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.

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Respectfully submitted,

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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

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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
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