

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 61327 / January 11, 2010

In the Matter of	:	ORDER PURSUANT TO
	:	SECTIONS 13(f)(2), 13(f)(4) AND
Full Value Advisors, LLC	:	36 OF THE SECURITIES
	:	EXCHANGE ACT OF 1934
	:	DENYING APPLICATION FOR
	:	EXEMPTION FROM RULE
	:	13f-1 UNDER THE SECURITIES
	:	EXCHANGE ACT OF 1934

Full Value Advisors, LLC ("Full Value"), a Delaware limited liability company and an investment adviser to certain private investment companies, filed an application on October 24, 2006, pursuant to section 13(f)(2) of the Securities Exchange Act of 1934 ("Exchange Act") seeking an exemption from rule 13f-1 under the Exchange Act ("Exemptive Application"). By letters dated February 7, 2007 and May 8, 2007, Full Value submitted written requests ("February CT Request" and "May CT Request," respectively, and together, "Full Value CT Requests") pursuant to section 13(f)(3) of the Exchange Act and rule 24b-2 under the Exchange Act seeking confidential treatment of information that Full Value otherwise was required to disclose on Forms 13F for the quarters ending December 31, 2006 and March 31, 2007, respectively.<sup>1</sup> The May CT Request also set forth "an additional but related constitutional argument for exemptive relief that [Full Value was] unaware of when [Full Value] submitted the Exemptive Application" ("Additional Argument"). The Exemptive Application and the Full Value CT Requests did not identify Full Value's Reportable Securities.

The Commission has considered the Exemptive Application, including the Additional Argument. The Commission finds that the standard for an exemption from section 13(f)(1) of the Exchange Act and rule 13f-1 thereunder, set forth in section 13(f)(4) of the Exchange Act, has not been met. Separately, the Commission is issuing an order denying the Full Value CT Requests ("CT Denial Order") for failure to provide the factual support necessary for the Commission to make an informed judgment as to the merits of the CT Requests.

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<sup>1</sup> Full Value also submitted a letter, dated February 13, 2008, correcting a statement in the February CT Request.

## Background

Section 13(f)(1) of the Exchange Act and rule 13f-1 thereunder require every "institutional investment manager," as defined in section 13(f)(5)(A) of the Exchange Act, that exercises investment discretion with respect to "section 13(f) securities," as defined in rule 13f-1, having an aggregate fair market value of at least \$100 million ("Institutional Manager," and the securities, "Reportable Securities"), to file with the Commission quarterly reports on Form 13F setting forth each Reportable Security's name, CUSIP number, the number of shares held, and the market value of the position. Form 13F must be filed within 45 days of the end of the calendar year during which the \$100 million threshold was satisfied and within 45 days of the end of the first three calendar quarters that follow.

Congress enacted section 13(f) in order to make publicly available information about Institutional Managers' holdings of Reportable Securities, and to create with the Commission a central depository of historical and current data about these holdings.<sup>2</sup> The legislative history of section 13(f) suggests that the provision was designed to further regulatory and policymaking uses of the information, as well as to contribute to the transparency and integrity of, and investor confidence in, the U.S. equity markets.<sup>3</sup>

Under section 13(f)(3) of the Exchange Act, information filed on Form 13F must be made publicly available, "except that the Commission, as it determines to be necessary or appropriate in the public interest or for the protection of investors, may delay or prevent public disclosure of any such information in accordance with [the Freedom of Information Act]." Rule 200.80(b)(4) of the Commission's Freedom of Information Act rules provides that the Commission generally will not publish or make available to any person matters that "[d]isclose trade secrets and commercial or financial information obtained from a person and privileged or confidential." An Institutional Manager seeking to delay or prevent public disclosure of any such information provided on Form 13F must submit a written confidential treatment request ("CT Request") following the procedures set forth in rule 24b-2 under the Exchange Act and the Commission's Instructions to Form 13F ("Instructions").

Under section 13(f)(2) of the Exchange Act, in relevant part, the Commission may by order exempt an Institutional Manager from section 13(f)(1) of the Exchange Act or the rules thereunder. Pursuant to Section 13(f)(4) of the Exchange Act, the Commission must determine that any such exemption is consistent with the protection of investors and the purposes of section 13(f). Under section 36 of the Exchange Act, in relevant part, the Commission may by order exempt any person from any provision of the Exchange Act or any rule or regulation thereunder. Rule 0-12 under the Exchange Act sets forth Commission procedures for applications for orders under section 36 of the Exchange Act.

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<sup>2</sup> See Report of Senate Comm. On Banking, Housing and Urban Affairs, S.Rep.No. 75, 94th Cong., 1<sup>st</sup> Sess. 83 (1975) at 79-82, 85-87.

<sup>3</sup> See *id.* at 80-84.

The Commission has not established separate procedures for applications under section 13(f)(2), and therefore follows the procedures set forth in rule 0-12 for issuing this order.

### The Exemptive Application

Full Value came under the definition of Institutional Manager in March 2006, and was required to file Forms 13F beginning with calendar quarter ended December 31, 2006. In October 2006, Full Value filed the Exemptive Application seeking an exemption from rule 13f-1 pursuant to section 13(f)(2). On February 8, 2007 and May 10, 2007, Full Value submitted the February CT Request and the May CT Request, respectively.

The Exemptive Application stated that Full Value was an activist investor that "seek[s] to acquire meaningful stakes in publicly-traded companies whose stocks [it has] concluded, after extensive research, are undervalued and to influence management to take action to increase the stock prices." The Exemptive Application further stated that "[t]he Applicants generally do not publicly disclose their investments" and "[t]he Applicants' equity holdings are trade secrets that are protected by the Taking Clause of the Fifth Amendment [to the Constitution]" ("Fifth Amendment Argument"). The Exemptive Application argued that "the investors in an entity advised by the Applicants may be harmed if the Applicants' trade secrets are accessed by other investors with whom it competes." The Exemptive Application also argued that "unless an exemption from rule 13f-1 is granted, the Applicants' trade secrets will be taken for public use without compensation in violation of the Fifth Amendment."<sup>4</sup>

The May CT Request stated "[p]lease be advised that there is an additional but related constitutional argument for exemptive relief that we were unaware of when we submitted the Exemptive Application. Involuntary compliance with the filing requirement of rule 13f-1 constitutes 'compelled speech.' A regulation that compels commercial speech must pass a four-part test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Com'r*, 447 U.S. 557, 562-63 (1980) . . ." The May CT Request went on to argue that the two Congressional purposes behind section 13(f) -- that the collected information find regulatory or policy uses and contribute to public confidence in the U.S. securities markets -- have not been fulfilled, and that section 13(f)(1) therefore violates the First Amendment to the Constitution.

### The Commission's Findings

The Commission has considered the Fifth Amendment Argument set forth in the Exemptive Application. We note that Congress, in section 13(f)(3) of the Exchange Act,

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<sup>4</sup> The February CT Request stated that "If the order requested in the Exemptive Application is denied we would likely seek a judicial determination that [section] 13(f) is unconstitutional. In light of these novel circumstances, we request to be excused from complying with certain instructions that are applicable to routine confidential treatment requests made pursuant to section 13(f)(3) and rule 24b-2." By telephone conversation and a letter, dated March 9, 2007, which attached the Instructions, Form 13F, and a staff letter to Institutional Managers, dated June 17, 1998, providing guidance on the CT Request process, the staff informed Full Value about the requirements applicable to CT Requests.

specifically provided protection from public disclosure for an Institutional Manager's trade secrets and similar sensitive business information. The Commission has established an administrative process, detailed in rule 24b-2 under the Exchange Act and the Instructions, for Institutional Managers to submit CT Requests to protect such information from public disclosure. The CT Request process is tailored to protect certain specific information upon a demonstration of substantial harm, while ensuring that other information required by Form 13F is publicly disclosed consistent with section 13(f)(1). We do not believe that Congress generally intended for the Commission to exempt an Institutional Manager from disclosing its Reportable Securities pursuant to section 13(f)(2) when the Commission's authority to delay or prevent public disclosure of certain Reportable Securities pursuant to section 13(f)(3) can adequately protect the proprietary interests of an Institutional Manager. Therefore, absent extraordinary circumstances, an Institutional Manager seeking protection on grounds provided for under section 13(f)(3) must make a good faith effort to obtain that protection through the CT Request process. Because the Fifth Amendment Argument in the Exemptive Application seeks to protect from public disclosure information that is trade secrets, such protection is more properly addressed pursuant to the CT Request process. Full Value's failure to provide the factual support necessary for the Commission to make an informed judgment as to the merits of its CT Requests is addressed separately in the CT Denial Order.

The Commission also has considered the Additional Argument alleging that section 13(f) violates the First Amendment to the Constitution. The Additional Argument is a type of facial challenge to the constitutionality of a law administered by the Commission upon which the Commission generally declines to pass. Therefore, the Commission proceeds on the presumption that section 13(f) is constitutional.

The Commission also disagrees with the assertion in the Exemptive Application and the Additional Argument that the information collected pursuant to section 13(f) has not been used for the purposes intended by Congress. The information collected on Forms 13F has been and continues to be used by U.S. regulators, academics, the media and financial information distributors, and investors and other U.S. equity markets participants, as intended by Congress. The Commission's staff use Form 13F information for a variety of research, oversight, and enforcement purposes. The Commission's staff also use Form 13F-based academic research, for example, to analyze the Commission's rulemaking initiatives under the federal securities laws.<sup>5</sup> As the primary source of data about institutional equity holdings, Form 13F information is monitored, analyzed, and distributed by market data services for use by investors and other participants in the U.S. equity markets. The information reported on Form 13F can be used for commercial and academic purposes, for example, to identify and locate large holders of an issuer's publicly-traded stock, measure investment performance, and characterize trading

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<sup>5</sup> Form 13F information from an Institutional Manager that is a bank whose deposits are insured under the Federal Deposit Insurance Act also is required to be filed, for example, with the Federal Reserve Board and the Office of the Comptroller of the Currency. *See* section 13(f)(4) of the Exchange Act (requiring such Institutional Manager to file a copy of its Form 13F with the "appropriate regulatory agency"). *See also* section 3(a)(34)(D) of the Exchange Act (defining the "appropriate regulatory agency").

patterns. We believe that the availability of information provided on Forms 13F to the public has contributed to the transparency and integrity of the U.S. equity markets and thereby to investor confidence, as intended by Congress.

Having considered the Exemptive Application and the Additional Argument, the Commission finds that Full Value has failed to demonstrate that exempting it from rule 13f-1 under the Exchange Act would be consistent with the protection of investors and the purposes of section 13(f), as required by section 13(f)(4).

Accordingly, IT IS ORDERED, pursuant to sections 13(f)(2), 13(f)(4) and 36 of the Exchange Act, that Full Value's Exemptive Application is denied.

By the Commission.

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Elizabeth M. Murphy  
Secretary