

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 34-72984/September 4, 2014

In the Matter of	:	ORDER PURSUANT TO
	:	SECTIONS 13(f)(3), 13(f)(5) AND
Brooklyn Capital Management, LLC	:	36 OF THE SECURITIES
	:	EXCHANGE ACT OF 1934
	:	DENYING APPLICATION FOR
	:	EXEMPTION FROM RULE
	:	13f-1 UNDER THE ACT

Brooklyn Capital Management, LLC (“Brooklyn Capital/Full Value”), a Delaware limited liability company and an investment adviser registered under the Investment Advisers Act of 1940, is under common control with Full Value Advisors, LLC (“Full Value”) and currently has investment authority over the client accounts of Full Value. Full Value, a Delaware limited liability company and an investment adviser to certain private investment companies, filed an application on October 31, 2011, and an amendment to that application on January 3, 2012, pursuant to section 13(f)(3) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ seeking an exemption from rule 13f-1 under the Exchange Act (“Amended Exemptive Application”). On February 14, 2013, Brooklyn Capital further amended the Amended Exemptive Application (the term “Amended Exemptive Application” includes the February 14, 2013 amendment).²

The Amended Exemptive Application was filed following a decision by the United States Court of Appeals for the District of Columbia Circuit (“Court Decision”)³ denying Full Value's petition for review of 1) a Commission order (“Prior Commission

¹ The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) amended section 13(f) of the Exchange Act to renumber paragraphs (2) – (5) as sections 13(f)(3), (4), (5), and (6), respectively. *See* section 929X of the Dodd-Frank Act.

² The February 14, 2013 submission from Brooklyn Capital also requests confidential treatment of information filed on Form 13F pursuant to section 13(f)(4) of the Exchange Act and rule 24b-2 under the Exchange Act for the calendar quarter ended December 31, 2012 (“December 2012 CT Request”). The Commission separately is issuing an order denying, among other things, the December 2012 CT Request for failure to provide the factual support necessary for the Commission to make an informed judgment as to the merits of the December 2012 CT Request.

³ *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101 (D.C. Cir. 2011), *cert. denied*, 131 S.Ct. 3003 (2011).

Order")⁴ denying a previous application filed by Full Value for an exemption from rule 13f-1 under the Exchange Act ("Original Exemptive Application"), and 2) a Commission order ("CT Denial Order")⁵ denying requests for confidential treatment filed by Full Value ("Full Value CT Requests").⁶

The Commission has considered the Amended Exemptive Application and 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)(5) 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)(6)(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 both 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.⁷ 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.⁸

Under section 13(f)(4) of the Exchange Act, information filed on Form 13F must be made publicly available, "except that the Commission, as it determines to be necessary

⁴ *In the Matter of Full Value Advisors, LLC*, Exchange Act Release No. 61327 (Jan. 11, 2010).

⁵ *In the Matter of Full Value Advisors, LLC*, Exchange Act Release No. 61328 (Jan. 11, 2010).

⁶ The Full Value CT Requests were submitted by letters dated February 7, 2007 and May 8, 2007 pursuant to section 13(f)(4) of the Exchange Act and rule 24b-2 under the Exchange Act and sought confidential treatment of information that Full Value otherwise was required to disclose on Forms 13F for the quarters ended December 31, 2006 and March 31, 2007, respectively.

⁷ *See* Report of Senate Comm. On Banking, Housing and Urban Affairs, S.Rep.No. 75, 94th Cong., 1st Sess. 83 (1975) ("Senate Report") at 79-82, 85-87.

⁸ *See* Senate Report at 80-84.

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]." An Institutional Manager seeking to delay or prevent public disclosure of 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"). A CT Request must contain, among other things, an analysis of the asserted FOIA exemption from public disclosure.⁹

Under section 13(f)(3) of the Exchange Act, in relevant part, the Commission may by order exempt an Institutional Manager from section 13(f) of the Exchange Act or the rules thereunder. Pursuant to section 13(f)(5) 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)(3), and therefore follows the procedures set forth in rule 0-12 for issuing this order.

Prior Commission Order

The Original 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 Original 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 Takings Clause of the Fifth Amendment [to the Constitution]" ("Fifth Amendment argument"). The Original 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 Original 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." Finally, the Original Exemptive Application alleged that "[i]nvoluntary compliance with the filing requirement of rule 13f-1 constitutes 'compelled speech'" in violation of the First Amendment to the Constitution.

The Prior Commission Order stated that "[a]bsent extraordinary circumstances, an Institutional Manager seeking protection on grounds provided for under section [13(f)(4)]

⁹ See *Requests for Confidential Treatment of Information Filed by Institutional Investment Managers*, Exchange Act Release 15979 (Jun. 28, 1979) ("Since the purpose of Section 13(f) is to require extensive disclosure of the investment activities of institutions, confidential treatment can be granted only to managers who can make an affirmative showing that they satisfy the standards of [current] Section 13(f)(4))."

must make a good faith effort to obtain that protection through the CT Request process. Because the Fifth Amendment Argument in the [Original] 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." In the CT Denial Order, in turn, the Commission stated as follows:

Full Value has not identified the Reportable Securities for which it seeks confidential treatment and otherwise failed to provide the factual and analytical support necessary for the Commission to make an informed judgment as to the merits of the Full Value CT Requests. Full Value has failed to address both the status and the expected duration of its purported acquisition program in the Reportable Securities as required by rule 24b-2 and the Instructions. Full Value has not provided sufficient facts or analysis about its Reportable Securities to demonstrate that disclosure of its position in any Reportable Security would likely cause substantial harm to Full Value's competitive position. Full Value also has failed to justify any period of confidential treatment, as required by the Instructions.

With respect to Full Value's First Amendment argument, the Prior Commission Order stated that this "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 Court Decision

Full Value petitioned for review of the Prior Commission Order and the CT Denial Order in the D.C. Circuit, raising both the First and Fifth Amendment arguments. The Court Decision stated that disclosure of Full Value's Reportable Securities holdings to the Commission does not raise First or Fifth Amendment concerns. The Court Decision also stated that "[t]o the extent Full Value's claims rest on potential public disclosures of its investment positions, they are not ripe. Full Value will not have to disclose its positions to the public if the Commission grants an exemption or provides confidential treatment. Of course, for the Commission to properly consider Full Value's confidential treatment and exemption requests, Full Value must provide the Commission with sufficient information to make an informed judgment."

The Amended Exemptive Application

The Amended Exemptive Application stated that "our arguments for exemptive relief are essentially the same as those included in [the Original Exemptive Application and the Full Value CT Requests]." The Amended Exemptive Application also repeated the allegation in the Original Exemptive Application that public disclosure under section 13(f) violates the First Amendment. Finally, although the Amended Exemptive Application identified the Reportable Securities held by Full Value as of December 31, 2006, it provided no other facts or other information supplementing the Original Exemptive Application to enable the Commission to make an informed judgment.

The Amended Exemptive Application stated that Full Value does not believe that the disclosure scheme of section 13(f) of the Exchange Act enhances investor protection and that granting Full Value's requested exemption therefore "will have no adverse effect on investor protection." The Amended Exemptive Application further stated that the requested exemption was "consistent with the purposes underlying section [13(f)(4)] which expressly authorizes the Commission to 'prevent public disclosure . . . in accordance with [the Freedom of Information Act]'," and that "[the Freedom of Information Act] provides for confidentiality for 'trade secrets and commercial or financial information obtained from a person and privileged or confidential'."

The Commission's Findings

The Commission has considered the Amended Exemptive Application, which makes no new arguments for exemptive relief and repeats earlier allegations. The Commission finds that Brooklyn Capital/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)(5).

In enacting the disclosure requirement in the statute, Congress determined that public disclosure under section 13(f) would contribute to the transparency and integrity of the U.S. equity markets and thus to investor protection. In arguing to the contrary, Brooklyn Capital/Full Value fails to take this into account and provides no basis for the Commission to question Congress's determination. As the Commission explained in the Prior Commission Order, 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."¹⁰

Brooklyn Capital/Full Value conclusorily asserts that "we will be harmed if [our equity holdings] are disclosed because others can reverse engineer our proprietary activist strategies which makes them less valuable to our investors and to us" and that "premature disclosure of an investment manager's investments may harm the manager's clients and that harm outweighs the benefits of such disclosure to non-clients." Brooklyn Capital/Full Value also asserts that Form 13F disclosure "may be harmful to investors that track the investments of money managers via Forms 13F and seek to invest based on such information." The legislative history of section 13(f), however, indicates that Congress was aware of this possibility when enacting the disclosure requirement and nonetheless determined that disclosure would be beneficial.¹¹ The Commission therefore

¹⁰ *In the Matter of Full Value Advisors, LLC*, Exchange Act Release No. 61327 (Jan. 11, 2010), at 4.

¹¹ *See* Senate Report at 82 ("That different investors may draw different conclusions from the data is not important; rather, what is important is that information about the securities holdings and certain transactions of institutional investment managers be available to all investors – both institutional and individual – so that they can all have it, whatever its relative usefulness in making their independent judgments.").

finds that the Amended Exemptive Application does not demonstrate that exempting Brooklyn Capital/Full Value from section 13(f) reporting is consistent with investor protection.

The Commission also finds that the Amended Exemptive Application failed to demonstrate that exempting Brooklyn Capital/Full Value from rule 13f-1 under the Exchange Act would be consistent with the purposes of section 13(f). Brooklyn Capital/Full Value asserted that its requested exemption is consistent with the purposes of section 13(f) because Brooklyn Capital/Full Value's equity holdings fit the category of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Congress specifically provided the more limited remedy of confidential treatment protection for such information as set forth in section 13(f)(4) of the Exchange Act and implemented by the Commission under rule 24b-2 under the Exchange Act and the Form 13F Instructions and therefore the broad remedy of an exemption is not ordinarily appropriate for such information.

Brooklyn Capital/Full Value's submissions are not sufficient to justify confidential treatment and satisfy the Court Decision. The Court Decision held that confidential disclosure of Form 13F holdings to the Commission does not raise compelled speech concerns under the First Amendment or takings concerns under the Fifth Amendment. In addition, the Court Decision held that Brooklyn Capital/Full Value must provide the Commission with sufficient information to make an informed decision about whether confidential treatment is merited under section 13(f) for Brooklyn Capital/Full Value. The Amended Exemptive Application does not do so. The Amended Exemptive Application submits a list of U.S. equity positions that Full Value held as of December 31, 2006, and incorporates the same Full Value confidential treatment requests for the quarters ended December 31, 2006 and March 31, 2007 that the Prior Commission Order held to be not sufficient.¹² A list of securities without the substantiation required by section 13(f)(4), the Instructions, and rule 24b-2 under the Exchange Act is not sufficient to support a grant of confidential treatment.¹³ The Amended Exemptive Application, therefore, does not satisfy the Court's holding.

The Prior Commission Order stated that Full Value's First Amendment argument was a "facial challenge to the constitutionality of a law administered by the Commission upon which the Commission generally declines to pass," and the Commission therefore proceeded "on the presumption that section 13(f) is constitutional." In reviewing the

¹² The reasons why the prior requests do not meet section 13(f)'s requirements for confidential treatment are set forth in the Prior Commission Order."

¹³ As noted above, *see supra* note 2, the Commission separately is issuing an order denying the December 2012 CT Request for also failing to provide the factual support necessary for the Commission to make an informed judgment as to the merits of the December 2012 CT Request. Such separate order also denies confidential treatment for Brooklyn Capital's CT Request, dated May 15, 2013, for the quarter ended March 31, 2013. The March 2013 CT Request is materially the same, in substance, as the December 2012 CT Request.

Prior Commission Order, the Court Decision stated that disclosure of Full Value's Reportable Securities holdings to the Commission does not raise First Amendment concerns. The Court Decision also stated that to "the extent Full Value's claims rest on potential public disclosures of its investment positions, they are not ripe," and because Full Value still has not submitted a confidential treatment request with sufficient information to enable the Commission to make an informed judgment, they remain unripe.

Accordingly, IT IS ORDERED, pursuant to sections 13(f)(3), 13(f)(5) and 36 of the Exchange Act, that the Amended Exemptive Application is denied.

By the Commission.

Kevin M. O'Neill
Deputy Secretary