

**FREEDOM OF INFORMATION ACT APPEAL**

May 20, 2011

**VIA FEDERAL EXPRESS**

FOIA/Privacy Act Office  
Securities and Exchange Commission  
Station Place, 100 F Street NE  
Mailstop 2736  
Washington, D.C. 20549

**Re: Appeal of Denial of Freedom of Information Request No.: 2011-05027-FOIA**

Dear Sir or Madam:

This firm represents Bloomberg L.P. (“Bloomberg”) and its reporter Christopher Condon in connection with their above-referenced Freedom of Information Act (“FOIA”) request to the U.S. Securities and Exchange Commission (the “Commission”). I am writing to appeal the Commission’s denial of Mr. Condon’s request.

**The Request**

On March 25, 2011, Bloomberg reporter Christopher Condon submitted a FOIA request to the Commission seeking all correspondence between Value Line, Inc. (“Value Line” or the “Company”) and the Commission in connection with the Commission’s review of the Company’s (i) Form 10-K for the fiscal year ended April 30, 2010; (ii) Definitive Proxy Statement filed on Schedule 14A on August 6, 2010; and (iii) Forms 10-Q for the fiscal quarters ended July 31, 2010 and October 31, 2010 (the “Request”).

In a letter dated April 8, 2011, the Commission informed Mr. Condon that it has decided to withhold the correspondence responsive to the Request under Exemption 4 of the FOIA because Value Line’s “registration is still pending” (the “Denial”). The Commission did not explain what specific registration is pending or why it has any impact on disclosure under the FOIA. Thus, the Commission has failed to provide the “detailed justification” required under the FOIA. Mead Data Cent., Inc. v. U.S. Dep’t of Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977) (citations omitted). Instead, the Denial simply recites Exemption 4: “The correspondence is being withheld under [Exemption 4], since it contains confidential commercial or financial information, the release of which would cause substantial competitive harm to the submitter.” 5 U.S.C. § 552(b)(4); 17 C.F.R. § 200.80(b)(4). However, as the D.C. Circuit has made clear, “the burden which the FOIA specifically places on the

Government to show that the information withheld is exempt from disclosure cannot be satisfied by the sweeping and conclusory citation of an exemption.” Mead Data Cent., Inc., 566 F.2d at 251 (citation omitted). Given the strong public interest in information relating to the accounting principles used by Value Line in preparing its public filings, and the fact that the Commission has released comment letters and filer responses since 2005, the correspondence requested by Mr. Condon is not exempt from disclosure and should be produced forthwith.

### Argument

#### **I. The Commission Has Not Met Its Burden Of Demonstrating That The Withheld Information Is Exempt From Disclosure Under Exemption 4 Of The FOIA.**

Exemption 4 of the FOIA protects from disclosure “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential” where disclosure of the information is likely to cause substantial competitive harm to the person or entity that submitted the information. 5 U.S.C. § 552(b)(4). In order to satisfy Exemption 4, an agency is required to “show exactly who will be injured by the release of [the] information and explain the concrete injury. Delta Ltd. v. U.S. Customs & Border Protection Bureau, 393 F. Supp. 2d 15, 19 (D.D.C. 2005).

“Conclusory and generalized allegations of substantial competitive harm . . . cannot support an agency’s decision to withhold requested documents.” Pub. Citizens Health Research Group v. FDA, 704 F.2d 1280, 1291 (D.C. Cir. 1983); see also Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., 649 F. Supp. 2d 262, 279 (S.D.N.Y. 2009) (“An agency must point to specific evidence substantiating an assertion that release of a record would cause substantial competitive harm to the person from whom the information was obtained. . . . The agency must provide evidence that if the requested information is disclosed, competitive harm would be ‘imminent.’”) (internal citation omitted), aff’d, Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys., 601 F.3d 143 (2d Cir. 2010), cert. denied, No. 10-543 (U.S. Mar. 21, 2011).

The statement that Value Line’s “registration is still pending,” without more, does not explain the concrete injury Value Line would suffer if the requested correspondence was disclosed. The Commission has therefore failed to satisfy its burden of demonstrating that the requested records are properly withheld from disclosure under Exemption 4. See 5 U.S.C. § 552 (a)(4)(B) (“the burden is on the agency to sustain its action”); see also In Defense of Animals v. U.S. Dep’t of Agriculture, 656 F. Supp. 2d 68, 79 (D.D.C. 2009) (ordering the Department of Agriculture to produce 1,017 pages withheld from disclosure pursuant to Exemption 4 where the Department failed to sustain its burden of demonstrating that the entity investigated would “suffer a substantial competitive injury if the information withheld [was] released”).

Moreover, it is not apparent how competitors would affirmatively use the information contained in the requested correspondence to Value Line’s detriment. As the Court of Appeals for the District of Columbia Circuit has “emphasize[d],” the “important point for competitive harm in the FOIA context . . . is that it be limited to harm flowing from the affirmative use of proprietary information by competitors” and that this “should not be taken to mean simply any injury to competitive position.” Pub. Citizens Health Research Group, 704 F.2d at 1291 n. 30 (internal quotation omitted). Here, the requested correspondence consists of comment letters dated February 4 and March 4, 2011 received by the Company from the staff of the Division of Corporation Finance that relate to Value Line’s “application of certain accounting principles to the novel reorganization of [its]

former investment advisor and broker-dealer subsidiaries that was completed on December 23, 2010.”<sup>1</sup> The requested correspondence also consists of Value Line’s February 18, 2011 response to the February 4, 2011 comment letter. It is difficult to see how disclosure of the two comment letters and Value Line’s response would cause substantial competitive harm to Value Line, particularly given the fact that the Commission began publicly releasing comment letters and filer responses relating to disclosure filings reviewed by the Division of Corporation Finance in 2005 for filings made after August 1, 2004.<sup>2</sup> In addition, disclosure of the accounting principles used by Value Line in preparing its public filings is unquestionably in the public interest. See Pub. Citizen Health Research Group v. FDA, 964 F. Supp. 413, 415 (D.D.C. 1997) (“An additional factor that may be considered is whether there is a strong public interest in release of the information.”).

In any event, the Commission is obligated to disclose “[a]ny reasonably segregable portion” of the requested correspondence.” 5 U.S.C. § 552(b). Consequently, to the extent that portions of the requested correspondence contain information that is protected from disclosure under Exemption 4, this information should be redacted and the remainder of the text produced.

## **II. The Commission Failed To Disclose All “Reasonably Segregable” Portions Of The Requested Correspondence.**

The FOIA requires an agency to disclose “[a]ny reasonably segregable portion” of a document that is, in part, exempt from disclosure. 5 U.S.C. § 552(b); see also Ctr. for Int’l Env’t Law v. Office of the U.S. Trade Representative, 505 F. Supp. 2d 150, 158 (D.D.C. 2007) (holding that even if a FOIA exemption applies, a government agency “may not automatically withhold the full document as categorically exempt without disclosing any segregable portions”).

Even if the requested correspondence contains some limited amount of information that is exempt from disclosure pursuant to Exemption 4 of the FOIA, the Commission’s withholding of this correspondence in its entirety is nonetheless improper. See Mead Data Cent. Inc., 566 F.2d at 260 (the FOIA’s focus “is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.”). In light of the fact that the Commission has withheld *all* records responsive to this Request *in their entirety*, Bloomberg can be left with no other impression than that the Commission failed to conduct the segregability analysis required by the FOIA. See, e.g., In Defense of Animals., 656 F. Supp. 2d at 68 (“In addition to establishing that information is properly withheld under the claimed FOIA exemption, an agency seeking to withhold information bears the burden of establishing that all reasonably segregable non-exempt portions of records are disclosed.”).

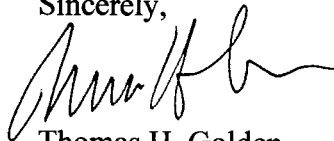
---

<sup>1</sup> Form NT 10-Q for Value Line, Inc., dated March 17, 2011, *available at*, [http://www.sec.gov/Archives/edgar/data/7177201000114420411015635/v215166\\_nt10q.htm](http://www.sec.gov/Archives/edgar/data/7177201000114420411015635/v215166_nt10q.htm).

<sup>2</sup> “SEC Staff to Publicly Release Comment Letters and Responses,” dated June 24, 2004, *available at*, <http://www.sec.gov/news/press/2004-89.htm>.

Bloomberg respectfully requests that the Commission respond to this appeal within 20 days. See 5 U.S.C. § 552(a)(6)(A)(ii). If you have any questions or require any additional information, please contact me directly at (212) 728-8657.

Sincerely,



Thomas H. Golden

cc: Office of the General Counsel (via Federal Express)  
Securities and Exchange Commission  
Station Place, 100 F Street NE  
Mailstop 9612  
Washington, D.C. 20549

Charles Glasser (via e-mail)  
Global Media Counsel, Bloomberg News

Christopher Condon (via e-mail)  
Reporter, Bloomberg News