

Court Rejects Hedge Fund's Challenge to Form 13F Disclosure

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On February 4, 2011, the U.S. Court of Appeals for the District of Columbia Circuit rejected Full Value Advisors LLC's challenge to Form 13F disclosure requirements. Full Value argued that the disclosure requirements amount to compelled speech in violation of the First Amendment and an uncompensated taking in violation of the Fifth Amendment. Full Value's requests for exemption from and confidential treatment under Section 13(f) had previously been denied by the U.S. Securities and Exchange Commission (the "SEC").

Under Section 13(f) of the Exchange Act, institutional investment managers with investment discretion over \$100 million or more worth of 13(f) securities are required to complete a reporting form, Form 13F. Section 13(f) securities generally include equity securities traded on securities exchanges or NASDAQ. Advisers must disclose the following: issuer names, security classes, number of shares, and fair market value of securities over which they exercise control. Absent an exemption, information provided on Form 13F may then be made available to the public. The first of these exemptions, Section 13(f)(2), permits the SEC to completely exempt any institutional investment manager, security, or class of investment managers or securities from Section 13(f) requirements. The second exemption, Section 13(f)(3), permits the SEC to delay or altogether prevent public disclosure of confidential information if necessary to protect investors or the interests of the public.

Prior to Full Value's constitutional challenge, the SEC had denied its request for exemption under Section 13(f)(2) and for confidential treatment under Section 13(f)(3). Because Full Value did not complete Form 13F and provide the required factual information, the SEC ruled it could not make an informed judgment on the merits.

In its decision, the Court held Full Value's First Amendment argument is not yet ripe for review. Because Full Value has not provided the required information to the SEC, upon receipt and review, the SEC may indeed grant the requested confidential treatment. The Court further rejected Full Value's claim that disclosure to the SEC constitutes a "taking" under the Fifth Amendment. An unconstitutional taking requires an affected property interest, and the Government must go too far in the extent of its deprivation. The Court held that, even assuming Full Value's information constitutes a property interest, the SEC has a public interest in promoting competition and minimizing market volatility, and therefore disclosure under Form 13F does not go too far.

Filing Form 13F

Advisers with over \$100 million worth of equity securities under their investment discretion are subject to Form 13F filing requirements. These advisers must file quarterly reports with the SEC within 45 days after the end of the March, June, September, and December calendar quarters.

Advisers reaching the \$100 million threshold for the first time must file Form 13F for the December quarter of the calendar year during which the threshold is met. This means that the adviser has 45 days into the following calendar year to complete the filing. After the initial filing, these advisers will be subject to the quarterly filing requirements for the following calendar year even if the market value of their securities subsequently falls below \$100 million. Filings must be made online via the SEC's Electronic Data Gathering, Analysis and Retrieval system ("EDGAR").

Confidentiality Exemptions Under Form 13F

Challenges to public disclosure of Form 13F are premised on the concern that such information may give others insight into an adviser's otherwise private investment strategies. For institutional investment managers wishing to seek confidential treatment under Section

13(f)(3), the request must describe the investment strategy, provide analysis supporting the request, and further state that such information will be kept confidential long enough to carry out the strategy. Such requests must be submitted as paper filings even though Form 13F must still be filed electronically via EDGAR. A grant of confidential treatment does not exempt the filer from its continuing obligation to submit quarterly Form 13F filings.

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