

May 30, 2023

Via Electronic Mail

Hon. Gary Gensler, Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Regulation of Market Data Collected and Disseminated by Registered Clearing Agencies and Their Affiliates

Dear Chair Gensler:

The Healthy Markets Association¹ writes to express our deep concerns with recent reports regarding operations and data practices for DTCC, an affiliate of three registered clearing agencies (National Securities Clearing Corporation, Fixed Income Clearing Corporation, and Depository Trust Company).

On May 9th, the same day that DTCC was celebrating its 50th anniversary for “serving the financial markets, protecting and safeguarding the system, delivering value to the industry and clients and launching products and services that mitigate risk and increase efficiencies,”² Themis Trading released a white paper calling into question the integrity of some of those products.³ Two days later, that 8-page DTCC Equity Data White Paper was reported in the Wall Street Journal.⁴

We are not in a position to confirm or deny any of the assertions made in the DTCC Equity Data White Paper, but write to share our concerns and considerations related to them. We have a lot of questions, and we hope the Commission does, too.

¹ The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

² Press Release, DTCC, *DTCC Celebrates 50th Anniversary As Critical Market Infrastructure Provider to the Global Financial Services Industry*, May 9, 2023, available at <https://www.dtcc.com/news/2023/may/09/dtcc-celebrates-50th-anniversary>.

³ Joe Saluzzi and Scott Wilson, *Sitting on a Gold Mine: Information Leakage at the DTCC*, Themis Trading, May 9, 2023, available at <https://blog.themistrading.com/2023/05/sitting-on-a-gold-mine-information-leakage-at-the-dtcc/> (“DTCC Equity Data White Paper”).

⁴ Alexander Osipovich, *Stock Clearinghouse Leaked Sensitive Data, Trading Firm Says*, Wall St. J., May 11, 2023, available at <https://www.wsj.com/articles/stock-clearinghouse-leaked-sensitive-data-trading-firm-says-11a7ed63>.



It is alleged that DTCC is selling equity market data products that rely upon data obtained by one or more of its affiliated registered clearing agencies, or as a result of its position as an affiliate of a registered clearing agency.

NSCC, as a registered clearing agency, is subject to numerous Commission rules, including that it must have detailed governance, cybersecurity, and systems compliance and integrity policies, procedures, and practices.

If a registered clearing agency wants to change the way it manages risk, for example, such as revising its valuation framework or adopting intraday volatility charges, it must file such changes with the Commission.⁵ Those filings are put out for public notice and comment, and are either deemed effective upon filing, or explicitly approved by the Commission before they may be implemented. Further, Commission actions related to registered clearing agency filings are subject to legal challenges. In fact, just a few years ago, the DC Circuit Court of Appeals reversed a Commission approval of a rule change by the Options Clearing Corporation.⁶

While NSCC performs an incredibly important function in the markets as a clearing agency, it also – not unlike registered securities exchanges – obtains material, non-public information arising from its performance of its essential, heavily-regulated, market function. It has, put simply, a treasure trove of valuable market data.

Understandably, when registered securities exchanges offer market data-related products, they are required by law to file those rule changes with the Commission. They may be “effective upon filing,” or alternatively affirmatively approved by the Commission or its staff via delegated authority. As you know, Healthy Markets Association has objected to exchanges’ data filings from time to time, often on the basis that a particular exchange hasn’t sufficiently proven the product is consistent with the Securities Exchange Act of 1934.

It does not appear that NSCC nor DTCC sought permission from the Commission prior to selling the equity market data products identified in the DTCC Equity Data White Paper. We reviewed filings by NSCC on the Commission’s website spanning several years, and were unable to find any regulatory filings (immediately effective or otherwise) related to the identified data products. Further, we assume because DTCC is not a registered clearing agency, we were not able to identify any filings from DTCC with the Commission related to it as well. This lack of oversight of data products sold by registered clearing agencies is particularly odd, considering that the data from the

⁵ See, e.g., *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Update the Clearing Agency Securities Valuation Framework*, SEC, Exch. Act Rel. No. 34-97280, Apr. 11, 2023, available at <https://www.sec.gov/rules/sro/nscc/2023/34-97280.pdf>.

⁶ See *Susquehanna Int’l Group, LLP v. SEC*, No. 16-1061 (DC Cir. 2017), available at <https://law.justia.com/cases/federal/appellate-courts/cadc/16-1061/16-1061-2017-08-08.html>.



registered clearing agencies is arguably more comprehensive of the market than the data arising from the activity on any individual equities exchange.

We worry that equities trade-related information sold by DTCC may be used by sophisticated market participants to effectively front-run large orders to the detriment of public pension funds, endowments, mutual fund investors, and other market participants. Worse, we are concerned that the dissemination of investors' non-public trade-related information may be occurring in other markets in which DTCC and its affiliates operate.

Below, we offer a number of questions related to the access, use, and dissemination of trade-related information by DTCC and its affiliates, which we hope the Commission will explore.

1. What access, if any, does DTCC have to non-public trade-related information upon which the products identified in the DTCC Equity Data White Paper rely, and is that consistent with the law and Commission rules?
2. Does DTCC independently collect the data that is subject to the DTCC Equity Data White Paper? Is that data obtained from NSCC? Or is it a combination of the two? Put simply, how is DTCC even getting the confidential trade-related information in the first instance, much less having authority to sell it (or data derived from it)?
3. What are the circumstances, including legal justifications, for DTCC having access to the underlying confidential trade-related information?
4. What information barriers, if any, exist to restrict access to confidential trade-related information?
5. Is any DTCC access to data obtained as a result of NSCC's clearing agency status consistent with NSCC's legal obligations under SEC rules, including information security protections and its own policies and procedures?
6. Was the Commission or staff made aware of the data products identified by the DTCC Equity Data White Paper by NSCC, DTC, FICC, or DTCC prior to the sales of those products? If so, what analysis, if any, was undertaken to assess the products for compliance with the law, Commission rules, and the Commission's mission?

7. What is the full range of data products offered by DTCC? For example, DTCC lists on its website a collection of data products, covering a swath of different securities markets.⁷
8. How is DTCC compensated for the data products identified above, and on what terms?
9. Is DTCC or another affiliate engaged in the collection and dissemination of confidential trade-related information for any of the products identified above (as it appears with the products identified by the DTCC Equity Data White Paper)?
10. DTCC has access to certain data in FINRA TRACE-eligible securities. In some cases, certain data is not disseminated by FINRA, or is done so on an anonymized and time-delayed basis, pursuant to FINRA rule filings. Does DTCC offer data products drawing upon this data, for example, such as for Treasuries? Does DTCC make available fixed income trade-related information that is not available from FINRA? If so, under what terms?
11. Does DTCC make short sale information available to customers or other market participants (e.g. issuers)? If so, what are the terms?
12. Is the Commission or staff aware of all data products offered by DTCC and any of its affiliates using data obtained from any of its registered clearing agencies?
13. What resources, if any, are committed by the Commission to identifying and reviewing the data products above?
14. What procedural rules, if any, are being applied by the Commission to those data products?
15. What substantive rules, if any, are being applied by the Commission to those data products?
16. Again, what rules are being applied by the Commission to ensure that data products other than the equities products identified in the DTCC Equity Data White Paper are not inconsistent with the law, Commission rules, and the Commission's mission?
17. We are not aware of any rule or guidance from the Commission on what non-public trade data would be appropriate for a registered clearing agency or affiliate to disclose. What specific non-public customer trade-related information does the Commission believe is appropriate to release, if any?

⁷ DTCC, DTCC Data Services, available at <https://www.dtccdata.com/products> (last viewed May 24, 2023).

18. The Commission has recently proposed two rules related to position reporting by investors, and in both instances, the Commission proposed including delays between trading and the position reporting. Here, however, the DTCC Equity Data White Paper suggests that some data is being released on T+3 and might soon be released on T+1 – which is far shorter than current equity position reporting requirements. What temporal delay does the Commission believe would be appropriate, if any, for a for-profit entity to sell its non-public customer trade data that it obtains as a result of its privileged market position?
19. Is the company's purported voluntary efforts at masking the identities of traders effective? Are data scientists able to use the data products (perhaps alone, or perhaps in conjunction with other information) to ascertain identities and details of trading that it isn't selling?
20. Does it even matter if the data is anonymized? If a firm is able to obtain material, non-public information about a large trader in a small or mid-sized company, for example, then that information could be easily used to front-run future investor orders, even if the exact identity of the victim is unknown.
21. We wonder why DTCC currently makes the data available on a purportedly anonymous basis. Presumably, DTCC understands that the data is valuable, which is why it is selling it. Further still, the company seems to recognize that selling the data in a non-anonymized manner would be facially offensive to investors and deeply problematic to the markets (if not illegal). Nevertheless, it appears that any current practices for anonymization of the data – regardless of intent or efficacy appear to be purely voluntary. Is the data being sold subject to any law or rules designed to protect investors or promote fair, orderly, and efficient markets?
22. Data products can change over time. Even if the Commission or staff believes that current data products offered by a registered clearing agency or its affiliate may not be offensive to the law and the Commission's mission, what about future products? What, if anything, exists to ensure that future products would continue to be inoffensive to the law and the Commission's mission?
23. Does DTCC adhere to the requirements of Section 17A of the Securities Exchange Act and the filing requirements of Section 19? If not, why not?
24. If DTCC or any of its affiliates follow the dictates of the Exchange Act in some instances, but not others, what is the criteria used by DTCC and its affiliates to decide if a proposed product falls within the contours of the Exchange Act?



25. If DTCC believes there is no data that falls within the requirements of Section 17A, does that mean DTCC could, for example, create a feed of real-time information on margin calls? What would be the implications of such a feed?

Conclusion

The protection of investors and market integrity should not rest on the benevolence and conflicted interpretations of the self-interested firms seeking to sell market data products.

The Commission should investigate DTCC and its affiliates regarding their use of information obtained pursuant to the operations of registered clearing agencies, as well as review the sales of all of their data products across all markets for compliance with the law and Commission rules.

Further, we urge the Commission to examine its own rules, examination modules, and enforcement practices to ensure that registered clearing agencies and their affiliates do not inappropriately abuse their positions and access to non-public, trade-related information.

Lastly, we are troubled by DTCC's governance, and urge the Commission to revise its rules to appropriately address the conflicts of interest presented by the company's ownership interests in essential market participants that also perform quasi-governmental functions.

If you have any questions, please contact me at (202) 909-6138 or ty@healthymarkets.org. Thank you for your consideration.

Sincerely,

President and CEO
Healthy Markets Association

Cc: Hon. Hester Peirce
Hon. Caroline Crenshaw
Hon. Mark Uyeda
Hon. Jaime Lizárraga
Haixiang Zhu, Director of the Division of Trading and Markets