ORAL ARGUMENT NOT YET SCHEDULED

NO. 13-5137

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION,
Plaintiff-Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION,
Defendant-Appellee.

On Appeal from a Final Order of the
U.S. District Court for the District of Columbia
(Honorable Beryl A. Howell)

APPELLANT'S OPENING BRIEF

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November 25, 2013

CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

(1) Parties and Amici. The Public Investors Arbitration Bar Association was the plaintiff in the district court and is the appellant in this Court. The U.S. Securities and Exchange Commission was the defendant in the district court and is the appellee in this Court. No amici curiae have appeared in this case.

(2) Rulings Under Review. The rulings under review are the order and accompanying memorandum opinion entered by the Honorable Beryl A. Howell on March 14, 2013, granting defendant's motion for summary judgment and denying plaintiff's cross-motion for summary judgment. These rulings are reproduced on pages 38 to 64 of the Joint Appendix. The memorandum opinion was also selected for publication and is available on Westlaw. *See Public Investors Arbitration Bar Ass'n v. SEC*, 930 F. Supp. 2d 55 (D.D.C. 2013).

(3) Related Cases. This case has not previously come before this Court or any other court. Counsel is aware of no related cases pending before this Court or any other court within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Julie A. Murray
Julie A. Murray

CORPORATE DISCLOSURE STATEMENT

The Public Investors Arbitration Bar Association (PIABA) is a bar association organized under section 501(c)(6) of the Internal Revenue Code, whose members represent public investors in disputes with the securities industry. PIABA's mission is to promote the interests of public investors in securities and commodities arbitration by protecting public investors from abuses in the arbitration process, making securities and commodities arbitration as just and fair as systematically possible, and creating a level playing field for public investors in securities and commodities arbitration.

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GLOSSARY

APA	Administrative Procedure Act
FINRA	Financial Industry Regulatory Authority
FINRA DR	Financial Industry Regulatory Authority Dispute Resolution
FOIA	Freedom of Information Act
GAO	Government Accountability Office
JA	Joint Appendix
OCC	Office of the Comptroller of the Currency
OCIE	U.S. Securities and Exchange Commission's Office of Compliance Inspections and Examinations
NASD	National Association of Securities Dealers
PIABA	Public Investors Arbitration Bar Association
SEC	U.S. Securities and Exchange Commission
SRO	Self-regulatory organization

INTRODUCTION

This case presents questions involving the proper interpretation of Freedom of Information Act (FOIA) Exemption 8, 5 U.S.C. § 552(b)(8). That exemption protects from disclosure information "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."

Plaintiff Public Investors Arbitration Bar Association (PIABA) filed a FOIA request for records regarding oversight by the U.S. Securities and Exchange Commission (SEC) of an arbitration program provided by the Financial Industry Regulatory Authority (FINRA). As the nation's only national securities association, FINRA regulates and enforces securities laws and rules with respect to its members, who are securities brokers and dealers doing business with the public. It also facilitates nearly all securities arbitrations in the United States. The SEC withheld the records under Exemption 8, contending that the records relate to "examination reports" about FINRA or were obtained through the SEC's ongoing supervision of FINRA. The district court endorsed the SEC's broad interpretation of Exemption 8, though it recognized that its decision might permit withholding of "everything the SEC scoops up in the course of its interaction with FINRA." JA 60 (internal quotation marks omitted). Because the district court's decision is at odds with FOIA's language, history, and purpose, it should be reversed.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction to consider PIABA's claim under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. It entered a final order and memorandum opinion on March 14, 2013. JA 38-64. PIABA timely appealed on May 10, 2013. Dist. Ct. Doc. 22, Notice of Appeal; *see* Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATUTES AND REGULATIONS

FOIA Exemption 8, 5 U.S.C. § 552(b)(8), exempts from disclosure

> matters that are . . . contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

Section 78x(e) of Title 15, which is codified as part of the Securities Exchange Act of 1934, provides that for the purpose of FOIA Exemption 8:

> (1) the [SEC] is an agency responsible for the regulation or supervision of financial institutions; and
>
> (2) any entity for which the [SEC] is responsible for regulating, supervising, or examining under [the Exchange Act] is a financial institution.

STATEMENT OF ISSUES

(1) Whether the records requested by PIABA, which concern the SEC's oversight of FINRA's arbitration program, constitute information in or related to an "examination report," as that term is used in FOIA Exemption 8;

(2) Whether, to carry its burden of showing that records fall within the scope of Exemption 8, the SEC must identify a specific report that the requested records are "contained in or related to," or whether the SEC need only demonstrate that the records relate to its oversight and supervisory responsibilities; and

(3) Whether the SEC otherwise met its burden of demonstrating that Exemption 8 applies to the requested records.

STATEMENT OF FACTS AND OF THE CASE

I. FINRA's Regulatory Role and Relationship with the SEC

FINRA, a non-profit organization, is the nation's only national securities association registered with the SEC. *Karsner v. Lothian*, 532 F.3d 876, 880 (D.C. Cir. 2008). Under the Securities Exchange Act of 1934 (Exchange Act), FINRA acts as a self-regulatory organization (SRO). *See* 15 U.S.C. § 78c(a)(26). In that capacity, it regulates—through a subsidiary called FINRA Regulation, Inc.—approximately 4,200 firms and 630,000 individual securities brokers who do business with the public. *See* FINRA, About FINRA, http://www.finra.org/About FINRA (last visited Nov. 21, 2013); FINRA 2007 Year in Review and Annual

Financial Report 34, *available at* http://www.finra.org/web/groups/corporate/@corp/@about/@ar/documents/corporate/p038602.pdf. FINRA was formed by the 2007 merger between the National Association of Securities Dealers (NASD) and the member regulation, enforcement, and arbitration departments of the New York Stock Exchange. *See Karsner*, 532 F.3d at 879 n.1.

By adopting the concept of self-regulation by entities like FINRA, the Exchange Act "reveals a deliberate and careful design for regulation of the securities industry." *In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 114 (D.C. Cir. 2008). Under this "regulatory model," the SEC delegates "certain governmental functions to private SROs," including FINRA. *Id.* Congress adopted this model in part because it "concluded that self-regulation with federal oversight would be more efficient and less costly to taxpayers" than having the SEC regulate all market participants directly. Government Accountability Office (GAO), Securities Regulation: Opportunities Exist to Improve SEC's Oversight of the Financial Industry Regulatory Authority 1 (2012) (GAO Report), *available at* http://www.gao.gov/assets/600/591222.pdf. Under this scheme of shared authority, FINRA's "regulatory responsibilities are similar to those of federal financial regulators." *Id.* at 15.

In practice, FINRA's SRO designation carries with it the authority to engage in rulemaking, general oversight and supervision, and enforcement. Specifically,

FINRA writes its own rules, governing everything from registration requirements, to broker-dealers' communications with the public, to capital requirements. *See* FINRA, FINRA Rules, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=607 (last visited Nov. 21, 2013). FINRA also oversees and enforces broker-dealers' compliance with the Exchange Act, SEC implementing regulations, and FINRA's own rules. *Saad v. SEC*, 718 F.3d 904, 907 (D.C. Cir. 2013) (citing 15 U.S.C. § 78o-3(b)(2)); 15 U.S.C. § 78s(g)(1). It does so in part by conducting regular "examinations" of firms to assess issues that present the greatest regulatory risk to the market and investors. These examinations cover, among other things, firms' business plans, financial integrity, and the fairness of their customer dealings. *See* FINRA, Compliance Exams, http://www.finra.org/Industry/Compliance/ComplianceExams/index.htm (last visited Nov. 21, 2013). FINRA also brings disciplinary proceedings against its members, wielding the power to impose suspensions or bars to practice, fines, and orders for investor restitution. *See* 15 U.S.C. § 78o-3(b)(7). In this way, FINRA acts as a "quasi-governmental agency." *Karsner*, 532 F.3d at 880 (internal quotation marks omitted); *see also In re Series 7*, 548 F.3d at 114 (stating that SROs enjoy absolute immunity from suit "for the improper performance of regulatory, adjudicatory, or prosecutorial duties delegated by the SEC").

Although FINRA has far-reaching regulatory powers, its authority is subject to extensive supervision by the SEC. *See generally* 15 U.S.C. § 78s; *see also Karsner*, 532 F.3d at 880. FINRA's rules are subject to approval by the agency, and in some cases, the SEC can create rules for FINRA. *See* 15 U.S.C. § 78s(b), (c). The SEC may also review FINRA adjudications. *See id.* § 78s(d)(2).

Most pertinent to this case, the SEC's Office of Compliance Inspections and Examinations (OCIE)—and within that office, the Market Oversight Program for SROs—conducts inspections of FINRA to help ensure that FINRA fulfills its regulatory responsibilities. *See* GAO Report at 2. Those inspections cover FINRA's various regulatory programs, including FINRA's examinations of securities firms and brokers, market surveillance, and enforcement efforts. *Id.* at 7.

II. FINRA's Arbitration Program and SEC Oversight

Through a subsidiary called FINRA Dispute Resolution (FINRA DR), FINRA also provides arbitration services for resolution of securities disputes between one of its members and either an investor or another industry party, and it operates the nation's largest arbitral forum for those cases. Since *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), which held that an arbitration agreement for a federal securities claims was enforceable, arbitration of securities disputes has become the norm. In fact, "virtually all" service agreements between securities brokers and their customers now require that

disputes be submitted to arbitration. Stephen J. Choi, Jill E. Fisch, & A.C. Pritchard, *Attorneys as Arbitrators*, 39 J. Legal Stud. 109, 110 (2010).

FINRA handles "nearly 100 percent" of the securities-related arbitrations and mediations in the United States. FINRA, What We Do, http://www.finra.org/AboutFINRA/WhatWeDo. Although FINRA does not directly employ arbitrators, it facilitates the arbitration process by selecting and training arbitrators, setting the rules and ethical restrictions under which the arbitrators operate, administering the panel selection process for securities arbitrations, and paying the arbitrators as contractors. *See, e.g.*, Jacobson Decl. ¶ 11, JA 34.

In FINRA proceedings, arbitrators either sit alone—the general practice for claims less than $100,000—or in panels of three. *See* FINRA, Arbitrator Selection, http://www.finra.org/ArbitrationAndMediation/Arbitration/Process/ArbitratorSelection/index.htm (last visited Nov. 21, 2013). From a list, the parties may strike available arbitrators under certain conditions and must rank remaining arbitrators in order of preference. *Id.* FINRA consolidates the ranked lists and appoints a panel or single arbitrator, depending on the type of case, with the best combined rankings. *Id.*

Whether FINRA arbitration proceedings are structurally and procedurally fair to investors is an ongoing issue of public concern. Some commentators highlight a structural advantage that routine players in the securities industry have

over one-shot claimants based on the repeat players' familiarity with the system, which guides their arbitrator strikes. *See, e.g.*, Choi, et al., *Attorneys as Arbitrators*, 39 J. Legal Stud. at 150 (highlighting earlier research suggesting this effect). Others contend that arbitrators who order large awards in favor of customers are at a disadvantage in the selection process. *See, e.g.*, *A Review of the Securities Arbitration System: Hearing Before the H. Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises*, 109th Cong. (2005) (statement of William Francis Galvin, Chief Securities Regulator of Massachusetts), *available at* http://financialservices.house.gov/media/pdf/031705wfg.pdf. For example, one commentator reported in 2012 that three arbitrators were removed from FINRA's roster because of a ruling in which they ordered Merrill Lynch to pay more than $500,000 in damages to a customer. William D. Cohan, *Wall Street's Captive Arbitrators Strike Again*, Bloomberg, July 8, 2012, http://www.bloomberg.com/news/2012-07-08/wall-street-s-captive-arbitrators-strike-again.html. Although FINRA denied the allegation, it reinstated all three arbitrators soon after the media attention and after one of the arbitrators filed a whistleblower letter with the SEC. *See* William D. Cohan, *Wall Street's Kangaroo Court Gets a Black Eye*, Bloomberg, July 29, 2012, http://www.bloomberg.com/news/2012-07-29/wall-street-s-kangaroo-court-gets-a-black-eye.html; Whistleblowers Today, *FINRA Fires Then Rehires Arbitrators That Ruled Against Merrill*, Aug. 13, 2012,

http://www.whistleblowerstoday.com/finra-fires-then-rehires-arbitrators-that-ruled-against-merrill.

Whatever the merits of these critiques, it is clear that investors have concerns about the securities arbitration process. One study found that "investors have a far more negative perception of securities arbitration than all other participants," and that "investors have a strong negative perception of the bias of arbitrators." Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. Disp. Resol. 349, 350, 353 (2008).

Since 1975, when Congress enacted broad amendments to the Exchange Act, the SEC has had "broad authority" to regulate rules by FINRA and other SROs "relating to customer disputes, including the power to mandate the adoption of any rules [the SEC] deems necessary to ensure that arbitration procedures adequately protect statutory rights." *Shearson*, 482 U.S. at 233-34. The SEC's Market Oversight Program, housed within the OCIE, also inspects FINRA's arbitration services, alongside its regulatory programs, such as FINRA's examinations of broker-dealers and enforcement proceedings. *See* GAO Report at 9-11, 18-19.

The SEC's power to oversee securities arbitration has grown since the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124

Stat. 1376 (2010) (Dodd-Frank Act). Through that statute, Congress gave the SEC express authority to restrict the use of—or even to prohibit outright— agreements requiring securities customers or clients to arbitrate future disputes with their brokers, where those disputes arise under federal securities laws and regulations or FINRA's own rules. *Id.* § 921, 124 Stat. at 1841, *codified at* 15 U.S.C. § 78o(o). Congress also directed the GAO to report periodically on the SEC's oversight of FINRA's arbitration services. *Id.* § 964, 124 Stat. at 1911, *codified at* 15 U.S.C. § 78d-9(a)(4); *see generally* GAO Report.

III. PIABA's FOIA Request for Documents Concerning SEC Audits, Inspections, and Reviews of FINRA's Arbitration Program

Plaintiff PIABA is a bar association whose members represent public investors in arbitration disputes with securities brokers. Part of PIABA's mission is to promote the interests of public investors in securities arbitration by protecting public investors from abuses in the arbitration process, making securities arbitration as just and fair as systematically possible, and creating a level playing field for public investors in securities arbitration.

Seeking to bring more transparency to the SEC's oversight of FINRA's arbitration program, PIABA submitted a FOIA request to the SEC for documents relating to the SEC's audits, inspections, and reviews of the program (or the program of FINRA's predecessor, NASD). Specifically, PIABA requested

documents "relating to audits, inspections, and reviews conducted by the SEC in connection with":

> (1) FINRA's arbitrator selection process;
>
> (2) FINRA's appointment of replacement arbitrators in the event that an arbitrator is stricken as part of the list selection process or removed for cause;
>
> (3) FINRA's policies, procedures, and processes in deciding causal challenges to an arbitrator's appointment;
>
> (4) FINRA's internal policies and procedures regarding arbitrator selection, appointment, and replacement; and
>
> (5) FINRA's pre-approval background check on arbitrator applicants.

See FOIA Request, JA 12.[1] PIABA did not seek financial information of FINRA or its subsidiary FINRA DR, information about their financial transactions, or information about FINRA's regulatory enforcement actions. Jacobson Decl. ¶ 6, JA 33.

The SEC determined that it had approximately 65 boxes containing "potentially responsive" documents but concluded that the requested records were exempt from disclosure under Exemption 8. Lever Decl. ¶ 5, JA 27. The SEC thus

[1] PIABA also sought records relating to FINRA's public arbitrator pilot program, but it subsequently withdrew that portion of its request. Dist. Ct. Doc. 7, Joint Status Report at 2 n.1.

denied PIABA's FOIA request and its subsequent administrative appeal. JA 14, JA 20.

IV. The District Court Proceedings

PIABA filed suit against the SEC to compel disclosure of the requested records under FOIA, and the parties cross-moved for summary judgment. The SEC relied on Exemption 8 but moved the Court to preserve its opportunity to raise additional exemptions if the Court held that Exemption 8 did not apply. The Court granted that motion. JA 36.

In support of the SEC's motion for summary judgment, the agency declarant relied upon her personal experience and review of "some of the boxes" to categorize the documents as relating to:

> [1] An inspection of the NASD Regulation, Inc.'s Office of Dispute Resolution, focusing on the Midwest Regional Office in Chicago. In that inspection, conducted in approximately 1999-2000, OCIE staff examined the Midwest Regional Office's management of its arbitration program, focusing both on the Midwest Regional Office's processing of cases and maintenance of its arbitrator pool.
>
> [2] A 2005 inspection of NASD Dispute Resolution's Kansas City/Omaha arbitrators. In that inspection, as a result of complaints received, OCIE staff reviewed the number, classification, and status of arbitrators in FINRA's Kansas City/Omaha hearing location.
>
> [3] An inspection of NASD Dispute Resolution, Inc.'s Southeast Regional Office's arbitration program for the period 2000-2006. In that inspection, OCIE staff examined the adequacy of the Southeast Regional Office's administration of its arbitration program, including the Southeast Regional Office's administration and processing of public and industry arbitration cases; the Southeast Regional Office's

> management of the arbitrator pool, including the selection, training, and evaluation of arbitrators; and the extent to which the Southeast Regional Office had implemented recommendations from previous inspections by the SEC.
>
> [4] An inspection of [FINRA DR's] arbitration program. In that inspection, OCIE staff reviewed [*i*] FINRA DR's arbitrators on the roster as of 2009, including examining arbitrator qualifications, trainings, classifications, and disclosures, and [*ii*] FINRA DR's process for dealing with complaints about its arbitrators.

Lever Decl. ¶¶ 7, 11, JA 27-28 (footnote omitted).[2] The declarant also indicated that "some of the potentially responsive documents may relate to particular complaints received by the SEC from arbitration participants." *Id.* ¶ 8, JA 28. She asserted that the SEC would have responded to those complaints as part of its "ongoing and continuous oversight responsibilities," and "would have investigated the allegations, which m[ight] have included obtaining a copy of the file and any other relevant documents from FINRA." *Id.*

The SEC's declarant contended that each of the inspections or investigations of consumer complaints "resulted in a writing, either termed a report or closing memorandum." *Id.* ¶ 9, JA 28. She stated that OCIE uses the terms "inspection" and "examination" interchangeably. *Id.* ¶ 6, JA 27. She also indicated that FINRA

[2] The SEC used the names of the entities at the time of the SEC's inspection, explaining that "NASD Regulation, Inc., Office of Dispute Resolution subsequently changed its name to NASD Dispute Resolution, Inc. and became a separate entity under the NASD, which subsequently became FINRA." Lever Decl. ¶ 7 n.1, JA27.

had requested that the SEC treat documents "in connection with one or more" of the inspections or consumer complaints as confidential under FOIA. *Id.* ¶ 12, JA 29.

The SEC's declarant made clear that she had not actually reviewed all of the boxes of documents after receiving PIABA's request. *Id.* ¶ 11, JA 28. Instead, she described the categories of documents that she expected to be contained in the boxes as (1) pre- and post-inspection materials, such as notes, legal memoranda, interview questions, FINRA responses to document requests, OCIE findings, and closing memoranda; (2) on-site inspection materials, such as arbitration case files, tape recordings, notes, and arbitrator application packets; (3) correspondence with FINRA, including e-mails; (4) FINRA's background information on arbitrators; (5) OCIE reviews of complaints regarding particular arbitration proceedings, including final memoranda; and (6) FINRA data regarding unpaid arbitration awards. *See id.*, JA 29.

The parties agreed in litigation that for the purpose of Exemption 8, FINRA constitutes a financial institution and the SEC is an agency responsible for the regulation or supervision of financial institutions. Dist. Ct. Op., JA 45. They did so in light of a 2010 amendment to the Exchange Act, *see* Application of the Freedom of Information Act to Certain Statutes, Pub. L. No. 111-257, 124 Stat. 2646 (2010) (2010 Amendment), which provides that for the purpose of FOIA Exemption 8:

> (1) the [SEC] is an agency responsible for the regulation or supervision of financial institutions; and
>
> (2) any entity for which the [SEC] is responsible for regulating, supervising, or examining under this chapter is a financial institution.

15 U.S.C. § 78x(e).

The district court granted summary judgment to the agency and denied PIABA's cross-motion for summary judgment. The district court concluded that the requested records "relate[] to" the SEC's "examination" of FINRA and are thus protected from disclosure under Exemption 8. JA 59; *see also* JA 62 (stating that "all of the potentially responsive documents were obtained pursuant to the SEC's ongoing and continuous oversight responsibilities" and were thus covered by Exemption 8 (internal quotation marks omitted)). In so doing, the court held that an "examination" may include oversight of "functions or activities" that are exclusively "administrative" in nature. *Id.* The court rejected PIABA's contention that Exemption 8 does not apply to the SEC's oversight of FINRA's securities arbitration program, a purely administrative activity engaged in by a self-regulatory organization.

The district court relied for its holding on what it termed the "plain meaning" of Exemption 8, the exemption's purpose, and FOIA's structure. It emphasized that Exemption 8 does not distinguish between a regulated entity's financial and administrative activities. JA 51. It also concluded that applying

Exemption 8 here would serve the purpose of protecting the cooperative relationship between the SEC and FINRA. JA 50. And it explained that a contrary reading of Exemption 8 would weaken or render superfluous FOIA Exemption 4, which exempts from disclosure certain commercial or financial information that is privileged or confidential. JA 52. The district court did not otherwise analyze the meaning of "examination report" in FOIA. Nor did the court consider whether the receipt or review of a consumer complaint constitutes an examination. Rather, it equated an "examination" with general oversight by the SEC. *See* JA 62.

The district court also relied heavily (at JA 54-59) on the 2010 Amendment to the Exchange Act described, *supra*, on pp.14-15 and codified at 15 U.S.C. § 78x(e), which provides that, for the purpose of Exemption 8, FINRA is a financial institution. The district court recognized that its interpretation of Exemption 8 might mean that the exemption "applies to everything the SEC scoops up in the course of its interaction with FINRA." JA 59 (internal quotation marks omitted). It concluded, however, that such a result was the only one that "comport[ed] with the current text of . . . FOIA and the clear intent of Congress to add an expansive definition of 'financial institution.'" *Id.*

The district court also held that the SEC was not required to identify any particular report to which its "examination" of FINRA pertained, and that, as a factual matter, "each potentially responsive document [did] appear to relate to an

examination report of some kind" because each of the OCIE's "examinations" "resulted in a writing, either termed a report or closing memorandum." JA 62 (internal quotation marks omitted).

The district court held that the SEC met its burden of demonstrating that Exemption 8 applied to the requested records in all other respects. JA 59-64. It deemed the agency's *Vaughn* declaration sufficient because "the plaintiff requested only one overarching category of documents: those relating to audits, inspections, and reviews conducted by the SEC of FINRA, and that entire category of records is, by its terms, exempt from disclosure." JA 61 (internal quotation marks, alteration, and citation omitted).

SUMMARY OF ARGUMENT

The requested records in this case are not exempt from disclosure under FOIA Exemption 8 for three reasons.

1. The withheld information is not contained in or related to an "examination report," as Congress used that term in Exemption 8. Rather, as the legislative record makes clear, the term "examination report" is intended to cover only a report revealing financial transactions or conditions, or operating or management issues bearing on those financial transactions or conditions, of a financial institution in its role as a traditional market participant. In contrast, the records in this case concern the adequacy of a self-regulatory organization's

administrative function—here, a securities arbitration program. And they were obtained or prepared as part of an effort by the SEC to determine whether FINRA is fulfilling its regulatory responsibilities, not whether it is complying with the securities laws and rules as a traditional market participant.

The district court's decision to the contrary rests on several errors. The district court failed to appreciate that "examination report" is a term of art in the financial world and under FOIA. It also erroneously concluded that PIABA's reading of "examination report" would render FOIA Exemption 4 superfluous. Under a properly narrow reading of "examination report," Exemptions 4 and 8 retain distinct purposes. In addition, the district court's reliance on the 2010 Amendment to the Exchange Act was misplaced. That amendment has no bearing on the definition of "examination report." If anything, the legislative record leading to that amendment confirms that the outcome here—in which the SEC can keep secret any documents it obtains or prepares as it supervises FINRA—is untenable and sweeps far beyond what Exemption 8 authorizes an agency to withhold.

2. The plain language of Exemption 8 requires that the SEC demonstrate that the withheld information is "contained in or related to" a specific report covered by the statute. The district court's decision, holding that Exemption 8 requires only that the withheld records be obtained by the SEC pursuant to its ongoing and continuous oversight responsibilities, has no basis in FOIA's text.

Moreover, the decision is inconsistent with FOIA's goal of broad disclosure and, if adopted by this Court, would render Exemption 8 an exception that swallows the disclosure rule.

3. The SEC has not met its evidentiary burden of demonstrating that Exemption 8 applies. The *Vaughn* declaration does not demonstrate that each of the requested records actually relates to an "examination," much less an "examination report." And the SEC's declarant and the agency's briefing below make clear that not all of the inspections and reviews of consumer complaints identified by the SEC resulted in a "report." Rather, the SEC has conceded that some resulted in documents that the agency termed "closing memoranda."

STANDARD OF REVIEW

This Court reviews de novo an agency's justification for the asserted application of a FOIA exemption to requested records. 5 U.S.C. § 552(a)(4)(B); *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009). This Court must "ascertain whether the agency has sustained its burden of demonstrating that the documents requested . . . are exempt from disclosure under" FOIA. *Summers v. DOJ*, 140 F.3d 1077, 1080 (D.C. Cir. 1998) (internal quotation marks omitted).

ARGUMENT

Under FOIA, each federal agency must "disclose records on request, unless they fall within one of nine exemptions." *Milner v. Dep't of Navy*, 131 S. Ct. 1259,

1262 (2011). Those exemptions "must be narrowly construed," with all doubts resolved in favor of disclosure. *Id.* (internal quotation marks omitted). Moreover, these "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is [FOIA's] dominant objective." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

This case involves the application of FOIA Exemption 8, which exempts from disclosure "matters that are . . . contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. § 552(b)(8). The parties agree that, for the purpose of Exemption 8, federal law defines the SEC as an agency responsible for regulating financial institutions, and that it defines FINRA as a financial institution regulated by the SEC. *See* 15 U.S.C. § 78x(e). Because the SEC does not argue that the requested records pertain to operating or condition reports, *see* Dist. Ct. Doc. 10, Def.'s Mot. for Summ. J. at 5-7; Dist. Ct. Op., JA 47, this case hinges on whether the requested records are "contained in or related to" an "examination report" under Exemption 8.

I. Exemption 8's Use of "Examination Reports" Does Not Protect from Disclosure Documents Pertaining to FINRA's Administrative Activities, Undertaken in FINRA's Role as a Self-Regulatory Organization.

The requested records in this case deal with a purely administrative function of a self-regulatory organization that offers arbitration services to resolve securities

disputes involving its members. The district court's conclusion that such documents are related to "examination reports" is at odds with the meaning of that phrase in Exemption 8. Congress used "examination reports" as a term of art to cover only information revealing financial transactions or conditions, or operating or management issues bearing on those financial transactions or conditions, of a financial institution acting in its role as a traditional market participant. Congress did not sweep within Exemption 8's scope records reflecting oversight of a self-regulatory organization's administrative function.

A. "Examination Reports," As Used in Exemption 8, Means Reports Concerning Financial Activities.

Although FOIA does not define "examination reports," numerous indicators make clear that the term has a special or technical meaning under the statute. "[W]here Congress has used technical words or terms of art, it is proper to explain them by reference to the art or science to which they are appropriate." *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974) (internal alterations and quotation marks omitted). Here, "examination report" is used in Exemption 8 as part of a reference to three related document types that are not part of common parlance—"examination, operating, or condition reports." 5 U.S.C. § 552(b)(8). The statute also indicates that these documents are used in a particular industry. They are "prepared by, on behalf of, or for the use of" agencies responsible for overseeing "financial institutions." *Id.* That Exemption 8 is industry-specific

further counsels in favor of reading "examination reports" as a term of art under the statute, rather than a general definition that must necessarily apply to all federal agencies. *Cf. Milner*, 131 S. Ct. at 1264 (turning to a dictionary definition at the time of FOIA's enactment to construe the term "personnel" under FOIA Exemption 2, applicable to all federal agencies).

Neither the SEC nor the district court has offered a definition for "examination report," despite asserting that Exemption 8's language plainly covers the documents at issue here. The SEC focused only on the term "examination" (not "examination reports"), and contended that the term should be given its common, modern-day meaning. Dist. Ct. Doc. 10, Def.'s Mot. for Summ. J. at 6. However, as described above, statutory indicators make clear that "examination reports" is a term of art under FOIA with limited scope. The SEC's resort to Thesaurus.com (*id.* at 6 n.4) for its contention that "examination" is a synonym for audits, inspections, and reviews—the types of documents described in PIABA's FOIA request—has no bearing on what Congress intended "examination reports" to mean in 1966 when it enacted FOIA.

Likewise, the district court simply stated that the exemption's meaning is "clear" and "should be applied as written." JA 47-48 (internal quotation marks omitted). But that conclusion begs the question: Clear as to what? The district court relied on language in *Consumers Union v. Heimann*, 589 F.2d 531 (D.C. Cir.

1978), and *Gregory v. FDIC*, 631 F.2d 896 (D.C. Cir. 1980) (per curiam), *see* JA 47-58, but those cases do not make explicit whether "examination reports" has a common or technical meaning under FOIA, nor do they identify the outer reaches of the term. In *Consumers Union*, this Court held that "bank examination reports" prepared by the Office of the Comptroller of the Currency (OCC) were covered by Exemption 8. 589 F.2d at 534. Those reports evaluated whether national banks' lending practices complied with the Truth in Lending Act. *Id.* at 532; *see also id.* at 537 n.10 (Wright, J., concurring) (further describing the records). The Court concluded without much discussion that the documents plainly fit within Exemption 8's broad language. Later, in *Gregory*, the Court held that "financial reports" prepared by the Federal Deposit Insurance Corporation were "examination, operating, or condition reports" exempt from disclosure. 631 F.2d at 898. The reports dealt with bank loans and banking relationships of two collapsed state banks. *Id.* at 899. The plaintiff "d[id] not contest" the district court's holding on the merits, which included a decision that "a literal reading of [Exemption 8] covered the financial records in dispute." *Id.* at 898. This Court instead focused its attention on the question whether application of that literal reading would lead to an unreasonable result. *Id*. *Consumers Union* and *Gregory* thus do not resolve the

question whether "examination reports" should be accorded a special meaning or whether the exemption's language covers the documents at issue here.[3]

Although FOIA does not define "examination reports," the legislative record reveals that Congress did not intend to cover reviews or inspections of a purely administrative function of an SRO like FINRA. House and Senate reports at the time of FOIA's adoption state that the exemption was "designed to insure the security and integrity of financial institutions, for the sensitive details collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm." H.R. Rep. No. 1497, 2d Sess., 89th Cong. 11 (1966); *accord* S. Rep. No. 813, 1st Sess., 89th Cong. 10 (1965) (stating that the exemption is "directed specifically to insuring the security of our financial institutions").

Moreover, in House and Senate hearings leading to FOIA's adoption, members of Congress and financial industry and agency witnesses made clear that the term "examination reports" was intended to cover information revealing financial transactions or conditions, or operating or management issues bearing on those financial transactions, of a financial institution in its role as a market

[3] In its only other Exemption 8 case, this Court held that "a 'financial institution' need not be a depository institution and examination reports need not pertain to an institution that is regulated or supervised by the withholding agency." *Public Citizen v. Farm Credit Admin.*, 938 F.2d 290, 293-94 (D.C. Cir. 1991). Because the parties agree that the SEC regulates FINRA and that FINRA is a financial institution, *Public Citizen* is not applicable here.

participant. By way of background, FOIA was adopted in 1966 to amend the public-disclosure section of the Administrative Procedure Act (APA), which had come "to be looked upon more as a withholding statute than a disclosure statute." *EPA v. Mink*, 410 U.S. 73, 79 (1973). The APA "was plagued with vague phrases," such as an exemption from disclosure for "any function of the United States requiring secrecy in the public interest." *Id.* (internal quotation marks omitted). Congress's movement to amend the APA's public-disclosure provision began "in earnest" in 1963. S. Rep. No. 93-82, 2d Sess., 93d Cong. (1974), Reprinted in Senate Subcommittee on Administrative Practice & Procedure, Freedom of Information Act Source Book: Legislative Materials, Cases, Articles 8 (1974) (Source Book). As initially proposed, the amendment included three exemptions from disclosure, none of which resembled current Exemption 8 or explicitly protected commercial or financial information. *See* S. 1666, 1st Sess., 88th Cong. (1963); *see also* Source Book at 8 (stating that S. 1663, a separate bill introduced at the same time as S. 1666, was identical with respect to the public disclosure provision).

The financial industry and regulators began lobbying for protection from disclosure of financial information and sought an industry-specific exemption. For example, during Senate hearings in 1963, a Treasury Department official strongly

objected to the bill as drafted and highlighted "examination reports" as one type of record that should not be disclosed. He explained the reports' contents as follows:

> I don't imagine you have ever had access to an examination report made by a national bank examiner, but he goes into that bank as you know, or several of them do, and they stay for quite a long time and they investigate all the loan credit files to see whether a loan is good, whether the bank has been provident and wise in extending the thing in the first place, and in keeping up-to-date credit information, and a bank can ask just about anything they want from a person to evaluate a loan.
>
> Then if it gets underwater they can ask even more.
>
> The criticism part of that report, for example, contains specific detailed criticisms of the X-Y-Z loan and the A-B-C loan for all these reasons.
>
> Now that is a very specific document which I don't think any of you or any of us would want to have made public.

Freedom of Information: Hearings on S. 1666 and S. 1663 Before the S. Subcomm. on Admin. Prac. & Proc., 1st Sess., 88th Cong. 190 (1963) (1963 Senate Hearings) (testimony of G. D'andelot Belin, Treasury Department General Counsel); *see also id.* at 271 (letter from the Treasury Department to the Hon. James Eastland, Chairman, S. Comm. on the Judiciary) (1963 Treasury Letter) (emphasizing that "[e]xaminations of banks reveal vast amounts of information with regard to deposits and financial activities of individuals and companies throughout the country").

The Treasury official also expressed concern that without a special exemption for "examination reports," two criminal statutory provisions might lose their bite. First, he highlighted the Trade Secrets Act, 18 U.S.C. § 1905, which criminalizes, among other things, a federal employee's unauthorized disclosure of trade secrets and certain other kinds of confidential information, such as the amount of an entity's income, profits, losses, or expenditures, where that information is obtained by way of an agency's "examination" or certain other methods.[4] *See* 1963 Senate Hearings at 191 (testimony of G. D'andelot Belin). He noted that the Trade Secrets Act does not apply where disclosure is made "as provided by law," and that the bill to amend the APA might provide such a source of law (a prescient statement in light of this Court's decision to that effect in *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1142 (D.C. Cir. 1987)). 1963 Senate Hearings at 191 (testimony of G. D'andelot Belin).

The Treasury Department also highlighted the bill's potential impact on 18 U.S.C. § 1906. *See* 1963 Senate Hearings at 271 (1963 Treasury Letter). That provision prohibited then, as it does today in pertinent part, a bank examiner from disclosing "the names of borrowers or the collateral for loans" of certain banks. *Id.* at 231 (memorandum from G. D'andelot Belin) (quoting 18 U.S.C. § 1906, as

[4] Although 18 U.S.C. § 1905 has been amended several times since FOIA's enactment, the prohibition described above has remained consistent.

codified in 1966). The Treasury Department expressed concern that under the bill, agency employees (other than bank examiners) could publicly disclose such examination-related documents, and in fact would be required to do so. *Id.* at 271 (1963 Treasury Letter).

The next year, Exemption 8 was inserted in the Senate bill, S. 1666. Its language was identical to that eventually adopted by Congress, with the exception that the phrase "any agency responsible" in the bill was changed to "an agency responsible" in the final legislation. *Compare* S. 1666, 2d Sess., 88th Cong. (1964) (as reported with amendments by the Committee on the Judiciary), *with* 5 U.S.C. § 552(b)(8). Testimony and discussion during the 1964 hearings again made clear that participants conceived of "examination reports" as addressing records revealing financial transactions or conditions, or operating or management issues bearing on those financial activities.[5] For example, an OCC official described examination reports as containing information "relating to the financial and commercial position of a bank" and "the personal affairs of bank officers." *Administrative Procedure Act: Hearings on S. 1663 Before the S. Subcomm. on Admin. Prac. & Proc.*, 2d Sess., 88th Cong. 186 (1964) (1964 Senate Hearings)

[5] The 1964 Senate hearings on the resulting bill took place before all the witnesses had reviewed the new Exemption 8; as a result, some of the statements and testimony identified weaknesses of the earlier bill, while others identified shortcomings of Exemption 8's language.

(testimony of Robert Bloom, Chief Counsel, OCC). In response to a question from Senator Kennedy about the scope of such reports, the official stated that "any particular [examination report] will contain information[] about a substantial number of borrowers." *Id.* at 196. Senator Long, the Chairman of the Senate Subcommittee on Administrative Practice and Procedure and a member widely credited for his role in crafting FOIA's language, elaborated on this point. He stated that, in his "experience in banking," an examination report would include the information of a substantial number of borrowers only when circumstances of the bank were dire. *Id.* He nevertheless agreed with the OCC official that such "information should not be made public and that is what we think that section 8 keeps from being made public." *Id.* at 197.

A statement by the American Bankers Association likewise defined "examination report" in terms of an examinee's financial interest and activities, expressing concern that the bill would require publication of such information:

> An examination report is not an audit of a bank, such as would be made by a certified public accountant, but rather it is an asset appraisal and an appraisal of the management, practices, and policies of the bank examined. The information contained in the report relating to asset appraisal is mainly data taken from the books and records of the bank itself. . . . The examination report usually contains a special section covering personal affairs of bank employees.

Id. at 549. The association contended that "[d]isclosure of information from examination reports and collateral records could seriously affect the financial

interest of the bank, its depositors, and its borrowers." *Id.* And it argued that a confidential relationship between bank examiners and banks was necessary, in part, to ensure that bank officials "feel free to disclose to the examiner facts having a bearing upon the bank's loans, general conditions, problems, operating and investment practices, and loan and credit policies." *Id.*

Thus, witnesses repeatedly referred to "examination reports" as a type of document that should be exempt from disclosure. They made clear that such reports contained sensitive information about an institution's financial transactions and condition, and the private, financial information of an institution's customers.

Although the addition of Exemption 8 was intended to allay concerns about the disclosure of "examination reports," as discussed at the hearings, it was not as broad as the exemption pressed by some federal agencies. An OCC official urged Congress to adopt a broader exemption than Exemption 8 for "all records containing information pertaining to the affairs of a bank." *Id.* at 179-80 (testimony of Robert Bloom, General Counsel, OCC). The Treasury Department urged adoption of an exemption for all records "relating to fiscal, monetary, foreign economic, national banking and internal revenue operations of the [agency]." *Id.* at 177E (Treasury Department Detailed Statement on S. 1663, as Revised, to Amend the APA). Despite these appeals for more expansive language, Congress adopted Exemption 8 in a form nearly identical to the one first introduced, thus rejecting

the all-encompassing exemptions urged by some financial regulators for documents relating to their oversight.[6]

Here, the documents do not bear on FINRA's financial transactions or condition. And they plainly do not fit within the confines of the type of "examination report" that witnesses repeatedly described in the legislative record. Instead, the documents concern FINRA's management of its arbitrator pool, its selection and evaluation of those arbitrators, and the adequacy of arbitrators' disclosures. *See* discussion, *supra*, at pp.11-13. The records also concern the extent of the SEC's review of customer complaints, which might indicate problems within FINRA's arbitration program that bear on the fairness of proceedings. *See*

[6] Although the SEC deemed the bills leading to FOIA as insufficiently protective of agency records, it did not urge the adoption of an expansive Exemption 8. Rather, the agency repeatedly lobbied for greater protections for personal, private information; information about business transactions, including mergers, acquisitions, and financing plans; preliminary proxy information; and information obtained as part of an investigation that might lead to an enforcement action. *See* 1963 Senate Hearings at 309-11 (Memorandum of the SEC to the Committee on the Judiciary on S. 1666); 1964 Senate Hearings at 541-42 (Memorandum of the SEC to the Subcommittee on Administrative Practice and Procedure on S. 1663 as Tentatively Revised); *Federal Public Records Law (Part 1): Hearings on H.R. 5012 Before a H. Subcomm. of the Comm. on Gov't Operations*, 1st Sess., 89th Cong. 259-60 (1965) (Memorandum of the SEC to the House Committee on Government Operations on H.R. 5012); *Administrative Procedure Act: Hearings on S. 1160 Before the S. Subcomm. on Admin. Prac. & Proc.*, 1st Sess., 89th Cong. 294-96 (1965) (Memorandum of the SEC on H.R. 5012 included in Senate record). FOIA Exemptions 4, 6, and 7 cover, respectively, certain commercial and financial information; personal, private information; and certain law enforcement investigation records. *See* 5 U.S.C. § 552(b)(4), (b)(6), (b)(7).

discussion, *supra*, *id.* Against the backdrop of Exemption 8's legislative record, the district court's holding that the exemption applies to records regarding FINRA's arbitration program cannot be sustained.

B. Withholding the Requested Records Would Not Serve Exemption 8's Purposes.

Exemption 8's purposes further confirm that matters "contained in or relating to" "examination reports" encompasses information only about financial transactions or conditions, or operating or management issues bearing on those financial activities, of a financial institution in its role as a market participant. The exemption was "primar[ily]" intended to "ensure the security of financial institutions" by preventing "unwarranted runs on banks" caused by disclosure. *Consumers Union*, 589 F.2d at 534. The SEC has never contended that withholding the requested records serves this purpose, *see* Dist. Ct. Op., JA 50 n.4, and for good reason. FINRA is not a depository institution or even a traditional market participant. It is a private regulatory association charged with regulating its members and enforcing the nation's securities laws and rules.

Withholding here likewise does not serve the "secondary purpose" of Exemption 8: "to safeguard the relationship between the banks and their supervising agencies." *Consumers Union*, 589 F.2d at 534. Congress feared that "[i]f details of the bank examinations were made freely available to the public and to banking competitors, . . . banks would cooperate less than fully with federal

authorities." *Id.* Disclosure of the requested records here does not threaten FINRA's cooperation with the SEC in the way envisioned by Congress when it enacted Exemption 8 for two reasons.

First, FINRA acts more like a monopolist in the securities arbitration field than a competitor. With limited exception, broker-dealers must become members of FINRA. In turn, FINRA rules require members to submit to arbitration at a customer's request, and, in any event, modern securities arbitration agreements "almost uniformly" require arbitration at FINRA. Jacobson Decl. ¶¶ 9, 10, JA 34. Indeed, FINRA now handles almost 100 percent of securities-related arbitrations and mediations in the United States.

Second, the SEC has strong mechanisms for ensuring FINRA's cooperation, including the authority to suspend FINRA from operating as a securities association or to impose limitations on FINRA's activities if FINRA refuses to make its records available. *See* 15 U.S.C. § 78s(h). In addition, should the SEC be unable to verify that FINRA arbitrations are procedurally fair, it has express authority to restrict the use of—or even prohibit outright—mandatory arbitration agreements between securities brokers or dealers and their customers and clients, where disputes arise under federal securities laws and regulations or FINRA's own rules. *See id.* § 78o(o) (requiring only that the SEC determine that such conditions

or an outright prohibition are "in the public interest and for the protection of investors").

The SEC has provided only conclusory assertions to the contrary, based on a declarant's observation that the agency "depends on receiving cooperation to effectively and efficiently conduct the types of examinations that are at issue here" and that the agency "relies on this cooperation to fulfill its oversight responsibilities." Lever Decl. ¶ 15, JA 31. Such vague assertions of impairment do not suffice to demonstrate that withholding serves Exemption 8's purpose. *Cf. Wash. Post Co. v. HHS*, 690 F.2d 252, 269 (D.C. Cir. 1982) (stating, in the context of a governmental-impairment analysis under FOIA Exemption 4, that "the question must be whether the impairment is significant enough to justify withholding the information" and that a "minor impairment" does not suffice).

The assertion that disclosure would hinder FINRA's cooperation is particularly weak here. Although such a request would not in any event trump FOIA's disclosure requirements, there is no evidence that FINRA even sought confidential treatment for all of the documents covered by PIABA's request. Under the SEC's FOIA regulations, if a submitter of information fails to request confidential treatment by the SEC, "it will be presumed that the submitter . . . has waived any interest in asserting an exemption from disclosure under [FOIA] for reasons of personal privacy or business confidentiality, *or for other reasons*." 17

C.F.R. § 200.83(h)(1) (emphasis added); *see also id.* § 200.83(c)(1) (providing process for designation of confidential material "for reasons of personal privacy or business confidentiality, or for any other reason permitted by Federal law"). The SEC's declarant states only that "FINRA requested FOIA confidential treatment for the documents provided to OCIE in connection with *one or more* of the examinations described" in the declaration. Lever Decl. ¶ 12, JA 29 (emphasis added).

C. The District Court Erred in Its Understanding of FOIA's Structure and in Its Interpretation of a Recent Statutory Amendment Defining "Financial Institution."

For its reading of the term "examination report," the district court relied in part on the structure of FOIA and on a recent legislative amendment to the Exchange Act, which defines any entity regulated, supervised, or examined by the SEC as a "financial institution" for the purpose of Exemption 8. JA 52, 54-59. Neither provides support for the district court's remarkably broad interpretation of "examination report" to cover records regarding FINRA's management of arbitrator pools, the selection and evaluation of arbitrators, arbitrators' disclosures, and customer complaints about the FINRA arbitration process.

1. A broad reading of Exemption 8 is not needed to ensure that Exemption 4 retains a distinct meaning.

The district court contended that its interpretation of "examination report" was necessary to ensure that FOIA Exemption 4 retains some "meaning that is

reasonably distinct from that of Exemption 8." JA 52. Exemption 4 protects from disclosure "commercial or financial information obtained from a person that is privileged or confidential." 5 U.S.C. § 552(b)(4).

The district court's rationale ignores that, in many circumstances, under any reading of "examination report," the government will be able to justify withholding under Exemption 8 more easily than it could under Exemption 4. For example, under a properly narrow definition of "examination report," an agency could rely on Exemption 8 to withhold bank examination reports detailing the loans and financial solvency of a bank, where it could not withhold this information under Exemption 4 unless it demonstrated that the documents were subject to a privilege or that disclosure would be "likely either '(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.'" *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc) (quoting *Nat'l Parks & Conserv. Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)) (setting forth test applicable to mandatory submissions of information).

Moreover, the district court ignored the use of Exemption 4 by agencies that are not involved in the regulation or supervision of financial institutions, or by financial regulators outside the context of "examination, operating, or condition

reports." For example, agencies such as the Food and Drug Administration and the National Highway and Traffic Safety Administration cannot rely on Exemption 8, but they obtain trade secrets and certain other commercial information that is protected from disclosure by Exemption 4.

2. Recent legislation defining FINRA as a "financial institution" does not affect the meaning of "examination reports" in Exemption 8.

The district court's reliance on a 2010 legislative amendment, which repealed a broad anti-disclosure provision in the Dodd-Frank Act and made clear that FINRA is a "financial institution," also misses the mark. By way of background, in 2010, Congress adopted, with urging from the SEC's enforcement division, section 929I of the Dodd-Frank Act. *See* 156th Cong. Rec. H6952 (Sept. 23, 2010) (statement of Rep. Frank). That provision amended the Exchange Act to permit the SEC to withhold from the public:

> records or information obtained pursuant to [15 U.S.C. § 78q(b)], or records or information based upon or derived from such records or information, if such records or information have been obtained by the [SEC] for use in furtherance of the purposes of this title, including surveillance, risk assessments, or other regulatory and oversight activities.

Dodd-Frank Act, § 929I, 124 Stat. at 1857-58 (hereinafter, Section 929I), *repealed in pertinent part by* 2010 Amendment, § 1, 124 Stat. at 2646. Under 15 U.S.C. § 78q(b), referenced in Section 929I, the records of numerous entities, including FINRA, are subject to "reasonable periodic, special, or other examinations" by the

SEC where "necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the [Exchange Act's] purposes."

News reports subsequently indicated that the SEC planned to rely on Section 929I in response to FOIA requests by Fox Business News, which had sued the SEC to obtain records about the agency's handling of the Bernie Madoff investment fraud scandal. *See* Dunstan Prial, *SEC Says New Financial Regulation Law Exempts It from Public Disclosure*, FoxBusinessNews.com, July 28, 2010, *available at* http://www.foxbusiness.com/markets/2010/07/28/sec-says-new-fin reg-law-exempts-public-disclosure. Public outrage ensued, and within weeks of the news reports, House and Senate bills proposed either repealing or replacing Section 929I. *See* H.R. 5924, 111th Cong. (2010); H.R. 5948, 111th Cong. (2010); H.R. 5970, 111th Cong. (2010); H.R. 6086, 111th Cong. (2010); S. 3717, 111th Cong. (2010). Senator Leahy, who introduced the Senate bill that ultimately replaced Section 929I, expressed concern that the Dodd-Frank provision could be interpreted to undermine that statute's goal of "enhancing transparency and accountability in our financial system." 156th Cong. Rec. S6889 (Aug. 5, 2010) (statement of Sen. Leahy). He disapproved of the SEC's "sweeping interpretation" of section 929I, which he said would permit the agency to "shield all information provided to the [SEC] in connection with its broad examination and surveillance activities." *Id.*; *see also* 156th Cong. Rec. H6954 (Sept. 23, 2010) (statement of

Rep. Towns, House sponsor of companion bill H.R. 6086) (describing his opposition to Section 929I because it "allow[ed] the SEC to avoid disclosing virtually any information it obtain[ed] under its examination authority").

The SEC urged Congress to retain section 929I on two grounds: first, that some entities regulated by the SEC had not yet been deemed "financial institutions" for the purpose of FOIA Exemption 8, and second, that the SEC needed new authority for withholding documents in non-FOIA contexts, such as court proceedings. *Legislative Proposals to Address Concerns over the SEC's New Confidentiality Provision: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. (2010) (testimony of SEC Chairwoman Schapiro), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg62679/html/CHRG-111hhrg62679.htm. Congress nevertheless repealed the provision with a unanimous vote in the Senate and a voice vote in the House. It replaced Section 929I with a provision providing, in pertinent part, that "any entity for which the [SEC] is responsible for regulating, supervising, or examining under [the Exchange Act] is a financial institution." *See* 2010 Amendment, *codified at* 15 U.S.C. § 78x(e). In a nod to the SEC's oversight responsibilities for new entities under the Dodd-Frank Act, Senator Leahy described the replacement provision as one that would help to "ensure that the SEC has access to the information that the Commission needs to carry out its new enforcement activities under the new reforms." 156th Cong. Rec.

S7298 (Sept. 21, 2010) (statement of Sen. Leahy). Congress did not, however, change the definition of an "examination, operating, or condition report."

The district court here recognized that the 2010 Amendment was a "well-intentioned legislative fix" adopted to ensure transparency in the SEC's operations. JA 59. Yet it concluded that because FINRA falls within the provision's definition of "financial institution," "Congress appear[ed] to have given back with . . . FOIA what it simultaneously intended to take away by repealing section 929I." JA 58. The district court determined that its decision might "mean . . . that Exemption 8 applies to everything the SEC scoops up in the course of its interaction with FINRA," but that such an outcome was the only one that comports with FOIA's language and congressional intent. JA 59 (internal quotation marks omitted).

The district court's conclusion makes no sense. Even with the 2010 Amendment, Exemption 8's coverage as applied to the SEC is limited to information "contained in or related to examination, operating, or condition reports." 5 U.S.C. § 552(b)(8). Before its repeal, section 929I would have reached—for both FOIA and non-FOIA purposes—all information obtained by the SEC in its "examinations" (as that term is used in the Exchange Act, 15 U.S.C. § 78q(b)) of regulated entities such as FINRA, or records obtained or derived from such information. There would have been no requirement that such examination

under the Exchange Act lead to an "examination report," as that term is used in FOIA.

Moreover, the district court's conclusion cannot be reconciled with Congress's express purpose in enacting the 2010 Amendment. The amendment's primary sponsors expressly rejected an outcome that would exempt "all information provided to the [SEC] in connection with its broad examination and surveillance activities." 156th Cong. Rec. S6889 (statement of Sen. Leahy); *accord* 156th Cong. Rec. H6954 (statement of Rep. Towns). Yet that outcome is precisely the one countenanced by the district court's opinion and advocated by the SEC in this case. It "would ill-serve Congress's purpose by construing Exemption [8] to reauthorize the expansive withholding that Congress wanted to halt." *Milner*, 131 S. Ct. at 1266. Accordingly, this Court should reverse the district court's decision interpreting Exemption 8's reference to "examination reports" to reach information about a purely administrative function, such as records regarding FINRA's management, selection, and evaluation of arbitrators, and the SEC's review of customer complaints about the arbitration process.

II. Under Exemption 8, the SEC Must Show That Withheld Information Is "Contained in or Related to" a Specific Examination Report.

Even if this Court were to adopt a more expansive interpretation of "examination reports," Exemption 8 requires the SEC to identify a specific report to which the information relates. The district court, however, erroneously held that

the agency need not "identify a specific report to which the [withheld] information relates." JA 62 (internal quotation marks omitted). Rather, the court determined that because "all of the potentially responsive documents were obtained pursuant to the SEC's ongoing and continuous oversight responsibilities," they fall "within the ambit of Exemption 8." *Id.* (internal quotation marks omitted).

The district court's position is untethered from the statute's plain language. Exemption 8 applies where information is "contained in or related to examination, operating, or condition reports." 5 U.S.C. § 552(b)(8). The statute presupposes the existence of an actual report, and the government's ability to demonstrate that all information withheld under Exemption 8 is either in that report or "related to" it. There is no statutory basis for the district court's far more expansive reading, which replaces "examination, operating, or condition report" with "ongoing and continuous oversight responsibilities." Indeed, the only way to reach the district court's reading "is by taking a red pen to the statute—cutting out some words and pasting in others until little of the actual provision remains." *Milner*, 131 S. Ct. at 1267 (internal quotation marks omitted).

The district court's interpretation is also at odds with FOIA's purpose. Because FOIA has a "goal of broad disclosure," its exemptions must be "given a narrow compass." *DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989). The district court's decision would turn the oft-repeated maxim that FOIA exemptions are to

be narrowly construed on its head, rendering Exemption 8 an exception that swallows the disclosure rule.

III. The SEC Has Not Met Its Burden of Demonstrating That Exemption 8 Applies.

The district court found in the alternative that "each potentially responsive document does appear to relate to an examination report of some kind." JA 62. It based that conclusion on the SEC's statement that (1) the potentially responsive records "'relate to four examinations conducted by OCIE,'" and (2) that "'[e]ach examination described . . . resulted in a writing, either termed a report or closing memorandum.'" *Id.* (quoting Lever Decl. ¶¶ 7, 9, JA 27-28).

The district court misread part of the evidence and ignored another. The SEC's declarant stated that "each potentially responsive document relates to one of . . . four examinations," which she elsewhere described as "inspections," in her declaration, "*and/or* relates to one or more customer complaints described in" the declaration. Lever Decl. ¶ 14, JA 30 (emphasis added); *see also id*. ¶¶ 7, 8, JA 27-28 (stating that "the documents potentially responsive to PIABA's FOIA request relate to four examinations conducted by OCIE, including" those described in the declaration and that "[i]n addition, some of the potentially responsive documents may relate to particular complaints received by the SEC from arbitration participants"). Thus, the declarant did not actually state that each of the requested records relates to an "examination," much less an "examination report." *See also*

Dist. Ct. Doc. 18, Def.'s Reply at 8 (stating that "each responsive document relates to an examination report, and/or was received as part of the SEC's ongoing supervisory process" and that "[e]ither way," Exemption 8 applies).

Moreover, the SEC's own declarant distinguished between a "report" and a "closing memorandum," as did the SEC in its briefing below. *See* Lever Decl. ¶ 9, JA 28; Dist. Ct. Doc. 18, Def.'s Reply at 8. The declarant made clear that some inspections or reviews of customer complaints identified in the declaration resulted only in closing memoranda. Lever Decl. ¶ 9, JA 28. The district court wholly disregarded this distinction, and because the SEC bears the burden of demonstrating that Exemption 8 applies, the district court's decision should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order granting summary judgment to the SEC and denying PIABA's cross-motion for summary judgment and remand to the district court for proceedings not inconsistent with this Court's decision.

Dated: November 25, 2013

Respectfully submitted,

/s/ Julie A. Murray

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: The type face is fourteen-point Times New Roman font, and the word count is 10,050.

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF SERVICE

I certify that on November 25, 2013, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Julie A. Murray
Julie A. Murray

ORAL ARGUMENT NOT YET SCHEDULED

NO. 13-5137

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION,
Plaintiff-Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION,
Defendant-Appellee.

On Appeal from a Final Order of the
U.S. District Court for the District of Columbia
(Honorable Beryl A. Howell)

JOINT APPENDIX

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November 25, 2013

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APPEAL,CLOSED,TYPE I−FOIA

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:11−cv−02285−BAH

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Assigned to: Judge Beryl A. Howell
Case in other court: USCA, 13−05137
Cause: 05:552 Freedom of Information Act

Date Filed: 12/22/2011
Date Terminated: 03/14/2013
Jury Demand: None
Nature of Suit: 895 Freedom of Information Act
Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
12/22/2011	1	COMPLAINT against UNITED STATES SECURITIES AND EXCHANGE COMMISSION (Filing fee $ 350, receipt number 4616044738) filed by PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION. (Attachments: #1 Exhibit 1, #2 Exhibit 2, #3 Exhibit 3, #4 Exhibit 4, #5 Civil Cover Sheet)(rdj) (Entered: 12/27/2011)
12/27/2011	2	LCvR 7.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION (Ball, Daniel) (Entered: 12/27/2011)
01/04/2012	3	STANDING ORDER. Signed by Judge Beryl A. Howell on January 4, 2012. (lcbah1) (Entered: 01/04/2012)
01/06/2012	4	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. UNITED STATES SECURITIES AND EXCHANGE COMMISSION served on 12/29/2011 (Attachments: #1 Certificate of Service)(Ball, Daniel) (Entered: 01/06/2012)
01/06/2012	5	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 1/3/2012. (Answer due for ALL FEDERAL DEFENDANTS by 2/2/2012.), RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United States Attorney General. Date of Service Upon United States Attorney General 1/3/2012. (See Docket Entry 4 to view document)(rdj) (Entered: 01/06/2012)
02/02/2012	6	ANSWER to 1 Complaint, by UNITED STATES SECURITIES AND EXCHANGE COMMISSION.(Hardy, Melinda) (Entered: 02/02/2012)
04/09/2012	7	MEET AND CONFER STATEMENT. (Cody, Kathleen) (Entered: 04/09/2012)
04/10/2012	8	NOTICE of Appearance by Kathleen A. Cody on behalf of All Defendants (Cody, Kathleen) (Entered: 04/10/2012)
04/10/2012		MINUTE ORDER (paperless) Upon consideration of the parties' 7 Joint Status Report, the parties shall comply with the following deadlines: The defendant shall file a dispositive motion by May 11, 2012. The plaintiff shall file its opposition and any cross−dispositive motion by May 25, 2012. The defendant shall file a reply in support of its motion and an opposition to any motion filed by the plaintiff by June 8, 2012. The plaintiff shall file a reply in support of any motion it has filed by June 15, 2012. Signed by Judge Beryl A. Howell on April 10, 2012. (lcbah1) (Entered: 04/10/2012)
04/11/2012		Reset Deadlines: Dispositive Motions due by 5/11/2012. Response to Dispositive Motions due by 5/25/2012. Reply to Dispositive Motions due by 6/8/2012. Responses due by 6/15/2012 (tj) (Entered: 04/11/2012)
05/11/2012	9	NOTICE of Appearance by Karen Johnson Shimp on behalf of UNITED STATES SECURITIES AND EXCHANGE COMMISSION (Shimp, Karen) (Entered: 05/11/2012)

05/11/2012	10	MOTION for Summary Judgment by UNITED STATES SECURITIES AND EXCHANGE COMMISSION (Attachments: #1 Declaration by Kristen Lever, #2 Statement of Facts Material Facts Not in Genuine Dispute, #3 Text of Proposed Order)(Shimp, Karen) (Entered: 05/11/2012)
05/11/2012	11	MOTION For an Order Preserving the Right to Assert Additional Exemptions by UNITED STATES SECURITIES AND EXCHANGE COMMISSION (Attachments: #1 Text of Proposed Order)(Shimp, Karen) (Entered: 05/11/2012)
05/25/2012	12	RESPONSE re 10 MOTION for Summary Judgment , *Memorandum and Cross−Motion for Summary Judgment* filed by PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION. (Attachments: #1 Declaration of William Jacobson, #2 Counter−Statement of Material Facts in Dispute and Cross−Motion for S.J. Statement of Undisputed Facts, #3 Forest Guardians slip op., #4 Text of Proposed Order)(Ball, Daniel) (Entered: 05/25/2012)
05/25/2012	13	RESPONSE re 11 MOTION For an Order Preserving the Right to Assert Additional Exemptions *and Memorandum in Opposition* filed by PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION. (Attachments: #1 Text of Proposed Order)(Ball, Daniel) (Entered: 05/25/2012)
05/25/2012	15	CROSS MOTION for Summary Judgment by PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION. (See Docket Entry 12 to view document) (dr) (Entered: 06/08/2012)
05/30/2012	14	Unopposed MOTION for Extension of Time to File Response/Reply as to 11 MOTION For an Order Preserving the Right to Assert Additional Exemptions by UNITED STATES SECURITIES AND EXCHANGE COMMISSION (Shimp, Karen) (Entered: 05/30/2012)
05/31/2012		MINUTE ORDER (paperless) granting 14 Defendant's Unopposed Motion for Extension of Time to File Reply in Support of Motion for an Order Preserving the Right to Assert Additional Exemptions. The defendant shall file a reply in support of its motion by June 8, 2012. Signed by Judge Beryl A. Howell on May 31, 2012. (lcbah1) (Entered: 05/31/2012)
06/08/2012	16	REPLY to opposition to motion re 11 MOTION For an Order Preserving the Right to Assert Additional Exemptions filed by UNITED STATES SECURITIES AND EXCHANGE COMMISSION. (Shimp, Karen) (Entered: 06/08/2012)
06/08/2012	17	REPLY to opposition to motion re 10 MOTION for Summary Judgment filed by UNITED STATES SECURITIES AND EXCHANGE COMMISSION. (Attachments: #1 Statement of Facts Reply supporting SEC's statement of material facts not in genuine dispute and responding to PIABA's statement of material facts not in genuine dispute, #2 Text of Proposed Order)(Shimp, Karen) (Entered: 06/08/2012)
06/08/2012	18	Memorandum in opposition to re 15 MOTION for Summary Judgment filed by UNITED STATES SECURITIES AND EXCHANGE COMMISSION. (Attachments: #1 Statement of Facts Reply in support of SEC's statement of material facts not in genuine dispute and responding to PIABA's statement of material facts not in genuine dispute, #2 Text of Proposed Order)(Shimp, Karen) (Entered: 06/08/2012)
06/14/2012	19	REPLY to opposition to motion re 15 MOTION for Summary Judgment filed by PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION. (Ball, Daniel) (Entered: 06/14/2012)
07/16/2012		MINUTE ORDER (paperless) granting 11 Defendant's Motion and Memorandum of Points and Authorities by the Securities Exchange Commission for an Order Preserving the Right to Assert Additional Exemptions. The defendant has sought summary judgment on the grounds that all documents at issue are protected from disclosure by Exemption 8 but has also notified the Court that Exemptions 4, 5, and 6 will likely apply to some or all of the documents. ECF No. 11 at 2; ECF No. 16 at 45. In the interests of preserving agency resources, promoting judicial economy, and ensuring the speedy and efficient resolution of this matter, the Court will allow the defendant to preserve the right to assert Exemptions 4, 5, and 6 in this case should the defendant's pending 10 Motion and Memorandum of Points and

		Authorities by the Securities and Exchange Commission for Summary Judgment be denied. Signed by Judge Beryl A. Howell on July 16, 2012. (lcbah1) (Entered: 07/16/2012)
03/14/2013	20	ORDER granting the defendant's 10 Motion for Summary Judgment; and denying the plaintiff's 15 Cross−Motion for Summary Judgment. The Clerk is directed to close this case. Signed by Judge Beryl A. Howell on March 14, 2013. (lcbah1) (Entered: 03/14/2013)
03/14/2013	21	MEMORANDUM OPINION regarding the defendant's 10 Motion for Summary Judgment and the plaintiff's 15 Cross−Motion for Summary Judgment. Signed by Judge Beryl A. Howell on March 14, 2013. (lcbah1) (Entered: 03/14/2013)
05/10/2013	22	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 20 Order on Motion for Summary Judgment, 21 Memorandum &Opinion by PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION. Filing fee $ 455, receipt number 0090−3319091. Fee Status: Fee Paid. Parties have been notified. (Attachments: # 1 Exhibit Order (Document 20), # 2 Exhibit Memorandum Opinion (Document 21), # 3 Exhibit Minute Order)(Ball, Daniel) (Entered: 05/10/2013)
05/10/2013	23	Transmission of the Notice of Appeal, Order Appealed, and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid this date re 22 Notice of Appeal to DC Circuit Court. (rdj) (Entered: 05/10/2013)
05/14/2013		USCA Case Number 13−5137 for 22 Notice of Appeal to DC Circuit Court, filed by PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION. (rdj) (Entered: 05/14/2013)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION 2415 A Wilcox Drive Norman, OK 73069 Plaintiff, -against- **UNITED STATES SECURITIES AND EXCHANGE COMMISSION** 100 F. Street, N.E. Washington, D.C. 20549 Defendant.	Case No. _____

COMPLAINT FOR DECLARATORY JUDGMENT

The Public Investors Arbitration Bar Association ("PIABA") files this Complaint for Declaratory Judgment against the United States Securities and Exchange Commission (the "SEC").

NATURE OF THE ACTION

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et. seq.*, to compel compliance with FOIA, including production of records requested from the SEC on February 9, 2010.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

3. Venue is proper in the District of Columbia pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

4. PIABA is a bar association whose members represent public investors in disputes with the securities industry. PIABA's mission is to serve the interests of the public investor in securities and commodities arbitration by protecting public investors from abuses in the arbitration process, such as those associated with the arbitrator selection process, document production, and discovery; making securities and commodities arbitration as just and fair as systematically possible; and creating a level playing field for the public investor in securities and commodities arbitration.

5. The SEC is an agency of the United States that has possession of and control over the agency records that are the subject of this action. The SEC's mission "is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[1] It is the responsibility of the SEC to oversee Self-Regulatory Organizations in the securities field. 15 U.S.C. § 78s.

FACTUAL BACKGROUND

6. The Financial Industry Regulatory Authority (FINRA) is the largest independent regulatory organization for securities firms doing business in the United States.[2] FINRA's "mission is to protect America's investors by making sure the securities industry operates fairly and honestly."[3] FINRA Dispute Resolution, Inc. (formerly known as the National Association of Securities Dealers (NASD) Dispute Resolution, Inc.), is a subsidiary company under the umbrella of FINRA (formerly the

[1] The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, *available at* http://www.sec.gov/about/whatwedo.shtml (last visited November 15, 2011).
[2] FINRA, http://www.finra.org/ (last visited November 15, 2011).
[3] About the Financial Industry Regulatory Authority, http://www.finra.org/AboutFINRA/ (last visited November 15, 2011).

National Association of Securities Dealers, Inc. (NASD)) charged with administrating arbitration, mediation, and other alternative dispute resolution services.[4] FINRA Dispute Resolution, Inc.'s role in dispute resolution is to be "separate[ ] . . . from the disciplinary role of [FINRA] Regulation [to] result in a more neutral and independent forum for the resolution of disputes between members, associated persons, and customers."[5] Because FINRA is not an entity or agency of the United States it is not subject to FOIA.

7. On February 9, 2010, PIABA submitted a written request to the SEC under FOIA (hereafter "FOIA Request") seeking, for the period of January 1, 2000 to the date of the response:

> (1) Documents relating to audits, inspections, and reviews conducted by the [SEC] in connection with the arbitrator selection process of [FINRA]; (2) Documents relating to audits, inspections, and reviews conducted by the SEC in connections with FINRA's appointment of replacement arbitrators in the event that an arbitrator is stricken as part of the list selection process or removed for cause; (3) Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's policies, procedures, and processes in deciding causal challenges to an arbitrator's appointment; (4) Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's internal policies and procedures regarding arbitrator selection, appointment, and replacement; (5) Documents relating to audits,

[4] *NASD Launches New Dispute Resolution Subsidiary*, FINRA News Release, *available at* http://www.finra.org/Newsroom/NewsReleases/2000/P011399 (last visited November 15, 2011).
[5] Self-Regulatory Organizations: Order Approving a Proposed Rule Change by the National Association of Securities Dealers, Inc. to Create a Dispute Resolution Subsidiary, 64 Fed. Reg. 55793 (Sept. 30, 1999).

> inspections, and reviews conducted by the SEC in connection with FINRA's pre-approval background check on arbitrator applicants; and (6) Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's public arbitrator pilot program.

Exhibit 1. The SEC received PIABA's request on February 23, 2010.

8. On March 24, 2010, the SEC's FOIA/Privacy Act Office, in a letter to PIABA, announced that it was withholding all records responsive to PIABA's request, citing 5 U.S.C. § 552(b)(8) ("Exemption 8") in support of its decision. Exhibit 2. The SEC improperly refused to produce any records under a blanket assertion of Exemption 8. It also did not release any reasonably segregable portion of the withheld records or provide PIABA with a list or description of the withheld records as required under Exemption 8(b).

9. PIABA filed an administrative appeal of the SEC's decision with the SEC's General Counsel, pursuant to 5 U.S.C. 552(a)(6). Exhibit 3. PIABA maintained in its appeal that the SEC's denial of PIABA's request did not satisfy the purposes of Exemption 8. *Id.* Specifically, the appeal maintained that Congress by enacting Exemption 8:

> sought to exempt financial institutions from producing information that would (1) lead to financial speculation or endanger the stability of any financial institution and (2) would undermine the regulatory relationship between agencies and the entities that agencies regulate in order to foster an environment of full cooperation. Thus, the legislative intent was meant to protect against the 'unwarranted runs on banks' . . .

Exhibit 3. The appeal maintained that the responsive documents, because they "would not undermine FINRA's credibility as a 'financial institution' nor would they subvert the cooperative relationship between" FINRA and the SEC, do not properly fall within Exemption 8. Exhibit 3. The SEC's FOIA/Privacy Act Office received PIABA's appeal on April 1, 2011.

10. In a letter dated April 25, 2011, the SEC's General Counsel's office, by Assistant General Counsel Richard M. Humes, rejected PIABA's appeal, stating that Exemption 8 properly applied because the withheld records "**were obtained or created during the course of an inspection conducted by Commission staff."** (emphasis added) Exhibit 4. The SEC admits, therefore, the existence of the documents. The SEC, as a federal agency, is subject to FOIA and therefore has a duty to "make available to the public" any information that does not fall within one of the stated exemptions. 5 U.S.C. § 552. The SEC improperly failed to disclose any records responsive to PIABA's request, specify what information was withheld, explain how the information withheld was "contained in or related to examination, operating, or condition reports," 5 U.S.C. § 552(b)(8), and failed to disclose any reasonably segregated portion of the relevant documents.

11. As if to support its blanket assertion of Exemption 8, the SEC in its denial of PIABA's appeal claimed that withholding the relevant documents "facilitates the staff's oversight and supervision of [FINRA's] activities" and therefore "advances the two principal purposes of Exemption 8: (1) to protect the security of financial institutions and (2) to promote cooperation and communication between regulated entities and their examiners." The SEC's letter claims that its broad interpretation of Exemption 8 satisfies

its legislative purpose of "protecting the integrity of financial institutions and facilitating cooperation between agencies and entities regulated by them" because "[d]isclosure would reveal very sensitive details collected by government agencies." Beyond these generalized statements, the SEC did not offer any other information that would enable PIABA to evaluate whether the documents were indeed "contained in or related to examination, operating, or condition reports," what the nature of the responsive documents were, or how disclosure of the documents would endanger FINRA's integrity as a financial institution or the SEC's relationship with FINRA.

12. As of the filing of this Complaint, the SEC has not disclosed any documents in response to PIABA's FOIA Request or appeal and has not provided a list of documents withheld. The SEC also has failed to provide an estimate of the volume of records that are being withheld in their entirety as mandated by Exemption 8(d)(5)(iv).

CLAIM FOR RELIEF

FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

13. PIABA repeats and realleges all of the allegations set forth in paragraphs 1 through 12 above.

14. An actual, present and justiciable controversy exists between Plaintiff PIABA and Defendant SEC in that PIABA has requested documents from the SEC under the Freedom of Information Act and the SEC contends that the documents are exempt from disclosure pursuant to Exemption 8.

15. PIABA has exhausted all required and available administrative remedies.

16. PIABA seeks a declaratory judgment from this Court declaring that all of the documents in the custody and control of the SEC, which are covered by PIABA's FOIA Request, must be disclosed to PIABA and that such documents are not protected from disclosure by Exemption 8.

17. Alternatively, PIABA seeks a declaratory judgment from this Court declaring that portions of the documents in the custody and control of the SEC, which are covered by PIABA's FOIA Request, are reasonably segregable, must be disclosed to PIABA, and that portions of such documents are not protected from disclosure by Exemption 8.

18. PIABA requests the Court to award it reasonable attorneys' fees, expenses, and costs incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E).

19. PIABA requests the Court to enter other and further relief to which PIABA may be entitled as a matter of law, or which the Court determines to be just and proper, to compel the SEC to produce documents covered by PIABA's FOIA Request.

WHEREFORE, for these and other such reasons as the Court may find, Plaintiff PIABA requests the Court to enter a Declaratory Judgment against Defendant United States Securities and Exchange Commission.

DATED: December 22, 2011

BALL LAW OFFICES, P.C.

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Public Investors Arbitration Bar Association

February 9, 2010

United States Securities and Exchange Commission
100 F Street, NE
Mail Code 5100
Washington, DC 20549

Dear Sir or Madam:

This is a request under the Freedom of Information Act. We request that a copy of the documents containing the following information be provided to us, for the period covering January 1, 2000 to the date of response:

1. Documents relating to audits, inspections, and reviews conducted by the Securities and Exchange Commission ("SEC") in connection with the arbitrator selection process of the Financial Industry Regulatory Authority ("FINRA")[1];

2. Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's appointment of replacement arbitrators in the event that an arbitrator is stricken as part of the list selection process or removed for cause;

3. Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's policies, procedures, and processes in deciding causal challenges to an arbitrator's appointment;

4. Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's internal policies and procedures regarding arbitrator selection, appointment, and replacement;

5. Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's pre-approval background check on arbitrator applicants; and

[1] FINRA was created in July 2007 and is the successor the National Association of Securities Dealers, Inc. ("NASD"). All requests herein should be considered requests for information relating to both FINRA and NASD.

6. Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's public arbitrator pilot program.[2]

The Public Investors Arbitration Bar Association ("PIABA") is an association of securities arbitration attorneys who represent public investors in securities disputes. Disclosure of the requested information is in the public interest, as it is likely to contribute significantly to the public understanding of the arbitration process; this information will not serve a commercial interest. As a public interest group, PIABA requests a waiver of all review costs associated with this request. PIABA is willing to pay fees limited to search and reproduction costs.

If you have any questions or would like to discuss any aspect of our request, please do not hesitate to contact PIABA at 1-888-621-7484 during the hours 9:00 a.m.-5:00 p.m. Central Time, or contact me at the number below. Thank you for your consideration of this request.

Very truly yours,

/s/

Scott R. Shewan, President

Mr. Shewan's Contact Information

Scott R. Shewan
Pape & Shewan, LLP
642 Pollasky Avenue, Suite 200
Clovis, California 93612
Telephone: (559) 299-4341
Facsimile: (559) 299-0920

[2] News Release, FINRA, FINRA to Launch Pilot Program to Evaluate All-Public Arbitration Panels (July 24, 2008), http://www.finra.org/Newsroom/NewsReleases/2008/P038958.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
STATION PLACE
100 F STREET, NE
WASHINGTON, DC 20549

Office of Freedom of Information
& Privacy Act Operations

Mail Stop 2736 March 24, 2010

Mr. Scott Shewan
Pape & Shewan, LLP
642 Pollasky Avenue Suite 200
Clovis, CA 93612

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552
Request No. 10-04520-FOIA

Dear Mr. Shewan:

This letter responds to your request, dated February 09, 2010, and received in this office on February 23, 2010, for information regarding the ***FINRA Arbitrator Selection Process***.

After consulting with other Commission staff, we have determined to withhold the non-public records that may be responsive to your request under 5 U.S.C. § 552(b)(8), 17 CFR § 200.80(b)(8). This exemption protects from disclosure records that relate to examination, operating, and condition reports, prepared by or on behalf of the Commission, in connection with its supervision and regulation of financial institutions.

You have the right to appeal our decision to our General Counsel under 5 U.S.C. § 552(a)(6), 17 CFR § 200.80(d)(5) and (6). Your appeal must be in writing, clearly marked "Freedom of Information Act Appeal," and should identify the requested records. The appeal may include facts and authorities you consider appropriate.

Send your appeal to the FOIA/Privacy Act Office of the Securities and Exchange Commission located at Station Place, 100 F Street NE, Mail Stop 2736, Washington, D.C. 20549, or deliver it to Room 1120 at that address. Also, send a copy to the SEC Office of the General Counsel, Mail Stop 9612, or deliver it to Room 1120 at the Station Place address.

If you have any questions, please contact Tina Churchman of my staff at churchmant@sec.gov or (202) 551-8330. You may also contact the undersigned at fullerb@sec.gov or (202) 551-7900.

Sincerely,
FOIA/Privacy Act Officer

by: Brenda L Fuller

Brenda L. Fuller
FOIA/Privacy Act Branch Chief

Public Investors Arbitration Bar Association

March 21, 2011

United States Securities and Exchange Commission
100 F Street, NE
Mail Code 5100
Washington, DC 20549

FREEDOM OF INFORMATION ACT APPEAL
CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552 Request No. 10-04520-FOIA

Dear FOIA Officer,

This is an appeal pursuant to 5 U.S.C. § 552 concerning the refusal of the Securities and Exchange Commission ("SEC") to disclose certain documents within its control.

The requested documents are audits, inspections, and reviews conducted by the SEC regarding the arbitration function of the Financial Industry Regulatory Authority's ("FINRA"), as set forth in our FOIA request (copy attached). The SEC's determination, which is the subject of this appeal, also is attached. As set forth below, the SEC's refusal to disclose the requested items violates the Freedom of Information Act ("FOIA" or "Act"), 5 U.S.C. § 552 et seq., as amended.

Introduction

We submitted an original FOIA request, dated February 9, 2010. The requested materials will facilitate transparency in the arbitration process.

Unfortunately, by a letter dated March 24, 2010, and signed by Brenda L. Fuller, the SEC has refused to disclose any of the requested materials. The stated basis was the exemption under 5 U.S.C. §552(b)(8), 17CFR §200.80(b)(8) ("exemption 8"). This exemption protects from disclosure, records that relate to "examination, operating, and condition report" prepared by or on behalf of the SEC, in connection with its supervision and regulation of financial institutions.

By this letter, we are therefore making a timely appeal pursuant to 5 U.S.C. § 552(a) (6), 17 C.F.R. § 200.80 (d) (5) and (6), in response to the SEC's denial of the FOIA request.

Public Investors Arbitration Bar Association
2415 A Wilcox Drive Norman, OK 73069 Phone: (405) 360-8776 Fax: (405) 360-2063
Toll Free: (888) 621-7484 Website: *www.PIABA.org* Email: *piaba@piaba.org*

Since the requested materials fall outside the definition of an "examination, operating, and condition report," the requested documents are not exempt and thus the SEC improperly denied our FOIA request. We ask that the Chief reverse the denial of our FOIA request and waive all associated fees. Additionally, we ask that those portions of the documents, which were properly withheld pursuant to exemption 8, be released pursuant to the Chief's powers of discretionary release under 17 C. F.R 200.80 (d)(6)(iv).

Discussion

To qualify for exemption under 5 U.S.C. §552 (b)(8), 17 CFR § 200.80 (d) (5) and (6), the records requested must be disclosure records that relate to "examination, operating, and condition report" prepared by or on behalf of the Commission, and in connection with its supervision and regulation of financial institutions.

Thus, in order for the exemption to apply, the SEC must prove the following elements: (1) that FINRA is a "financial institution" (2) that the SEC is an agency with supervisory responsibility over FINRA and (3) that the withheld documents relate to an SEC to "examination, operating, and condition report" regarding FINRA. Although SEC has met the definition of financial institution[1] and is an agency with supervisory responsibility over FINRA[2], the documents requested do not fall within the definition of to "examination, operating, and condition report" for the purpose of exemption 8.

Exemption 8 of the FOIA codified in 5 U.S.C. § 552 (b) (8) gives little guidance on what is included in the phrase "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[3] Courts have looked to canons of construction, and legislative intent of FOIA to determine the scope of the statute.[4]

The exemptions to FOIA must be narrowly construed and the SEC's use of exemption 8 is overly expansive here. As the Supreme Court notes, Congress created FOIA to "reflect a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."[5] FOIA exemptions are to be narrowly construed and "where the request for information seeks material outside the needed category, the court should review the

[1] Matthew Feshbach, et al., v. Securities and Exchange Commission, 5 F. Supp. 2d 744 (1997) (holding that past case law narrowly defining financial institution is abandon; *see* also Milton E. Mermelstein v. Securities and Exchange Commission, 629 F. Supp. 672 (1986) (quoting Jordan v. Department of Justice, 591 F.2d753 (D.C. Cir 1978)); Berliner Zisser Walter & Gallegos, P.C., v. Securities and Exchange Commission, 962 F. Supp. 1348 (1997).
[2] *SEC Gives Regulatory Approval for NASD and NYSE Consolidation*, http://www.sec.gov/news/press/2007/2007-151.htm (last visited April 28, 2010).
[3] *See* Consumer Union of United States, Inc., v. John G. Heimann, 589 F.2d 531 (1978).
[4] *See Id.*
[5] United States Dep't of Defense v. Federal Labor Relations Auth., 510 U.S. 487 (1994)

records and determine the discoverability of each record."[6]

In particular, according to legislative intent, exemption 8 sought to exempt financial institutions from producing information that would (1) lead to financial speculation or endanger the stability of any financial institutions and (2) would undermine the regulatory relationship between agencies and the entities that the agencies regulate in order to foster an environment of full cooperation.[7] Thus, the legislative intent was meant to protect against the "unwarranted runs on banks" which would ultimately lead to procedural difficulties for regulatory agencies.[8]

Courts treat the potential for endangering financial institutions or weakening regulatory relationships as **necessary** elements for using exemption 8. For example, in *Public Citizen v. Farm Credit Administration,*[9] the National Consumer Cooperative Bank ("NCCB") was a "financial institution" for the purposes of FOIA exemption for agency reports prepared by an agency responsible for regulation or supervision of such institutions. The exemption was applied to financial reports of two banks prepared for use by the Federal Deposit Insurance Corporation. The court held that these reports fell directly within the meaning of the statutory language. In particular, the courts found that the availability of this kind of information would lead to financial speculation and significantly endanger the stability of the financial institution.

In a similar case, *Consumer Union of U.S v. Heimann,*[10] banks submitted documents to the Comptroller of Currency concerning the extent that those banks complied with the Truth and Lending Act. The court held that these documents were "examination, operating, or condition reports" within the meaning of the exemption.[11] The court came to this decision by virtue of the fact that the availability of this information would undermine the regulatory relationship of the regulatory agency by thwarting the production of information. In other words, financial institutions were unwilling to disclose information out of fear that it would be subsequently disclosed. In *Mermelstein v. S.E.C.,*[12] members of the Boston Stock Exchange (BSE) and a partner of the BSE firm were involved in a disciplinary proceeding. Thus, they were not entitled to receive reports from the SEC's inspection of the BSE because the court found that the matters fell within the statutory definition of "examination" or "condition" reports, since it would endanger the stability of the institution.

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[6] *Shapiro*, 339 F. Supp. 467 at 469; *see* also Bristol-Myer Co. v. Federal Trade Commission, 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970); Willamette Industries, Inc. v. U.S., 689 F.2d 865(1982) (holding generally that uncertainties in language are to be resolved in favor of disclosure, and exemptions to be read narrowly).

[7] National Community reinvestment coalition v. National Credit Union Administration, 290 F. Supp 2d 124 (2003); *see* also Berliner Zisser Walter& Gallegos, P.C., v. Securities and Exchange Commission, 962 F. Supp. 1348 (1997).

[8] Public Citizen v. Farm Credit Administration, 938 F.2d 290, 291 (D.C. Cir. 1991).

[9] Pub. Citizen v. Farm Credit Admin., 938 F.2d 290, 292 (D.C. Cir. 1991).

[10] Consumers Union of United States, Inc., v. John G. Heinmann, 589 F. 2d 531(U.S. App. D.C. 8)(1978).

[11] *Id.*

[12] Mermelstein v. Securities Exchange Commission, 629 F. Supp. 672 (1986).

The FOIA request here seeks documents relating to the arbitrator selection process of FINRA, which does not meet the two necessary elements to use exemption 8. The documents requested would not undermine FINRA's credibility as a "financial institution" nor would they subvert the cooperative relationship between agencies and the entities that the agencies regulate.

In addition, information listed in the FOIA request would add more transparency and fairness to the arbitration process. In 2008 the Securities Industry Conference on Arbitration (SICA), an advisory panel created by the SEC, sponsored and FINRA funded a report that analyzed the results of a survey of participants' perceptions of the fairness of self-regulatory organization arbitrations involving customers.[13] The survey illustrated that participants have divided views about the fairness of securities arbitration based on their most recent experience with the process; but participants' overall impressions of the securities arbitration were more negative.[14] By allowing access to documents related to the arbitrators' selection process, the appointment of replacement arbitrators, the process for deciding causal challenges to arbitrator appointments, and FINRA's public arbitrator pilot program, the SEC reinforced FINRAs authority as an equitable forum for dispute resolution.[15]

Conclusion

Because withheld documents do not relate to SEC "examination, operating, and condition reports" regarding FINRA, we ask that the Chief reverse the denial of our FOIA request and waive all associated fees. Additionally, we ask that those portions of the documents which may indeed be properly exempted from disclosure by exemption 8 be released pursuant to the Chief's powers of discretionary release under 17 C. F.R 200.80 (d)(6)(iv).

Respectfully submitted,

Peter J. Mougey
President

[13] *See* JILL I. GROSS & BARBARA BLACK, PERCEPTIONS OF FAIRNESS OF SECURITIES ARBITRATION: AN EMPIRICAL STUDY (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090969.

[14] *Id.*

[15] In 2002, the SEC commissioned Professor Michael Perino to examine the adequacy of the arbitrator disclosure requirements of the NASD and the New York Stock Exchange. Among other things, Perino's report recommended several amendments to the arbitration classification and disclosure rules that might "provide additional assurance to investors that arbitrations are in fact neutral and impartial." *See* MICHAEL PERINO, REPORT TO THE SECURITIES AND EXCHANGE COMMISSION REGARDING ARBITRATOR CONFLICT DISCLOSURE REQUIREMENTS IN NASD AND NYSE SECURITIES ARBITRATION 4 (2002), *available at* http://www.sec.gov/pdf/arbconflict.pdf.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

Stop 9612

April 25, 2011

Peter Mougey
Public Investors Arbitration Bar Association
2415 A Wilcox Drive
Norman, OK 73069

Re: Appeal, Freedom of Information Act Request No. 2010-04520

Dear Mr. Mougey:

I am responding to your Freedom of Information Act appeal, dated March 21 and received on April 1, 2011, filed on behalf of Scott Shewan, of the decision of the FOIA/Privacy Act Officer, Securities and Exchange Commission ("Commission"), to deny the request for records related to any "audits, inspections, and reviews" which the Commission may have conducted of the arbitrator selection process of the Financial Industry Regulatory Authority (FINRA). On March 24, 2011, the FOIA Officer asserted Exemption 8 to protect records arising from an examination conducted by the Commission's Office of Compliance Inspections and Examinations. I have considered your appeal and find that the FOIA Officer properly applied Exemption 8.

Exemption 8 protects matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of" the Commission in connection with its supervision or regulation of financial institutions. 5 U.S.C. 552(b)(8), 17 CFR 200.80(b)(8). Two criteria must be met for Exemption 8 to apply. First, the information must concern a "financial institution." Second, the information must be "contained in or related to" an examination, operating, or condition report prepared by or for the use of the Commission. This second requirement of Exemption 8 has been broadly construed to "provide absolute protection regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports." *Gregory v. FDIC*, 631 F.2d 896, 898 (D.C. Cir. 1980); *see also Consumers Union v. Heimann*, 589 F.2d 531, 535 (D.C. Cir. 1978). Such broad interpretation advances Exemption 8's two principal purposes: (1) to protect the security of financial institutions and (2) to promote cooperation and communication between regulated entities and their examiners.[1] *See Berliner Zisser Walter & Gallegos, P.C. v. SEC*, 962 F. Supp.

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[1]This broad interpretation is also consistent with the legislative history of Exemption 8. Disclosure would reveal very "sensitive details collected by Government agencies" which Congress sought to protect. See H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) (the purpose

(continued...)

1348, 1353 (D. Colo. 1977) (delineating Exemption 8's "dual purposes" as protecting the integrity of financial institutions and facilitating cooperation between agencies and entities regulated by them); *Consumers Union*, 589 F.2d at 534.

As you acknowledge in the appeal, FINRA is a financial institution within the meaning of Exemption 8. *See Feshbach v. SEC*, 5 F. Supp. 2d 774, 781 (N.D. Cal. 1997) (holding that "the term 'financial institutions' encompasses brokers and dealers of securities or commodities as well as self-regulatory organizations, such as the NASD"). The issue is whether the withheld records are "contained in or related to" an examination, operating or condition report prepared by and for the use of the Commission. These records were obtained or created during the course of an inspection conducted by Commission staff. This information facilitates the staff's oversight and supervision of this self-regulatory organization's activities. As the information at issue concerns a financial institution and was received by the Commission for the Commission's use in connection with its supervisory authority and oversight of FINRA, Exemption 8 is properly applied.

Finally, on appeal, you asked that any fees be waived. As no fees have been assessed, it is unnecessary to address a fee waiver at this time.

You have the right to seek judicial review of my determination by filing a complaint in the United States District Court for the District of Columbia or in the district where you reside or have your principal place of business. *See* 5 U.S.C. 552(a)(4)(B). Voluntary mediation services as a non-exclusive alternative to litigation are also available through the Office of Government Information Services (OGIS). For more information, please contact OGIS at ogis@nara.gov, www.archives.gov/ogis, or 1-877-684-6448. If you have any questions concerning my determination, please call Celia Jacoby, Senior Counsel, at 202-551-5158.

For the Commission
by delegated authority,

Richard M. Humes
Associate General Counsel

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[1](...continued)
of Exemption 8 is to "insure the security and integrity of financial institutions, for the sensitive details collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm"); *see also*, S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION,	
Plaintiff,	
v.	**Civil Action No. 1:11-cv-02285 (BH)**
U.S. SECURITIES AND EXCHANGE COMMISSION,	
Defendant.	

ANSWER

Defendant Securities and Exchange Commission ("Defendant" or "SEC"), by and through undersigned counsel, hereby answers Plaintiff Public Investors Arbitration Bar Association's ("Plaintiff" or "PIABA") Complaint for Declaratory Judgment as follows:

FIRST AFFIRMATIVE DEFENSE

Defendant has conducted an adequate search in response to the underlying request under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, as amended, and properly withheld records that are subject to the statutory exemptions.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

The Court lacks subject matter jurisdiction over this lawsuit because no records have been improperly withheld within the meaning of FOIA.

Defendant reserves the right to assert additional defenses, affirmative or otherwise, upon further investigation into the matters alleged.

SPECIFIC RESPONSES

In response to the specifically-enumerated paragraphs, as set forth in the Complaint, Defendant admits, denies, and/or otherwise avers as follows:

1. The allegations set forth in Paragraph 1 contain Plaintiff's characterization of the Complaint to which no response is required.

2. The allegations contained in Paragraph 2 are Plaintiff's characterization of jurisdiction in this matter and state a legal conclusion to which no response is required.

3. The allegation contained in Paragraph 3 is Plaintiff's characterization of venue in this matter and states a legal conclusion to which no response is required.

4. The allegations contained in Paragraph 4 are denied as Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations.

5. The first two sentences of Paragraph 5 are admitted. Defendant also admits that is responsible for the regulation and supervision of Self-Regulatory Organizations. The third sentence of Paragraph 5 is denied to the extent it suggests Defendant's responsibilities are different than the ones outlined in the federal securities laws.

6. Admitted.

7. Admitted that Plaintiff submitted a FOIA request to the SEC. The allegation in Paragraph 7 that Plaintiff submitted the FOIA request on February 9, 2010 is denied as Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegation. The FOIA request, attached as Exhibit 1 to Plaintiff's Complaint, speaks for itself.

Admitted that the SEC's FOIA Office received PIABA's FOIA request on February 23, 2010.

8. Admitted as to first sentence of Paragraph 8. Defendant's letter, attached as Exhibit 2 to Plaintiff's Complaint, speaks for itself. Defendant denies that its decision not to produce documents was improper. Defendant denies that it was required to provide a list or description of the withheld documents other than the description it provided.

9. Admitted as to the first sentence of Paragraph 9. Plaintiff's administrative appeal, attached as Exhibit 3 to Plaintiff's Complaint, speaks for itself.

10. Admitted as to the first and second sentences of Paragraph 10. The remaining sentences in Paragraph 10 state a legal conclusion to which no response is required. Nonetheless, Defendant denies the last sentence of Paragraph 10.

11. Defendant's decision on Plaintiff's administrative appeal, attached as Exhibit 4 to Plaintiff's Complaint, speaks for itself.

12. Defendant admits that it withheld responsive, exempt documents in their entirety, that it did not produce a *Vaughn* Index, and that it did not provide an estimate of the volume of records in response to Plaintiff's FOIA request and administrative appeal. Defendant denies that it was required to estimate the volume of records being withheld.

13. Defendant repeats and realleges its responses to Paragraphs 1 through 12 above.

14. The allegations in Paragraph 14 state a legal conclusion to which no response is required.

15. The allegations in Paragraph 15 state a legal conclusion to which no response is required.

The remainder of the Complaint consists of Plaintiff's requests for relief, which do not

require a response. To the extent that a response is required, Defendant denies that Plaintiff is entitled to the relief requested in Paragraphs 16, 17, 18, 19, and the "Wherefore" clause of the Complaint or any other relief.

Pursuant to Rule 8(b) of the Federal Rules of Civil Procedure, Defendant denies each and every allegation in the Complaint that was not admitted.

WHEREFORE, Defendant asks this Court to deny Plaintiff's requests for relief, dismiss the Complaint with prejudice, and grant the Defendant such other relief as the Court may deem appropriate.

Dated: February 2, 2012

Respectfully submitted,

/s/ Melinda Hardy

MELINDA HARDY D.C. Bar # 431906
Assistant General Counsel

KATHLEEN CODY, D.C. Bar # 412517
Senior Counsel

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Securities and Exchange Commission
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION, Plaintiff, v. U.S. SECURITIES AND EXCHANGE COMMISSION, Defendant.	:	Civil Action No. 1:11-cv-02285 (BH)

DECLARATION BY KRISTEN LEVER IN SUPPORT OF MOTION BY THE SECURITIES AND EXCHANGE COMMISSION FOR SUMMARY JUDGMENT

1. My name is Kristen Lever. I am an Exam Manager in the Office of Market Oversight within the U.S. Securities and Exchange Commission's ("SEC") Office of Compliance Inspections and Examinations ("OCIE"). I have held that position since 2001. From 1999 to 2001, I was an Attorney Advisor in the predecessor office within OCIE.

2. Among other responsibilities, OCIE conducts oversight examinations of arbitration programs at self-regulatory organizations that are registered with the SEC, including the Financial Industry Regulatory Authority, Inc. ("FINRA").

3. As part of my normal job duties, I received information from the SEC's FOIA Office, through OCIE's Chief Counsel's office, that the Public Investors Arbitration Bar Association ("PIABA") submitted a FOIA request that might pertain to records held by OCIE. After reviewing that request, I searched all places within OCIE's records where it would be reasonable to find responsive documents, including reviewing offsite storage records, locating boxes with labels indicating the contents may be responsive in OCIE's onsite file room, and contacting

examiners still employed by the SEC who participated in the examinations to identify boxes responsive to the request and to identify unboxed documents that may be responsive, including any electronic documents.

4. I have personal knowledge of the examinations at issue because I conducted all of the examinations described in paragraph 7 and also supervised the three most recent examinations described in paragraph 7, and I was personally involved in reviewing and investigating most, if not all, of the individual arbitration complaints described in paragraph 8.

5. As a result of my search, I determined that, to the best of my knowledge, there are approximately 65 boxes that contain potentially responsive material.

6. Based on my personal observations and experience, within OCIE, the terms "inspection" and "examination" are used interchangeably to describe the staff's work. An inspection is an examination, and an examination is an inspection.

7. Based on my personal knowledge and the documents I reviewed in conducting the search described in paragraph 3, I believe the documents potentially responsive to PIABA's FOIA request relate to four examinations conducted by OCIE, including:

- An inspection of the NASD Regulation, Inc.'s Office of Dispute Resolution, focusing on the Midwest Regional Office in Chicago.[1] In that inspection, conducted in approximately 1999-2000, OCIE staff examined the Midwest Regional Office's management of its arbitration program, focusing both on the Midwest Regional Office's processing of cases and maintenance of its arbitrator pool.

- A 2005 inspection of NASD Dispute Resolution's Kansas City/Omaha arbitrators. In that inspection, as a result of complaints received, OCIE staff reviewed the number, classification, and status of arbitrators in FINRA's Kansas City/Omaha hearing location.

- An inspection of NASD Dispute Resolution, Inc.'s Southeast Regional Office's arbitration program for the period 2000-2006. In that inspection, OCIE staff

[1] The names used are the names of the entities at the time of the SEC's inspection. To the best of my knowledge, NASD Regulation, Inc., Office of Dispute Resolution subsequently changed its name to NASD Dispute Resolution, Inc. and became a separate entity under the NASD, which subsequently became FINRA.

examined the adequacy of the Southeast Regional Office's administration of its arbitration program, including the Southeast Regional Office's administration and processing of public and industry arbitration cases; the Southeast Regional Office's management of the arbitrator pool, including the selection, training, and evaluation of arbitrators; and the extent to which the Southeast Regional Office had implemented recommendations from previous inspections by the SEC.

- An inspection of the Financial Industry Regulatory Authority, Inc. Dispute Resolution's ("FINRA DR") arbitration program. In that inspection, OCIE staff reviewed 1) FINRA DR's arbitrators on the roster as of 2009, including examining arbitrator qualifications, trainings, classifications, and disclosures, and 2) FINRA DR's process for dealing with complaints about its arbitrators.

8. In addition, some of the potentially responsive documents may relate to particular complaints received by the SEC from arbitration participants. In response to each complaint, as part of OCIE's ongoing and continuous oversight responsibilities, OCIE would have investigated the allegations, which may have included obtaining a copy of the file and any other relevant documents from FINRA. In addition, to the best of my knowledge, on one or more occasions OCIE incorporated the general subject matter of a particular complaint into a later investigation of FINRA's arbitration processes.

9. Each examination described in paragraphs 7 and 8 resulted in a writing, either termed a report or closing memorandum.

10. Each examination described in paragraphs 7 and 8 was conducted as part of the SEC's ongoing and continuous oversight responsibilities pursuant to Section 17 of the Exchange Act (15 U.S.C. 78q) and Rule 17a-1 thereunder (17 C.F.R. 240.17a-1).

11. Based on my review of some of the boxes that contain potentially responsive documents, my personal involvement with the examinations, and my 13 years of experience with OCIE, the documents in the boxes can be categorized as follows:

a. Pre-Inspection Planning Materials, including
   - Entrance interview questions
   - Planning memo drafts
   - Scope memo drafts
   - Document requests and drafts
   - Preliminary arbitrator file selection information
   - Document review notes
   - Memoranda of law
   - General Research
   - FINRA's Responses to Document Requests – policies and procedures, rule books, personnel charts, web site pages, etc.

b. Onsite Inspection Materials, including
   - Arbitration case files, including internal arbitrator reports, arbitrator selection materials, pleadings, documents
   - Master lists of arbitration files or arbitrators reviewed
   - OCIE staff's review notes
   - Tapes of recordings of arbitration hearings
   - Arbitrator Application packets

c. Post-Inspection Materials, including
   - Write-ups of findings by staff
   - Draft inspection reports
   - Outlines of potential findings
   - Closing memos

d. Correspondence, including emails, to and from FINRA

e. Background information on arbitrators obtained from FINRA

f. Reviews by OCIE staff of individual complaints about a particular arbitration, including accompanying document requests, case files, close out memoranda, and staff notes

g. Data obtained from FINRA regarding unpaid arbitration awards

12. FINRA requested FOIA confidential treatment for the documents provided to OCIE in connection with one or more of the examinations described in paragraphs 7 and 8.

13. It is likely that not all of the documents in the boxes will be responsive to the FOIA request. To determine the percentage of documents that are potentially responsive, OCIE would have to review each document. I estimate it would take at least three months to review the documents to sort potentially responsive documents from the remainder of the documents in the 65 boxes.

14. Based on my review of the language in the FOIA request, OCIE's records, my personal involvement with the examinations, and my 13 years of experience with OCIE, each potentially responsive document relates to one of the four examinations described in paragraph 7 and/or relates to one or more customer complaints described in paragraph 8.

15. It has been my experience as both an examiner and a supervisor that OCIE depends on receiving cooperation to effectively and efficiently conduct the types of examinations that are at issue here. In addition, OCIE relies on this cooperation to fulfill its oversight responsibilities generally, which affects the SEC's mission to effectively regulate the securities markets.

16. It has been my experience as both an examiner and a supervisor that, in the course of an examination, the staff necessarily must provide frank evaluations of the quality of, and need for improvement in, FINRA's regulatory programs. The ability to share and discuss those evaluations with FINRA without making them public is crucial to the success of the SEC's examination program.

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. 1746.
Executed on May 11, 2012 at Washington, D.C.

Kristen Lever

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Executed on May 11, 2012 at Washington, D.C.

Kristen Lever

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION **Plaintiff** v. **SECURITIES AND EXCHANGE COMMISSION** **Defendant**	**Civil Action No. 1:11-cv-02285 (BH)**

DECLARATION OF WILLIAM A. JACOBSON IN SUPPORT OF PIABA'S OPPOSITION TO THE SEC'S MOTION FOR SUMMARY JUDGMENT AND PIABA'S CROSS-MOTION FOR SUMMARY JUDGMENT

1. I am an attorney admitted to the Bars of New York (1985), Massachusetts (1985) and Rhode Island (1994).

2. I have practiced in the area of securities arbitration since the late 1980s, including numerous customer arbitrations filed at NASD Dispute Resolution, now known as FINRA Dispute Resolution (collectively, "FINRA DR"). I am a co-author of the *Securities Arbitration Desk Reference*, 2011-2012 Ed. (West 2011).

3. In November 2007, I joined the faculty of Cornell Law School as an Associate Clinical Professor of Law. In January 2008, I founded the Cornell Securities Law Clinic, of which I am the Director The Clinic represents smaller investors in securities arbitrations primarily in the mostly rural area of upstate New York, conducts research and writing in areas of

investor protection, and provides public education on how to avoid becoming the victim of investment fraud.

4. I also am a Director and a member of the Executive Committee of the Public Investors Arbitration Bar Association (PIABA), the Plaintiff in this case, and Chair of its annual Securities Law Seminar. PIABA is an organization of approximately 450 attorneys who represent public investors in securities arbitration.

5. This Declaration is submitted in my individual capacity.

6. I participated in the drafting of the FOIA Request at issue in this case. (Document 1-1) The FOIA Request arose out of a concern over a lack of transparency as to whether and in what manner FINRA DR was complying with and implementing FINRA DR rules with regard to various aspects of the arbitrator selection process. The FOIA Request does not seek, and was not intended to obtain, financial information regarding the condition of the Financial Industry Regulatory Authority ("FINRA") or FINRA DR, their financial transactions, or the regulatory enforcement actions of FINRA Regulation, Inc.

7. FINRA administrates arbitrations through FINRA DR. The arbitrations at issue in the FOIA Request concern disputes between public investors ("customers"), on the one hand, and FINRA Members and Associated Persons, on the other hand.

8. The basic nature of customer arbitration at FINRA DR has not changed since enforcement of pre-dispute agreements to arbitrate federal securities law claims was upheld by the U.S. Supreme Court in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332 (1987), although some of the specific procedures have changed and NASD DR became FINRA DR.

9. The vast majority of customer arbitrations arise out of an arbitration agreement between a FINRA Member and the customer requiring arbitration. While such arbitration agreements in the past sometimes provided for arbitration at organizations such as the American Arbitration Association, over the past 20 years such provisions almost uniformly have come to require arbitration at FINRA either by name, or because the specified self-regulatory organization, such as the New York Stock Exchange, no longer has its own arbitration facilities and uses FINRA DR to administrate arbitrations.

10. In addition to arbitration required by contract, the FINRA Code of Arbitration for Customer Cases (the "Customer Code")[1] also provides the customer, but not the Member or Associated Person, an ability to demand arbitration even in the absence of an agreement to arbitrate. (Customer Code, Rule 12200[2])

11. In customer arbitrations at FINRA DR, neither FINRA nor FINRA DR is a party and the arbitrators are not FINRA or FINRA DR employees. Rather, FINRA DR employees administrate the case pursuant to the terms of the Customer Code, which contains various provisions as to arbitrator selection, disclosure, removal, and replacement. (*See* FINRA Customer Code, Rules 12400-12410[3])

12. All substantive decisions as to the merits of the case and the interpretation of all rules are to be made by the arbitrators, not FINRA, FINRA DR, or any of their employees. For example, Rule 12409 provides "[t]he panel has the authority to interpret and determine the

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[1] Available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096.
[2] Available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4106.
[3] Available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4137.

applicability of all provisions under the Code. Such interpretations are final and binding upon the parties."

13. The FOIA Request is directed only towards a discrete administrative function performed by FINRA DR in customer arbitrations.

I declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. 1746.

Executed on May 25, 2012, at Barrington, Rhode Island.

William A. Jacobson

Daniel Ball

From: DCD_ECFNotice@dcd.uscourts.gov
Sent: Monday, July 16, 2012 10:23 AM
To: DCD_ECFNotice@dcd.uscourts.gov
Subject: Activity in Case 1:11-cv-02285-BAH PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION Order on Motion for Miscellaneous Relief

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U.S. District Court

District of Columbia

Notice of Electronic Filing

The following transaction was entered on 7/16/2012 at 10:22 AM and filed on 7/16/2012

Case Name: PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Case Number: 1:11-cv-02285-BAH
Filer:
Document Number: No document attached

Docket Text:
MINUTE ORDER (paperless) granting [11] Defendant's Motion and Memorandum of Points and Authorities by the Securities Exchange Commission for an Order Preserving the Right to Assert Additional Exemptions. The defendant has sought summary judgment on the grounds that all documents at issue are protected from disclosure by Exemption 8 but has also notified the Court that Exemptions 4, 5, and 6 will likely apply to some or all of the documents. ECF No. 11 at 2; ECF No. 16 at 45. In the interests of preserving agency resources, promoting judicial economy, and ensuring the speedy and efficient resolution of this matter, the Court will allow the defendant to preserve the right to assert Exemptions 4, 5, and 6 in this case should the defendant's pending [10] Motion and Memorandum of Points and Authorities by the Securities and Exchange Commission for Summary Judgment be denied. Signed by Judge Beryl A. Howell on July 16, 2012. (lcbah1)

1:11-cv-02285-BAH Notice has been electronically mailed to:

Daniel A. Ball dball@dablaw.com

Karen Johnson Shimp shimpk@sec.gov

Melinda Hardy hardym@sec.gov

Kathleen A. Cody codyk@sec.gov

1:11-cv-02285-BAH Notice will be delivered by other means to::

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION, Plaintiff, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Defendant.	Civil Action No. 11-2285 (BAH) Judge Beryl A. Howell

ORDER

Upon consideration of the defendant's Motion for Summary Judgment, ECF No. 10, the plaintiff's Cross-Motion for Summary Judgment, ECF No. 15, the memoranda, declarations, and exhibits submitted in support and opposition, and the entire record herein, it is hereby

ORDERED that, for the reasons stated in the accompanying Memorandum Opinion, the defendant's Motion for Summary Judgment, ECF No. 10, is GRANTED; and it is further

ORDERED that, for the reasons stated in the accompanying Memorandum Opinion, the plaintiff's Cross-Motion for Summary Judgment, ECF No. 15, is DENIED.

SO ORDERED.

This is a final and appealable Order.

Date: March 14, 2013

/s/ Beryl A. Howell
BERYL A. HOWELL
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION, Plaintiff, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Defendant.	Civil Action No. 11-2285 (BAH) Judge Beryl A. Howell

MEMORANDUM OPINION

The plaintiff, an association of attorneys who represent public investors in securities arbitrations, brings this action against the defendant U.S. Securities and Exchange Commission ("SEC") to compel its compliance with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Pursuant to the FOIA, the plaintiff requested various records related to the SEC's oversight of the Financial Industry Regulatory Authority ("FINRA"), but the SEC refused to disclose any responsive records, citing FOIA Exemption 8, 5 U.S.C. § 552(b)(8). Both parties have moved for summary judgment, and the primary question presented by these motions is whether FOIA Exemption 8 applies to documents related to the SEC's examinations of the administrative activities of a self-regulatory organization.

I. BACKGROUND

Before discussing the plaintiff's FOIA request, the Court will provide a brief introduction to FINRA, public investor arbitrations, and the SEC's oversight of FINRA. FINRA is a non-profit corporation that acts as a self-regulatory organization over all securities firms that do business with the public, also known as "broker-dealers." *See* Steven D. Urban, *Securities Arbitration of Investor Disputes: A Primer for the Unwary Practitioner*, 59 ADVOCATE 11, 11

(2012). FINRA was created in 2007, "upon the consolidation of the enforcement arm of the New York Stock Exchange, and the National Association of Securities Dealers, Inc." *Id.* Beginning with the Supreme Court's holding in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987), "most disputes involving broker-dealers are now subject to arbitration rather than litigation." 6 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 15.0 (6th ed. 2009).[1] One forum for the arbitration of securities claims by public investors is FINRA Dispute Resolution, Inc. ("FINRA DR"), which is "a subsidiary company under the umbrella of FINRA . . . charged with administrating arbitration, mediation, and other alternative dispute resolution services." *See* Compl. ¶ 6, ECF No. 1.

Once parties commence an arbitration proceeding, "the proceedings in some ways resemble a typical court case": the parties file pleadings, engage in discovery, and present their arguments to a panel of arbitrators, which in turn makes an award. *See* 6 HAZEN, THE LAW OF SECURITIES REGULATION §§ 15.6–15.7. "[N]either FINRA nor FINRA DR," however, "is a party [to the proceedings,] and the arbitrators are not FINRA or FINRA DR employees." Decl. of William A. Jacobson ("Jacobson Decl.") ¶ 11, ECF No. 12-1. "Rather, FINRA DR employees administrate the case pursuant to the terms of the [FINRA Code of Arbitration for Customer Cases], which contains various provisions as to arbitrator selection, disclosure, removal, and replacement." *Id.*[2] For example, FINRA uses what is called a "Neutral List Selection System," which randomly generates lists of arbitrators for a given hearing. *See* FINRA Code of Arbitration Procedure for Customer Disputes ("FINRA Code") § 12400(a) (2008). Once this list is generated, each party has the ability to strike up to four arbitrators from the list and must rank

[1] In *Shearson/American Express*, the Supreme Court held that pre-dispute agreements to arbitrate federal securities laws claims were enforceable. *See Shearson/American Express*, 482 U.S. at 238.

[2] *See generally* FINRA Code of Arbitration Procedure for Customer Disputes (2008), *available at* http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbion/documents/arbmed/p117546.pdf.

the remaining arbitrators by preference. *See id.* § 12404. Then, FINRA DR appoints the highest ranked arbitrators from a combined list, *see id.* § 12406, and FINRA DR may remove and replace any arbitrator "for conflict of interest or bias," either by request of a party or on its own, *see id.* § 12407.

The SEC's Office of Compliance Inspectors and Examinations ("OCIE"), among other responsibilities, "conducts oversight examinations of arbitration programs at self-regulatory organizations that are registered with the SEC, including [FINRA]." Decl. of Kristen Lever ("Lever Decl.") ¶ 2, ECF No. 10-1. The OICE also handles "particular complaints . . . from arbitration participants." *Id.* ¶ 8. "In response to each complaint, as part of OCIE's ongoing and continuous oversight responsibilities, OCIE [investigates] the allegations," which can "include[] obtaining a copy of the [arbitration] file and any other relevant documents from FINRA." *Id.*

In a letter dated February 9, 2010, the plaintiff submitted a FOIA request to the SEC for six categories of documents, all of which "relat[e] to audits, inspections, and reviews conducted by the [SEC]" of FINRA. *See* Compl. Ex. 1, at 1, ECF No. 1-1. Specifically, the plaintiff's FOIA request sought the following:

1. Documents relating to audits, inspections, and reviews conducted by the [SEC] in connection with the arbitrator selection process of [FINRA];
2. Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's appointment of replacement arbitrators in the event that an arbitrator is stricken as part of the list selection process or removed for cause;
3. Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's policies, procedures, and processes in deciding causal challenges to an arbitrator's appointment;
4. Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's internal policies and procedures regarding arbitrator selection, appointment, and replacement;
5. Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's pre-approval background check on arbitrator applicants; and

6. Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's public arbitrator pilot program.

Id. at 1–2 (footnotes omitted). Upon receipt of this request, the SEC "searched all places within OCIE's records where it would be reasonable to find responsive documents." Lever Decl. ¶ 3. This search included "reviewing offsite storage boxes, locating boxes with labels indicating the contents may be responsive in OCIE's onsite file room," and "contacting examiners still employed by the SEC who participated in the examinations to identify boxes responsive to the request and to identify unboxed documents that may be responsive, including any electronic documents." *Id.* After conducting this search, the SEC located "approximately 65 boxes that contain potentially responsive material." *Id.* ¶ 5. On March 24, 2010, however, the SEC notified the plaintiff that it had "determined to withhold the non-public records that may be responsive to your request under 5 U.S.C. § 552(b)(8)." *See* Compl. Ex. 2, at 1, ECF No. 1-2.

The plaintiff filed an administrative appeal of the SEC's determination on March 21, 2011—nearly one year after the SEC communicated its determination to the plaintiff. *See* Compl. Ex. 3, ECF No. 1-3. After considering the plaintiff's administrative appeal, on April 25, 2011, the SEC decided to affirm its decision to withhold all potentially responsive records under FOIA Exemption 8. *See* Compl. Ex. 4, ECF No. 1-4.

The plaintiff filed its Complaint in the instant action on December 22, 2011, seeking "a declaratory judgment . . . that all of the documents in the custody and control of the SEC, which are covered by [the plaintiff's] FOIA Request, must be disclosed to PIABA and that such documents are not protected from disclosure by Exemption 8." Compl. ¶ 16. Pending before the Court are the SEC's motion for summary judgment on the plaintiff's FOIA claim, as well as the plaintiff's cross-motion for summary judgment. For the reasons discussed below, the Court grants the SEC's motion and denies the plaintiff's cross-motion.

II. LEGAL STANDARD

Congress enacted the FOIA to promote transparency across the government. *See* 5 U.S.C. § 552; *Quick v. U.S. Dep't of Commerce, Nat'l Inst. of Standards & Tech.*, 775 F. Supp. 2d 174, 179 (D.D.C. 2011). The Supreme Court has explained that the FOIA is "a means for citizens to know 'what their Government is up to.' This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (citation and internal quotation marks omitted). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). As a result, the FOIA requires federal agencies to release all records responsive to a request for production. *See* 5 U.S.C. § 552(a)(3)(A). Federal courts are authorized under the FOIA "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." *Id.* § 552(a)(4)(B).

This strong interest in transparency must be tempered, however, by the "legitimate governmental and private interests [that] could be harmed by release of certain types of information." *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 559 (D.C. Cir. 2010) (internal quotation marks omitted); *see also Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 872 (D.C. Cir. 1992) (en banc). Accordingly, Congress included nine exemptions permitting agencies to withhold information from FOIA disclosure. *See* 5 U.S.C. § 552(b). Generally, "[t]hese exemptions are explicitly made exclusive, and must be narrowly construed." *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1262 (2011) (citations and internal quotation marks omitted); *see also Pub. Citizen, Inc. v. Office of Mgmt. & Budget*, 598 F.3d 865,

869 (D.C. Cir. 2010) ("FOIA allows agencies to withhold only those documents that fall under one of nine specific exemptions, which are construed narrowly in keeping with FOIA's presumption in favor of disclosure." (citations omitted)). When a FOIA requester properly exhausts its administrative remedies, it may file a civil action challenging an agency's response to its request. *See* 5 U.S.C. § 552(a)(4)(B); *Wilbur v. CIA*, 355 F.3d 675, 677 (D.C. Cir. 2004). Once such an action is filed, the agency generally has the burden of demonstrating that its response to the plaintiff's FOIA request was appropriate.

When an agency's response to a FOIA request is to withhold responsive records, either in whole or in part, the agency "bears the burden of proving the applicability of claimed exemptions." *Am. Civil Liberties Union v. U.S. Dep't of Def.* ("*ACLU/DOD*"), 628 F.3d 612, 619 (D.C. Cir. 2011). "The government may satisfy its burden of establishing its right to withhold information from the public by submitting appropriate declarations and, where necessary, an index of the information withheld." *Am. Immigration Lawyers Ass'n v. U.S. Dep't of Homeland Sec.*, 852 F. Supp. 2d 66, 72 (D.D.C. 2012) (citing *Vaughn v. Rosen*, 484 F.2d 820, 827–28 (D.C. Cir. 1973)). "If an agency's affidavit describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption," and "is not contradicted by contrary evidence in the record or by evidence of the agency's bad faith, then summary judgment is warranted on the basis of the affidavit alone." *ACLU/DOD*, 628 F.3d at 619. "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical or 'plausible.'" *Id.* (internal quotation marks omitted) (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)).

When a requester challenges an agency's response based on the adequacy of the search performed, "[t]o prevail on summary judgment . . . the defending 'agency must show beyond

material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents.'" *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (quoting *Weisberg v. U.S. Dep't of Justice* ("*Weisberg I*"), 705 F.2d 1344, 1351 (D.C. Cir. 1983)). "In order to obtain summary judgment the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). "Summary judgment may be based on affidavit, if the declaration sets forth sufficiently detailed information 'for a court to determine if the search was adequate.'" *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 838 (D.C. Cir. 2001) (quoting *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995)).

III. DISCUSSION

A. The Scope of FOIA Exemption 8

This case primarily presents a question of statutory interpretation. In particular, this case requires the Court to examine the scope of FOIA Exemption 8, which exempts from disclosure any matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. § 552(b)(8). The parties agree that FINRA is a "financial institution" within the meaning of Exemption 8, and they also agree that the SEC is "an agency responsible for the regulation or supervision of financial institutions," as that phrase is used in Exemption 8. *See* Def.'s Mem. of P. & A. for Summ. J. ("Def.'s Mem.") at 5, ECF No. 10; Pl's Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Opp'n") at 7, ECF No. 12. The parties disagree, however, whether the documents sought by the plaintiff are "related to examination, operating, or condition reports prepared by, on behalf of, or for the use of" the SEC. *See* 5 U.S.C. § 552(b)(8).

At the outset, the Court notes that the language of Exemption 8, by its terms, is very broad. First, although Exemption 8 is limited to "examination, operating, or condition reports prepared by, on behalf of, or for the use of" a financial regulatory agency, the exemption covers all material that is "related to" such reports, not just reports themselves. Hence, the "related to" language casts a wide net of non-disclosure over any documents that are logically connected to an "examination, operating, or condition report[]." *See id.* Furthermore, "Exemption 8 does not require the defendant to identify a specific report to which the information relates." *Judicial Watch, Inc. v. U.S. Dep't of Treasury* ("*Judicial Watch/Treasury*"), 796 F. Supp. 2d 13, 37 (D.D.C. 2011) (citing *McKinley v. FDIC*, 744 F. Supp. 2d 128, 143–44 (D.D.C. 2010)). Rather, Exemption 8 extends to any documents received by a financial regulatory agency in the course of exercising its "regulatory responsibilities in relation to the financial institutions whose information has been withheld." *See McKinley*, 744 F. Supp. 2d at 144; *see also Judicial Watch/Treasury*, 796 F. Supp. 2d at 37 (upholding Treasury Department's withholding, under Exemption 8, of "information [the FDIC] relayed to the [Treasury] through its monitoring of the condition of the financial institutions it regulates"). Finally, the D.C. Circuit has held that, for purposes of Exemption 8, "examination reports need not pertain to an institution that is regulated or supervised by the withholding agency." *Pub. Citizen v. Farm Credit Admin.*, 938 F.2d 290, 294 (D.C. Cir. 1991). This means that agencies that do not directly regulate or supervise a particular financial institution may still withhold information about that institution under Exemption 8, so long as the withholding agency is one that is "responsible for the regulation or supervision of financial institutions" more generally. *See* 5 U.S.C. § 552(b)(8).

In the instant action, the SEC rests its argument in favor of nondisclosure on the plain language of both Exemption 8 and the plaintiff's FOIA request, contending that "PIABA's

request by its very terms recognizes that responsive documents will have been obtained or generated in the course of SEC 'audits, inspections, and reviews,' which are all synonyms for 'examinations.'" Def.'s Mem. at 5–6. Thus, according to the SEC, "[b]ecause the documents relate to examinations of a financial institution regulated by the SEC, that is the beginning and end of the inquiry." *Id.* at 6. The plaintiff, however, advocates for a narrower construction of Exemption 8, based on what it perceives to be the thrust of the FOIA's legislative history and the weight of authority interpreting Exemption 8. The plaintiff begins by clarifying that its FOIA request "seeks a narrow set of documents as to the way in which FINRA, through FINRA DR, administrates the arbitrator selection process in private arbitrations." Pl.'s Opp'n at 2. Next, the plaintiff contends that "neither of the legislative purposes behind Exemption 8 is implicated" by this narrow set of documents, and "[e]very reported case of which we are aware in which Exemption 8 has been applied in some measure involved the finances of the subject financial institution or financial transactions involving the financial institution." *See id.* at 8. According to the plaintiff, since "the audits, inspections, and reviews conducted by the SEC of FINRA's arbitrator selection process do not implicate any such financial conditions or transactions," it "would work an unreasonable result to apply an exemption based on protecting the financial security of the institution to documents having nothing to do with the institution's finances or financial activities." *Id.* at 9.

1. *The Text of, and Legislative Purpose for, Exemption 8 Permit Withholding.*

In approaching the question presented by this case, the Court is mindful that "a reviewing court must accord first priority in statutory interpretation to the plain meaning of the provision in question." *See Consumers Union of U.S., Inc. v. Heimann*, 589 F.2d 531, 533 (D.C. Cir. 1978). Heeding this canon of statutory construction, the D.C. Circuit has held that "the meaning of

exemption 8 [is] clear," and "its broad, all-inclusive scope should be applied as written since Congress ha[s] 'intentionally and unambiguously' so contemplated." *Gregory v. FDIC*, 631 F.2d 896, 898 (D.C. Cir. 1980) (per curiam) (quoting *Heimann*, 589 F.2d at 533). Indeed, the D.C. Circuit has held that, in Exemption 8, "Congress has intentionally and unambiguously crafted a particularly broad, all-inclusive definition," and thus "it is not [the Court's] function, even in the FOIA context, to subvert that effort." *Heimann*, 589 F.2d at 533; *see also McKinley*, 744 F. Supp. 2d at 143 ("Although generally FOIA exemptions are to be 'narrowly construed,' it is well-established that Exemption 8's scope is 'particularly broad.'" (citations omitted)); *Judicial Watch/Treasury*, 796 F. Supp. 2d at 37 ("While FOIA exemptions are normally construed narrowly, it is recognized in this Circuit that Exemption 8's scope is 'particularly broad.'" (quoting *Heimann*, 589 F.2d at 533)).

Despite the strong preference accorded to a statute's plain meaning, "a court can look beyond the plain meaning of a statute in limited instances, most notably when . . . a literal reading leads to an unreasonable result." *Heimann*, 589 F.2d at 534. The plaintiff "vigorously asserts" that this situation is present here, *see id.*, and therefore the Court will also consider the legislative history of this FOIA exemption. *See, e.g.*, Pl.'s Opp'n at 8 ("[I]t would lead to an 'unreasonable result' to apply Exemption 8 to documents which have nothing to do with the purposes behind the exemption."). To begin, the legislative history specifically addressing the purposes of Exemption 8 during the enactment of the FOIA "is rather sparse." *See Heimann*, 589 F.2d at 539 (Wright, J., concurring). The 1965 Senate report on the FOIA stated that "Exemption No. 8 is directed specifically to insuring the security of our financial institutions by making available only to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by[,] on behalf of,

or for the use of such agencies." S. Rep. No. 89-813, at 10 (1965). Similarly, the 1966 House report observed: "[Exemption 8] is designed to insure the security and integrity of financial institutions, for the sensitive details collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm." H.R. Rep. No. 89-1497, at 11 (1966).

From these reports and other pieces of the FOIA's legislative history, the D.C. Circuit has distilled two legislative purposes behind Exemption 8. "[T]he primary reason for adoption of exemption 8 was to ensure the security of financial institutions." *Heimann*, 589 F.2d at 534. "Specifically, there was concern that disclosure of examination, operation, and condition reports containing frank evaluations of the investigated banks might undermine public confidence and cause unwarranted runs on banks." *Id.* "[A] secondary purpose in enacting exemption 8 appears to have been to safeguard the relationship between the banks and their supervising agencies." *Id.* In this regard, "[i]f details of the bank examinations were made freely available to the public and to banking competitors, there was concern that banks would cooperate less than fully with federal authorities." *Id.*; *see also Bloomberg, L.P. v. U.S. Sec. & Exch. Comm'n*, 357 F. Supp. 2d 156, 170 (D.D.C. 2004) ("[T]he purpose of [Exemption 8] is . . . to ensure that [financial] institutions continue to cooperate with regulatory agencies without fear that their confidential information will be disclosed.").[3]

The plaintiff agrees that these were the two discernible legislative purposes motivating enactment of FOIA Exemption 8, but the plaintiff nevertheless contends that "neither of the legislative purposes behind Exemption 8 is implicated" by the documents that it seeks. *See* Pl.'s

[3] As to this second purpose, former Chief Judge Wright noted in his concurring opinion in *Heimann* that "[t]he House and Senate Reports make reference to the 'integrity' and 'security' of financial institutions," which are "words that could . . . refer only to commercial soundness and solvency." *Heimann*, 589 F.2d at 539 (Wright, J., concurring). On the other hand, Judge Wright observed, "those words might have somewhat broader import as well, perhaps encompassing the need for a smoothly functioning regulatory regime." *Id.*

Opp'n at 8.[4] In particular, the plaintiff argues that "in the context of FINRA DR's administration of the arbitrator selection process in private arbitrations, there is no threat of [regulatory] disruption" from the release of documents related to the examination of FINRA's administrative functions. *See* Pl.'s Opp'n at 9. The plaintiff goes so far as to contend that "[t]o apply Exemption 8 to the administrative functions of FINRA DR as to arbitrator selection would read the purpose and wording of Exemption 8 out of existence," and "would create the unreasonable result that the SEC would act as a functional vacuum cleaner into which all manner of non-exempt documents would be shielded from scrutiny." Pl.'s Reply Mem. in Further Supp. of Pl.'s Cross-Mot. for Summ. J. ("Pl.'s Reply") at 6–7, ECF No. 19.

The Court is sympathetic to the plaintiff's parade of horribles, but the broad language of the FOIA, as well as Congress's recent amendment to the 1934 Securities Exchange Act, require the Court to conclude that the documents sought by the plaintiff are exempt from disclosure. The keystone of the plaintiff's argument is that Congress did not intend, through FOIA Exemption 8, to protect from disclosure records related to a regulatory agency's examination of a financial institution's administrative functions. Indeed, only if this proposition were true would the withholding of such documents be the "unreasonable result" of which the plaintiff repeatedly cautions. Yet, it is clear that at least one purpose of Exemption 8, apparent from both the plain meaning of its text and the legislative history, is served by withholding the records at issue in this case. That purpose, as the D.C. Circuit has put it, is "to safeguard the relationship between the banks and their supervising agencies." *See Heimann*, 589 F.2d at 534. Put another way, this purpose is "to ensure that [financial] institutions continue to cooperate with regulatory agencies without fear that their confidential information will be disclosed." *Bloomberg*, 357 F. Supp. 2d at 170. As the SEC states in its sworn declaration, "OCIE depends on receiving cooperation to

[4] The SEC does not argue that the first purpose—preserving the security of financial institutions—is implicated here.

effectively and efficiently conduct the types of examinations that are at issue here," and "in the course of an examination, the [OCIE] staff necessarily must provide frank evaluations of the quality of, and need for, improvement in, FINRA's regulatory programs." Lever Decl. ¶¶ 15–16. Hence, according to the SEC, "[t]he ability to share and discuss those evaluations with FINRA without making them public is crucial to the success of the SEC's examination program." *Id.* ¶ 16. The plaintiff offers no meaningful opposition to these statements other than the conclusory assertion that release of the examination documents carries "no threat of disruption." *See* Pl.'s Opp'n at 9.

At a higher level of generality, the plaintiff's policy argument does not fit with either the plain language of the FOIA's text or the statute's legislative history, as that history has been interpreted in this Circuit. The plaintiff's proposed interpretation of Exemption 8 would only protect documents that in some way "implicate[] a financial transaction or condition of the financial institution." *See* Pl.'s Opp'n at 9. This might make sense, from a policy perspective, to prevent self-regulatory organizations or other industry-policing organizations from becoming "captive" to the financial institutions they regulate, rather than serving the consumer protection and market integrity functions that they were intended to perform. The text of the statute, however, indicates no such limitation. The statute broadly exempts any records "related to examination, operating, or condition reports prepare by, on behalf of, or for the use of" a financial regulatory agency. 5 U.S.C. § 552(b)(8). This sweeping language "seems an odd way of phrasing the kind of [limited] provision which [the plaintiff] claims was intended." *Heimann*, 589 F.2d at 540 (Wright, J., concurring). Congress did not limit the exemption according to the function of the financial institution being examined. Rather, "Congress looked to the nature and source of the material and determined to provide *absolute* protection *regardless* of the

circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports." *Gregory*, 631 F.2d at 898 (emphasis added). Indeed, "there is nothing in the legislative history to indicate that Congress . . . intended exemption 8 to apply only to the varieties of bank examinations then extant, for . . . the disclosure of the bank examination reports *of any type* . . . could lead to the same adverse results." *Heimann*, 589 F.2d at 534 (emphasis added).

Furthermore, the plaintiff's proposed limitation on the text of Exemption 8 does not appear to fit with the larger structure of the FOIA. Although the plaintiff would narrow Exemption 8 only to cover records related to "a financial transaction or condition of the financial institution," *see* Pl.'s Opp'n at 9, the FOIA already provides a separate exemption for "commercial or financial information obtained from a person and privileged or confidential." *See* 5 U.S.C. § 552(b)(4). The plaintiff's reading of Exemption 8 would essentially render Exemption 4 superfluous, or at least would sap Exemption 4 of any meaning that is reasonably distinct from that of Exemption 8. Hence, the plaintiff's proposed interpretation of Exemption 8 does not comport with the Court's obligation to "strive to interpret a statute to give meaning to every clause and word, and certainly not to treat an entire subsection as mere surplusage." *See Donnelly v. FAA*, 411 F.3d 267, 271 (D.C. Cir. 2005).

Finally, although the plaintiff finds significance in the notion that "[e]very reported case of which [the plaintiff] is aware in which Exemption 8 has been applied in some measure involved the finances of the subject financial institution or financial transactions involving the financial institution," *see* Pl.'s Opp'n at 8, that assertion is both factually inaccurate and legally irrelevant. First, it is clear that at least one case from within this Circuit (and arguably more) has applied Exemption 8 to documents other than those involving the finances or financial

transactions of the institutions being examined. That case, *Bloomberg, L.P. v. SEC*, upheld the application of Exemption 8 to "notes and memoranda" of two aides to then SEC Chairman Harvey Pitt relating to the Chairman's meeting with officials from the New York Stock Exchange, the National Association of Securities Dealers, and several brokerage firms in which the officials "report[ed] to the SEC on steps they were taking or considering in connection with issues of concern regarding the regulation of securities analysts." *See* 357 F. Supp. 2d at 167, 169. Although the plaintiff baldly contends that "it is clear that the subject document [in *Bloomberg*] did concern the finances and financial transactions of the various brokerage firms involved," *see* Pl.'s Reply at 4–5, that fact is far from clear. In fact, the *Bloomberg* court noted that the documents reflected "a candid assessment of industry problems" by financial institutions, *see Bloomberg*, 357 F. Supp. 2d at 170, which appears similar to the "frank evaluations of the quality of, and need for improvement in, FINRA's regulatory programs" contained in the documents at issue in the instant action, *see* Lever Decl. ¶ 16.

Indeed, the plaintiff's attempt to distinguish *Bloomberg* from the instant case is unpersuasive. The plaintiff contends that the documents in *Bloomberg* "concern[ed] the finances and financial transactions of the various brokerage firms involved" because the documents related to "the interaction between the investment banking and broker-dealer functions." Pl.'s Reply at 4–5. Yet, the clear thrust of the meeting at issue in *Bloomberg* was not to report *directly* on the transactions or financial conditions of the brokerage firms, but rather to report on institutional problems related to fairness and transparency, such as conflicts of interest, that likely bear *indirectly* on financial matters and might require further regulation. *See Bloomberg*, 357 F. Supp. 2d at 167–68 (observing that issues discussed at meeting included "the supervision of analysts, potential conflicts of interest for analysts and their firms, the structure of analyst

compensation, and the transparency of analysts' reports"). The plaintiff does not convincingly distinguish the institutional or industry-wide regulatory problems at issue in *Bloomberg* with the similar potential institutional problems at issue in the instant action. Most notably, the plaintiff does not explain why records regarding the examination of FINRA's arbitration selection process—which appear to address similar institutional concerns about fairness and transparency and that also likely have an indirect effect on the financial condition or transactions of the financial institutions appearing in arbitrations before FINRA—should be treated differently from the documents at issue in *Bloomberg*. *See* Pl.'s Opp'n at 10 n.10 (stating that plaintiff's purpose in obtaining the requested records is to "add more transparency and fairness to the arbitration process and increase public confidence in the process").

More generally, however, even if the plaintiff were correct that every reported case applying Exemption 8 only involved documents about financial institutions' transactions and fiscal health, that pattern "would not provide a basis for imposing a limitation that does not exist in the statutory language." *See* Reply in Supp. of Mot. for Summ. J. ("Def.'s Reply") at 4, ECF No. 17. All that this fact would establish (if it were true) is that courts have consistently upheld the application of Exemption 8 in the context of records related to financial institutions' transactions and financial health. It would most certainly *not* establish that such fact patterns are the only scenarios in which application of Exemption 8 is appropriate. Indeed, court decisions cannot be read like statutes, applying the maxim *expressio unius est exclusio alterius* to exclude any applications of a legal rule not previously considered.

2. *2010 Amendment Defining "Financial Institution"*

Before concluding its discussion of Exemption 8's scope, the Court feels compelled to point out a peculiar aspect of Exemption 8's reach that has not been addressed by the parties but nevertheless illuminates why one origin of the instant controversy is the FOIA's definition of

"financial institution," not the definition of "examination, operating, or condition reports." *See* 5 U.S.C. § 552(b)(8). As referenced above, the plaintiff concedes that FINRA is a "financial institution" as that term is used in Exemption 8. *See* Pl.'s Opp'n at 7. This concession is mandated by a recent legislative amendment, not to the FOIA, but to the Securities Exchange Act of 1934, which states that "[f]or purposes of [FOIA Exemption 8], . . . any entity for which the [SEC] is responsible for regulating, supervising, or examining under this title is a financial institution." *See* 15 U.S.C. § 78x(e). This amendment, passed by Congress in 2010, was intended "to improve transparency at the Securities and Exchange Commission," *see* 156 Cong. Rec. H6954 (daily ed. Sept. 23, 2010) (statement of Rep. EdolphusTowns), but it appears to have done just the opposite.

By way of background, Congress enacted a confidentiality provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376–2223 (2010), which amended the Securities Exchange Act to state that:

> the [SEC] shall not be compelled to disclose records or information obtained pursuant to [15 U.S.C. § 78q(b)], or records or information based upon or derived from such records or information, if such records or information have been obtained by the [SEC] for use in furtherance of the purposes of this title, including surveillance, risk assessments, or other regulatory and oversight activities.

See Dodd-Frank § 929I, 124 Stat. at 1858 (repealed 2010). This provision was inserted into the Dodd-Frank bill at the request of the SEC, but it immediately came under scrutiny when the SEC invoked it in a civil lawsuit with Fox Business Network to withhold documents regarding the agency's handling of the Bernie Madoff case. *See* 156 Cong. Rec. H6953 (daily ed. Sept. 23, 2010) (statement of Rep. Barney Frank). The response from Congress was swift. On September 16, 2010—less than two months after the SEC purportedly invoked section 929I in the Fox News litigation—a hearing was held before the House Financial Services Committee about how to fix what was perceived as an overbroad exemption for the SEC. *See, e.g.*, *Legislative Proposals to*

Address Concerns over the SEC's New Confidentiality Provision, Hearing Before the H. Comm. on Fin. Servs. ("SEC Confidentiality Hearing"), 111th Cong. 6 (2010) (testimony of Rep. Towns) (testifying that section 929I was "too broad" because "[i]t allows the SEC to keep secret virtually any information it obtains under its examination authority."). At that time, five bills had already been drafted to repeal section 929I—four in the House and one in the Senate. *See* H.R. 5924 (2010); H.R. 5948 (2010); H.R. 5970 (2010); H.R. 6086 (2010); S. 3717 (2010). Two of the bills would have simply repealed section 929I, *see* H.R. 5924; H.R. 5948, while others would have, in addition to repealing section 929I, specified that "any entity for which the Commission is responsible for regulating, supervising, or examining under this title is a financial institution" for purposes of FOIA Exemption 8, *see* H.R. 6086; S. 3717.

In her testimony before the House Financial Services Committee, then SEC Chairman Mary Schapiro defended section 929I by testifying that it "was designed to improve [the SEC's] examinations of regulated entities by clarifying the protections afforded to regulatees that provide the Commission with sensitive and confidential materials as part of those examinations." *See* SEC Confidentiality Hearing at 10. Chairman Schapiro also specifically discussed the need for section 929I in light of the possibility that FOIA Exemption 8 "might not clearly cover [certain] materials and protect them from disclosure" because "courts have not yet addressed whether certain entities the Commission has the authority and the responsibility to examine . . . are financial institutions for purposes of these FOIA protections." *See id.* at 10, 12. Similarly, Susan Merrill, a former Chief of Enforcement at FINRA, testified that "[t]he FOIA exemptions are simply too imprecise to allay the industry's fears regarding public disclosure." *See id.* at 32. It is clear from the testimony before the House Financial Services Committee that the primary goal of section 929I was to fill a perceived gap in the law and prevent private litigants from

obtaining "proprietary information" from regulated financial entities through FOIA requests or third-party subpoenas to the SEC. *See, e.g.*, *id.* at 8 (testimony of Rep. Darrell Issa) ("[T]here is a legitimate reason to say that no one should ever be able to use the [SEC] to backdoor their way into information that would not otherwise be available through FOIA."); *id.* at 11 (testimony of Chairman Schapiro) ("[N]one of these proposals address instances in which third parties seek to compel the Commission to produce documents in non-FOIA litigation through third-party subpoenas."); *id.* at 33 (testimony of Susan Merrill) ("The fact that the FOIA exemptions do not apply to third-party subpoenas served upon the SEC is, in the industry's view, the most important consideration in weighing the interests served by Section 929I.").

Ultimately, Congress passed the Senate's proposed bill repealing section 929I. *See* Pub. L. No. 111-257, 124 Stat. 2646 (2010) (codified at 15 U.S.C. § 78x(e)). That law, as discussed above, not only repealed section 929I of Dodd-Frank but also amended the Securities Exchange Act to "clarify that any entity the SEC regulates under the Securities Exchange Act will be considered a financial institution for the purpose of FOIA Exemption 8." *See* SEC Confidentiality Hearing at 6 (testimony of Rep. Towns). The purpose for the repeal of section 929I was clear. As the Senate sponsor stated when he introduced the legislation on the floor of the Senate, section 929I "would shield from public scrutiny all information provided to the [SEC] in connection with its broad examination and surveillance activities," and therefore interests of government transparency necessitated its repeal. *See* 156 Cong. Rec. S7299 (daily ed. Sept. 21, 2010). In fact, Congressman Barney Frank was pellucid in his comments on the House floor that "we don't want the SEC at any point to be able to shelter information about what it's doing" because the SEC "must be fully transparent in its operations" and "accountable

to the American people, and also to scrutiny of the media and the press." *See* 156 Cong. Rec. H6953–54 (daily ed. Sept. 23, 2010).

Yet, by adding this definition of "financial institution" that would apply in FOIA Exemption 8, Congress appears to have given back with the FOIA what it simultaneously intended to take away by repealing section 929I. Although perhaps motivated as a response to the concerns raised by Chairman Schapiro and others regarding the ambiguity of Exemption 8, the new definition of "financial institution" effectively expanded that term to include entities like FINRA that do not "manage[] money, credit, or capital," *see* BLACK'S LAW DICTIONARY 706 (9th ed. 2009), and appears to have inadvertently resulted in the very type of broad disclosure shield that the repeal of section 929I was intended to prevent. Indeed, Congress's 2010 amendment to the Securities Exchange Act provides an even *broader* disclosure shield than section 929I did because Exemption 8 can be invoked by any "agency responsible for the regulation or supervision of financial institutions," *see* 5 U.S.C. § 552(b)(8), not just the SEC.[5] The Court is skeptical that a self-regulatory organization like FINRA would logically qualify as a "financial institution" as that term has traditionally been defined or as that term was understood when the FOIA was first enacted. *See, e.g.*, BLACK'S LAW DICTIONARY at 706; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 851 (1981) (defining "financial institution" as "an enterprise specializing in the handling and investment of funds"); *see also* 18 U.S.C. § 20 (defining "financial institution" for purposes of the criminal code); 31 U.S.C. § 5312(a)(2) (defining "financial institution" for purposes of the Bank Secrecy Act). For this reason, the plaintiff may be correct that Exemption 8 is overbroad because it extends to records related to the oversight of self-regulatory organizations, but there is no escaping the conclusion

[5] The amended scope of Exemption 8 is also obviously narrower than section 929I of Dodd-Frank insofar as section 929I would have applied in non-FOIA contexts as well, such as third-party subpoenas.

that "Congress has left no room for a narrower interpretation," and therefore the plaintiff's arguments must be directed at Congress, rather than the courts. *See Heimann* 589 F.2d at 535; *see also id.* at 541 (Wright, J., concurring) ("[I]f Congress wanted a bright line, I am not persuaded that we are the ones who should smudge it."); *Gregory*, 631 F.2d at 899 ("When experience shows that a[] [FOIA] exemption was too broadly drawn, Congress is, of course, free to reconsider."). There is little question in the Court's mind that Congress's amendment effectively expanding the definition of "financial institution" was a well-intentioned legislative fix which, as this case demonstrates, has resulted in its own set of unintended consequences.

* * *

For the reasons discussed above, the Court holds that FOIA Exemption 8 broadly applies to records related to a regulatory agency's examination of a financial institution, including that financial institution's administrative functions or activities. This may mean, as the plaintiff cautions, that "Exemption 8 applies to everything the SEC scoops up in the course of its interaction with FINRA," Pl.'s Reply at 3, but if that is the result, it is the only result that comports with the current text of the FOIA and the clear intent of Congress to add an expansive definition of "financial institution."

B. Sufficiency of the SEC's Search Efforts and Identification of Documents

In light of the Court's holding regarding Exemption 8, the rest of the issues presented in this case fall into line. Nevertheless, the plaintiff raises two other potential problems with the SEC's response to the plaintiff's FOIA request that the Court must briefly address. First, the plaintiff argues that the SEC has failed to "substantiate its motion for summary judgment with information sufficient to identify the documents at issue with sufficient clarity so as to demonstrate the application of the claimed exemption." *See* Pl.'s Opp'n at 11. The plaintiff also

appears to challenge whether the SEC conducted a reasonable search for responsive records. *See id.* at 5–6, 11–12.

1. *Identification of Documents*

"'Even if the protected records could be withheld under one of the FOIA exemptions, that does not absolve the agency of its duty to identify the responsive documents, claim the relevant exemptions . . ., and explain its reasoning for withholding the documents in its affidavit.'" *Elliott v. U.S. Dep't of Agric.*, 596 F.3d 842, 851 (D.C. Cir. 2010) (quoting *Morley*, 508 F.3d at 1120). The agency's identification of withheld records is traditionally done through a *Vaughn* index, which permits an agency "to justify its actions without compromising its original withholdings." *See Judicial Watch, Inc. v. FDA* ("*Judicial Watch/FDA*"), 449 F.3d 141, 146 (D.C. Cir. 2006); *see also Campaign for Responsible Transplantation v. FDA*, 511 F.3d 187, 190 (D.C. Cir. 2007) ("The [*Vaughn*] index is supposed to 'describe with reasonable specificity the material withheld' and justify why each responsive document is exempt from disclosure under FOIA." (quoting *King v. Dep't of Justice*, 830 F.2d 210, 221 (D.C. Cir. 1987))); *Vaughn*, 484 F.2d at 826 (requiring agencies to submit "a relatively detailed analysis" of their basis for withholding information). Notwithstanding the traditional requirement of a *Vaughn* index, when "a claimed FOIA exemption consists of a generic exclusion, dependent upon a category of records rather than the subject matter which each individual record contains, resort to a *Vaughn* index is futile." *Church of Scientology of Cal. v. IRS*, 792 F.2d 146, 152 (D.C. Cir. 1986). Indeed, an agency may "submit other measures in combination with *or in lieu of* the index itself." *Judicial Watch/FDA*, 449 F.3d at 146 (emphasis added). Ultimately, an agency's submissions suffice "'so long as they give the reviewing court a reasonable basis to evaluate the claim of privilege.'" *Id.* (quoting *Gallant v. NLRB*, 26 F.3d 168, 172–73 (D.C. Cir. 1994)).

In the instant action, the SEC did not submit a *Vaughn* index. In lieu of a *Vaughn* index, the SEC submitted a sworn declaration that summarizes the agency's search efforts and explains both the nature of the withheld documents and the factual basis for withholding those documents categorically under Exemption 8. *See* Lever Decl. The plaintiff complains that this declaration is insufficient, *see* Pl.'s Opp'n at 12–14, but the Court disagrees. In fact, this case is a paradigmatic example of a situation in which a document-by-document *Vaughn* index is unnecessary because the scope of the plaintiff's FOIA request necessarily renders all potentially responsive materials exempt from disclosure under Exemption 8. As previously discussed, each of the six categories of records sought by the plaintiff "relat[e] to audits, inspections, and reviews conducted by the [SEC]" of FINRA. *See* Compl. Ex. 1, at 1. Therefore, in light of the Court's holding above that records related to SEC examination reports of FINRA are exempt under Exemption 8, it necessarily follows that *any* records responsive to the plaintiff's FOIA request would be exempt from FOIA disclosure. In other words, for purposes of analyzing the SEC's withholding decision, the plaintiff requested only one overarching category of documents: those "relating to audits, inspections, and reviews conducted by the [SEC]" of FINRA, *see id.*, and that entire category of records is, by its terms, exempt from disclosure. Hence, the SEC's claimed exemption is "dependent upon the category of records rather than the subject matter which each individual record contains," and therefore "resort to a *Vaughn* index is futile." *Church of Scientology*, 792 F.2d at 152.[6]

The plaintiff also attempts to point out other deficiencies in the SEC's sworn declaration, but none of them holds water. First, the plaintiff complains that the SEC's declaration "does not

[6] To put this issue in stark relief, the factual scenario in this case is akin to a FOIA request that would seek "all materials in the possession of the agency that are classified in the interest of national security." Of course, any records potentially responsive to such a request would be categorically exempt from disclosure under FOIA Exemption 1, just as here any records potentially responsive to the plaintiff's request are categorically exempt from disclosure under Exemption 8.

in any way demonstrate that the documents withheld concern FINRA's financial condition or FINRA's financial transactions, or that the disclosure would damage the SEC's regulatory oversight." Pl.'s Opp'n at 12. Yet, as the Court's holding above makes clear, the SEC is not required to demonstrate any of these things to withhold documents under Exemption 8. *See supra* Part III.A.

The plaintiff further complains that the SEC's declaration "leaves unclear whether some of the documents withheld . . . are even part of or related to a report covered by Exemption 8" and that the SEC's affiant "does not affirm that all of the documents in the 65 boxes are contained in or relate to a report." Pl.'s Opp'n at 13. Once again, this contention is both factually inaccurate and legally irrelevant. It is factually inaccurate because the SEC's declaration avers that all of the potentially responsive records "relate to four examinations conducted by OCIE," and that "[e]ach examination described . . . resulted in a writing, either termed a report or closing memorandum." *See* Lever Decl. ¶¶ 7, 9. Thus, each potentially responsive document does appear to relate to an examination report of some kind. In any event, the plaintiff's assertion is legally irrelevant because, as discussed above, "Exemption 8 does not require the defendant to identify a specific report to which the information relates," *see Judicial Watch/Treasury*, 796 F. Supp. 2d at 37 (citing *McKinley*, 744 F. Supp. 2d at 143–44), and the SEC avers that all of the potentially responsive documents were obtained pursuant to the SEC's "ongoing and continuous oversight responsibilities," *see* Lever Decl. ¶¶ 8, 10, which is sufficient to bring them within the ambit of Exemption 8.

Finally, the plaintiff complains that some of the records in the 65 boxes located by the SEC may not be responsive to its FOIA request. *See* Pl.'s Opp'n at 12 (complaining that some documents "might be beyond the scope of the FOIA Request"); Pl.'s Reply at 3 n.2 (arguing that,

because "we are left to guess whether the documents the SEC says might be in the boxes even are responsive to the FOIA Request," this constitutes a "failure of proof" that is "fatal to the SEC's motion"). Yet, it is elementary that an agency's decision to withhold *non-responsive* material is not a violation of the FOIA. *See, e.g.*, 5 U.S.C. § 552(a)(3).

2. *Adequacy of Search*

The plaintiff does not clearly state whether it challenges the adequacy of the SEC's search, but it does contend in its statement of material facts in dispute that "[t]he SEC has not set forth a sufficient basis to prove that there are 'approximately 65 boxes in which potentially responsive documents could be located,' as there has not been an actual search of boxes," and "[t]he SEC has not set forth a sufficient basis to prove that the universe of documents is only the four 'examinations' by the SEC's [OCIE]." *See* Pl.'s Opp'n at 5–6. These statements, though not elaborated through any legal argument, fairly raise the issue of whether the SEC conducted an adequate search for responsive records. Though the issue was (barely) raised, the Court is skeptical that the adequacy of the SEC's search makes any difference in light of the fact that any records potentially responsive to the plaintiff's request would be categorically exempt from disclosure in any event. *See supra* Part III.B.1. Assuming *arguendo* that the adequacy of the SEC's search is still a relevant issue, however, the Court finds that the SEC has nevertheless averred that it "conducted a search reasonably calculated to uncover all relevant documents.'" *Morley*, 508 F.3d at 1114. The SEC's sworn declaration states that it "searched all places within OCIE's records where it would be reasonable to find responsive documents." Lever Decl. ¶ 3. This was accomplished by "reviewing offsite storage records, locating boxes with labels indicating the contents may be responsive in OCIE's onsite file room," and "contacting examiners still employed by the SEC who participated in the examinations to identify boxes responsive to the request and to identify unboxed documents that may be responsive, including

any electronic documents." *See id.* The plaintiff points to no aspect of this search that was inadequate, and the Court concludes that, absent some identifiable deficiency in the SEC's process, the agency's search efforts were sufficient to comply with its FOIA obligations.

Therefore, the Court concludes that none of the additional arguments raised by the plaintiff is sufficient to defeat summary judgment in favor of the SEC.

IV. CONCLUSION

As the foregoing discussion establishes, the Court concludes that the SEC is entitled to summary judgment on the plaintiff's FOIA claim, primarily because all records relating to the SEC's examination reports—including reports relating to the administrative functions of FINRA—are exempt from disclosure under the FOIA. Additionally, the Court concludes that the SEC sufficiently identified the withheld documents in order to justify its withholdings, despite the absence of a document-by-document *Vaughn* index, and the Court also concludes that the SEC's search efforts were adequate. Therefore, the SEC is entitled to summary judgment. For the same reasons, the Court concludes that the plaintiff's cross-motion for summary judgment must be denied.

An appropriate Order accompanies this Memorandum Opinion.

Date: March 14, 2013

/s/ *Beryl A. Howell*
BERYL A. HOWELL
United States District Judge

CERTIFICATE OF SERVICE

I certify that on November 25, 2013, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Julie A. Murray
Julie A. Murray