**Administrative Proceeding**

**File No. 3-20238**

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**UNITED STATES OF AMERICA**

**SECURITIES AND EXCHANGE COMMISSION**

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

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

**Oral Argument Requested**

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

## ARGUMENT

### I. The Commission has Jurisdiction to Review the Application of NSCC's Required Deposit Charges as a Limitation of Access under Section 19(d).

#### A. The *NASDAQ v. SEC* Decision Does Not Preclude Review of the Individualized and Targeted Required Deposit Charges under Section 19(d).

In its Opening Brief, Alpine comprehensively addressed the errors in the Commission's preliminary analysis, in the Order Denying Alpine's Motion to Stay, that *NASDAQ Stock Market v. SEC*, 961 F.3d 421 (D.C. 2020) deprives it of jurisdiction to review the application of the NSCC's Required Deposit Charges at issue as "limitations of access" under Section 19(d) of the Exchange Act.[1] NSCC's Opposition Brief largely repeats the Commission's preliminary analysis of the *NASDAQ* decision in the Order Denying Motion to Stay. In the interests of efficiency, Alpine will not repeat its discussion of *NASDAQ* here, except in summary.

In short, the *NASDAQ* case held only that a "generally-applicable fee rule" to purchase a product is not a limitation of access that is reviewable under Section 19(d). *See NASDAQ,* 961 F.3d at 424. According to the Circuit, "[t]he text [of Section 19(d)] contemplates ***action*** targeted at specific individuals" or entities, *id.* at 430 (emphasis added), and thus Commission review under Section 19(d) is available for fee rules or other actions targeted at specific individuals or entities. *Id.* at 427-28. In contrast to the generally-applicable fee rules at issue in *NASDAQ,* the Volatility

[1] The Required Deposit Charges at issue are the: (a) "Haircut-Based Volatility Charge Applicable to Illiquid Securities" ("the Volatility Charge"), (b) Market Requirement Differential ("MRD Charge"), (c) Coverage Component ("CC Charge") and (d) Backtesting Charge.



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Charge and other Required Deposit components at issue are member specific; they are uniquely calculated and targeted at a specific member based on their individual characteristics and trading activity. Because of this, the daily Required Deposit charges imposed on Alpine, including the Volatility, MRD, CC and Backtesting Charges, are different than the Required Deposit charges that might be imposed on any other member.

More than this, the Required Deposit charges at issue are designed to target, and disproportionately impact, a specific group: those in the disfavored microcap market. NSCC knows it would not be permitted to selectively impose a special exorbitant fee, by rule or direct charge, on a specifically named member. While any attempt to do so would undoubtedly satisfy any targeted-action requirement, Section 19(d) does not require such specificity, but is broad enough to also capture what NSCC had done here: devised a mechanism of constructing charges that apply only against a targeted kind of transaction and the small number of member firms that still process those transactions. Instead of identifying the target of the "limitation to access" by name, NSCC has carved out a category of investors and firms who are seeking to sell a particular type of security, so-called "Illiquid Securities," and made those transactions cost-prohibitive.

Such actions are reviewable by the Commission under Section 19(d). The notion that the Commission, as NSCC's supervising agency, does not even have jurisdiction to review a discrete application of NSCC's rules outside of a adjudicative proceeding is not only contrary to Section 19(d), it is contrary to the entire SRO structure created by Congress in the Exchange Act. After all, the authority NSCC "exercises ultimately belongs to the SEC," and it has "'no authority to regulate independently of the SEC's control.'"[2] The *NASDAQ* decision should not be overread to

[2] *National Ass'n of Securities Dealers, Inc. v. S.E.C.,* 431 F.3d 803, 806-07 (D.C. Cir. 2005) (quoting S. Rep. No. 94-75, at 23 (1975)).



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strip the Commission of its essential supervisory function, which includes, as a necessary part, the power and duty to review SRO actions that limit access.

Moreover, and further distinguishing this case from *NASDAQ,* NSCC provides notice to Alpine (and other NSCC members) of their individualized Required Deposit Charges every day, and makes specific margin calls to members to deposit more money to cover a specific purported deficiency arising from actual trading activity. NSCC does not dispute this, but instead argues that interpreting Section 19(d) to provide review of the Required Deposit charges at issue would be unworkable because it would require NSCC to provide notice to the SEC each time it imposes a margin requirement on a member.[3] Notably, however, the *NASDAQ* Court did not raise that purported notice issue or claim that it would be incompatible with the structure of Section 19(d). *See NASDAQ,* 961 F.2d at 429-30.[4] This is likely because the D.C. Circuit recognized that both the Commission and the Second Circuit have held that the "filing of notice is not a condition precedent to SEC review" under Section 19(d).[5]

Alpine has also established, including with evidence in its Motion to Stay, that the Required Deposit charges at issue resulted in an actual limitation of Alpine's and its customers' access to

[3] NSCC Opp., at 13.

[4] The *NASDAQ* Court indicated only that the statutory requirement to provide notice to every person to whom the generally applicable fee could conceivably apply, including anyone who conceivably may purchase the product, was "unworkable." *Id.* at 429. As indicated, this problem does not exist with respect to NSCC's margin charges because NSCC already provides notice to its members of their individually calculated margin charges every day *because* they are specifically targeted to each member.

[5] *MFS Sec. Corp., v. N.Y.S.E.,* 277 F.3d 613, 619 n. 6 (2d. Cir. 2002); *see also In re William Higgins,* 51 Fed. Reg. 6186-04, 1986 WL 89969 (Feb. 20, 1986) (holding that, "[u]nder Section 19(d)(2) … the Commission's review authority extends to prohibitions of, and limitations on, any person's access to services offered by an SRO or member thereof" and that "the Commission may commence such a review irrespective of whether a filing [of formal notice] is, in fact, submitted by the SRO.")

NSCC's essential clearance and settlement services. Among other things, Alpine has had to deny customer trades, and lost customers and revenue, due to the capital necessary to fund the Required Deposit. These harms are felt even more acutely by Alpine's customers who are being restricted in their ability to sell stock they own, and which is already at DTC at the time their orders to sell must be declined, because Alpine lacks the capital to post the margin for the trades. NSCC has never provided any evidence to refute this, either in connection with the Motion to Stay, or in its Opposition Brief here.

These margin charges fail to comply with the Exchange Act because they are, *inter alia,* unreasonably onerous, discriminatory and impose an undue burden on competition by unfairly targeting the microcap market.[6] More specifically, the excessive margin charges imposed by NSCC as a condition of clearing a trade are designed to and in fact do constitute a denial or limitation of access that applies *only* to those who have acquired and are seeking to liquidate microcap securities. These discriminatory charges are wildly excessive in comparison to the underlying trades to be cleared and settled through NSCC, have not been shown to correspond to any actual risk, and prevent investors from being able to sell the securities that they acquired.

Among other things, as detailed in Alpine's Opening Brief, there is no actual counterparty risk to NSCC to justify the enormous, cost-prohibitive margin imposed on transactions executed by Alpine, or similarly situated broker-dealer members. In every instance, the customer has already deposited his stock to cover the trade and that stock is already in Alpine's account at DTC *before* the customers' orders to sell their stock are submitted to NSCC. NSCC thus faces no central

[6] NSCC's actions violate, *inter alia,* 15 U.S.C. § 78q-1(b)(3)(D), (F) and (I), *and* (b)(6); 15 U.S.C. § 78s(f); 17 C.F.R. § 17Ad-22(e)(4), (6) and (7) (requiring NSCC's margin systems and procedures be "reasonably designed," and produce margin levels "commensurate with" the risk), and principles against retroactive application of rules.



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counterparty exposure to the buyer from having to locate the shares, or to buy-in the shares in the market at potentially increased prices, to close a net-sell position in transactions processed by Alpine. Although NSCC claims it does not have a lien on DTC holdings, it is unable to cite a single instance when it has been unable to acquire stock from a member's account at DTC, or that there is any statistically significant risk that it cannot do so.[7]

Similarly, NSCC has never offered any explanation for its refusal to use the actual share price in transactions involving sub-penny stocks, for which it instead increases the share price to a fictional $.01 to calculate margin. That manipulation of the price invariably results in charges that exceed the value of the position, often by several orders of magnitude – *e.g.,* pretending that a stock is worth $.01/share when it is actually worth $.0001/share to calculate margin is the same as pretending that a stock is worth $1,000/share when it is actually worth $10/share. In neither instance is the margin rationally related to any actual risk exposure. Unsurprisingly, NSCC did not attempt to justify the practice in the Volatility Rule Change, and thus the Commission could not have found the practice complies with the Exchange Act. This is arbitrary and capricious,[8] and the

[7] For instance, NSCC has arrangements and contracts, including cross-guaranty and netting contracts, designed to "permit transactions to flow smoothly between DTC's system and the CNS system in a collateralized environment." *See* National Securities Clearing Corporation, Disclosure Framework for Covered Clearing Agencies and Financial Market Infrastructures, at p. 42 (December 2021). NSCC's rules confirm that, even where NSCC has "ceased to act" for a member, it can "continue to instruct [DTC] ... to deliver CNS Securities from such Member's account at [OTC] to [NSCC's] account in respect to such Member's Short Position." NSCC's Rules & Procedures, Rule 18, § 5. As NSCC itself has lauded in its Disclosure Framework, there are also "exceptions and safe harbors contained in FDICIA, the Bankruptcy Code, SIPA, FDIA and Title II of Dodd-Frank that support the finality of securities transactions and the closeout of the insolvent Member's open positions." *See* NSCC's Disclosure Framework, at 22.

[8] *See Susquehanna Int'l Group, LLP v. S.E.C.,* 866 F.3d 442, 446 (D.C. Cir. 2017) (observing that the "SEC cannot simply accept what [a self-regulatory organization] has done, but rather is obligated to make an independent review," and holding that the SEC acted arbitrarily and capriciously by simply accepting the SRO's explanation without the SEC making its own findings. (alterations in original) (internal citations omitted)).



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Commission also has the authority to review this practice, as a limitation of access that violates the Exchange Act as applied, under Section 19(d).

In sum, the *NASDAQ* decision is distinguishable and does not strip the Commission of jurisdiction to review Alpine's challenges to the Required Deposit charges at issue under Section 19(d). The Commission should thus reject NSCC's effort to avoid review of its actions by declining to adopt NSCC's expansive reading of *NASDAQ,* and instead following the Commission's prior precedents as to the scope of Section 19(d) review for matters other than the generally-applicable fee rules at issue in *NASDAQ*.[9]

**B. NSCC Mischaracterizes the Scope of Review Under Section 19(d).**

In addition to mischaracterizing the scope of the *NASDAQ* decision, NSCC also fundamentally mischaracterizes Section 19(d) itself by arguing that the review process thereunder is limited to "adjudicative proceedings," and does not provide a mechanism for review of an approved rule as it is applied.[10] NSCC provides no authority to support its argument and it is contrary to the express language of both Sections 19(d) and 19(f).

[9] This includes, but is not limited to: *In re Bloomberg, L.P.*, Release No. 49076, 2004 WL 67566 at *2 (Jan. 14, 2004 ) (accepting jurisdiction to review NYSE's imposition of restrictions relating to depth-of-book data as a limitation on access under Section 19(d); *In re William Higgins*, 51 Fed.Reg. 6186-04, 1986 WL 89969 (Feb. 20, 1986) (accepting jurisdiction to review NYSE's denial of a member's request to install an unrestricted phone line on the floor of the Exchange to contact customers as a denial of access under Section 19(d); *Tower Trading, L.P.*, Exchange Act Release No. 47537, 56 SEC 270, 2003 WL 1339179, at *5 (Mar. 19, 2003) (accepting jurisdiction under Section 19(d) to review a loss of "guaranteed participation" as a fundamental alteration of access to services offered by CBOE); *In re Application of Leon Greenblatt III,* Exchange Act Release No. 34–34953, 1994 WL 640090, at *1 (Nov. 9, 1994) ("We believe that the action taken by the [Chicago Stock Exchange, denying plaintiff access to the trading floor without notice or an opportunity to be heard] constitutes a denial of Greenblatt's access to services offered by the Exchange. Consequently, it is subject to Commission review.").

[10] *See* NSCC Opp. Memo., at 12-13.

Section 19(d) provides review from a "limitation of access," as well as from a formal disciplinary proceeding, or formal proceeding denying membership or participation. In *MFS Securities,* the Second Circuit rejected a similar argument that Section 19(d) only provides review from "formal disciplinary proceedings," because the statute also provides for review of limitations of access, which "provides for SEC review disciplinary and ***regulatory actions*** by self regulating organizations," such as the NYSE's denial of a member's request to install an unrestricted phone line on the floor of the Exchange.[11] "[T]he fact that the member's appeal was not from a disciplinary action, but rather from a ***regulatory decision***, did not prevent the SEC from reviewing the Exchange's actions."[12] The calculation and imposition of a margin charge on a member is a "regulatory action" by NSCC, and where it results in an actual limitation on access, as the Required Deposit charges at issue have done with respect to Alpine and its customers, it is reviewable under Section 19(d).

Furthermore, accepting NSCC's argument would impermissibly transfer control of the right to review under Section 19(d) from the aggrieved party to the SRO itself because the SRO determines whether to commence a formal "adjudicative proceeding." Under NSCC's argument, an SRO could insulate itself from any review, no matter how unjustified its action or charge, by simply not commencing an adjudicative proceeding, and placing the regulated party in the untenable position of having to "bet the farm" by not complying with the SRO action to trigger review. This is neither consistent with the language of Section 19(d), nor the law in general.[13]

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[11] *MFS Sec.,* 277 F.3d at 619 (emphasis added).

[12] *Id.* (emphasis added)

[13] *See, e.g., MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 1118, 128-29 (2007) (reiterating the well-established rule that "enforcement action is not a prerequisite to challenging the law," and a regulated party is not required to "bet the farm" and "expose [itself] to liability … to challenge the basis for the threat.")

NSCC's related argument that Sections 19(d) and (f) do not provide for review of the *application* of approved rules is also refuted by the express language of Section 19(f). That statute explicitly requires the SEC to review an SRO rule *as it is applied* for compliance with the Exchange Act (among other requirements).[14] To the extent NSCC attempts to fault Alpine for not demonstrating that "NSCC's actions in applying its margin requirements … are inconsistent with [NSCC's] rules," this is irrelevant.[15] NSCC is not simply required to comply with its own rules, it must also comply with the Exchange Act in applying its rules.[16]

Given this statutory language, there is no merit to NSCC's assertions that Commission review of an SRO rule is only available before it is approved under Section 19(b)(2). While Alpine is entitled to comment on an SRO rule before it is approved, and to seek review of an order approving an SRO rule, Congress has made clear in Section 19(d) and (f) that an approved rule can also be reviewed by the Commission *when it is applied* for compliance with the Exchange Act, if it results in a limitation of access.

NSCC's argument is inconsistent also with the well-established line of authorities holding that "a party against whom a rule is applied may, at the time of application, pursue substantive objections to the rule[,] even where the petitioner had notice and opportunity to bring a direct challenge within statutory time limits but failed to do so."[17] "'For unlike ordinary ***adjudicative*** orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would ***effectively deny many parties ultimately affected by a rule***

[14] 15 U.S.C. § 78s(f) (requiring the SEC "set aside" an SRO action unless it finds, *inter alia,* that the SRO's rules "are, ***and were applied*** in a manner, consistent with the purposes of this chapter [the Exchange Act] …." (emphasis added)).

[15] *See* NSCC Opp. Memo., at 13.

[16] *See* 15 U.S.C. § 78s(f).

[17] *NextWave Pers. Commc'ns, Inc. v. FCC*, 254 F.3d 130, 141 (D.C.Cir.2001).

***an opportunity to question its validity***."[18] Alpine is thus not foreclosed from seeking review of the imposition of the Required Deposit charges at issue as limitations of access that are contrary to the Exchange Act, simply because it did not also seek direct review from the orders approving the rules giving rise to those charges.

## II. The Commission Has Jurisdiction to Review NSCC's Unauthorized Changes to the CC, MRD and Backtesting Components under Section 19(d).

NSCC does not dispute that it did not provide notice of any proposed changes to the calculation, or imposition, of the CC, MRD and Backtesting components of the Required Deposit, nor obtain Commission approval to alter these components. Nor does it dispute that Alpine's CC Charge, MRD Charge and Backtesting Charge significantly increased the same day it began implementing the new Volatility Charge.[19] NSCC does not even dispute that the sudden spike resulted from its use of the new Volatility Charge in calculating and deciding to impose these charges against Alpine.

Instead, NSCC claims that it was not required to subject the CC, MRD and Backtesting Charges to the Section 19(b) procedures because these components already took the "volatility component" into account before the Volatility Rule Change.[20] In other words, NSCC maintains that "nothing in [these charges] has changed."[21]

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[18] *N.L.R.B. Union v. F.L.R.A.,* 834 F.2d 191, 196 (D.C. Cir. 1987) (citation omitted) (emphasis added); *accord Weaver v. Fed. Motor Carrier Safety Admin.,* 744 F.3d 142, 145-46 (D.C. Cir. 2014) (same).

[19] As detailed in Alpine's Opening Brief, and supported by evidence submitted with Alpine's Motion to Stay, once NSCC began implementing the new Volatility Charge, Alpine's MRD and CC charges spiked 450% overnight, from a steady approximate amount of $200,000 to approximately $900,000. NSCC also imposed a significant ($1.1 million) Backtesting Charge, which it had not done before.

[20] NSCC Opp. Memo., at 15.

[21] *Id.*

This is nonsensical. Regardless of whether the CC, MRD and Backtesting Charges had a volatility component before the Rule Change, that volatility component fundamentally changed for Illiquid Securities when the new Volatility Charge was approved. Making a significant change to one factor in a formula irrefutably changes the formula, and will invariably result in a different calculative result. And here, the proof is in the pudding: Alpine's CC, MRD and Backtesting Charges increased, substantially. To accomplish such changes to these components, NSCC was required to provide notice and receive approval.[22] Indeed, NSCC used the Section 19(b)(2) rulemaking process to make far less impactful changes to its rules, such as altering the language of definitions of terms, and making "conforming changes to harmonize the Rules in light of the proposed amendments."[23] It is disingenuous for NSCC to now insist it needed to provide no notice and receive no approval to alter factors it uses to calculate other Required Deposit charges, such as the CC, MRD and Backtesting Charges, particularly given the material and substantive impact of such changes on members. As the D.C. Circuit has observed, "[t]he Exchange Act permits the SEC to approve [an SRO's] proposed rule change only if it finds the proposal is consistent with the requirements of the Act," and "[t]hat is only possible if the SEC determines that the rule complies with specified requirements," for which "the SEC must make findings and determinations – not merely accept those made by the [SRO]."[24]

[22] *See* 15 U.S.C. § 78s(b)(1) ("No proposed rule change shall take effect unless approved by the Commission ….").

[23] *See 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, 77,284-85 (Dec. 1, 2020) ("Volatility Rule Change Order").

[24] *Susquehanna,* 866 F.3d at 447 (cleaned up) (internal quotations and citations omitted).

NSCC's next argument – that it was "explicitly presumed that the SEC and other interested parties were on notice of potential changes in the value of other components that relied on the volatility component"– is even more outlandish and insupportable.[25] NSCC claims that because its Volatility Rule Change Proposal included an introductory paragraph referencing "all of Procedure XV," and stated that the "proposed rule change consists of modifications … to enhance the calculation of certain components of the Clearing Fund formula," that the SEC and interested parties should have divined that NSCC was proposing to alter more than the items that were actually identified and discussed.[26]

The Commission should reject this desperate attempt by NSCC to justify its unapproved changes to the CC, MRD and Backtesting Charges. Although the Volatility Rule Change Proposal does include an introductory paragraph referencing modifications to Procedure XV and uses the plural "components," NSCC ignores that the Proposal says "*certain* components," and then specifically identifies what those components are and how they would change in the remaining sentences of the paragraph.[27] It is undisputed that there is no reference to any modifications to the CC Charge, MRD Charge and Backtesting Charge in that paragraph or elsewhere in the Volatility Rule Change Proposal. If anything, that proposed changes to "certain components" of the Clearing Fund formula were specifically referenced and identified further undermines NSCC's position.

Furthermore, as detailed in Alpine's Opening Brief, the Commission's *Bloomberg* decision rejected an SRO's attempt to alter an approved rule by grafting unapproved restrictions upon

[25] NSCC Opp. Memo., at 16.

[26] *See id.; see also 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 (Mar. 31, 2020) ("Volatility Rule Change Proposal").

[27] Volatility Rule Change Proposal, 85 Fed. Reg. at 17,910 (emphasis added).

them.[28] Notably, the Commission undertook its review in *Bloomberg* under Section 19(d) as a limitation of access.[29] The circumstances in *Bloomberg* are analogous to NSCC's attempt here to make unapproved changes to the CC, MRD and Backtesting Charges, which is similarly reviewable under Section 19(d) and should likewise be set aside as contrary to the Exchange Act's requirements for making rule changes.

There is no merit to NSCC's attempt to distinguish *Bloomberg* by claiming there is some distinction between adding unapproved "restrictions" to an existing rule versus making unapproved changes to how a rule governing a margin charge is calculated and implemented. The two circumstances are plainly analogous,[30] and *Bloomberg* is patently more applicable to the issues here than the Fifth Circuit's decision in *Ehm v. National Rail Road Passenger Corp.,* 732 F.2d 1250, 1252 (5th Cir. 1984), upon which the Commission relied in the Order Denying Motion to Stay, which addressed only whether Amtrack was an agency under the Privacy Act.[31] Moreover, NSCC's changes to these Required Deposit components was a rule change requiring SEC approval, even if the language of the rules relating to these components itself did not technically

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[28] *In re Bloomberg, L.P.*, Release No. 49076, 2004 WL 67566 at **2-5 (Jan. 14, 2004 ).

[29] *See id.,* at **1, 3, 5.

[30] Frankly, altering the CC, MRD and Backtesting components were more clearly rule changes than the restrictions in *Bloomberg* because these components are literally set forth in NSCC's Rules and Procedures, whereas in *Bloomberg* the Exchange merely appended restrictions to a contract outside of the SEC's order approving a rule change. It was the manner in which the Exchange attempted to impose the restrictions in *Bloomberg* that caused the Commission to evaluate whether they were rules. *See id.* at *3. This is an easier case than *Bloomberg.*

[31] The language in *Ehm* upon which both NSCC and the Commission (in the Order Denying Motion to Stay) relied is "[b]ecause the Privacy Act defines 'agency' by cross-reference to 5 U.S.C. § 552(e), the amended definition also applies to the Privacy Act." *Ehm,* 732 F.2d at 1252. Both NSCC and the Commission ignored the actual holding from the case, however, that Amtrack is not an agency of the federal government within the meaning of the Privacy Act, regardless of the cross-reference to this extended definition of agency in § 552(e). *See id.* (affirming summary judgment for Amtrack "on the ground that it was not an 'agency' of the federal government, within the meaning of the Privacy Act.").

change (i.e., the reference in the formula to a "volatility component") because NSCC altered, at least, "***[t]he meaning, administration or enforcement of an existing rule***." 17 C.F.R. § 240.19b-4(a)(6) (emphasis added).

Finally, the Commission should reject NSCC's fall-back argument that changes to the MRD, CC and Backtesting Charges did not need approval because the changes were "reasonably and fairly implied by an existing rule."[32] NSCC does not even identify the "existing rule" from which the alterations to the MRD, CC and Backtesting components purported to be "reasonably and fairly implied." These components were not altered until NSCC began implementing the Volatility Rule Change, and that exception cannot be used to bury unidentified rule changes within a proposal to alter a different rule. Rather, that exception is intended to cover regulatory notices or interpretations that are apparent from the "face of an existing rule."[33] There is nothing on the face of the rules governing the MRD, CC and Backtesting Charges that makes it apparent that NSCC would also use a new haircut-based volatility charge for Illiquid Securities in calculating and imposing these other margin components. That is certainly true prior to and at the time of the Volatility Rule Change Proposal. And, that is also true even after the Proposal was approved, even if one ignores the fact that the "existing rule" requirement is not met to trigger the exception, particularly since the entire volatility component itself was not changed by the Proposal, only some aspects of it.[34]

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[32] NSCC Opp. Memo., at 19 (citing 17 C.F.R. § 240.19b-4(c)).

[33] *Bloomberg,* 2004 WL 67566 at *4 (citing authorities).

[34] For example, there are several different types of volatility charges incorporated into the volatility component of the Required Deposit, including a value at risk or "VaR" volatility calculation, and a Volatility Charge for Illiquid Securities. NSCC's Rules & Procedures, Procedure XV. It is certainly not clear from the "face of the rule" which type of volatility charge is being used to in the formula for the CC, MRD or Backtesting components.

The Commission thus has jurisdiction under Section 19(d) to review NSCC's unauthorized changes to the MRD, CC and Backtesting Charges, and should set them aside to prevent the groundless, covert and targeted limitations that are being imposed by NSCC through its multi-layered calculation of deposit requirements.

## CONCLUSION

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

DATED this 19th day of January 2024.

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## ATTORNEY CERTIFICATION

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

*/s/ Aaron D. Lebenta*
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## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served on the following on this 19th day of January 2024, in the manner indicated below:

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