to limit their trading activities so that the risk to which the clearing agency and its other members is exposed is proportionate to the firm's excess regulatory capital").

[31] *Alpine I* Order Dismissing Application at *5–7.

[32] *Id.* at n.54 (citing *Alpine Sec. Corp.*, Release No. 87599, 2019 WL 6251313, at *11 (Nov. 22, 2019)).

[33] *Bloomberg*, 2004 WL 67566, at *2.

[34] *See id.* at *4–5.

under Section 19(d). Moreover, in *Bloomberg*, the petitioner was subject to an individualized SRO determination in the form of NYSE amending its contract with petitioner and rejecting multiple proposed data uses from petitioner.[35] Alpine has presented no authority supporting the proposition that the Volatility Charge component of the clearing agency service can be likened to a restriction on access to services (a) without foundation in a rule duly approved by the Commission under Section 19(b) of the Exchange Act,[36] or (b) following an individualized SRO adjudicatory process.[37]

The other cases Alpine cites are inapposite for the same reasons.[38] What is more, all of these cases predate the D.C. Circuit's opinion in *NASDAQ,* which the Commission has repeatedly recognized provides dispositive support for NSCC's argument that the Commission has no jurisdiction under Section 19(d) to consider Alpine's challenge to NSCC's Require Fund Deposit rules.[39] As the Commission already held in this proceeding, "[l]imitations of access reviewable under Section 19(d) typically involve revocations of membership or denials of services after

[35] *Id.* at *1–2 ("The parties further agree that the Exchange has 'formally' rejected one screen shot that had been proposed for use by Bloomberg's Tradebook ECN, and earlier had 'informally' rejected two of Bloomberg's screen shots.").

[36] In contrast to the rule in *Bloomberg*, *see* 2004 WL 67566 at *4–5, the challenged margin components here are collected pursuant to rules that NSCC proposed and had approved under Section 19(b), *see, e.g.*, nn.14, 19, *supra*.

[37] *See* Section III, *infra*.

[38] *In re International Power Grp., Ltd.* unambiguously involved a limitation on service, as it concerned an SRO action to suspend indefinitely book-entry clearing and settlement services to [Appellants] with respect to Appellee's common stock inconsistent with the SRO's rules. Release No. 66611, 2012 WL 892229, at *2 (Mar. 15, 2012). *In re William Higgins and Michael D. Robbins* dealt with a limitation on non-NYSE member phone access to the trading floor not properly founded under the SRO's rules. Release No. 24429, 1987 WL 757509, at *5 (May 6, 1987).

[39] *Alpine I* Order Dismissing Application at *5–9; Order Denying Stay at 11–14; Order Denying Emergency Stay at 4–8.

individualized determinations or adjudicatory proceedings against specific member firms, not the assessment of fees or charges under generally applicable rules."[40]

B. *The Commission Already Determined that Under* NASDAQ*, Section 19(d) Is Not Available as a Means for Alpine to Challenge the Volatility Charge.*

The Required Fund Deposits and all components thereof, including the Volatility Charge, are applied uniformly to *all* members engaging in transactions subject to the rules. For this reason alone, the recent decision in *NASDAQ* forecloses Alpine's Application.

In *NASDAQ* the United States Court of Appeals for the D.C. Circuit held that the plain language of Section 19(d) of the Exchange Act does "not contemplate challenges to generally-applicable fee rules," but rather "speaks to 'limits [on] any *person*' with regard to accessing the SRO's services."[41] The court held that "for a fee rule to be challengeable under Section 19(d), it must, at a minimum, be targeted at specific individuals or entities."[42] The court therefore found that Section 19(d) could not be used to challenge fees that national securities exchanges charged for depth-of-market data.[43]

In *Alpine I*, the Commission determined that the reasoning in *NASDAQ* applied equally to generally applicable rules governing clearing fund deposits for purpose of Section 19(d).[44] It therefore follows that the reasoning of *NASDAQ* controls here too. In fact, the Commission already determined that the Volatility Rule Change is generally applicable because it "applies to any NSCC member that deals in Illiquid Securities" and addresses "backtesting deficiencies so that NSCC

[40] Order Denying Stay at n.67.

[41] *NASDAQ*, 961 F.3d at 424, 428.

[42] *Id.* at 427–28.

[43] *Id.*

[44] *Alpine I* Order Dismissing Application at *5–9.

collects margin commensurate with the levels of risk that members pose as a result of their trading activity in Illiquid Securities."[45]

Alpine does not dispute the Commission's understanding of the Volatility Rule Change's application. Instead, it again attempts to distinguish this proceeding from *NASDAQ* by overreading the opinion's dicta, which pertained to the targeting of *individual entities* through SRO rules, not rules that may simply affect one class of investors or products more than another. Alpine does not and cannot contend that it was individually targeted by the Volatility Rule Change; it merely complains that those who deal in microcap securities are subject to higher margin charges due to this rule change. But that is not individual targeting. Instead, that is precisely the kind of rule of general applicability that Section 19(d) cannot be used to challenge under *NASDAQ* and *Alpine I*.[46] Indeed, as the Commission aptly stated in its Order Denying Stay, "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."[47]

C. The Volatility Rule Change Was Properly Reviewed and Approved Under Section 19(b)(2) and Cannot Be Reviewed Again Under Section 19(d).

Alpine also cannot seek review of the Volatility Rule Change under Section 19(d) because the appropriate avenue for SEC review of SRO rules is through the proposal, notice-and-comment, and approval processes set forth in Section 19(b).[48] With respect to the Volatility Rule Change, after the NSCC filed the proposed rule change with the Commission, Alpine received public notice

[45] Order Denying Stay at 11.

[46] *NASDAQ*, 961 F.3d at 428–30; *Alpine I* Order Dismissing Application at *6 (there is "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).")

[47] Order Denying Stay at 13.

[48] The Volatility Rule Change was effectuated through Section 19(b)(2), as it did not fall under any of the "immediately effective" categories provided in Section 19(b)(3).

of the rule's substance and nature through publication in the Federal Register, which sought public comment from interested parties. As a result, Alpine had an opportunity to provide its views on the Volatility Rule Change before it was approved, and it did. Alpine submitted a Comment Letter to the SEC regarding the proposed change.[49] Following the full rule-making process under Section 19(b)(2) and "after considering the record as a whole, including Alpine's comments," the Volatility Rule Change was approved by order.[50] The Commission has therefore already considered the record as a whole, including comments from Alpine and other interested parties, and determined the rule to be consistent with the Exchange Act and the applicable rules and regulations thereunder.[51]

Moreover, the rule was approved by delegated authority.[52] An aggrieved person that disagreed with the approval thus could have sought two additional levels of review—Commission review of the delegated approval under Rule 430 followed by judicial review under Section 25(a).[53] Alpine did not seek either, and it cannot do so now.[54] Nor can Alpine improperly use Section 19(d) to get *yet another* bite at the apple. As the Commission already stated, "[i]t would

[49] *See* Alpine Comment Letter.

[50] *See* Order Denying Stay at *7; *see also* Volatility Rule Change Approval Order.

[51] *See Alpine I* Order Dismissing Application at *7; *see also* Order Denying Stay and Denying Motion for Protective Order, *Alpine I*, Admin. Proc. File No. 3-18979, Release No. 87599, at 15 n.74 (Nov. 22, 2019) (describing notice requirements as being designed so that affected parties have an opportunity provide their views on proposed rules before they are approved to ensure they are tested and fair among other things) (citing *Am. Coke & Coal Chems. Inst. v. EPA,* 452 F.3d 930, 938 (D.C. Cir. 2006)).

[52] Volatility Rule Change Approval Order at 77,281–82.

[53] *See* 17 C.F.R. § 201.430 (detailing how a person aggrieved by an action made by delegated authority may obtain Commission review); 15 U.S.C. § 78y(a) (detailing how a person aggrieved by a final order of the Commission may obtain federal judicial review).

[54] *See* 17 C.F.R. § 201.430(b) (providing applicable time limits to seek Commission review); 15 U.S.C. § 78y(b)(1) (same for appellate review). Additionally, under Section 704 of the Administrative Procedure Act, 5 U.S.C.§ 704, a petition to the SEC for review of an action pursuant to delegated authority is a prerequisite to judicial review of a final order under Section 25(a). *See* 17 C.F.R. § 201.430(c).

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)).”[55] In sum, having received *several* opportunities to challenge the Volatility Rule Change under applicable procedures and review mechanisms for SRO rules, Alpine cannot now inappropriately exploit Section 19(d) to give itself yet another.

Alpine attempts to argue that the Commission’s interpretation of its scope of review under Section 19(d) is inconsistent with Section 19(f)’s “broader” scope, which requires the Commission to ensure “that a specific application of an SRO rule complies with Exchange Act” under the “Section 19(d)/(f) review process . . . .”[56] Alpine’s argument is based on a mischaracterization of the statute. Section 19(d) contemplates the review of adjudicated actions addressing conduct that is inconsistent with SRO rules—not the substance or validity of the rules themselves. Among other things, the public input that Section 19(b) review contemplates is *unavailable* in a challenge to the substance of a rule under Section 19(d) (including, *e.g.*, public input that would account for the potential impact of the elimination of the Volatility Charge on other members). Further, Section 19(f), which provides the standard of review employed in Section 19(d) proceedings, describes SEC hearing constraints (limiting them to consideration of the record before the SRO) that are *consistent* with the limitation on jurisdiction to adjudicative proceedings for actions contrary to SRO rules below, but are *inconsistent* with review of the rules themselves. In light of

[55] Order Denying Stay at 12.

[56] *See* Brief at 9.

this, Alpine fundamentally mischaracterizes Section 19(f) by taking the material it quotes out of context—the "applied" language is referring to application of an SRO rule *pursuant to which a sanction or denial of service reviewable under 19(d) was implemented*, not the standard operation of all SRO rules.[57]

Section 19(b), which provides for notice and public comment on new rule proposals and amendments, is the proper mechanism to vet their impacts on *all* affected parties. Section 19(d), which does not allow for public input, cannot be used to supplant the rulemaking process. Alpine does not generally allege that NSCC's actions in applying its margin requirements,[58] particularly the Volatility Rule Change, are inconsistent with the rules; instead, it takes issue with the substance of the rules themselves. In this regard, it would have the Commission use Section 19(d) improperly to prevent the application of a validly promulgated rule, at least with respect to itself, without proper input and consideration of the effects on other constituencies, including other members subject to the same rules (and carefully calibrated risk management regime) that Alpine challenges.

D. ***Alpine's Reading Would Lead to an Absurd Result.***

If the Commission were to adopt Alpine's reasoning and find that Section 19(d) is to be understood to include generally-applicable rules governing margin components, NSCC would be obligated to provide notice to the SEC each time it imposes a margin requirement on a member, which occurs innumerable times each day. That is the same kind of "nonsensical and likely impossible" notice requirement the *NASDAQ* court sought to avoid, and refutes the idea that the deposit is reviewable under Section 19(d)(2). Indeed, as the Commission stated in its Order

[57] *See* 15 U.S.C. § 78s(f).

[58] The only possible exceptions are Alpine's allegations concerning the MRD, CC, and Backtesting charges, which are addressed below. *See* Section II, *infra*.

Denying Stay, "[r]equiring 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."[59]

II. Section 19(d) Is Not Available as a Means for Alpine to Pursue Its Alternative Framing of Its Claim.

A. *NSCC Did Not Implement Any Rule Changes That the Commission Did Not Approve.*

Alpine's attempt to reframe its challenge as addressing "unauthorized changes" to the MRD, CC, and Backtesting charges is a mischaracterization and unavailing.[60] As the Commission recognized in denying Alpine's request for a stay, the rules governing the MRD, CC, and Backtesting charges were approved in accordance with Section 19(b) in 2016, and there have been no changes to them since, except for the removal of the references to "Illiquid Charge" and "Market Maker domination charge" from the rule governing the CC charge.[61] The removal of both of these computation components was made explicit in the relevant rule change proposals, which were publicized in accordance with Section 19(b). Moreover, to the extent there remains any question

[59] Order Denying Stay at 14.

[60] *In re John Boone Kincaid III*, Release No. 87384, 2019 WL 5445514, at *5 (Oct. 22, 2019) ("Nor can Kincaid establish jurisdiction by re-framing his arguments . . . .").

[61] *See* Order Denying Stay at 15–16 n.84 (citing *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*, 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*, 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; *Notice of Filing of 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*, 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; Volatility Rule Change Approval Order; Volatility Rule Change Notice, Ex. 5 at 81, *available at* https://www.sec.gov/rules/sro/nscc/2020/34-88474-ex5.pdf)

about whether NSCC is using the Illiquid Charge when calculating the CC Charge, it is not, as the current version of the Risk Margin Component Guide reflects.[62]

Accordingly, at all relevant times, the MRD, CC, and Backtesting charges have transparently taken into account the "volatility component" (i.e., the Volatility Charge).[63] The fact that they continued to do so following changes to that component through Section 19(b) does not mean that they too must now be re-subjected to Section 19(b) procedures notwithstanding that nothing in them has changed. Such a supposition is unsupported by any relevant authority and would lead to absurd and inefficient results.

[62] Though Alpine initially claimed in its Application that the CC charge was improperly continuing to incorporate the Illiquid Charge into its computation, Alpine did not re-raise or address this argument in its Brief. There is good reason for this—the present Risk Margin Component Guide explicitly describes what margin components are used to compute the CC charge, and the Illiquid Charge is not among them. *See* Guide at 22 ("The CC charge is calculated by comparing the simulated liquidation profit and loss of a Member's portfolio, using the actual positions and the actual historical returns on the positions, against the sum of each of the following Clearing Fund components: (i) volatility charge; and (ii) MRD charge."); *accord* NSCC Rules & Procedures, Procedure XV.I(A)(1)(f) (describing computation of CC charge as including same components). In any event, Alpine is estopped from raising this argument now because it failed to raise it in its Brief, effectively acquiescing in the Commission's holding that Alpine had "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." *See* Order Denying Stay at 17.

Moreover, Alpine failed to raise this issue with NSCC below; therefore, it is also prevented from doing so now before the Commission under longstanding policy designed to exhaust all remedies with the SRO and thus build a proper record for appeal. *See MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621 (2d Cir. 2004) ("Were SRO members, or former SRO members, free to bring their SRO-related grievances before the SEC without first exhausting SRO remedies, the self-regulatory function of SROs could be compromised.").

[63] *See* NSCC Rules & Procedures, Procedure XV.I(A)(1)(e) (describing MRD component as the sum of an exponentially weighted average in positive changes over a look back period in the "Member's (i) Mark-to-Market component and *(ii) volatility component*") (emphasis added); *id.* Procedure XV.I(A)(1)(f) (describing CC component as an exponentially weighted average of the Member's daily backtesting coverage deficiency amount, which is in turn "determined as the difference between the simulated profit and loss on a Member's portfolio and the sum of the Member's *(i) volatility component* and (ii) [MRD]") (emphasis added); *id.* Procedure XV.1(B)(3) (describing backtesting charge as "equal to the Member's third largest deficiency that occurred during the previous 12 months" where deficiency amounts are computed by reference to, among other things, the volatility component).

B. *Section 19(b) Procedures Are Not Required Simply Because an Approved Rule Affects How Existing Rules Are Applied.*

To the extent the Volatility Rule Change affected the *value* of the MRD, CC, and Backtesting charges, which appears to be what Alpine is arguing,[64] such effects were acknowledged and implicitly approved with the proposal and adoption of the Volatility Rule Change. As discussed above, Alpine and NSCC's other members were on notice of the Volatility Rule Change and its effects.[65]

Moreover, it is explicitly presumed that the SEC and other interested parties were on notice of potential changes in the values of other components that relied on the volatility component though their formulas did not change. The SEC proposing release for the Volatility Rule Change expressly referenced all of Procedure XV, which includes the Volatility Charge and other components that reference the Volatility Charge. Accordingly, the release states that "[t]he proposed rule change consists of modifications to NSCC's Rules & Procedures ("Rules") in order to enhance the calculation of certain *components* (plural) of the Clearing Fund formula," notwithstanding that the proposal itself centered on changes in the formula of only one component, the Volatility Charge (while eliminating another, the Illiquid Charge).[66]

Moreover, as the SEC correctly observed in denying Alpine's stay request, no authority supports Alpine's contention that NSCC must obtain SEC approval not only for new rules, but

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[64] Brief at 13.

[65] The Volatility Rule Change Notice stated that the change would "clarify and enhance the methodology for identifying [Illiquid Securities] for purposes of determining the applicable calculation of the volatility component" and "enhance the calculation" of the Volatility Charge as applied to positions in Illiquid Securities. Volatility Rule Change Notice, 85 Fed. Reg. at 17,910.

[66] *Id.* (emphasis added)*; see id.* at 17,911 ("NSCC is proposing a number of enhancements to its methodology for calculations of certain *components* of the Clearing Fund.") (emphasis added); *id.* ("Pursuant to the Rules, each Member's Required Fund Deposit amount consists of a number of applicable *components*, each of which is calculated to address specific risks faced by NSCC, as identified within Procedure XV. Generally, the largest *component* of Members' Required Fund Deposits is the *volatility component*.") (emphasis added).

also any prior rules any such new rules might affect. As the Commission stated, "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."[67] Alpine still cannot make any such showing.

Instead, Alpine simply reiterates its argument that "it makes no sense that incorporating a substantially modified Volatility Charge to also substantially modify other Required Deposit components . . . would not also require Commission approval under Section 19(b)(1)."[68] But this argument relies on the heavily flawed premise that MRD, CC, and Backtesting charges have been "substantially modified" such that they constitute new rules requiring Section 19(b) procedures simply because *another rule* on which they depend was changed.[69] Alpine cites no case law or authority to back up its understanding, because none exists.

Indeed, Alpine's reading of Section 19(b) would result in the same sorts of "nonsensical" inefficiencies as the Section 19(d) interpretation that the *NASDAQ* court rejected out of hand,

[67] Order Denying Stay at 15–16.

[68] Brief at 13.

[69] Alpine attempts to bolster its "substantial modifi[cation]" characterization by claiming the Volatility Rule Change was "applied retroactively to create a backtesting deficiency that did not exist prior to the use of the new Volatility Charge in the analysis." Brief at 15. The SEC correctly rejected this argument in its Order Denying Stay, observing that new rules are permitted to take into account antecedent facts. Order Denying Stay at 18. Alpine resists this conclusion by claiming that "NSCC instead used the newly modified Volatility Charge to change the backtesting calculation and thereby change the past facts in order to trigger the charge," Brief at 15 n.5. But the only past *facts* are Alpine's trading activity, which is exactly the sort of antecedent fact set that can be taken into account through the operation of new rules. Those new rules adjust the mechanisms assessing the risk a Member's positions pose *right now*, including through the examination of past trading activity. Such consideration cannot credibly be characterized as "retroactive application" of rules.

requiring the Commission to re-review the same change to the "volatility component" it already approved pursuant to Section 19(b) for every application not explicitly addressed on adoption. Especially given how deeply interrelated SRO rules can be, acceptance of Alpine's argument would set a wasteful and burdensome precedent. Alpine and other interested parties already had a chance to review and comment on how the Volatility Rule Change would affect other margin components during the comment period for that rule. They are not entitled to more opportunities to do the same thing.

Alpine also argues that the Order Denying Stay ignores *Bloomberg*.[70] But Alpine's reliance on *Bloomberg* is again misplaced. In *Bloomberg*, the NYSE *added* a number of *new* and unapproved *restrictions* to a rule the Commission had previously approved regarding the dissemination of data.[71] As a result of these new and additional restrictions, Bloomberg was denied access to the data.[72] For the reasons discussed above, *see* Section I(A)–(B), *supra*, the Volatility Rule Change is not similar to the "restrictions" at issue in *Bloomberg*, and neither the rule governing the Volatility Charge nor its effect on the three Challenged Margin Components deny Alpine access to any services. Nor does anything in *Bloomberg* suggest that the rules governing the MRD, CC, and Backtesting charges are "new" and require Commission approval simply by virtue of an interrelated rule having been changed.

Alpine also offers a misplaced argument that the rules governing the MRD, CC, and Backtesting charges are "substantive" rather than "house-keeping rules" and therefore the "house-

[70] Brief at 14–15.

[71] *Bloomberg*, 2004 WL 67566, at *2.

[72] *Id.*

keeping" exception under 17 C.F.R. § 240.19b-4(c) [73] does not apply. None of the rules concerning the MRD, CC, and Backtesting charges has been changed, nor even have their interpretations—those margin components have, at all relevant times, included the Volatility Charge. In this regard, Alpine neglects to mention the exception for policies, practices, or interpretations that are "reasonably and fairly implied by an existing rule of the self-regulatory organization."[74] Assuming *arguendo* that the Volatility Rule Change's effects on the application of other rules could somehow constitute a new NSCC "stated policy, practice, or interpretation" of those rules, that "policy, practice, or interpretation" would constitute a textbook example of one "reasonably and fairly implied by an existing rule of the self-regulatory organization."[75]

Consistent with the "reasonably and fairly implied" exception, in its Order Denying Stay, the Commission analogized to *Ehm v. Nat'l R.R. Passenger Corp.*, 732 F.2d 1250, 1252 (5th Cir. 1984) in which the court found that where 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." [76] Similarly, here, the MRD, CC, and Backtesting components include the "volatility component," the substance of which is set forth separately in the NSCC Rules. Like the *Ehm* Court, any reasonable NSCC Member understands that the volatility component does not

[73] Under Rule 19b-4, "[a] stated policy, practice, or interpretation of the self-regulatory organization shall be deemed to be a proposed rule change unless (1) it is reasonably and fairly implied by an existing rule of the self-regulatory organization or (2) it is concerned solely with the administration of the self-regulatory organization and is not a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization."

[74] 17 C.F.R. § 240.19b-4(c).

[75] *Id.*

[76] Order Denying Stay at 16 & n.86.

exist in a vacuum; it is beyond "reasonably and fairly implied" that changes to the volatility component apply to it wherever it appears, even by cross-reference, in the Rules.

In sum, NSCC did not take any actions that were unauthorized. Applying the same reasoning the Commission applied in *Alpine I*, Alpine cannot obtain Section 19(d) review of rules by "framing its challenge as a challenge to particular margin amounts calculated pursuant to those rules. The margin amounts that NSCC imposes are not actions targeted at Alpine specifically but rather the results of the application of the [rules]."[77]

III. The Record Need Not Be Supplemented.

Consistent with the limitation on jurisdiction under Section 19(d), NSCC did not provide a record in the underlying proceeding; and NSCC does not believe it necessary to supplement the present record here because the issues Alpine raises in its Application with respect to the rules governing margin components are not properly before the Commission. A substantive challenge to existing and approved rules is not the kind of proceeding that is appropriate for Section 19(d) review, which is reserved for SRO adjudicated actions or disputes.[78] NSCC was merely applying its approved rules of general applicability. The matter does not involve any disciplinary actions or prohibitions or limitations on access to services directed at a specific member as contemplated by Section 19(d). There is no record of disciplinary action to produce.

There are, of course, records of the significant material NSCC already published about the Volatility Rule Change along with the submissions the Commission received from NSCC and the public in the course of considering and approving it in accordance with Section 19(b). But the consideration of such evidence has no place in the present proceeding, as Section 19(f) (which

[77] *Alpine I* Order Dismissing Application at *9.

[78] *See* 15 U.S.C. § 78s(d).

describes the "record" to be considered in Section 19(d) proceedings) does not provide for it.[79] Such review is only contemplated under SEC Rule of Practice 430 and Section 25(a), and the time to obtain review of the approval order and accompanying record under those provisions has long lapsed.[80] The limitations on the record for review under Section 19(f) are further evidence that Section 19(d) is not available to challenge the substance of an SRO rule promulgated under Section 19(b).

Accordingly, there is neither a need nor a mechanism through which to supplement the record here.

CONCLUSION

For the reasons set forth above, NSCC respectfully requests the SEC dismiss the Application. Alpine should not be permitted to burden NSCC and the Commission with endless litigation of the same jurisdictionally defective and otherwise meritless claims.

Respectfully submitted,

New York, NY
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[79] *See* 15 U.S.C. § 78s(f) (describing 19(d) hearing as consisting "*solely* of consideration of the record before the [SRO] and opportunity for the presentation of supporting reasons to dismiss the proceeding or set aside the action of the [SRO]") (emphasis added).

[80] *See* nn.53–54, *supra*.

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ATTORNEY CERTIFICATIONS

I hereby certify that all sensitive personal information has been omitted or redacted in compliance with Rule 151(e).

Margaret A. Dale

CERTIFICATE OF SERVICE

Adam L. Deming HEREBY CERTIFIES PURSUANT TO Rule 15l(d) of the Commission's Rules of Practice that, on January 5, 2024, he caused to be served with this Certificate of Service the foregoing Opposition of NSCC to Alpine's Application for Review, by the following means:

1. By electronic mail to counsel for Alpine Securities Corporation Aaron D. Lebenta and Jonathan D. Bletzacker of Parsons Behle & Latimer at alebenta@parsonsbehle.com and jbletzacker@parsonsbehle.com, respectively, and at ecf@parsonsbehle.com;

2. By electronic mail to counsel for Alpine Securities Corporation Maranda E. Fritz of Maranda E. Fritz, P.C. at maranda@fritzpc.com;

3. By eFAP filing and electronic mail to the Securities and Exchange Commission at apfilings@sec.gov.

Adam L. Deming