

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 61930 / April 16, 2010

In the Matter of	:	ORDER PURSUANT TO
	:	SECTIONS 13(f)(2), 13(f)(4) AND
Wynnefield Capital Management	:	36 OF THE SECURITIES
LLC and Wynnefield Capital, Inc.	:	EXCHANGE ACT OF 1934
	:	DENYING APPLICATION FOR
	:	EXEMPTION FROM RULE
	:	13f-1 UNDER THE SECURITIES
	:	EXCHANGE ACT OF 1934

Wynnefield Capital Management LLC and Wynnefield Capital, Inc. (together, "Wynnefield"), investment managers of certain private investment companies, filed an application on February 13, 2007, 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"). The Commission has considered the Exemptive Application. 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.

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>1</sup> The legislative history of section 13(f) suggests that the provision was designed to further regulatory and policymaking

---

<sup>1</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.

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>2</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 ("FOIA")]. 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 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. 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

Wynnefield, an Institutional Manager subject to section 13(f)(1) of the Exchange Act and rule 13f-1 thereunder, filed the Exemptive Application. The Exemptive Application stated that "exemptive relief under Section 13(f)(2) of the Exchange Act is consistent with Congressional intent in situations where disclosure would otherwise be harmful to reporting companies or their investors." The Exemptive Application went on to state that the CT Request process under section 13(f)(3) of the Exchange Act "is insufficient to prevent harm to [Wynnefield] "because it is (i) unduly burdensome, as Wynnefield would "have to continually file new [CT Requests] annually to keep sensitive information confidential," and (ii) uncertain, so as to "adversely affect [Wynnefield's] investment strategies," "because there can be no assurance that the Commission will grant, or continue to grant, confidential treatment." The Exemptive Application also stated that Wynnefield's "investment strategies are trade secrets protected by the Takings Clause of the Fifth Amendment [of the U.S. Constitution]." The Exemptive Application went on to argue that "an exemption pursuant to section 13(f)(2) is necessary to avoid a 'taking' without just compensation in violation of the Fifth Amendment."

---

<sup>2</sup> See *id.* at 80-84.

## The Commission's Findings

The Commission has considered the arguments set forth in the Exemptive Application. We note that Congress, in section 13(f)(3) of the Exchange Act, 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. For the calendar quarters ended December 31, 2006 through and including September 30, 2009, Wynnefield submitted CT Requests for its entire portfolio of Reportable Securities ("Wynnefield CT Requests") in accordance with the established administrative procedures for CT Requests.<sup>3</sup> By letter dated February 1, 2010, the Commission staff, under delegated authority from the Commission, denied the Wynnefield CT Requests.<sup>4</sup>

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).<sup>5</sup> 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) could 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. The fact that Wynnefield in good faith pursued the CT Request process and failed to obtain the requested protection does not in and of itself amount to an extraordinary circumstance that justifies an exemption pursuant to section 13(f)(2) of the Exchange Act.

The Commission and the staff administer the CT Request process in accordance with the substantive and procedural requirements that are set forth in section 13(f) of the Exchange Act, rules 13f-1 and 24b-2 thereunder, FOIA, and the Instructions. 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

---

<sup>3</sup> See Wynnefield's public filings on EDGAR available at <http://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0001056835&type=&dateb=&owner=exclude&start=0&count=40>.

<sup>4</sup> See rule 30-5(c)(1) of the Commission's Rules of Practice (delegating authority under section 24(b) of the Exchange Act and rule 24b-2 to the Commission's Division of Investment Management to grant and deny CT Requests under section 13(f)(3) of the Exchange Act).

<sup>5</sup> 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. See, e.g., *Full Value Advisors, LLC*, Exchange Act Release No. 61327 (Jan. 11, 2010) (Commission order that discusses some of the uses of information collected on Forms 13F).

protection of investors, may delay or prevent public disclosure of any such information in accordance with [FOIA]." We believe that section 13(f)(3) thus anticipated the very process that Wynnefield finds objectionable -- the submission of a request for confidential treatment and the Commission's evaluation of the request on a case by case basis, with the accompanying uncertainty as to whether the request will be granted. Therefore, we do not believe that Wynnefield's objections to the CT Request process justify an exemption from section 13(f)(1) of the Exchange Act and rule 13f-1 thereunder.

Having considered the Exemptive Application, the Commission finds that Wynnefield 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 Wynnefield's Exemptive Application is denied.

By the Commission.

Elizabeth M. Murphy  
Secretary