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UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of ALPINE SECURITIES CORPORATION, For Review of Adverse Action Taken by the NATIONAL SECURITIES CLEARING CORPORATION and THE DEPOSITORY TRUST COMPANY	Admin. Proc. File No. 3-21924

ALPINE'S REPLY BRIEF IN SUPPORT OF MOTION FOR AN EMERGENCY INTERIM STAY AND OTHER APPROPRIATE COMMISSION RELIEF

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PRELIMINARY STATEMENT

The opposition brief filed by DTCC vividly illustrates that the parties in this proceeding have put forth two dramatically different narratives. Alpine asserts that it received $6.4 million on October 25, 2023, designated in writing as capital; that those funds constituted capital from the moment they were received; that a DTC request on November 2, 2023 for a resolution led to confusion within Alpine, causing a subsequent error in its daily estimates; but that Alpine's inaccurate daily estimates did not and could not alter the fact that the funds received by the firm were properly included in excess net capital ("ENC") from the outset.

From DTCC's perspective, and although obscured by the hyperbole and rhetoric that constitute the bulk of its brief, the wrongdoing allegedly committed by Alpine is that, while Alpine obtained and had sufficient *funds* to satisfy DTCC's capital requirements, for a period of roughly *two weeks* those funds should not have been considered excess net capital because Alpine had not obtained a written resolution.[1] DTCC has not disputed that Alpine is and (other than the period at issue) has been in compliance with its ENC requirements. DTCC agrees that Alpine obtained the requisite funds precisely to meet NSCC's new ENC requirement and they admit the funds were designated and received as capital in the transfer documents. But, they argue, a subsequent shareholder resolution somehow negated the original written designation of the funds as capital. ***Based on that disputed predicate,*** DTCC claims that Alpine has made misstatements surrounding those events.[2] But DTCC offers no support for its essential claim that the funds were not "good"

[1] As discussed in the initial brief, a written resolution is not a requirement for capital; it was provided only because DTCC insisted on one.

[2] DTCC's allegations regarding Alpine's supposed misstatements are nothing more than a tacit admission that the alleged two-week lapse is nowhere near anything that would justify ceasing to act for Alpine. Rather than admit that it has no basis for such a harsh penalty, DTCC is attempting to buttress its fragile determination with unfounded allegations that Alpine made intentional misstatements surrounding these events. There is no evidence to support this. To the contrary, the record of communications between Alpine and DTCC shows that Alpine was prompt and forthcoming in responding to all of DTCC's requests.

capital, while Alpine's description of these events is fully supported by the relevant testimony, *e.g.,* both the individual who paid in the capital and the individuals who received the capital testified that it was capital from the outset and at all times, and Alpine's FOCUS report plainly reflects that, as of October 31, 2023, it had greater than $10 million in excess capital. Yet this plain and consistent testimony concerning the events of that week, the errors that occurred, the resolution of the accounting issue, and the fact that the funds were at all times good capital is ignored or attacked by DTCC without any evidentiary basis. DTCC goes so far as to characterize Alpine's straightforward description of this sequence of events as a "fairy tale" when in reality it is DTCC's attempt to deprive Alpine of access to the market that ignores the uncontroverted testimony and has no basis other than DTCC's own unsupported narrative.

DTCC's position, in the end, is a self-serving and circular embrace of its unsupported version of events: it insists that Alpine's evidence and description of the events is not accurate and uses that claim as a bootstrap to insist that Alpine has "broken trust." It has constructed a narrative that it believes would justify its rush to cease to act, but it does not and cannot counter the consistent evidence that the capital was received by the firm on October 25, 2023 and constituted capital of the firm at all times thereafter.

The Commission's review of this proceeding will, Alpine submits, confirm that DTCC's Board Members adopted in its entirety the contentions of DTCC, failed *even to acknowledge* the clear and consistent evidence put forth by Alpine, issued a Decision that is based on a skewed and unsupported iteration of events, and failed to apply rational standards that govern DTCC's ability to deprive a firm of access to the markets. There are critical and substantial questions that underlie

Alpine's appeal, clear and irreparable injury that will flow absent a stay while those issues are addressed and a complete lack of any harm that would flow from issuance of a stay.[3]

ARGUMENT

A. DTCC's Submission Bombards the Commission With Misstatements of the Record

In its initial brief, Alpine set forth the chronology of events, as reflected in the record, that resulted in Alpine's temporary underreporting of its ENC. The testimony of its witnesses laid out those events, which were not particularly complex: $6.4 million was received by Alpine on October 25, 2023 designated as capital; that $6.4 million brought the firm's capital to greater than $10 million; Alpine then disbursed for certain expenses and as a result reported and then remedied a shortfall of $177,000; Alpine then on November 2, 2023 received a letter from DTCC demanding a written resolution; a resolution was prepared that referred only to a portion of the additional funds because Alpine's ownership wanted to preserve an argument that it was subject to the lower $5 million requirement; Alpine's accountants, on receipt of that resolution, wanted clarification concerning the capital and, in the meantime, excluded the funds from ENC calculations; and Alpine then received clarification from the owner that all funds were capital of the firm from the outset and Alpine's ENC numbers were corrected.[4]

Those are the events as described by the witnesses. But DTCC is determined to tell a different story to support its decision to cease to act for Alpine. Because the record does not

[3] While DTCC opposes this motion for a stay, it appears that DTCC, in the only other cease to act proceeding, took a number of months after the decision to implement a cease to act. See DTC Notice Re Cease to Act in Lek Securities Matter, advising that, in relation to March 10, 2022 Decision affirming the cease to act, NSCC would cease to act for Lek on July 27, 2022 and DTC would cease to act for Lek on September 20, 2022, available at https://www.dtcc.com/-/media/Files/pdf/2022/6/10/9153.pdf.

[4] Tr. 539:17-24 (Cosman).

actually support DTCC's narrative, its presentation relies throughout on inaccurate descriptions of the record and authorities.

Even on the seemingly straightforward issue of whether Alpine would suffer irreparable injury, DTCC appears not willing to accept this Commission's own conclusion. DTCC claims that ceasing to act for Alpine, a clearing firm, does not constitute irreparable injury because it could "clear trades through another Member."[5] DTCC ignores the fact that the Commission has stated otherwise in the matter involving Lek Securities, confirming in its decision that it does not dispute that "cease to act determinations will cause Lek to suffer irreparable harm."[6] And in fact the irreparable injury that would flow from barring *a clearing firm* from clearing trades is evident. It will prevent the firm from conducting its business.

On the related issue of whether the stay should be granted, DTCC offers the conclusory claim that there exists some "real danger" associated with Alpine's continued operations. It utterly fails to address the fact that Alpine is operating with the full $10 million in ENC and that it engages in transactions in which it is always long the stock that is being sold and so presents no risk that NSCC would have to acquire stock in the market to "cover" a sale. Instead of dealing with those facts, it cites the importance of "a safe, efficient clearing system," as if it expects the Commission to accept the nonsensical notion that allowing Alpine to continue to operate during the pendency of the appeal would prevent DTCC from properly performing its function.

DTCC then offers an iteration of the underlying events that is contradicted by the actual testimony that was received on the issue. Set forth below are examples:

- While DTCC does not attempt to controvert the evidence that the capital was received and properly designated on October 25, 2023, and remained with the firm thereafter. it oddly cites the language in the Decision that "cash in an account is not capital." But of course cash provided by ownership for the purpose of meeting the ENC requirement

[5] Opp. at 2.
[6] SEC Lek Decision at 11.

and with the written designation of paid in capital *is capital*.[7] DTCC assiduously ignores those facts and instead points to net capital estimates issued by Alpine that were, the witnesses explained, not accurate. DTCC's entire argument hinges on its disregard for that extensive, clear and consistent testimony from Alpine's owner, chief executive and accountant regarding the reason for the error in those estimates and the fact that the funds remained capital of the firm.

- DTCC says the additional funds received on October 25, 2023 were held in a "non-capital account."[8] But there was no such thing; the funds were in an *Alpine* account.[9] The funds are currently held in the same bank account where they were received, and Alpine has properly and continuously included those funds, held in that account, in its excess net capital calculations (including after November 9, 2023 and in its FOCUS report). *DTC has never contested the accuracy of those calculations over the past six months*.[10] The reference to a "non-capital account" is a fictional straw at which DTCC grasps to try to argue that funds that were contributed by ownership as capital and designated in writing as capital do not actually constitute capital.

- DTCC claims that Alpine's owner, by providing a resolution referring to a portion of the additional capital, "designated the remainder as not authorized."[11] That claim manages to incorporate two false assumptions: it misstates the language and the purpose of that resolution and it again ignores the prior, written and binding designation of the entire $6.4 million as capital of the firm. The only testimony concerning the content of the resolution came from the owner of the firm who explained the reasons for that language, confirmed that a resolution was not necessary in order for funds to constitute capital and emphasized that the resolution did not and could not alter the character of funds that had already been provided by ownership to the firm with the written designation of paid in capital. DTCC's claim is also unquestionably at odds with the regulatory reality: there is no question that, once those funds were delivered by the owner with the written designation of paid capital, FINRA would have ensured that the funds were treated as such, regardless of any other documentation, and would not have allowed any withdrawal or encumbrance of those funds.

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[7] James Cosman testified that, while "[c]ash in a bank account doesn't mean anything…contributions do, especially if they are from the owner or a shareholder, then that would matter to whether they are or aren't part of [the excess net capital] calculation." Tr. 512:11-25 (Cosman).

[8] Opp. at 2.

[9] James Cosman testified that the account where the funds were held was an Alpine account that it opened specifically to receive the capital infusion from the owner, and that Alpine opened the account at a bank where it had an existing, years-old relationship. Tr. 556:13-557:2 (Cosman). Alpine was also asked to and did provide the bank records reflecting that the funds remained in that account as of October and November 2023. Tr. 558:2-16 (Cosman).

[10] DTCC's own brief confirms, for example, that Alpine's ENC was above $10 million as of November 10, 2023 (Opp. at 6) – while the funds continued to reside in the so-called "non-capital account."

[11] Opp. at 2. *See also*, Opp. at 7 (claiming that the resolution dated October 26, 2023 "disclosed" that "only $1.6 million of the $6.4 million transfer was actually capital."); Opp at 15 (asserting wrongly that the language of the resolution regarding the firm's receipt of a capital contribution means that the remainder was not capital). The evidence confirmed that a written resolution was demanded by DTCC on November 2, 2023 (although there exists no requirement of a resolution for the funds to be received and treated as capital), it was *then* prepared and provided to DTCC on November 3, 2023. *See*, Alpine's Emergency Motion for Stay at 8, n. 26.

- DTCC continues to claim, without any evidentiary basis, that Alpine's ENC was "overstated" after the funds were received.[12] It repeats that claim on virtually every page and as its support for each of its arguments. But it does so based on its myopic refusal to acknowledge that the funds were designated and *received as capital* and were not – nor could they be – designated otherwise. Its claim flies in the face of the documents confirming the transfer of the capital as well as the testimony of both the accountant who made those entries and the owner who provided the funds as capital. The funds were properly treated as capital and the only error occurred when Alpine's accountant temporarily *removed them* from the ENC calculation while he awaited clarification – clarification that confirmed and that expressly stated that the funds were at all times capital of the firm as of the date of their deposit.[13]

DTCC's aggressive mischaracterization of the record continues with its argument that Mr. Maratea deliberately misstated Alpine's capital. According to DTCC, that is evidenced by the fact that, on October 26, 2023, Mr. Maratea sent an email to DTCC forwarding his accountants total of Alpine's ENC.[14] That must have been a deliberate lie, DTCC claims, because the net capital estimate filed by the accountant at the end of that day showed that Alpine's ENC was "just under $10 million."[15] But, as the Commission will see in its review of the record, Alpine's chief executive officer explained in some detail that, in those daily net capital estimates, Alpine was subject to continual changes in expenses and revenues and that a payment of expenses on October 26, 2023 brought the day-end number below $10 million.[16]

Significantly, DTCC even attempts to alter the testimony of its own witnesses, now denying that its actions were based on the inaccurate information supposedly received by Mr. Cuddihy from some unnamed individual at FINRA. Mr. Cuddihy has consistently confirmed that

[12] Opp. at 2, 17-18.
[13] James Cosman testified that the funds were "received and we did have an intent and we had discussions and conversations and meetings that pointed that this was going to be capital. It was just the form that it was taken in, and I was waiting for clarification." Tr. 533:19-24 (Cosman). "By the time that we [were] required to file [the] FOCUS, we had clarification, there were no suggestions that this wasn't going to be contributed capital, and therefore the adjustments were made *and made effective as of the date of those capital contributions*." Tr. 539:17-24 (Cosman) (emphasis added).
[14] DTCC Exhibit 18.
[15] Opp. at 17.
[16] Tr. 416:18-417:20 (Maratea).

he went forward with the cease to act proceeding because of the initial $177,000 deficiency followed by his having supposedly learned from FINRA that Alpine's capital was "encumbered" and was not "good capital"[17] – an assertion that, if made by FINRA, was both false and problematic. The funds were in no way restricted or encumbered; they were the paid-in capital that had been demanded by NSCC.

As for DTCC's railing about Alpine's argument that Mr. Cuddihy was misled or confused regarding whether the funds were properly treated as capital, that much is unquestionably evident from the record.

- He never saw and did not know that the funds were designated as capital in writing.[18]
- He did not understand that the funds were not, as he claimed, encumbered.[19]
- He knew that a firm's ENC is properly reflected in its FOCUS report (not a daily estimate)[20] but went forward with a cease to act without reviewing Alpine's FOCUS. If he had waited, he would have seen that the FOCUS confirmed that, as of October 31, 2023 and thereafter (days *prior to* DTCC's November 9, 2023 claim that Alpine lacked the requisite ENC) Alpine had greater than $10 million in excess net capital.[21]

[17] Tr. 254:12-255:23 (Cuddihy)

[18] "Q. So have you reviewed the documents that reflect that that capital came into the firm designated as capital?
A. I have not reviewed the documents."
Tr. 248:12-16 (Cuddihy).

[19] "Q. Do you know that those funds were not in any way restricted or encumbered, do you know that?
A. Do I personally know that? Have I personally validated that? No, I have not."
Tr. 256:9-14 (Cuddihy).

[20] "Q. Tim, when you say this should be very clear to us in terms of the amount of capital that they have, how do you ascertain what the amount of capital that they have?
A. I mean, as you are kind of aware, because you go through this, the capital calculation is a very, you know, robust, you know, it –
Q. In terms of what, the focus report?
A. Yes."
Tr. 249:11-23 (Cuddihy). The hearing panelist's reference to Mr. Cuddihy as "Tim" was a reminder of the relationship that exists between DTCC's Board and executives like Mr. Cuddihy.

[21] Alpine Ex. 8 at 9.

- He pressed ahead with a cease to act even as Alpine resolved the issue[22] and confirmed that, as Mr. Cosman testified, the lower estimates were incorrect and Alpine at all times should have reported the additional $6.4 million.[23]

- He had no basis for believing that a shareholder resolution is necessary for amounts transferred to the firm with a written designation of capital to be treated as capital.[24]

There is one issue on which the parties agree: that Alpine itself reported a deficiency of approximately $177,000 as of October 27, 2023. DTCC states that Alpine "admitted" that it was deficient and, on that point, DTCC is correct. The daily estimates that were being considered by DTCC were subject to daily revision based on revenue and expenses and payment of certain expenses brought Alpine's reported ENC to below $10 million on October 25th. Of course, DTCC fails to note that Mr. Leibrock communicated with Alpine concerning the deficiency and directed Alpine to remedy it. And Alpine did. In the meantime, however, Mr. Cuddihy had already commenced the cease to act process.[25] It is Alpine's position that it honestly disclosed a deficiency and remedied it, and that the deficiency presented no basis for a cease to act determination. Remarkably, DTCC takes the position that, even though the firm honestly disclosed it and remedied it, the temporary deficiency entitled DTCC to cease to act.

DTCC's arguments concerning Alpine's decision to engage only in self-clearing are similarly riddled with incorrect and misleading contentions. DTCC states, contrary to undisputed evidence, that Alpine only conveyed to DTCC, "days before the grace period would expire, that it was considering changing its business model" to self-clearing so as to be subject to the lower $5

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[22] "Q. You now know that the same day that you were providing the notice of intent to cease to act, Alpine was obtaining the further resolution and reporting the full 10 million?
A. I know that today, but I did not know that at the time.
Q. Had that occurred a few hours earlier, would you have had a different view of whether the firm should be shut down?
A. We possibly could have had a different view."
Tr. 257:17-258:5 (Cuddihy).

[23] Tr. 539:17-24 (Cosman).

[24] Tr. 254:12-255:14 (Cuddihy)

[25] Tr. 245:9-20 (Cuddihy).

million ENC requirement. The Commission's review of the record will confirm that DTCC's statements are false: Alpine communicated its inquiry regarding engaging only in self-clearing a month prior to the Compliance Date. DTCC also asserts that Alpine "was not successful in making the required changes to its business prior to (or even after) the Compliance Deadline." In fact, Alpine ceased clearing *for others* as of the Compliance Date in October and DTCC has continued to ignore that fact for months and to instead insist that Alpine should be deprived of access to the markets for a failure to meet the higher $10 ENC requirement. DTCC's continuing misstatements of the record are inexplicable and highly inappropriate.

B. The Decision Failed to Acknowledge or Apply Any Proper Standard In Relation to DTCC's Cease to Act Determination

In a head spinning maneuver, DTCC includes a subheading that **"The Cease to Act is … Necessary to Protect the Clearing Agencies,"** and then immediately under that heading argues that there is *no requirement that a cease to act be necessary to protect the Clearing Agencies*.[26] According to DTCC, it can cease to act for a firm, and thereby block its access to the markets, any time that that a firm fails to comply with any financial or operational requirement."[27] DTCC is adamant that there are **no other** factors or requirements to be considered because DTCC can take any action permitted *by its rules,* and those rules permit it to deploy its harshest sanction – an actual limitation on access to the markets – where *any* violation exists.[28] But that is obviously not what DTCC has been contending throughout the proceeding; its Notice of Intent to Cease to Act and its filings present at high volume the argument that it was allowed to impose this severe sanction because it could no longer "assess the risks presented . . . by Alpine with a high degree of

[26] Opp. at 19 (emphasis in original).
[27] *Id.*
[28] These concerns are particularly acute in this case: DTCC has acted to cease to act in only two instances, targeting two firms that operate in the microcap markets and are subject to the multi-layered and massive margin requirements that have been imposed on thinly traded low-priced securities.

confidence."[29] Nor is its insistence on unfettered discretion consistent with authority. DTCC has made clear that "the draconian measure of ceasing to act" is *not* appropriate in all circumstances.[30] And the SEC has held that a cease to act "was necessary" because the firm "lacked sufficiently reliable liquidity" and so created an actual risk to which DTCC is exposed.[31] Because the Decision failed to consider these issues of whether DTCC was unable to assess risk and whether a cease to act was necessary to protect DTCC, the Decision should be reversed.

DTCC also pivots and argues that "necessity" was demonstrated in this case because of Alpine's inaccurate reporting. DTCC supports that argument by once again assuming – wrongly – that Alpine's treatment of the funds as ENC was improper. But that once again ignores reality: NSCC set a dramatically increased ENC requirement of $10 million, there is no dispute that Alpine resolved its accounting issues and confirmed that it had greater than $10 million as of November 10, 2023, and so, under DTCC's analysis, the risk associated with Alpine's operations is properly addressed. Further, since October 26, 2023, Alpine has only engaged in self-clearing,[32] conduct that according to DTCC warrants ENC of $5 million.

This appeal starkly presents that issue of whether DTCC may cease to act and bar a firm from NSCC's essential settlement services "in its discretion," based on *any* violation and without evidence of risk or necessity.[33] Certainly the Decision is based on that assumption; it does not even address, much less find, that Alpine's operations present any actual risk. Further, although the Hearing Panel emphasized that it was determining *only* whether DTCC's actions were consistent with DTCC's rules, it is clear that the Commission will evaluate not only the sufficiency of the

[29] Notice of Determination to Cease to Act at 2, 7.
[30] DTCC Lek Decision at 12-13.
[31] SEC Decision at 11.
[32] Tr. 483:16-23 (Maratea).
[33] DTCC Rule 21 lists a host of other actions that can be taken by DTCC including "suspension; limitation of activities, functions and operations; fine; censure; and any other fitting sanction." Rule 21.

evidence but also whether the Decision "is consistent with the purposes of [the Exchange Act"[34] and whether the sanction imposed was "excessive or oppressive."[35] Because there is no precedent for or reason to close the firm where it has errors in its reporting that were promptly resolved and correctly presented in their FOCUS report, and Alpine obtained and at all times held the requisite capital, it appears likely that the Commission may conclude that closure of this decades-old firm is excessive.

C. Alpine Has Demonstrated a Likelihood of Success On its Constitutional and Statutory Claims

DTCC asserts that the claims relating to DTCC's structure and its enforcement mechanism may not be considered on this appeal. According to DTCC, the Commission should confine itself to the exceedingly narrow question of whether DTCC's actions were consistent "with its own rules," and should not consider whether they comply with either statutory or Constitutional directives. But the issues raised by Alpine regarding failures to comply with the Constitution are real and substantial and should be resolved before DTCC is able to close Alpine's doors and prevent it from continuing to pursue those issues.[36]

Here, Alpine has undergone a proceeding that arguably presents issues of fairness, due process and constitutionality similar to those that existed in *Axon*. With respect to the Hearing Panel, for example, DTCC's Board members not only appear to suffer from bias and a combination of conflicts but also their role appears indistinguishable from the ALJs in *Lucia v. SEC*.[37] There, the Court recognized that SEC ALJs are "Officers of the United States" who exercise "significant

[34] 15 U.S.C. 78s(e) & (f).
[35] 15 U.S.C. 78s(e)(2).
[36] A stay is supported by the view that irreparable injury exists if a firm is subjected to a proceeding that fails to comport with critical protections. *Axon Enter. v. FTC*, 598 U.S. 175 (2023) (Being subjected to an illegitimate proceeding constitutes a "here-and-now injury" which is "impossible to remedy once the proceeding is over" at which point "[j]udicial review of the structural constitutional claims would . . . come too late to be meaningful.")
[37] *Lucia v. SEC*, S. Ct. 2044, 2053-54 (2018).

discretion," have "the authority needed to ensure fair and orderly adversarial hearings," and may serve as the "last-word."[38] All of that is also true of the DTCC's Hearing Officers who, by virtue of delegated governmental authority, have the ability to determine whether a business can continue to have access to essential settlement services. As confirmed in *NASD v. SEC*, an enforcement proceeding conducted by an SRO "supplants a disciplinary action that might otherwise start with a hearing before an ALJ" at the SEC.[39] And it was in fact those same circumstances that led the D.C. Circuit Court of Appeals to stay a FINRA proceeding while that Court considered the issues concerning the constitutionality of FINRA's operation.[40]

Here, DTCC is deploying governmental power conferred by Congress and delegated by the SEC and that power is massive and impactful: it can deprive individuals of their livelihood and property and it can do so, it insists, without complying with the same Constitutional protections that have to be afforded by the delegating agency, the SEC.[41] There is certainly a substantial question as to whether they are engaged in state action but have failed to comply with Constitutional requisites.[42]

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[38] *Id.*

[39] NASD v. SEC, 431 F.3d 803 at 806-07 (D.C. Cir. 2005).

[40] *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, No. 23-5129, 2023 U.S. App. LEXIS 16987, at *5 (D.C. Cir. July 5, 2023).

[41] Scholars have recognized more broadly that amendments to the federal securities laws and the SEC's practices in recent years have "effectively entwined the SEC and its SROs, making it difficult to characterize the SEC's role as purely oversight." Edwards, Supreme Risk, 74 FLA. L. REV. 543, 559 (2022); see also, e.g., Birdthistle & Henderson, Becoming a Fifth Branch, 99 CORNELL L. REV. 1 (2013); Stone & Perino, Not Just a Private Club: Self-Regulatory Organizations as State Actors When Enforcing Federal Law, 2 COLUMBIA BUS. L. REV. 453 (1995).

As SEC Commissioner Hester Peirce put it: "on the strength of a government mandate and carrying out a regulatory mission using government-like tools, FINRA is difficult to distinguish from its patron agency." Hester Peirce, The Financial Industry Regulatory Authority: Not Self-Regulation After All, at 20, MERCATUS CTR. GEO. MASON UNIV. (Working Paper 2015).

[42] "The requisite nexus [for state action] generally exists when a private party acts as an agent of the government in relevant respects." *NB ex rel. Peacock v. D.C.*, 794 F.3d 31, 43 (D.C. Cir. 2015) (emphasis added). *See Blount v. S.E.C.*, 61 F.3d 938, 941 (D.C. Cir. 1995) (stating that it would "put[] to one side" the effect of a government charter because what was "critical" was the entity's enforcement of "federal law"). The Supreme Court has provided additional standards. A private party may be considered a state actor when "the State had so far insinuated itself into state action" or occupies "a position of interdependence with the [private parties] that it was a joint participant in the

Alpine has also raised the substantial issue of whether the extent of the authority and discretion that DTCC insists it wields runs afoul of the private non-delegation doctrine. In multiple respects, the claims of DTCC and its interpretation of the rules appear to contravene the fundamental requisite that delegation to a private entity passes Constitutional muster only if the entity acts subordinately to the government agency. As stated in *Oklahoma v. United States,* "a private entity may not be the principal decisionmaker in the use of federal power, may not create federal law, may not wield equal power with a federal agency, or regulate unilaterally."[43]

Secondly, DTCC's insistence that it can act in its "discretion" and without regard even to matters of risk or necessity squarely presents the concern that the delegation lacks the "reasonably fixed statutory standards" and articulable guidelines that are required for a permissible delegation of governmental power to a private entity.[44]

Finally, DTCC takes issue with the seemingly clear holding in *Oklahoma* that a private entity is permitted to propose rules and issue decisions *so long as* they do not become effective until they are reviewed and approved by the agency.[45] The court in *Oklahoma* expressly held that delegation was permissible because "the Authority's adjudication decisions are not final until the FTC has the opportunity to review them."[46] DTCC seeks to parse that holding, claiming that its ability to close Alpine without plenary agency review is permissible because the decision is

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enterprise." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357-58 (1974). Or "when it is entwined with governmental policies or when government is entwined in its management or control." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 288-89 (2001). State action is also present when a private party performs a "public function" of the sort traditionally performed only by the government. *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

[43] *Oklahoma v. United States*, 62 F.4th 221, 228-29 (6th Cir. 2023) (cleaned up, emphasis added) ("if a private entity creates the law or retains full discretion over any regulations, Carter Coal and Schechter tell us the answer: that it is an unconstitutional exercise of federal power.")

[44] *Todd & Co. v. Sec. & Exch. Com.*, 557 F.2d 1008, 1012 (3d Cir. 1977). *See also, FCC v. Fox Tel. Stations Inc.*, 597 U.S. 239, 253 (2012) (regulatory standards are inadequate when they are "so standardless" that they permit discriminatory enforcement).

[45] *Id.* at 231 (holding that a private entity is subordinate where it "may only 'propose' rules to the Commission" which rules cannot go into effect "unless the proposed rule has been approved by the Commission.").

[46] *Id.*

"effective", but not "final."[47] That semantic assertion makes mincemeat of the critical issue of subordination: where an entity like DTCC has the power to close the business before agency review, the decision is effective, it is final and it is impermissible.

Finally, in its insistence that the Commission should decline to consider Alpine's arguments, DTCC also fails to acknowledge that the Commission must address the assertion that DTCC violated the Exchange Act by failing to provide fair process to Alpine. There appears to be no other instance in which an entity acting with delegated governmental power is able to hand pick a Hearing Panel from its own Board to then review the decision of the Board, and there appears to be no reason why DTCC should be allowed to deprive a firm of access to the markets using a deeply flawed mechanism that lacks even a semblance of an objective and neutral decision maker. This is yet another substantial issue that needs to be addressed as DTCC begins increasingly to avail itself of its authority to seek to expel and close certain firms.

CONCLUSION

For the foregoing reasons and those stated in the moving brief, Alpine respectfully requests that the Commission grant a stay of the Cease to Act determination pending resolution of the appeals in this matter.

Dated: May 9, 2024

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[47] Opp. at 24.

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2024, I caused to be served a copy of Alpine's Reply Brief in Support of Motion for an Emergency Interim Stay and Other Appropriate Commission Relief, via email to the following individuals:

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