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

NO. 13-5137

PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION,
Plaintiff-Appellant,

v.

U.S. 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)

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION

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January 24, 2014

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(1) **Parties and Amici.** Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Plaintiff-Appellant PIABA:

> Project On Government Oversight, Citizens for Responsibility and Ethics in Washington, and Open The Government.org appear in this Court as amici curiae in support of the Plaintiff-Appellant.

(2) **Rulings Under Review.** References to the rulings at issue appear in the Brief for Plaintiff-Appellant PIABA.

(3) **Related Cases.** This case has not previously come before this Court or any other court. Counsel is not aware of any related cases pending before this Court or any other court within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Karen J. Shimp
Counsel for Defendant-Appellee SEC

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GLOSSARY

Amici Br. at __	Brief of Amici Curiae page citation
Amici Curiae	Project On Government Oversight, Citizens for Responsibility and Ethics in Washington, and Open The Government.org
Br. at __	Brief for Appellant page citation
Exchange Act	Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq*.
FINRA	Financial Industry Regulatory Authority
FINRA DR	Financial Industry Regulatory Authority Dispute Resolution
JA at __	Joint Appendix page citation
NASD	National Association of Securities Dealers
PIABA	Public Investors Arbitration Bar Association
SEC	U.S. Securities and Exchange Commission

Authorities upon which we chiefly rely are marked with asterisks.

STATEMENT OF JURISDICTION

The SEC agrees with the Statement of Jurisdiction contained in the Brief for Plaintiff-Appellant PIABA.

COUNTERSTATEMENT OF THE ISSUE

FOIA Exemption 8 allows agencies to withhold documents relating to examination reports prepared by agencies responsible for the regulation or supervision of financial institutions. All entities the SEC examines are statutorily defined as financial institutions for purposes of Exemption 8. In response to a FOIA request for documents relating to SEC examinations of FINRA's arbitration processes, the SEC withheld the requested documents pursuant to Exemption 8. Was the district court correct in holding that the SEC properly withheld these documents?

COUNTERSTATEMENT OF FACTS AND OF THE CASE

Under the FOIA, any member of the public can obtain many types of government documents upon request, but FOIA Exemption 8 specifically provides that agencies may withhold documents "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) ("Exemption 8"). In 2010, Congress enacted Section 24(e) of the Exchange Act and made clear that all SEC examinations come within Exemption 8:

> (e) Freedom of Information Act
>
> For purposes of section 552(b)(8) of Title 5, (commonly referred to as the Freedom of Information Act)—
>
> (1) the Commission is an agency responsible for the regulation or supervision of financial institutions; and
>
> (2) any entity for which the Commission is responsible for regulating, supervising, or examining under this title is a financial institution.

15 U.S.C. § 78x(e).

The SEC administers a nationwide examination program pursuant to Section 17(b) of the Exchange Act (15 U.S.C. § 78q(b)). That section broadly authorizes the SEC to conduct examinations of all records that various entities regulated by the Commission are required to keep. "Registered securities associations," which the federal securities laws also refer to as "national securities associations" registered with the SEC (*see, e.g.*, 15 U.S.C. § 78o-3(a)), are among the entities subject to SEC

examinations. FINRA is such a national securities association,[1] and the SEC consequently can examine all the records FINRA is required to keep, including all "records as shall be made or received by it in the course of its business as such and in the conduct of its self-regulatory activity." 17 C.F.R. § 240.17a-1 ("Rule 17a-1") . The SEC's examinations of FINRA include reviews of FINRA's arbitration program. JA 26 at ¶ 2.

On or about February 9, 2010, PIABA submitted a FOIA request to the SEC seeking six categories of documents. Each of the six categories specifically requested documents "relating to audits, inspections, and reviews" that the SEC conducted of FINRA's selection of arbitrators in connection with its arbitrator selection process. JA 12-13. The SEC determined that most of the responsive documents would relate to four examinations that its examination staff conducted of various aspects of FINRA's arbitration processes.[2] JA 26-31 at ¶ 7. In addition, the SEC determined that some documents relating to complaints about particular

[1] *See, e.g.*, 77 Fed. Reg. 38422 (June 27, 2012) at n. 8; *Application by National Association of Securities Dealers, Inc. for Registration as a National Securities Association*, Exchange Act Release No. 34-2211, 1939 SEC LEXIS 659 (1939). FINRA is the successor to the National Association of Securities Dealers; *see e.g. Fiero v. FINRA*, 660 F.3d 569, 571 (2nd Cir. 2011).

[2] The SEC's examination staff uses the terms "examination" and "inspection" interchangeably. JA 26-31 at ¶ 6.

arbitrations that the SEC examined as part of its ongoing and continuous oversight of FINRA might be responsive. *Id.* at ¶ 8.

All of these examinations were conducted as part of the SEC's ongoing supervision of FINRA, and each resulted in a written document, denominated as either a "report" or a "closing memorandum." *Id.* at ¶¶ 9, 10.

The SEC's FOIA Office determined that the requested documents were protected from disclosure pursuant to Exemption 8 and, by letter dated March 24, 2010, denied PIABA's request. JA 14-15. A year later, on or about March 21, 2011, PIABA administratively appealed that decision. JA 16-19. By letter dated April 25, 2011, the SEC upheld the FOIA Office's assertion of Exemption 8. JA 20-21. Eight months later, on December 22, 2011, PIABA filed its complaint in district court. JA 4-11.

In the district court, the SEC provided a declaration from an Exam Manager with more than a decade of experience who had worked on several examinations of FINRA's arbitration programs. JA 26 at ¶¶ 1-2, 4. That declaration described the SEC's search for responsive documents, described the examination files that could contain responsive

documents, specified that each examination resulted in either a report or closing memorandum, and stated that each examination was conducted pursuant to the SEC's authority in Section 17 and Rule 17a-1 thereunder. JA 26-28 at ¶¶ 3-10. The declaration also explained that the SEC's examination staff "depends on receiving cooperation to effectively and efficiently conduct the types of examinations that are at issue here." JA 30 at ¶ 15. In addition, "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." JA 30 at ¶ 16.

In its opposition to the Commission's motion for summary judgment, PIABA principally asserted that the court should read into Exemption 8 a limitation that only documents about a regulated entity's financial condition or financial transactions should be protected.

In March 2013, the district court rejected PIABA's argument, finding that PIABA's contention that the court should read its proposed limitation into Exemption 8 "does not fit with either the plain language

of the FOIA's text or the statute's legislative history" and "does not appear to fit with the larger structure of the FOIA." *Public Investors Arbitration Bar Ass'n v. SEC,* 930 F. Supp. 2d 55, 65 (D.D.C. 2013); JA 51. The district court also discussed Section 24(e) of the Exchange Act and recognized that the effect of Section 24(e) is to reinforce that Exemption 8 provides broad protection for documents obtained or generated during Commission examinations. JA 54-58.

SUMMARY OF ARGUMENT

This case raises no new or novel issues. This Court has recognized for nearly four decades that FOIA Exemption 8 is clear and unambiguous, so courts must give effect to the plain meaning of the exemption's terms. PIABA's principal argument is that the Court should read into Exemption 8 a requirement that an examination report must be related to "financial transactions or conditions, or operating or management issues bearing on those financial transactions or conditions" to be exempt. Br. at 21. But this Court has noted that "if the Congress has intentionally and unambiguously crafted a particularly broad, all-inclusive definition, it is not [the Court's] function, even in the

FOIA context, to subvert that effort." *Consumers Union of United States, Inc. v. Heimann*, 589 F.2d 531, 533 (D.C. Cir. 1978). The text of Exemption 8 simply does not support the limitations PIABA urges the Court to impose. Further, in light of this Court's prior holdings, the contentions of Amici Curiae that Exemption 8 must be more narrowly construed should also be rejected.

PIABA also argues that the district court improperly found that the SEC did not have to show that the withheld documents were related to an examination report, and the SEC had not shown all the withheld documents were related to an examination report. Br. at 42-44. Those arguments are meritless because the SEC's declarant established that all responsive documents relate to a report about an SEC examination of FINRA (JA 26-31 at ¶ 9), and the district court found that PIABA's contention that the SEC had not identified a report pertaining to each document was "factually inaccurate." JA 62.

Thus, the district court correctly held that the SEC demonstrated that the requested documents are all subject to withholding pursuant to Exemption 8. This Court should affirm.

STANDARD OF REVIEW

The SEC agrees with PIABA that a de novo standard of review applies. *See* Br. at 19.

ARGUMENT

The Freedom of Information Act, 5 U.S.C. § 552 *et seq*., gives the public the right to request information from the government. But Congress recognized that access to certain types of information could harm the government's ability to function effectively, and thus gave the government discretion to withhold information in enumerated circumstances. As relevant here, Congress exempted from disclosure "matters that are … (8) 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).

PIABA concedes that the SEC is an agency responsible for the regulation or supervision of financial institutions, and that FINRA is a financial institution for purposes of Exemption 8. Br. at 20. The only issue presented, then, is whether the information PIABA seeks is

contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the SEC. The district court correctly held in the affirmative, following this Court's long-standing guidance on the proper interpretation of Exemption 8.

I. CONGRESS INTENTIONALLY DESIGNED EXEMPTION 8 TO PROTECT A BROAD SET OF INFORMATION BASED ON THE SOURCE OF THAT INFORMATION.

A. Exemption 8 Is Clear and Unambiguous and Is Thus to Be Interpreted in Accordance with the Plain Meaning of Its Terms.

This Court first had the opportunity to consider the scope of Exemption 8 in *Consumers Union of the U.S., Inc. v. Heimann*, 589 F.2d 531 (D.C. Cir. 1978). The Court began its analysis by stating that it was

> well aware of the fact that exemptions to the FOIA must be narrowly construed. However, we are also mindful that a reviewing court *must accord first priority in statutory interpretation to the plain meaning* of the provision in question. Thus, if the Congress has intentionally and unambiguously crafted a particularly broad, all-inclusive definition, it is not our function, *even in the FOIA context*, to subvert that effort.

Id. at 533 (emphasis added) (internal citations omitted). This Court went on to find that Exemption 8 applies to any examination of a financial institution, even if the type of examination at issue did not exist

when FOIA was enacted. *Id.* at 534. This Court also found that Exemption 8 "safeguard[s] the relationship between the [financial institutions] and their supervising agencies" without requiring that the financial security of the entity be implicated. *Id.* at 534. Concluding its analysis, this Court stated that "Congress has left no room for a narrower interpretation of exemption 8." *Id.* at 535.

In the 35 years since *Consumers Union*, this Court has twice reiterated that Exemption 8 is a particularly broad provision that is to be interpreted in accordance with the plain meaning of its terms. In *Gregory v. FDIC*, 631 F.2d 896 (D.C. Cir. 1980), the Court held that "the meaning of exemption 8 [is] clear and [] its broad, all-inclusive scope should be applied as written since Congress had 'intentionally and unambiguously' so contemplated. … Congress [] left no room for a narrower interpretation in its choice of statutory language … [and] determined to provide *absolute protection* regardless of the circumstances underlying the regulatory agency's receipt or preparation of examination, operating or condition reports." *Id.* at 898-99 (quoting *Consumers Union*); *see also McKinley v. FDIC*, 744 F.Supp.2d 128, 143 (D.D.C. 2010) ("Although generally FOIA exemptions are to be 'narrowly construed,' …

it is well-established that Exemption 8's scope is 'particularly broad.'"). And in *Public Citizen v. Farm Credit Admin.*, 938 F.2d 290 (D.C. Cir. 1991), this Court again refused to look behind the plain meaning of Exemption 8 in holding that the term "financial institution" is not limited to banks or other depository institutions. *Id.* at 293. The Court then went on to hold that Exemption 8 applies even if the agency withholding the documents neither regulates nor supervises the examined entity, so long as the documents relate to an examination report. *Id.* at 293-94.

Other courts have likewise followed *Consumers Union* in finding that the words Congress chose in Exemption 8 should be given their plain meaning, in accordance with the legislatively-intended broad reach of the provision. *See, e.g., Abrams v. U.S. Dep't of Treasury*, 243 Fed.Appx. 4 (5th Cir. 2007) (unpublished) (citing *Consumers Union* with approval in holding that Exemption 8 protects documents related to an examination even if not directly connected to an examination report); *Berliner Zisser Walter & Gallegos, P.C. v. SEC*, 962 F.Supp. 1348 (D. Colo. 1997) (citing *Consumers Union* with approval in holding that

Exemption 8 protects documents related to SEC examinations of investment advisors).

Thus, under this Court's long-standing precedent, each term of Exemption 8 is given its plain meaning. Neither the word "report" nor the word "examination" is obscure. When the SEC exercises its examination authority, it is performing "examinations." There is no question that under Section 17 of the Exchange Act the SEC has broad authority to require several types of entities, including national securities associations like FINRA, to keep records for prescribed periods and that the SEC has in fact required those entities to keep "all correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such and in the conduct of its self-regulatory activity." 17 C.F.R. § 240.17a-1. Nothing in either the Exchange Act or the SEC's regulations limit examinations to an entity's financial transactions or to operating issues bearing on financial transactions.[3] The word "report" also has a plain meaning, *i.e.*, "an account given of a particular matter,

[3] Amici Curiae question whether reviews of customer complaints are the type of examination included within Exemption 8, Amici Br. at 20-22, but point to nothing in Exemption 8 or elsewhere that would limit the reach of Exemption 8 to only lengthy or formal examinations.

especially in the form of an official document, after thorough investigation or consideration by an appointed person or body."[4]

Thus, any account the SEC writes memorializing the exercise of its examination authority is an "examination report" under the plain meaning of the statute. Any document that "relates to" such a report also comes within Exemption 8. PIABA requested documents obtained or generated in the course of SEC "audits, inspections, and reviews." PIABA has never contended that the "audits, inspections, and reviews" referenced in its request could relate to anything other than activities conducted pursuant to the SEC's examination authority.[5] And in fact, the SEC has submitted a declaration explaining that all responsive documents were obtained or created by the SEC in the course of four different examinations of various aspects of FINRA's operation of its arbitration program and/or examinations of particular complaints, all

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[4] Available at http://www.oxforddictionaries.com/us/definition/american_english/report?q=report.

[5] Audit, inspection, and report are all synonyms for "examination." *See, e.g.*, http://thesaurus.com/browse/examination. Within OCIE, the terms "examination" and "inspection" are used interchangeably. JA 26-31 at ¶ 6.

conducted pursuant to the SEC's examination authority. JA 26-31 at ¶¶ 2, 7, 8, 10, 14.

Because the documents requested by PIABA relate to one or more reports of examinations of a financial institution regulated by the SEC, they come within Exemption 8, and no further analysis is required or relevant. The arguments of Amici Curiae that the district court misapplied this Court's precedent and interpreted Exemption 8 to be broader than its plain meaning are consequently without merit. Amici Br. at 5-14.

B. It Is Neither Necessary nor Appropriate to Look Beyond the Text of Exemption 8 Itself; In Any Event, the Legislative History Does Not Support Reading PIABA's Proposed Limits Into the Exemption.

Courts look beyond the plain meaning of a statute only in limited circumstances, "most notably when there is an assertion of a significant change in circumstances since enactment" or "when a literal reading leads to an unreasonable result." *Consumers Union*, 589 F.2d at 534; *see also Ratzlaj v. U.S.*, 510 U.S. 135, 147-48 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"). PIABA devotes much of its brief to the legislative history of Exemption 8 in an

effort to show that the term examination report—despite its plain language—covers only reports that come within a somewhat convoluted definition: "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." Br. at 21.[6] That argument is unavailing. PIABA points to nothing that suggests Congress sought to exclude aspects of the SEC's examination program from Exemption 8.

[6] PIABA later states that "FINRA is not a depository institution or even a traditional market participant." Br. at 32. By asserting that only information "of a financial institution acting in its role as a traditional market participant" is protected by Exemption 8, PIABA is thus arguing that documents relating to examinations of FINRA, a non-traditional market participant, never come within Exemption 8. As discussed below, that result is inherently inconsistent with Congress's clarification that all entities the SEC examines or regulates, including FINRA, are financial institutions within the meaning of Exemption 8. 15 U.S.C. § 78x(e).

1. PIABA Does Not Identify any Authority that Limits the Meaning of "Examination, Operating, or Condition Report."

In the district court, PIABA did not question the meaning of "examination, operating, or condition reports."[7] On appeal, it argues for the first time that these terms are "not part of common parlance" and are "industry-specific" terms of art that cannot be given their plain meaning. Br. at 21. Arguments not raised in the district court are generally waived. *See, e.g.*, *Murthy v. Vilsack*, 609 F.3d 460, 465 (D.C. Cir. 2010). In any event, PIABA's argument is unfounded and unpersuasive.

PIABA does not cite any support for its proposition that "examination, operating, or condition report" is a term of art that has some established meaning that is different from its plain meaning. Br. at 21. PIABA attempts to find support for its argument in the legislative history of Exemption 8. But despite repeatedly asserting that it is "clear" that Congress intended the exemption to be limited to "records revealing

[7] PIABA asserts that "the SEC does not argue that the requested records pertain to operating or condition reports" and that accordingly "this case hinges on" the definition of an "examination report." Br. at 20. However, because the documents clearly related to examinations, the parties had no need to brief – or even discuss – whether the written product could alternatively be characterized as an "operating report" or as a "condition report."

financial transactions or conditions, or operating or management issues bearing on those financial activities," PIABA's citations show only the unremarkable occurrence of a variety of references to bank examination reports and the type of information that would typically be expected in such a report. Br. at 26-30. This Court's seminal case on Exemption 8 specifically rejected the proposition that the term "examination" is limited to the types of examinations Congress may have contemplated in 1966. *Consumers Union*, 589 F.2d at 534. In any event, PIABA points to nothing that shows that Congress limited Exemption 8 to bank examination reports or to financial information about an entity. To the contrary, Exemption 8, by its plain terms, applies to *all* documents contained in or related to *any* examination, operating, or condition report of *any* financial institution if prepared by, on behalf of, or for the use of an agency responsible for regulating or supervising financial institutions.[8]

[8] PIABA takes issue with the district court's discussion about whether PIABA's proposed limitation would render Exemption 8 superfluous because financial information is already exempt from disclosure pursuant to Exemption 4. JA 52. That discussion was purely dicta and this Court need not consider it to resolve this appeal.

2. The Plain Language of Exemption 8 Does Not Lead to an Unreasonable Result.

As noted above, courts may look behind the plain meaning of a statute if a literal application would produce an unreasonable result. PIABA does not cite to any result of applying Exemption 8's plain meaning that is unreasonable. At most, PIABA implies that the Court should look behind the plain meaning because a plain reading of the statute would lead to a result at odds with the statute's purpose. Br. at 32-35. Even assuming *arguendo* that an outcome inconsistent with a statute's stated purpose warrants disregarding the plain meaning,[9] a plain reading of Exemption 8 is fully in accord with the purpose of that provision. This Court has recognized that one purpose of Exemption 8 is "safeguard[ing] the relationship between the banks and their supervising agencies," and applying Exemption 8 to all SEC examinations, as Congress intended in recently enacting Section 24(e), safeguards the relationship between the SEC and all the entities it examines. *Consumers Union*, 589 F.2d at 534.

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[9] *But see Eagle-Picher Industries, Inc. v. U. S. Environmental Protection Agency*, 759 F.2d 922, 930 (D.C. Cir. 1985) ("the correct rule is … that resort is not to be made to the legislative history when the statute is clear and fidelity to the plain language does not lead to an irrational result").

PIABA suggests that withholding the requested documents does not further the purpose of Exemption 8, because the SEC does not need the protections of FOIA to safeguard its regulatory relationship with FINRA. Br. at 32-35. As support for its argument, it asserts that "the SEC has strong mechanisms for ensuring FINRA's cooperation." *Id*. at 33. This characterization of the regulatory relationship dramatically underestimates the importance of voluntary compliance. The fact that the SEC has the authority to take draconian measures does not mean that it is efficient or effective to do so. The SEC depends on FINRA's cooperation to effectively and efficiently conduct examinations, to address potential remedies for any deficiencies found in those exams, and to fulfill its oversight responsibilities generally, which in turn affects the SEC's mission to effectively and efficiently regulate the securities markets.

PIABA appears to imply that the SEC must provide evidence detailing how disclosing the particular documents at issue would hinder FINRA's cooperation with future examinations. Br. at 34. Again, it cites no persuasive support for that proposition, relying solely on one inapposite case. *Washington Post Co. v. HHS*, 690 F.2d 252, 269 (D.C.

Cir. 1982) (addressing the parameters of Exemption 4, which serves different purposes than Exemption 8). This Court has consistently recognized that maintaining a productive relationship between the regulator and the regulatee is an animating purpose of the exemption. *See, e.g.*, *Consumers Union*, 589 F.2d at 534 (if documents related to examinations were made freely available to the public, then financial institutions "would cooperate less than fully with federal authorities"); *Public Citizen*, 938 F.2d at 293 ("potential consequences of disclosure may also strain the cooperation . . . that is essential to the examination process").

In any event, the SEC has provided evidence that mandatory disclosure of its examination-related documents could make its regulatory relationship with FINRA more adversarial and consequently less effective. JA 26-31 at ¶¶ 15, 16. While PIABA dismisses this evidence as "conclusory" and "vague," it is neither. The SEC's declarant stated that, in her (then) 13 years of experience as both an examiner and a supervisor, "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. … [I]n 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." JA 26-31 at ¶¶15, 16.

The district court thus correctly found 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." JA 50.

3. Recent Congressional Action Stating That Every Entity the SEC Is Responsible for Regulating, Supervising, or Examining Is a "Financial Institution" for Purposes of Exemption 8 Shows That Exemption 8 Is Not Limited to Traditional Bank Examination-type Records.

The district court noted that a short-lived provision of the Dodd-Frank Act[10] ("Section 929I") would have given the SEC specific authority

[10] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 929I (2010).

to withhold certain types of information from the public, but that provision was repealed due to concerns about whether it was overbroad. In its stead, Congress enacted Section 24(e) of the Exchange Act (15 U.S.C. § 78x(e)) to clarify that "any entity the SEC regulates under the Securities Exchange Act will be considered a financial institution for the purpose of Exemption 8." JA 57 (quoting testimony of Rep. Towns at an SEC Confidentiality Hearing). The district court found it "peculiar" that Congress on the one hand repealed Section 929I as overbroad but simultaneously (arguably) expanded the reach of Exemption 8 as applied to the SEC.[11] Nonetheless, the district court found that "there is no escaping the conclusion that 'Congress has left no room for a narrower interpretation.'" JA 58-59.

PIABA and Amici Curiae argue that the activity surrounding Section 929I is either irrelevant or in some way supports PIABA's position. Br. at 37-41; Amici Br. at 14-20. That is not so. Section 929I

[11] The district court questioned whether, absent the clarifying amendment, FINRA would qualify as a "financial institution" for purposes of Exemption 8. JA 58. However, in *Feshbach v. SEC*, 5 F.Supp.2d 774, 781 (D.D.C. 1997), the district court held that the term "financial institutions" in Exemption 8 "encompasses . . . self-regulatory organizations such as the NASD."

permitted the SEC to withhold "records or information obtained pursuant to [the SEC's examination authority], 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." 124 Stat. at 1857-58. Thus, Section 929I allowed the SEC to withhold documents from examinations in response to subpoenas as well as in response to FOIA requests. When Congress repealed Section 929I and enacted Section 24(e), it narrowed the SEC's ability to withhold documents because Section 24(e) does not specifically protect examination documents that are subpoenaed.

By plainly stating in Section 24(e) that all entities the SEC regulates, supervises, or examines are "financial institutions" for the purpose of Exemption 8, Congress did not (as the district court feared) give back with one hand what it took away with the other. Rather, Congress recognized the SEC's legitimate need to improve its "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" because the "courts

have not yet addressed whether certain entities the Commission has the authority and responsibility to examine … are financial institutions for purposes of these FOIA protections." JA 56-57 and citations therein. Congress thus reconciled the SEC's legitimate concerns about protecting the examination-related information of *all* its regulated entities with concerns about the effects of Section 929I that went beyond Exemption 8.

PIABA does not, and cannot, reconcile its argument that there is an unexpressed limitation hidden in Exemption 8 with the legislative history and purpose of Section 24(e). The SEC's concern that led Congress to adopt Section 24(e) was not limited to protecting financial information of a type that would appear in a bank examination report. Instead, the amendment was intended to protect "sensitive and confidential" materials generally—if that information was obtained in the course of an SEC examination—to promote an efficient and effective supervisory relationship. In that context, Congress' specification that any entity regulated by the SEC is a "financial institution" for purposes of Exemption 8, without expressing any limitation on the types of documents protected by that exemption, reaffirmed the broad scope of

the protection Congress intended Exemption 8 to afford to *all* examination-related information.

II. PIABA'S REMAINING ARGUMENTS ARE EQUALLY UNAVAILING.

A. Even If Exemption 8 Requires That the Withheld Information Relate to a Specific Examination Report, the SEC Has Made That Showing Here.

PIABA argues that the district court erred in finding that the SEC has shown that all responsive documents are "contained in or related to" an examination report, because the district court "replace[d] 'examination, operating, or condition report' with 'ongoing and continuous oversight responsibilities.'" Br. at 42. This argument is meritless because the district court did not base its holding on the proposition that Exemption 8 applies to all documents related to an examination, even if there is not an examination report. [12] Rather, the district court found that PIABA's contention that the SEC had not

[12] The district court observed that in other cases Exemption 8 was found to be broad enough to encompass documents related to examinations even where the examination does not culminate in a specific report, so long as the examination-related information is obtained through an ongoing supervisory process. *See, e.g.*, *Judicial Watch, Inc. v. U.S. Dept. of Treasury*, 796 F.Supp.2d 13, 37 (D.D.C. 2011); *McKinley*, 744 F.Supp.2d at 143.

identified a report pertaining to each document was "factually inaccurate." JA 62.

The record amply supports the district court's factual finding. The SEC offered the sworn statement of an Exam Manager who had first-hand knowledge about the examinations at issue. Her statement described the different examinations to which PIABA's request relates and established that each examination resulted in a written product, whether termed a "report" or a "closing memorandum." JA 27-28 at ¶¶ 7-10.

B. The SEC's Declaration Is Sufficient to Establish That Exemption 8 Applies to All the Requested Information.

For reasons that are not entirely clear, PIABA finds fault with the SEC's support for its argument that all the withheld information relates to one or more examination reports. Br. at 43-44. But as noted above, the SEC's declarant established that there were four different examinations and additional reviews of customer complaints, all conducted pursuant to the SEC's examination authority, to which PIABA's request relates and stated that each examination or review resulted in a report or closing memorandum. JA 28 at ¶ 9.

PIABA attempts to find fault with the declaration because it uses both the term "report" and "closing memorandum." Br. at 44. But that is a distinction without a legal difference. As discussed above, the plain meaning of "examination report" encompasses any writing that memorializes an examination, and the SEC's examination staff uses both the terms "report" and "closing memorandum" to refer to such a writing. JA 28 at ¶ 9; *see also Bloomberg, L.P. v. SEC,* 357 F.Supp.2d 156 (D.D.C. 2004) (holding that memoranda are a "report" for purposes of Exemption 8 where exempting those documents serves the purposes of the exemption).

The district court correctly found that the SEC provided sufficient evidence on which the court could conclude that all the responsive documents pertain to one or more examinations, each of which culminated in a written report. JA 62.

CONCLUSION

This Court has rejected every attempt to read limitations into Exemption 8 that Congress did not see fit to write into the statute itself. PIABA's attempt should not fare any better. The SEC respectfully asks this Court to affirm the district court's decision.

Respectfully submitted,

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January 24, 2014

APPENDIX OF STATUTES AND REGULATIONS

Except for the following, all applicable statutes and regulations are contained in the Brief for Plaintiff-Appellant PIABA.

Section 17 of the Securities Exchange Act of 1934
(15 U.S.C. § 78q):

(a)(1) Every … registered securities association … shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter. …

…

(b)(1) All records of persons described in subsection (a) of this section are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission and the appropriate regulatory agency for such persons as the Commission or the appropriate regulatory agency for such persons deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter: …

Rule 17a-1
(17 C.F.R. § 240.17a-1):

(a) Every … national securities association … shall keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such and in the conduct of its self-regulatory activity.

(b) Every … national securities association … shall keep all such documents for a period of not less than five years, the first two years in an easily accessible place, subject to the destruction and disposition provisions of Rule 17a–6.

(c) Every … registered securities association … shall, upon request of any representative of the Commission, promptly furnish to the possession of such representative copies of any documents required to be

kept and preserved by it pursuant to paragraphs (a) and (b) of this section.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5275 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Century Schoolbook font.

January 24, 2014

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CERTIFICATE OF SERVICE

I certify that on this date a true and accurate copy of the foregoing Brief of the Securities and Exchange Commission was served on each of the following via the Court's CM/ECF system:

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