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 REPLY BRIEF

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GLOSSARY

FINRA	Financial Industry Regulatory Authority
FOIA	Freedom of Information Act
JA	Joint Appendix
PIABA	Public Investors Arbitration Bar Association
SEC	U.S. Securities and Exchange Commission
SRO	Self-regulatory organization

SUMMARY OF ARGUMENT

The narrow issue in this case is whether records that the Public Investors Arbitration Bar Association (PIABA) requested from the U.S. Securities and Exchange Commission (SEC) under the Freedom of Information Act (FOIA) are contained in or related to "examination reports," as FOIA Exemption 8 uses that term. As PIABA has explained, "examination reports" is a term with a special meaning under FOIA that covers reports about financial transactions or conditions, or related operating or management issues, undertaken by a bank or another financial institution acting as a traditional market participant. The requested records are not contained in or related to examination reports, so defined, because the records pertain to the SEC's review of a purely administrative function of the Financial Industry Regulatory Authority (FINRA), a self-regulatory organization (SRO). In addition, even under the definition of "examination reports" advanced by the SEC, the agency has not met its evidentiary burden of demonstrating that each of the requested records is covered by Exemption 8. Accordingly, the records should be released.[1]

[1] The SEC suggests that the issue presented is whether the requested records relate to "examination, operating, or condition reports," not just "examination reports." SEC Br. at 8-9. But the SEC never argued below 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. And on appeal it states only that it has had "no need to brief . . . whether the written product could alternatively be (continued)

The SEC's contention to the contrary is based on several errors and should be rejected.

1. The SEC contends that Exemption 8's language plainly and unambiguously covers the records at issue. Its argument, however, rests on an implicit and mistaken assumption that Exemption 8's reference to "examination" as part of the term "examination reports" includes any exercise of the SEC's "examination" authority under the Securities Exchange Act of 1934 (the Exchange Act). The SEC does not point to any evidence that Congress intended the two terms to be synonymous, nor does Exemption 8 expressly cross-reference the Exchange Act. And although the SEC points to this Court's Exemption 8 cases for support, none of those cases supports the definition urged by the SEC or stands for the proposition that this Court looks to an agency's "examination" authority under its organic statute to divine the meaning of "examination reports" for the purpose of Exemption 8.

2. Contrary to the SEC's contention, it is perfectly appropriate for this Court to consult the congressional record to determine the meaning of "examination reports," a term undefined in FOIA. The congressional record at the

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characterized" as an operating or condition report. SEC Br. 16 n.7. The SEC has waived this assertion—to the extent it could even be deemed an argument—by raising it in such a "cursory" fashion "only in a footnote." *Hutchins v. Dist. of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (en banc).

time of Exemption 8's adoption demonstrates that Congress had a far narrower view than does the SEC today of the type of "examination" that would lead to "examination reports" covered by Exemption 8. The SEC points to no contrary evidence, contending instead that PIABA must point to language expressly precluding application of Exemption 8 to the type of documents at issue here. But the term "examination reports" should be interpreted consistent with the problem that Exemption 8 was adopted to solve, and when Congress enacted FOIA, it was concerned about disclosure of information about financial transactions and operations, not about the type of administrative program operated here by an SRO.

3. Neither FOIA's purposes nor a 2010 amendment to the Exchange Act support the SEC's position. The SEC does not dispute that its broad interpretation of Exemption 8 would permit the withholding of "everything [the agency] scoops up in the course of its interaction with FINRA," just as the district court suggested. Dist. Ct. Op., JA 59 (internal quotation marks omitted). That outcome is flatly at odds with FOIA's purpose as a disclosure statute. The SEC contends that withholding here serves a more specific purpose of Exemption 8 to protect the cooperative relationship between the SEC and FINRA. This Court has explained, however, that Congress aimed to promote this cooperation between financial regulators and financial institutions by alleviating institutions' concern that their examination reports would be disclosed to competitors and the public. The SEC

ignores that FINRA acts more like a monopolist in the securities arbitration field, so disclosure does not threaten FINRA's competitive edge. In addition, there is no evidence that FINRA sought confidentiality for all of the requested records. Under the SEC's own regulations, a failure to request confidentiality creates a presumption that FINRA has waived any confidentiality interest, a point that PIABA made in its opening brief to which the SEC has not responded.

The SEC's contention that the 2010 amendment to the Exchange Act *confirmed* its authority to withhold under FOIA documents related to "examinations" under the Exchange Act is contrary to express statutory language. If anything, Congress's adoption of the 2010 amendment demonstrates that the term "examination reports" under Exemption 8 does not include the product of all "examinations" under the Exchange Act.

4. Even if this Court were to adopt the SEC's broad definition of "examination reports," the agency has failed to meet its burden of demonstrating that each requested record is exempt from disclosure. The SEC's own declarant states that some of the requested records relate to consumer complaints that originated with consumers, not FINRA, and the evidence does not support a finding that all such complaints resulted in reviews of FINRA records. Thus, even if this Court were to conclude that an exercise of the SEC's examination authority under the Exchange Act invariably leads to an "examination report" under FOIA

Exemption 8, the SEC has not demonstrated that it exercised that authority with respect to all of the requested records. Moreover, the agency's declarant distinguishes between "reports" and "closing memoranda"—a distinction that the SEC wrongly asks this Court to ignore. FOIA places the burden on the government to demonstrate that an exemption applies, and the SEC's ambiguous evidence does not meet that burden.

ARGUMENT

I. The Term "Examination Reports" in Exemption 8 Does Not Cover Documents Regarding the Adequacy of an Administrative Function That FINRA Undertakes As a Self-Regulatory Organization.

As PIABA has explained, FOIA does not expressly define "examination reports," but the statutory structure makes clear that "examination reports" is a term with a special meaning under the statute. Opening Br. at 21-22. The congressional record indicates that Congress used the term "examination reports" to cover only reports about financial transactions or conditions, or related operating or management issues, undertaken by an entity acting as a traditional market participant. *Id.* at 24-32. At the time of Exemption 8's adoption, congressional witnesses repeatedly described "examination reports" as containing information about financial activities, including deposits, loans, or other credit, or about an entity's competitive position. *See id.* at 25-30 and citations therein. Moreover, the Treasury Department argued that Exemption 8's protection was needed to preserve

the bite of both the Trade Secrets Act, which protects from unauthorized disclosure various types of financial and commercial information obtained by way of an agency's examination, and a separate statutory provision forbidding a bank examiner from disclosing borrowers' names or certain collateral for loans. *See id.* at 27 (discussing 18 U.S.C. §§ 1905, 1906). Because the records requested by PIABA deal only with an SRO's administrative function—that is, FINRA's securities arbitration program and related customer complaints—they do not fall within the scope of "examination reports" under Exemption 8 and should be released.

A. The SEC's Position with Regard to the "Plain Language" of Exemption 8 Is Internally Inconsistent, Based on an Unjustified Assumption, and Unsupported by Case Law.

Although the SEC contends that the requested records are contained in or related to "examination reports" under Exemption 8's "plain terms," SEC Br. at 17, the SEC neither explains why "examination reports" is a term in common parlance, nor offers a dictionary definition for the term as a whole. Rather, the SEC breaks the term into separate words, contending that "[n]either the word 'report' nor the word 'examination' is obscure." *Id.* at 12. It emphasizes that the Exchange Act permits it to make "reasonable periodic, special, or other examinations" of the records of various entities, including FINRA, 15 U.S.C. § 78q(b)(1), and that SEC regulations require FINRA to keep all of the records it produces or obtains in its

capacity as an SRO, 17 C.F.R. § 240.17a-1. In the SEC's view, whenever the agency reviews FINRA documents, it conducts an "examination" for the purpose of FOIA Exemption 8. Any "account" it writes after considering or investigating an issue is a report, SEC Br. at 13 (citing OxfordDictionaries.com), and any such account "memorializing the exercise of its examination authority is an 'examination report' under" FOIA, *id.* The SEC errs in three primary ways.

1. The SEC is wrong to contend that the definition of "examination reports" is plain under FOIA. Indeed, the SEC implicitly concedes its error by urging this Court to resort to the Exchange Act to define "examination." *See, e.g.*, *United States v. Correll*, 389 U.S. 299, 304 & n.16 (1967) (noting that where a statutory provision was not "self-defining" or capable of definition with resort to a dictionary, "no appeal to the 'plain language' of the section [could] obviate the need for further statutory construction"). Thus, PIABA and the SEC do not so much disagree as to whether "examination report" is a term with a special meaning not apparent from the face of FOIA. Rather, they disagree as to the appropriate source from which to discern its meaning and the extent to which the meaning can be determined without reference to the congressional record.

2. The SEC would have this Court assume that the Exchange Act's use of the term "examination" is interchangeable with FOIA's reference to "examination" in the term "examination reports." But the SEC provides no

justification for such an assumption. Exemption 8 does not cross-reference the Exchange Act, a connection that Congress certainly could have made had it wished to incorporate the Exchange Act's use of the word "examination" for the purpose of defining "examination reports" in FOIA. *See, e.g.*, *AFL-CIO v. Chao*, 409 F.3d 377, 381 (D.C. Cir. 2005) (rejecting an argument that a statute's reference to reports on "financial condition" and "operations" necessarily incorporated a requirement that reports be made in accordance with generally accepted accounting principles because the statute did not "expressly provide" for such incorporation).

Instead, as PIABA explained in its opening brief, to the extent that Congress even considered other statutory provisions using the term "examination" or "examiner" when it adopted Exemption 8, it appears to have focused on the Trade Secrets Act, which prohibits the unauthorized disclosure of trade secrets and other confidential information obtained by way of an agency's "examination" or certain other methods, and a separate criminal provision forbidding bank examiners from disclosing borrowers' names or certain loan collateral. *See* Opening Br. at 27-28 (discussing 18 U.S.C. §§ 1905, 1906). Moreover, although the SEC lobbied Congress for greater secrecy provisions under FOIA, it did not urge the adoption of an expansive Exemption 8, focusing instead on the types of protections later incorporated in Exemptions 4, 6, and 7. *See id.* at 31 n.6. Thus, it is not clear that Congress even thought about the SEC's examination authority under the Exchange

Act when it crafted Exemption 8, much less that it intended to incorporate the Exchange Act's use of the term "examination" into FOIA.

3. In its discussion of Exemption 8's "plain language," the SEC relies heavily on several court of appeals decisions purportedly supporting its position. SEC Br. at 9-11. However, none of these cases provides support.

As PIABA has explained, neither *Gregory v. FDIC*, 631 F.2d 896 (D.C. Cir. 1980) (per curiam), nor *Consumers Union v. Heimann*, 589 F.2d 531 (D.C. Cir. 1978), defines the outer limits of the term "examination report" or makes clear the basis for defining that term. Opening Br. 22-24. Further, to determine whether Exemption 8 applies, those cases do not consider whether an agency conducts an "examination" under the terms of its organic statute, as the SEC would have this Court do. The plaintiff in *Gregory* conceded on appeal that "a literal reading of [Exemption 8] covered the financial records in dispute," but contended that such a reading would lead to an unreasonable result and thus should not apply. 631 F.2d at 898. PIABA noted this limitation in its opening brief, yet the SEC failed to respond to it. Likewise, in *Consumers Union*, this Court had no difficulty concluding that the documents were related to "bank examination reports." 589 F.2d at 534. It focused instead on the more difficult question whether it would be unreasonable to apply Exemption 8 to documents related to examination reports

that assessed compliance with the Truth in Lending Act because that statute post-dates FOIA.

Here, PIABA does not concede that the documents at issue are plainly covered by Exemption 8's reference to "examination reports," as the plaintiff in *Gregory* did. And its argument is not that Exemption 8 fails to apply because the purported "examination reports" assess FINRA compliance with laws or obligations that post-date FOIA. Rather, PIABA contends that the documents regarding SEC inspections and investigations at issue here, regardless of vintage, are not the type that Congress intended to cover when it enacted Exemption 8.

The SEC cites two other court of appeals decisions for support, SEC Br. at 11, but those cases are irrelevant. *Public Citizen v. Farm Credit Administration*, 938 F.2d 290 (D.C. Cir. 1991), 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." *Id.* at 293-94. That case is not applicable here because the parties agree that the SEC regulates FINRA and that FINRA is a financial institution. Likewise, the SEC's reliance on *Abrams v. DOT*, 243 Fed. App'x 4 (5th Cir. 2007), is misplaced because *Abrams* does not define the term "examination reports." In any event, the SEC misstates *Abrams*' holding as standing for the proposition that "Exemption 8 protects documents related to an examination even if not directly connected to an examination report."

SEC Br. at 11. *Abrams* held no such thing. The plaintiff there argued that for Exemption 8 to apply, a requested record not only must relate to an examination report, but that "a direct connection must be shown between the contents of the [r]eport and the contents" of the requested record. 243 Fed. App'x at 6. The court of appeals rejected that argument because Exemption 8 "only requires that a matter be related to [an examination] [r]eport." *Id.* It did not permit withholding simply because documents relate to an examination, in the absence of an "examination report."

B. The Congressional Record Demonstrates That Exemption 8 Was Not Intended to Cover the Requested Records.

The SEC contends that this Court should not look to the congressional record to discern the scope of "examination reports" in Exemption 8 because the language of Exemption 8 is plain. But as PIABA demonstrated in Part I.A, the definition of "examination reports" is not apparent on FOIA's face, and even the SEC concedes that this Court must look elsewhere to give meaning to that term. In the face of ambiguous statutory text, it is appropriate to look to legislative history and statutory purpose to determine the meaning of the text. *See, e.g.*, *Whitaker v. Thompson*, 353 F.3d 947, 951-52 (D.C. Cir. 2004).

In any event, the SEC contends that this Court may look beyond the purportedly "plain meaning" of Exemption 8—including with reference to the legislative history—if the law's "'literal reading leads to an unreasonable result.'"

SEC Br. at 14 (quoting *Consumers Union*, 589 F.2d at 534); *see also id.* at 18. This Court has in more recent cases indicated that this doctrine is limited to instances in which application of a literal reading would lead to an "absurd" result, *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 494 (D.C. Cir. 2004) (citing *Lamie v. U.S. Tr.*, 124 S. Ct. 1023, 1030 (2004)), or would "produce a result demonstrably at odds with the intentions of its drafters," *Fin. Planning Ass'n v. SEC*, 482 F.3d 481, 488 (D.C. Cir. 2007) (internal quotation marks and alterations omitted). Either way, under the expansive interpretation of Exemption 8 urged by the SEC, the SEC could withhold virtually every document that it obtains or creates in its dealings with FINRA. That outcome could not conceivably be what Congress intended.

1. Withholding here is inconsistent with the congressional record at the time of FOIA's enactment. As PIABA has explained, *see* Opening Br. at 24-31, Congress had ample evidence before it about the dangers of revealing "examination reports" that concern a bank or other financial institution's financial transactions or conditions, or related operating or management issues. It was those dangers that Congress sought to avoid by enacting Exemption 8.

The SEC cites no contrary authority, instead dismissing PIABA's evidence from the congressional record on the ground that PIABA does not point to express evidence that "Congress sought to exclude aspects of the SEC's examination

program from Exemption 8." SEC Br. at 15. But the SEC has pointed to no justification that Congress sought to *include* all examinations under the Exchange Act. The term "examination reports" takes its meaning from what Congress had in mind when enacting Exemption 8, and there is no indication that Congress sought to protect records regarding an SRO's administrative function not bearing on the SRO's financial position or operations.

2. The SEC's reliance on a 2010 amendment to the Exchange Act, *see* Application of the Freedom of Information Act to Certain Statutes, Pub. L. No. 111-257, § 1, 124 Stat. 2646 (2010) (2010 Amendment), to bolster its position is misplaced. The SEC contends that by defining all entities regulated by the SEC as "financial institutions" in the 2010 Amendment, "Congress recognized the SEC's legitimate need to improve its examinations of regulated entities by clarifying the protections afforded to regulatees that provide the [SEC] with sensitive and confidential materials." SEC Br. at 23 (internal quotation marks omitted). In the SEC's view, the 2010 Amendment thus confirmed the agency's broad withholding authority under FOIA and cut back only on the agency's ability to withhold documents in response to subpoenas. *Id.* at 23-24. The SEC's contention is based on a revisionist history at odds with the express language of the 2010 Amendment and is seemingly oblivious to the congressional outrage at the SEC's FOIA processing that led to that amendment's adoption. To the extent the 2010

Amendment is relevant at all, it confirms that this Court should not give the broad definition urged by the SEC to "examination reports" under Exemption 8, and that doing so would be patently unreasonable in light of Congress's intent.

As PIABA has explained, the 2010 Amendment was adopted to replace Section 929I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010), a broad secrecy provision for the SEC. In its short-lived tenure, Section 929I permitted the SEC, in response to both FOIA requests and to subpoenas, to withhold

> 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, *repealed in pertinent part by* 2010 Amendment. Section 929I thus gave the SEC broader authority to withhold documents under FOIA than the agency had under Exemption 8 alone. The 2010 Amendment repealed Section 929I and left intact Exemption 8's existing requirement that records be "contained in or related to examination, operating, or condition reports," as FOIA used that term, for Exemption 8 to apply. 5 U.S.C. § 552(b)(8). However, it provided 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.

2010 Amendment, *codified as* 15 U.S.C. § 78x(e).

A comparison of the plain language of Section 929I and the 2010 Amendment (in conjunction with Exemption 8) makes clear that the 2010 Amendment constrained the SEC's ability to withhold documents in response to FOIA requests. That the 2010 Amendment affected the agency's authority to withhold information in response to FOIA requests—not just to subpoenas—is also evident from the amendment's title ("Application of the Freedom of Information Act to Certain Statutes") and express purpose (providing "for certain *disclosures* under section 552 of title 5, United States Code, (commonly referred to as the Freedom of Information Act), and for other purposes"). 2010 Amendment (emphasis added).

Were there any doubt about the 2010 Amendment's impact on the SEC's ability to withhold documents in response to FOIA requests, the legislative history resolves that doubt in PIABA's favor. The impetus for the 2010 Amendment was a media report that the SEC intended to rely on § 929I in response to FOIA requests—not subpoenas—by Fox Business News about the Bernie Madoff scandal. *See* Opening Br. at 38. In addition, congressional sponsors repeatedly indicated the amendment was necessary to protect disclosure under FOIA. For example, Senator Leahy stated that the bill was intended to ensure that "FOIA[]

remains an effective tool to provide public access to critical information about the stability of our financial markets" and that the bill would "eliminate several broad FOIA exemptions for [SEC] records." 156th Cong. Rec. S6889 (Aug. 5, 2010) (statement of Sen. Leahy). The SEC thus errs by claiming that the amendment was intended to confirm Exemption 8's broad reach without cutting back in any way on the agency's ability to withhold documents in response to FOIA requests.

Indeed, to the extent the 2010 Amendment is revelatory, its history indicates that a more recent Congress legislating against the backdrop of existing Exemption 8 interpretations did not ascribe to Exemption 8 the broad reach accorded it by the SEC here. Congress enacted the 2010 Amendment because of deep concerns that Section 929I, as interpreted by the SEC, permitted the agency to withhold "all information provided to the [SEC] in connection with its broad examination and surveillance activities." 156th Cong. Rec. S6889 (Aug. 5, 2010) (statement of Sen. Leahy); *see also* 156th Cong. Rec. H6954 (Sept. 23, 2010) (statement of Rep. Towns) (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"). If adopted by this Court, the SEC's interpretation of Exemption 8 would reinstate by judicial decree the very outcome deemed anathema to FOIA by Congress in 2010. Thus, to the extent the 2010 Amendment is relevant here, it confirms that the Court should interpret "examination reports" narrowly.

C. Withholding in This Case Does Not Serve FOIA's Purposes.

This Court may also consider FOIA's purpose, including the particular purposes of Exemption 8, when interpreting the term "examination reports." "[D]isclosure, not secrecy, is [FOIA's] dominant objective." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976). The SEC's interpretation of "examination reports" surely would not serve that purpose because it would permit the withholding of "everything [the agency] scoops up in the course of its interaction with FINRA," just as the district court suggested. Dist. Ct. Op., JA 59 (internal quotation marks omitted).

The SEC's interpretation fares no better when measured against the specific purposes of Exemption 8. The SEC does not argue that withholding serves Exemption 8's primary purpose of protecting the security of financial institutions and preventing unwarranted runs on the banks. And it errs in contending, *see* SEC Br. at 18, that withholding serves Exemption 8's "secondary purpose" of "safeguard[ing] the relationship between the banks and their supervising agencies," *Consumers Union*, 589 F.2d at 534.

In adopting Exemption 8, Congress sought to assuage the concern that if banks feared that their examination information would be "freely available to the public and to banking competitors," they might be less willing to cooperate with their regulators. *Id.* However, as PIABA has explained, FINRA acts more like a

monopolist in the securities arbitration field than a competitor. *See* Opening Br. at 33. Accordingly, disclosure of FINRA arbitration program reviews or consumer complaints would not threaten FINRA's competitive edge. Nor would such disclosure create the same concerns about public reaction that disclosure of business-related information for a traditional market participant might create. The SEC's brief is silent in response to PIABA's argument in this regard.

In addition, the SEC has strong mechanisms for ensuring FINRA's cooperation should FINRA attempt to curtail its voluntary compliance, which undercuts the assertion that secrecy here is needed to protect the relationship between regulators and regulated entities. The SEC may, for example, impose limitations on FINRA's activities due to a failure to produce records, 15 U.S.C. § 78s(h), or restrict the use of mandatory arbitration agreements, *id.* § 78o(o). The SEC does not dispute that it could obtain the information it needs for oversight by compulsion; it contends only that such compulsory measures are "draconian," and that the agency's current oversight depends on the agency's ability to keep secret evaluations of FINRA's regulatory programs. SEC Br. at 19-21. But it will presumably *always* be true that voluntary compliance is preferable to the invocation of an agency's enforcement powers. And the SEC has provided only vague assertions regarding programmatic effectiveness. *See* Lever Decl. ¶¶ 15-16, JA 30.

In any event, the evidence does not support finding that FINRA has requested confidential treatment for all of the requested records in this case. *See id.* ¶ 12, JA 29 (stating only that "FINRA requested FOIA confidential treatment for the documents provided to [the SEC's Office of Compliance Inspections and Examinations] in connection with *one or more* of the examinations described" (emphasis added)). Under the SEC's regulations, a failure to make such a request creates a presumption that FINRA has waived any interest in confidentiality, *see* 17 C.F.R. § 200.83(h)(1), a presumption that would severely undercut the SEC's assertion regarding the need for secrecy, even assuming that need is dispositive here. *See* Opening Br. at 34-35. The SEC's brief fails entirely to respond to PIABA's argument in this regard.

II. Even If This Court Adopts the SEC's Broad Definition of "Examination Reports," the SEC Has Not Met Its Burden of Demonstrating That the Withheld Records Are Exempt from Disclosure.

Even if this Court were to adopt a more expansive definition of "examination reports" than PIABA urges, the SEC still has not demonstrated that its inspections of FINRA's arbitration program and investigations of consumer complaints resulted in "examination reports," as FOIA uses that term. The district court rejected PIABA's argument in this regard on two alternative grounds, holding both that as a factual matter "each potentially responsive document does appear to relate to an examination report of some kind," and that "[i]n any event,"

"Exemption 8 does not require the defendant to identify a specific report to which the information relates." Dist. Ct. Op., JA 62 (internal quotation marks omitted). However, as PIABA has explained, evidence from the SEC's declarant does not support the district court's factual finding, and the plain language of Exemption 8, which applies only where matters are "contained in or related to examination . . . *reports*," 5 U.S.C. § 552(b)(8) (emphasis added), refutes the district court's legal holding. *See* Opening Br. at 41-44.

The SEC does not attempt to defend the district court's holding that Exemption 8 may apply even when the SEC cannot identify any particular report to which requested records relate. Instead, it contends that, as a factual matter, it has demonstrated that each of the requested records relates to an "examination report." SEC Br. at 26-27. That assertion—adopted by the district court—is incorrect. First, the SEC attempts to gloss over the distinction that its own declarant made between "four examinations," elsewhere described as "inspections" by the declarant, and the agency's "investigat[ion]" of customer complaints as part of its "ongoing and continuous oversight responsibilities." Lever Decl. ¶¶ 7-8, JA 27-28 (emphasis added). The agency takes the position that all of these inspections and consumer complaint investigations constitute "examinations." SEC Br. at 26. It never explains, however, how investigations of consumer complaints "received by the [agency] from arbitration participants," Lever Decl. ¶ 8, JA 28, necessarily fall

within the scope of the SEC's authority to conduct "examinations" of FINRA under 15 U.S.C. § 78q(b). Indeed, it is not even clear that the SEC obtained or reviewed documents from FINRA in the course of investigating each of the consumer complaints. The agency's declarant states only that the agency "*may have* . . . obtained a copy of the file and any other relevant documents from FINRA" in investigating each consumer complaint and that "*on one or more occasions*" the agency "incorporated the general subject matter of a particular complaint into a later investigation of FINRA's arbitration processes." Lever Decl. ¶ 8, JA 28 (emphasis added). That ambiguous evidence does not meet the agency's burden of demonstrating that each withheld record relates to an "examination" under the Exchange Act, much less to an "examination report" under FOIA.

The SEC also argues that, even though its declarant contends that the withheld records relate to "reports" *or* "closing memorand[a]," *id.* ¶ 9, JA 28, the declaration is sufficient to demonstrate that all of the requested records relate to "examination reports" for the purpose of Exemption 8. SEC Br. at 27. But the SEC's declarant drew a distinction between these two forms of written work product, and the case law does not support the SEC's conclusion that "memoranda are a 'report' for purposes of Exemption 8 where exempting those documents serves the purposes of the exemption." *Id.* The agency relies for this proposition exclusively on a district court's decision in *Bloomberg, L.P. v. SEC*, 357 F. Supp.

2d 156 (D.D.C. 2004), and that case does not stand for the proposition for which the SEC cites it. In *Bloomberg*, the SEC contended that notes and memoranda were exempt under Exemption 8 *not* because they were themselves "reports," but because they "relate[d] to . . . reports" made by financial institutions to the SEC during a meeting about "securities analyst conflicts and possible regulatory responses." *Id.* at 169. And the court accepted without any apparent dispute the assertion that information conveyed by financial institutions during a meeting could constitute a "report" covered by Exemption 8, focusing instead on other challenges to Exemption 8's application. *See id.* at 169-70.

In sum, the government has the burden of demonstrating that each of the requested records is contained in or relates to an "examination report." In the district court, the SEC recognized ambiguity in its evidence, but contended that such ambiguity did not matter, since Exemption 8 applies to all records obtained or created pursuant to the agency's examination or supervisory authority under the Exchange Act. The SEC has substantially narrowed its contention on appeal and now attempts to recast ambiguous evidence to meet Exemption 8's more stringent standard. The SEC has failed to meet its burden, and the district court's decision should be reversed.

CONCLUSION

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

Dated: February 12, 2014

Respectfully submitted,

/s/ Julie A. Murray

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: The type face is fourteen-point Times New Roman font, and the word count is 5,325.

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF SERVICE

I certify that on February 12, 2014, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Julie A. Murray
Julie A. Murray