NOTES

BACKDOOR BAILOUT DISCLOSURE: MUST THE FEDERAL RESERVE DISCLOSE THE IDENTITIES OF ITS BORROWERS UNDER THE FREEDOM OF INFORMATION ACT?

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I. INTRODUCTION 260
II. STRUCTURAL JUSTIFICATIONS FOR NON-DISCLOSURE 276
A. Agency Records 277
1. Board's Regulations Defining 'Agency Records' 278
2. Should a Deferential Standard of Review be Applied? 280
a. The Rationale for Deference 280
b. Deference to the Board's FOIA Regulations is Inappropriate 283
c. There is No 'Delegated Authority' Requirement 287
3. The Board's 'Agency Records' Argument Under Common Law 289
III. QUALITATIVE ARGUMENTS FOR NONDISCLOSURE 293
A. Evidentiary Burden 300
B. Exemption Four 304
1. Obtained From A Person Under Exemption Four 304
a. SCLF Lending Records Are Not 'Obtained From a Person' 307
2. Confidential 308
a. Purported Program Effectiveness Prong 309
b. Substantial Competitive Harm 316
c. Impairment 320
C. Exemption Five 322
1. Exemption Five is No Longer Applicable 324
IV. CONCLUSION 325

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I. INTRODUCTION

Bailout opacity allows for multiple narratives. There is the 'popular' version, in which the Treasury's hotly debated[1] and heavily scrutinized[2] $700 billion Troubled Asset Relief Program[3] allowed a handful of 'bailed out' AIG executives to pocket $165 million in bonus payments.[4] There is also the 'skeptics' version, in which the $170 billion injected into AIG was really a 'backdoor bailout'[5] of belatedly[6] disclosed[7] counterparties who continue to make big gambles and profit handsomely[8] while tapping a multi-trillion dollar, self-administered[9]

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1. *See*, *e.g.*, 154 CONG. REC. H10119-27 (daily ed. Sept. 30, 2008); Deborah Solomon & Michael R. Crittenden, *Paulson Debates Second Infusion—Hostile Lawmakers, Competing Bailout Demands and GAO Criticism Pose Dilemma*, WALL ST. J., Dec. 3, 2008, at A4.

2. *See*, *e.g.*, CONGRESSIONAL OVERSIGHT PANEL FOR ECONOMIC STABILIZATION, QUESTIONS ABOUT THE $700 BILLION EMERGENCY ECONOMIC STABILIZATION FUNDS: THE FIRST REPORT OF THE CONGRESSIONAL OVERSIGHT PANEL FOR ECONOMIC STABILIZATION 6 (Dec. 10, 2008), *available at* http://cop.senate.gov/documents/cop-121008-report.pdf (asking "who got the money, what have they done with it, how has it helped the country, and how has it helped ordinary people").

3. This is the infamous Troubled Asset Relief Program, dubbed "TARP." Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

4. *See*, *e.g.*, Michael W. Phillips, *Outrage Overflows on Capitol Hill as Lawmakers Denounce Bonuses*, WALL ST. J., Mar. 19, 2009, at A4.

5. OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLED ASSET RELIEF PROGRAM, FACTORS AFFECTING EFFORTS TO LIMIT PAYMENTS TO AIG COUNTERPARTIES 2 (Nov. 17, 2009) [hereinafter SIGTARP].

6. *See The Real AIG Outrage*, WALL ST. J., Mar. 17, 2009, at A14 (pointing out the real outrage is "the five-month Beltway cover-up over who benefited most from the AIG bailout," including banks such as SocGen and Goldman Sachs); Dean Starkman, Editorial, *Goldman's Backdoor Bailout: A Call for Transparency in the Taxpayer Rescue of Wall Street*, COLUM. JOURNALISM REV., Nov. 4, 2008, http://www.cjr.org/the_audit/goldmans_backdoor_bailout.php; Dean Starkman, Editorial, *Goldman's Risk: Somewhere Between Zero and $20 Billion, Contradictory NYT, Bloomberg Stories Show Need for Bailout Transparency*, COLUM. JOURNALISM REV., Oct. 29, 2008, http://www.cjr.org/the_audit/goldmans_risk_somewhere_betwee.php?page=1.

7. AIG, AIG Discloses Counterparties to CDS, GIA and Securities Lending Transactions: Attachments A-D (Mar. 15, 2009), *available at* http://www.aig.com/aigweb/internet/en/files/CounterpartyAttachments031809_tcm385-155645.pdf.

8. *See*, *e.g.*, Graham Bowley, *With Big Profit, Goldman Sees Big Payday Ahead*,

Federal Reserve System[10] ("Fed" or "the Fed")[11] slush fund. In the official version, determined public servants at the Fed and Treasury implemented and diligently managed necessary financial rescue programs[12] to facilitate economic recovery[13] and eventually earn taxpayers a 'profit'[14] on their investment. Each of these variants is plausible without meaningful disclosure from the Fed.

The bailout enigma is largely attributable to the trillions of dollars the Fed lent through 'special credit and liquidity facilities' ("SCLF")[15] without disclosing any information about the borrowers. The Fed,[16] a peculiar creation of the 1913 Federal Reserve Act ("FRA"),[17] is

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N.Y. TIMES, July 15, 2009, at A1; Christine Harper, *Goldman Sachs Boosts Risk-Taking at Fastest Pace on Wall Street*, BLOOMBERG NEWS, Apr. 26, 2009.

9. *See*, *e.g.*, Kambiz Foroohar & Sree Vidya Bhaktavatsalam, *BlackRock Is Go-To Firm To Divine Wall Street Assets*, BLOOMBERG, May 8, 2009, http://www.bloomberg.com/apps/news?pid=20601109&sid=a6TJmW9R44yc; Neil Irwin, *At N.Y. Fed, Blending in Is Part of the Job,* WASH. POST, July 20, 2009, at A1; Kate Kelly & Jon Hilsenrath, *New York Fed Chairman's Ties to Goldman Raise Questions*, WALL ST. J., May 4, 2009, at A1.

10. *See infra* note 16 and accompanying text.

11. When people use the term "the Fed," they generally do not intend to distinguish between the Board and the Federal Reserve Banks. *Compare infra* note 25 (describing Federal Reserve Board), *with infra* note 21 (describing Federal Reserve Banks). On occasion, people use the terms interchangeably. In this Note, "the Fed" refers to the entire Federal Reserve System and will not be used when the distinction between the Federal Reserve Banks and the Federal Reserve Board is essential to understanding the issue discussed.

12. DAVID WESSEL, IN FED WE TRUST: BEN BERNANKE'S WAR ON THE GREAT PANIC 217-41 (2009); David Cho & Michael D. Shear, *How the Fed Failed to Tell Obama About the Bonuses*, WASH. POST, Mar. 19, 2009, at A1; Randall Smith & Liam Pleven, *Some Will Pay Back AIG Bonuses*, WALL ST. J., Mar. 19, 2009, at A1.

13. David Wessel, *Inside Dr. Bernanke's E.R.*, WALL ST. J., July 24, 2009, at D1 (quoting Federal Reserve Board Chairman Ben S. Bernanke saying "I care about Wall Street for one reason and one reason only: because what happens on Wall Street matters to Main Street.").

14. Zachery Kouwe, *As Banks Repay Bailout Money, U.S. Sees a Profit*, N.Y. TIMES, Aug. 30, 2009, at A1.

15. *See infra* note 23 (detailing the mechanics of the "discount window," the most well-established SCLF); notes 26 and 32 and accompanying text (describing the temporary SCLF established to combat the financial crisis).

16. The Federal Reserve System is principally comprised of: (1) twelve Reserve Banks, (2) a seven-member Board of Governors, and (3) the Federal Open Market Committee ("FOMC"). S*ee infra* notes 21 and 25 and accompanying text.

17. Fed. Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913).

responsible for carrying out the nation's 'monetary policy.'[18] Under the FRA, the twelve[19] federally chartered[20] Federal Reserve Banks ("Reserve Banks")[21] have the statutory authority[22] to make 'discount

18. Monetary policy functions are intended "to improve financial or credit conditions broadly." Joint Press Release, Federal Reserve Bank and the Treasury, The Role of the Federal Reserve in Preserving Financial and Monetary Stability Joint Statement by the Department of the Treasury and the Federal Reserve para. 2 (Mar. 23, 2009), *available at* http://www.federalreserve.gov/newsevents/press/monetary/20090323b.htm [hereinafter Joint Statement] (explaining monetary policy in very general terms). The Fed's "monetary policy" is implemented through its power to regulate the money supply; the U.S. dollar is an instrument of "fiat money" not tied to a commodity such as gold; and interest rates. *See* GEORGE B. GREY, FEDERAL RESERVE SYSTEM: BACKGROUND, ANALYSES AND BIBLIOGRAPHY 17-41 (Susan Boriotti & Donna Dennis eds., Nova Science Publishers, Inc., 2002). *See generally* Robert L. Hetzel, *Henry Thornton: Seminal Monetary Theorist and Father of the Modern Central Bank*, 73(4) ECON. REV. (1987) (explaining role of the central bank).

19. They are located in New York, Boston, Philadelphia, Richmond, Cleveland, Chicago, Atlanta, Dallas, St. Louis, Minneapolis, Kansas City, and San Francisco.

20. 12 U.S.C. § 341 (2006). Unlike any normal corporation, which should operate for the profit of its shareholders, for example, *Dodge v. Ford Motor Co.*, 170 N.W. 668. (Mich. 1919), the Reserve Banks are not operated for profit and return their profits to the U.S. Treasury, to the extent they exceed the Reserve Bank's expenses. 12 U.S.C. § 289(b)(1) (2006); 12 U.S.C. § 290 (2006); *see* GREY, *supra* note 18, at 3. This characteristic alone significantly undercuts any notion the Reserve Banks are truly independent from the Board or the federal government.

21. The main monetary policy functions of the Reserve Banks are: (1) supporting and participating in the process of policy formulation through the Reserve Banks' (a) minority of seats (5 of 12) on the and Federal Open Market Committee ("FOMC"), 12 U.S.C. § 263(a) (2006) (creating the FOMC), and (b) analysis and research, GREY, *supra* note 18, at 2 (explaining Reserve Banks employ their own researchers and economists to gather and analyze a wide range of economic data and to interpret conditions and developments in the economy); (2) implementation of Board and FOMC directives through Reserve Bank (a) lending, 12 U.S.C. §§ 301, 343, 347b(a) (2006), (b) and administration of FOMC open market operations, 12 U.S.C. § 355 (2006) (authorizing the Reserve Banks, at the behest of the FOMC, to buy certain debt in the open market). Each Reserve Bank is controlled by a board of directors comprised of nine people who serve terms of three-years. Three of the directors are appointed by the Board to represent the public and the Reserve Bank's "member banks" elect the remaining six. Of the directors selected by reserve bank members, each member receives one vote regardless of the number of shares it holds. Directors are placed into one of three "classes," according to institutional size; each class is eligible to elect one director to represent the interests of the class and another to represent the public. FED. RES. BANK OF N.Y., 2007 ANN. REP. 19 (2007). *See* GREY, *supra* note 18, at 5-6.

22. 12 U.S.C. §§ 301, 343, 347b(a) (2006). The Federal Reserve Act "vests

window'[23] advances to any member bank[24] under rules and regulations prescribed by the Board of Governors of the Federal Reserve System ("Board").[25] In "unusual and exigent circumstances" the Board can exercise its FRA § 13(3) ("§ 13(3)") power[26] to "authorize"[27] Reserve Bank lending to "any individual, partnership, or corporation . . . . unable to secure adequate credit accommodations from other banking

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[discount window] lending authority in the Reserve Banks, and the power to supervise [the discount window] lending in the Board." Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment at 41, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, 2009 U.S. Dist. LEXIS 74942 (S.D.N.Y. Aug. 24, 2009) [hereinafter Memorandum of Points and Authorities].

23. These discount window loans are classified as either primary credit, "a backup source of funding to a depository institution that is in generally sound financial condition," 12 C.F.R. § 201.4(a) (2009), or secondary credit, a short-term basis backup source of funding to a depository institution ineligible for primary credit. 12 C.F.R. § 201.4(b) (2009). Only depository institutions can borrow from the discount window. 12 C.F.R. § 201.2(c)(1) (2009).

24. Fed member banks include all national banks, 12 U.S.C. § 282 (2006), and approved state-chartered banks, 12 U.S.C. § 321 (2006), which own nonvoting shares, 12 U.S.C. § 285 (2006), in their region's Reserve Bank. *See generally* FED. RES. BANK OF N.Y., 2007 ANN. REP. 19, 27 (2007).

25. The Board is an "independent federal agency" responsible for the formulation of monetary policy and supervision of the reserve banks. FED. RES. BANK OF N.Y., 2007 ANN. REP. 19 (2007). The Board's seven President-appointed and Senate-confirmed Governors serve 14-year terms office, 12 U.S.C. § 241 (2006), and meet several times per week, see for example GREY, *supra* note 18, at 2-3, to facilitate the Board's oversight of monetary policy by: (1) Board Governors' control of seven of the twelve seats on the FOMC, 12 U.S.C. § 263(a) (2006); (2) setting Fed member bank reserve requirements, Fed. Reserve Bank, Reserve Requirements, http://www.federalreserve.gov/monetarypolicy/reservereq.htm (last visited Sept. 10, 2009) (explaining "[r]eserve requirements are the amount of funds that a depository institution must hold in reserve against specified deposit liabilities"); *but see* MURRAY N. ROTHBARD, THE MYSTERY OF BANKING 94-103 (2008), *available at* http://www.mises.org/mysteryofbanking/mysteryofbanking.pdf (critiquing this system of bank reserves as inflationary and ephemeral); prescribing rules and regulations for Reserve Bank lending, 12 U.S.C. § 353 (2006); and (3) supervising transactions with foreign banks. 12 U.S.C. § 348a (2006) (stating the Board "shall exercise special supervision over all relationships and transactions of any kind entered into by any [] reserve bank with any foreign bank or banker, or with any group of foreign banks or bankers, and all such relationships and transactions shall be subject to such regulations, conditions, and limitations as the Board may prescribe").

26. 12 U.S.C. § 343 (2006). The Section 13(3) the lending "shall be subject to such limitations, restrictions, and regulations as the [Board] may prescribe." *Id.*

27. *Id.* Through the "'affirmative vote' of at least five" Board Governors. *Id.*

institutions."[28] As the relative calm of August 2008[29] abruptly gave way to the panic of 'searing September' with the collapse of Lehman Brothers and AIG,[30] the Fed's balance sheet ballooned. It expanded from $910 million in August 2008 to $2.08 trillion dollars a year later.[31] Nearly all of this expansion is attributable to SCLF lending.[32] The Fed's

28. The Reserve Bank "shall obtain evidence" the Section 13(3) borrower's inability to borrow. Also, this borrowing must also be "secured to the satisfaction of the Reserve Bank . . . ." *Id*.

29. The financial crisis began in earnest in Fall 2007, when two Bear Stearns hedge funds which invested heavily in subprime mortgages collapsed. The Treasury Department urged major financial institutions to take measures to address the situation. When Bear Stearns collapsed in March 2008, and the Fed and Treasury backstopped J.P. Morgan's acquisition of the failed investment bank liquidity dried up temporarily. During the summer of 2008, skyrocketing oil prices jolted the economy. James Stewart, *Eight Days; the Battle to Save the American Financial System*, NEW YORKER, Sept. 21, 2009, at 59.

30. This is when the global financial crisis accelerated with the collapse of Lehman Brothers and the bailout of AIG. *See*, *e.g.*, Matthew Karnitschnig et al., *U.S. to Take Over AIG in $85 Billion Bailout*, WALL ST. J., Sept. 17, 2008, at A1.

31. *Compare* Federal Reserve Statistical Release, Condition Statement of Federal Reserve Banks, H.4.1 (Aug. 28, 2008), *available at* http://www.federalreserve.gov/releases/h41/20080828/, *with* Aug. 27, 2009 Release, *available at* http://www.federalreserve.gov/releases/h41/20090827/.

32. "[E]levated pressures in short-term funding markets" in December 2007 prompted the Board to approve the Term Auction Facility ("TAF"). Press Release, Federal Reserve Bank, Federal Reserve and Other Central Banks Announce Measures Designed to Address Elevated Pressures in Short-Term Funding Markets (Dec. 12, 2007), *available at* http://www.federalreserve.gov/monetarypolicy/20071212a.htm. The TAF was the first in a series of new SCLFs the Board introduced to augment the Discount Window and creatively provide financial institutions—as likely to hold debt securities as more traditional assets like loans in today's economy—with needed liquidity. *C.f. id.* "Experience gained under this temporary program will be helpful in assessing the potential usefulness of augmenting the [Fed's] current monetary policy tools—open market operations and the primary [discount window] credit facility—with a permanent facility for auctioning term discount window credit." *Id.* Through the TAF, the Fed "auctioned" credit for between 28 and 84 days to depository institutions eligible for primary credit at the Discount Window. Federal Reserve Bank, Term Auction Facility Frequently Asked Questions, http://www.federalreserve.gov/monetarypolicy/taffaq.htm (last visited Sept. 10, 2009). "By allowing the Fed to inject term funds through a broader range of counterparties and against a broader range of collateral than open market operations [focused on Treasury bonds], this facility could help promote the efficient dissemination of liquidity when the unsecured interbank markets are under stress." *See* Press Release, Federal Reserve Bank, *supra*.
Similar initiatives followed and were directed at institutions which traditionally lacked

practice is not to reveal any information about its SCLF borrowers' identity, collateral, terms, rates or other information.[33]

To protect this secrecy, the Fed vociferously resists[34] any attempts to compel disclosure through legislation[35] or litigation. The Senate passed legislation by a vote of 96 to 2 in April 2009[36] which required publication of some key information[37] "with respect to all lending and

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access to Fed credit—seventeen "primary dealers." *See infra* note 48 and accompanying text (defining and identifying "primary dealers"). The Term Asset-Backed Securities Loan Facility ("TALF") "supports the issuance of" asset-backed securities (ABS) collateralized by student loans, auto loans, credit card loans and loans guaranteed by the Small Business Administration (SBA). The Primary Dealer Credit Facility ("PDCF") allowed the dealers to secure loans with illiquid collateral. "The PDCF was created as a temporary emergency measure." Declaration of Susan McLaughlin at ¶ 10, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, 2009 U.S. Dist. LEXIS 74942 (S.D.N.Y. Aug. 24, 2009) [hereinafter McLaughlin Declaration]. Apparently relying on the structure laid out in Section 13(3), PDCF "loans are processed through a clearing bank's systems," not the New York Fed. The New York Fed determines the eligible collateral while the clearing bank, using a variety of third-party pricing services and dealer prices, actually values the collateral. *Id.* at 4-5 ¶ 11. Through the Commercial Paper Funding Facility ("CPFF") the New York Fed finances the purchase of highly-rated unsecured and asset-backed commercial paper from eligible issuers via eligible primary dealers. Donald S. Bernstein, Financial Crisis Fallout: Legislative and Regulatory Action 13-14 (Apr. 2009) (unpublished report prepared by Davis Polk & Wardwell, Third Circuit Judicial Conference) (on file with author). Finally, there is the TSLF. *See infra* note 47 and accompanying text. The Fed also lends, on a non-recourse basis, "to eligible institutions" which purchase high-quality asset-backed commercial paper from money market mutual funds through the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility ("AMLF"). *See* Bernstein, *supra* at 13.

33. *See*, *e.g.*, Memorandum of Points and Authorities, *supra* note 22, at 20.

34. *See*, *e.g.*, *Federal Reserve Independence: Testimony Before the Subcomm. on Domestic Monetary Policy and Tech., Comm. on Fin. Serv.*, 111th Cong. (July 9, 2009) (statement of Donald L. Kohn, Vice Chairman, Fed. Reserve Bank) (transcript available at http://www.federalreserve.gov/newsevents/testimony/kohn20090709a.htm) (arguing "the process of vetting ideas and proposals, many of which are never incorporated into policy decisions, could suffer from the threat of public disclosure").

35. *See*, *e.g.*, Federal Reserve Transparency Act, S. 513, 111th Cong. (2009) (requiring disclosure of Section 13(3) SCLF borrowers' identities, type and terms of loan, value, collateral and rationale for the loan).

36. 155 CONG. REC. S4223-24 (daily ed. Apr. 1, 2009) (S. Amend. 913 to S. Con. Res. 13 § 2(A) (amending S. Con. Res. 13 at § 215); S. Con. Res. 13, tit. 2 § 215 (setting forth the congressional budget for the United States Government for fiscal year 2010)).

37. The statute provided, in pertinent part:

(A) the nature and amounts of the collateral that the central bank is accepting on

financial assistance facilities" created by the Board "to address the financial crisis . . . ."[38] The first required disclosure under the legislation,[39] in a June 10, 2009 Board-issued report,[40] suggests the Board continues to avoid the spirit of the April 2009 disclosure provisions. For example, the report conveniently omitted from the 'portfolio composition' by 'credit rating'[41] two-thirds of the assets[42] held by the entity comprising assets the Fed guaranteed[43] in the March 2008 bailout of J.P. Morgan Chase & Co.'s acquisition of investment bank Bear Stearns.[44] In an even more flagrant example of non-revelatory disclosure, the reported "par[45] value of securities lent"[46] through the

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> behalf of American taxpayers in the various lending programs, on no less than a monthly basis; (B) the extent to which changes in valuation of credit extensions to [to entities holding former Bear Stearns and AIG assets in] . . . are a result of losses on collateral which will not be recovered; (C) the number of borrowers that participate in each of the lending programs and details of the credit extended, including the extent to which the credit is concentrated in one or more institutions; and (D) information on the extent to which the central bank is contracting for services of private sector firms for the design, pricing, management, and accounting for the various lending programs and the terms and nature of such contracts and bidding processes.

Id.

38. *Id*.

39. *Id.* The Board presented it differently, however, describing its efforts to provide "considerable new information on [Fed] credit and liquidity programs." Press Release, Federal Reserve Bank, Federal Reserve Issues First Monthly Report on Its Credit and Liquidity Programs (June 10, 2009), *available at* http://www.federalreserve.gov/newsevents/press/monetary/20090610a.htm.

40. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FEDERAL RESERVE SYSTEM MONTHLY REPORT ON CREDIT AND LIQUIDITY PROGRAMS AND THE BALANCE SHEET, *available at* http://www.federalreserve.gov/newsevents/press/monetary/monthlyclbsreport200906.pdf [hereinafter June 10 Report].

41. *See id.* at 13 tbl. 27.

42. This is by excluding "swaps and other derivative contracts, commercial and residential mortgage loans, and to be announced (TBA) investments." *Id.* at 13 n.1 accompanying tbl. 27. Such assets appear to make up, based on the collateralized mortgage obligations and "other investments" category (defined, *id*. at n.2, as "all asset sectors that, individually, represent less than 5 percent of aggregate portfolio fair value"), approximately 67.6% of Maiden Lane's net assets. *Compare id.* at 13 tbl. 26 (detailing "Portfolio Composition"), *with id.* at 13 tbl. 27 (detailing "Asset Distribution by Type and Rating").

43. "Maiden Lane LLC," *id.* at 13.

44. *See*, *e.g.*, KATE KELLY, STREET FIGHTERS: THE LAST 72 HOURS OF BEAR STEARNS, THE TOUGHEST FIRM ON WALL STREET 197-98 (Portfolio 2009).

45. Face or stated value.

46. June 10 Report, *supra* note 40, at 7 and accompanying tbl. 9.

Fed's Term Securities Lending Facility ("TSLF")[47] to primary dealers,[48] in exchange for "all manner of lesser-quality paper" dealers could not otherwise borrow against,[49] includes only the "portion of securities held outright" when "[s]ecurities loans under the TSLF are off-balance-sheet transactions."[50] Not surprisingly, 84 percent of this selectively disclosed TSLF lending is secured by the highest quality collateral.[51] Attempts to compel disclosure under the Freedom of Information Act ("FOIA"),[52] enacted to "facilitate public access to Government documents"[53] by creating a "judicially enforceable public right to secure such information from possibly unwilling official hands,"[54] have been similarly

47. The TSLF and TSLF Options Program ("TOP") "promote liquidity in Treasury and other collateral markets and thus foster the functioning of financial markets more generally." *See* Bernstein, *supra* note 32, at 14.

48. *See* Federal Reserve Bank of New York, Primary Dealers List, http://www.newyorkfed.org/markets/pridealers_current.html (last visited Sept. 10, 2009); Federal Reserve Bank of New York, Administration of Relationships with Primary Dealers (Jan. 22, 1992), http://www.newyorkfed.org/markets/pridealers_policies.html (explaining what these primary dealers do for the New York Fed).

49. The TSLF program allows the dealers to "swap" these low quality debt securities "in the market for ultra-liquid Treasury securities." Randall W. Forsyth, *Current Yield: Should the Fed Regulate Wall Street?*, BARRON'S, Mar. 24, 2008, at M15.

50. June 10 Report, *supra* note 40, at 1 and accompanying tbl.1.

51. *Id.* at 9 tbl. 14. The calculation represents the portion of disclosed SCLF lending secured by "U.S. Treasury, agency, and agency-backed securities" and AAA, AA, and A rated securities. *Id*.

52. 5 U.S.C. § 552 (2006).

53. U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991); John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989); Associated Press v. U.S. Dep't of Defense, 554 F.3d 274, 283 (2d Cir. 2009); Lahr v. Nat'l Transp. Safety Bd., 569 F.3d 964, 973 (9th Cir. 2009); Judicial Watch, Inc. v. FBI, 522 F.3d 364, 365 (D.C. Cir. 2008); Campaign for Responsible Transplantation v. FDA, 511 F.3d 187, 190 (D.C. Cir. 2007); Avondale Indus. Inc. v. NLRB, 90 F.3d 955, 958 (5th Cir. 1996); Davin v. DOJ, 60 F.3d 1043, 1049 (3d Cir. 1995); Forest Guardians v. FEMA, 410 F.3d 1214, 1217 (10th Cir. 2005); Ligorner v. Reno, 2 F. Supp. 2d 400, 403 (S.D.N.Y. 1998).

54. John Doe Agency v. John Doe Corp., 493 U.S. 146, 151 (1989); Dep't of Air Force v. Rose, 425 U.S. 352, 361 (1976) (quoting EPA v. Mink, 410 U.S. 73, 79-80 (1973)); Lahr v. Nat'l Transp. Safety Bd., 569 F.3d 964, 973 (9th Cir. 2009); News-Press v. U.S. Dep't of Homeland Sec., 489 F.3d 1173, 1190 (11th Cir. 2007); Judicial Watch, Inc. v. DOJ, 365 F.3d 1108, 1113 (D.C. Cir. 2004); Dickerson v. DOJ, 992 F.2d 1426, 1435 (6th Cir. 1993) (Batchelder, J., dissenting); Miller v. U.S. Dep't of Agriculture, 13 F.3d 260, 262 (8th Cir. 1993); Hale v. DOJ, 973 F.2d 894, 898 (10th Cir. 1992); Bowers v. DOJ, 930 F.2d 350, 356 (4th Cir. 1991); Schell v. U.S. Dep't of Health & Human Servs., 843 F.2d 933, 936 (6th Cir. 1988); LaRouche v. FBI, 677 F.2d

unsuccessful.

This is unsurprising, as the Fed has made every attempt to circumvent the FOIA since its passage.[55] The Board could and did close all meetings dealing with bank regulation, monetary policy, or international finance. The publicly released minutes of these meetings reveal few specifics. Moreover, the Fed insisted that the Government in the Sunshine Act,[56] intended to open agency meetings to public scrutiny,[57] did not apply[58] to the "quasigovernmental" Federal Open Market

256, 258 (2d Cir. 1982); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 135 (3d Cir. 1974).

55. The Fed's behavior contravenes the Board's purported aversion to "dubious" means of circumventing the FOIA. Arthur F. Burns, Chairman, Board of Governors of the Federal Reserve System, Address at the 1976 International Monetary Conference: The Proper Limits of Openness in Government 18-19 (June 19, 1976) (transcript available at http://fraser.stlouisfed.org/historicaldocs/afb76/download/29508/Burns_19760619.pdf) (rejecting "circumvention as a suitable course for the Federal Reserve" which "will have no part in any such dubious exercises"); *see infra* text accompanying notes 58, 61, 63, 80; *see also* WILLIAM GREIDER, SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY 54-55 (Simon & Schuster 1989) (stating "[n]o other agency of government, not even the Central Intelligence Agency, enjoyed [the Boards] privacy").

56. Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552b (2006)).

57. The Sunshine Act was passed "to provide that meetings of multimember Federal agencies shall be open to the public." H.R. REP. NO. 94-880 (1976). It requires "the deliberations of at least the number of individual agency members required to take action," 5 U.S.C. § 552b(a)(2) (2006), on behalf of an agency, *see infra* note 78 and accompanying text (defining agency under the FOIA), "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such positions by the President with the advice and consent of the Senate," 5 U.S.C. § 552b(a)(1) (2006), to be conducted so "every portion of every meeting of an agency shall be open to public observation." 5 U.S.C. § 552b(b) (2006). *See generally* F.C.C. v. ITT World Commc'ns, 466 U.S. 463 (1984); NRDC v. NRC, 216 F.3d 1180 (D.C. Cir. 2000); Jennifer A. Bensch, *Seventeen Years Later: Has Government Let the Sun Shine In*, 61 GEO. WASH. L. REV. 1475 (1993); Kathy Bradley, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 FED. COMM. L.J. 473 (1997); James T. O'Reilly & Gracia M. Ber, *Stealth Caused by Sunshine: How Sunshine Act Interpretation Results in Less Information for the Public About the Decision-Making Process of the International Trade Commission*, 36 HARV. INT'L L.J. 425 (1995).

58. The Board claimed the FOMC's inclusion of Reserve Bank presidents gave the FOMC "special status that the measure's language did not cover." WYATT C. WELLS, ECONOMIST IN AN UNCERTAIN WORLD: ARTHUR F. BURNS AND THE FEDERAL RESERVE,

Committee ("FOMC").[59] When litigation[60] threatened to compel the disclosure of detailed, paraphrased minutes of FOMC meetings, then-Board Chairman Arthur Burns seemingly abolished them in 1976. In fact, "[d]espite years of denials the FOMC . . . recorded and transcribed in complete detail every FOMC meeting since 1976."[61] Thirty-two years later, at the height of the 2008 financial panic, the composition of the "four musketeers" who comprised current Board Chairman Ben Bernanke's "core group" of decision-makers was driven by the desire to meet without triggering the Sunshine Act's formal notice requirements.[62] The Board also refused to disclose[63] detailed records about its dramatic recent SCLF lending[64] in response to FOIA requests.[65] As things stand now, the public knows little about the administration of SCLF funds or their recipients.

This Note will focus on recent litigation in which news organizations sued the Board after it refused to disclose SCLF lending

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1970-78 186 (1994).

59. *See*, *e.g.*, FED. RES. BANK OF N.Y., 2007 ANN. REP. 19 (2007) (explaining the FOMC is responsible for establishing policy regarding and overseeing domestic open market operations, while the Federal Reserve Bank of New York executes open market transactions in accordance with FOMC authorizations and directives). *See generally* 12 U.S.C. §§ 348a, 353-59 (2006) (delineating powers of FOMC); Merrill v. Fed. Open Market Comm. of Fed. Reserve Sys., 565 F.2d 778, 781 n.4 (D.C. Cir. 1977) (describing impact of open market operations).

60. *See*, *e.g.*, *Merrill*, 565 F.2d at 781 n.4.

61. The FOMC voted to discontinue the release of a detailed memorandum of discussion at its meetings on May 18, 1976. Letter from Henry Gonzalez, Chairman of H. Comm. on Banking, Finance & Urban Affairs to Members of the Committee on Banking, Finance & Urban Affairs (Jan. 27, 1994), *reprinted in* STAFF OF H. COMM. ON BANKING, FINANCE & URBAN AFFAIRS, 103RD CONG., THE FEDERAL RESERVE'S 17-YEAR SECRET 103-2 at v (Comm. Print 1994).

62. DAVID WESSEL, IN FED WE TRUST 106-7 (2009). No more than three FRB Governors can meet to consider action without formal notice. The fourth "musketeer," current Treasury Secretary Timothy Geithner, was then president of the New York Fed and "didn't count" because he was not an FRB Governor. *Id*. at 107.

63. *See*, *e.g.*, Memorandum of Points and Authorities, *supra* note 22, at 20.

64. *See*, *e.g.*, *supra* text accompanying note 31.

65. *See*, *e.g.*, Complaint of Bloomberg LP against the Federal Reserve Bank at ¶ 22, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, 2009 U.S. Dist. LEXIS 74942 (S.D.N.Y. Aug. 24, 2009) (seeking detailed information about securities posted as collateral to the Fed's Primary Dealer Credit Facility ("Loan Request"); *id.* at ¶ 38 (seeking detailed information about the collateral "supporting the loan extended by the Federal Reserve in connection with the proposed acquisition of Bear Stearns . . . .").

records in response to a FOIA request: *Fox News Network, LLC v. Board* ("*Fox*")[66] and *Bloomberg L.P. v. Board* ("*Bloomberg*").[67] In both of these cases the Board made three arguments: 1) Board SCLF records are not 'agency records' subject to the FOIA; 2) Even if Board SCLF records are within the FOIA's reach, they are exempt from the FOIA's disclosure requirements[68] as 'confidential financial records' under exemption four;[69] or 3) 'inter or intra-agency deliberative material' under exemption five.[70] This Note will analyze the facts, statutes and case law applicable to each of the Board's arguments.

If the *Bloomberg* and *Fox* decisions are any indication, the question of whether the Fed must disclose SCLF lending records under the FOIA is a close one. U.S. District Court for the Southern District of New York judges Alvin K. Hellerstein, in *Fox*, and Loretta Preska, in *Bloomberg*, reached different conclusions. Judge Hellerstein held that the SCLF records at issue were not 'agency records,' but were 'confidential' material 'obtained from a person.' Judge Hellerstein, however, acknowledged that his decision raised the possibility that the public will never obtain "any meaningful documents enabling a public accounting of"[71] the Fed's SCLF lending. Judge Preska, who issued her *Bloomberg* decision less than a month after Hellerstein's ruling in *Fox*, was not persuaded by the Board's arguments. In fact, Judge Preska ordered the Board to produce documents containing the names of borrowers, the type of SCLF borrowed from, individual loan amounts and loan origination and maturity dates.[72] She also ordered the Board to search the Federal Reserve Bank of New York ("New York Fed")[73] for Board

66. 639 F. Supp. 2d 384 (S.D.N.Y. 2009).

67. No. 08 Civ. 9595 (LAP), 2009 WL 2599336, 2009 U.S. Dist. LEXIS 74942 (S.D.N.Y. Aug. 24, 2009).

68. 5 U.S.C. § 552(b) (2009 Supp.).

69. § 552(b)(4).

70. § 552(b)(5).

71. *Fox News Network,* 639 F. Supp. at 396.

72. *Bloomberg,* 2009 WL 2599336, at *17, 2009 U.S. Dist. LEXIS 74942, at **51-52. These "Remaining Term Reports" did not identify the interest rates on the loans, specific items of collateral pledged for the loans or the haircuts applied to the collateral, or other information responsive to the news outlet's FOIA request. *Id*. Preska originally ordered the disclosure within five days, *id*., but the order was stayed pending appeal. Stipulation and Order Staying Order of August 24, 2009, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, 2009 U.S. Dist. LEXIS 74942 (Aug. 24, 2009) (on file with author).

73. The New York Fed plays a particularly important role in the SCLF lending

records.[74] The issue is now before the Second Circuit Court of Appeals after the Board appealed[75] Judge Preska's decision in *Bloomberg* and consented to similar efforts by an "an association of leading financial institutions . . . ."[76]

The dispute over the Board's SCLF records will require the appellate court to resolve between one and three questions. As the Supreme Court explained in *Kissinger v. Reporters Committee for Freedom of Press* ("*Kissinger*"),[77] a federal court's jurisdiction to order disclosure of material under the FOIA depends upon a showing that an agency[78] has (1) improperly; (2) withheld; (3) agency records.[79] Here,

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program.

74. Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, at *17, 2009 U.S. Dist. LEXIS 74942, at **51-52 (S.D.N.Y. Aug. 24, 2009).

75. Mark Pittman, *Federal Reserve Appeals Court Order to Disclose Loans*, BLOOMBERG, Sept. 30, 2009, www.bloomberg.com/apps/news?pid=20601087&sid=aSab0xkcV8jc.

76. Memorandum of Law in Support of the Clearing House Association L.L.C.'s Motion to Intervene at 1, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, 2009 U.S. Dist. LEXIS 74942 (S.D.N.Y. Aug. 24, 2009) [hereinafter Clearing House Intervention Memo]. This "association" includes branches of four primary dealers. *Compare id*. at note 1 (listing organizations who make up the clearinghouse challenging disclosure), *with supra* note 48 (listing New York Fed primary dealers). The association's motion to intervene in the *Bloomberg* case and appeal Preska's order, Clearing House Intervention Memo, *supra* at 2, was granted by Preska. *See* Order Granting Clearing House Association's Motion, No. 08 Civ. 9595 (LAP) (Sept. 17, 2009) (on file with author). The motion was filed out of fear "the Board will [not] obtain such approval or, if necessary exhaust its appellate remedies, including seeking Supreme Court review." Clearing House Intervention Memo, *supra* at 3. Such fears may have been prompted by an effort to pressure the President of the United States into declining the Board's request to the Solicitor General, an executive branch official, for permission to pursue the appeal. *See*, *e.g.*, Matthew Winkler, *Transparency and the Fed*, WALL ST. J., Sept. 18, 2009, at A21 (arguing the decision belongs not to the Board but to the President of the United States because "[a]ny appeal would have to be mounted by [Department of Justice's] Solicitor General . . . who reports to [the] President . . . .").

77. 445 U.S. 136, 150 (1980).

78. 5 U.S.C. § 552(f)(1) (2009 Supp.) (defining agency as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency"); Rushforth v. Council of Econ. Advisers, 762 F.2d 1038, 1043 (D.C. Cir. 1985) (defining an agency for purposes of 5 U.S.C. § 552b (2006) with the § 552b(a)(1) definition). The Board is an agency, *supra* note 25, and admits as much in litigation.

the first and third prongs of the *Kissinger* requirements are at issue.[80]

First, a court must determine whether the disputed materials are 'agency records' subject to the FOIA. The Court articulated the prevailing definition of 'agency records' under the FOIA in *DOJ v. Tax Analysts* ("*Tax Analysts*"):[81] Agency records must be created or obtained by the agency[82] and within the control of the agency at the time of the FOIA request.[83] Here, both of these requirements are at issue.

Memorandum of Points and Authorities, *supra* note 22, at 34. *See* 44 U.S.C. § 3502(5) (2006 & 2008 Supp.) (defining the term "independent regulatory agency" to include the FRB within for purposes of the Paperwork Reduction Act of 1995, Pub. L. No. 104-13 § 2, 109 Stat. 164) (1995); 12 U.S.C. § 241 (2006); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 686 (D.C. Cir. 2008) (including "Federal Reserve" within its listing of independent regulatory agencies) (citing 44 U.S.C. § 3502(5) (2008 Supp.)); Albrecht v. Comm. on Employee Benefits of the Fed. Reserve Employee Benefits Sys., 357 F.3d 62, 65-66 (D.C. Cir. 2004) (characterizing the Board as a "governmental entity"); Lewis v. United States, 680 F.2d 1239, 1241 (9th Cir. 1982); *but c.f.* Research Triangle Inst. v. Bd. of Governors of the Fed. Reserve, 132 F.3d 985, 989 (4th Cir. 1997) (concluding "money used to fund the [FRB] . . . 'shall not be construed to be Government funds or appropriated moneys'") (quoting 12 U.S.C. § 244 (2006))).

79. 445 U.S. 136, 150 (1980).

80. The Board's court filings indicate material responsive to FOIA requests for SCLF records are withheld. *See*, *e.g.*, Declaration of Alison M. Thro at Exhibit 4 pp. 25-26, , Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, 2009 U.S. Dist. LEXIS 74942 (S.D.N.Y. Aug. 24, 2009) [hereinafter Thro Declaration]; Declaration of Steven G. Mintz in Support of Motion for Summary Judgment at Attachment "Index of Withheld Material, Fox News FOIA Request 2009-73," Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384 (S.D.N.Y. 2009) [hereinafter Mintz Declaration].

81. 492 U.S. 136 (1989).

82. *Id*. at 144. "The relevant issue is whether an agency covered by the FOIA has created or obtained the materials sought, not whether the organization from which the documents originated is itself covered by the FOIA." *Id*. at 146 (internal citations and quotations omitted) (quoting Forsham v. Harris, 445 U.S. 169, 182 (1980)). The Court noted this point was also "implicit" in the Court's holding in *DOJ v. Julian*, 486 U.S. 1, 7 & n.6 (1988), where "it was uncontroverted that presentence reports, which had been prepared under district court auspices and turned over to the Department and the Parole Commission, constituted 'agency records.'" *Tax Analysts*, 492 U.S. at 146 n.7.

83. "By control," the Court explained, "we mean that the materials have come into the agency's possession in the legitimate conduct of its official duties." *Tax Analysts*, 492 U.S. at 145. "The control inquiry focuses on an agency's possession of the requested materials, not on its power to alter the content of the materials it receives." *Id*. at 147.

Next, if the disputed material satisfies the definition of 'agency records,' the court must determine if an exemption to the FOIA applies. "[U]nless the requested materials fall within one of the Act's enumerated exemptions" the Supreme Court explained in *Taylor v. Sturgell* ("*Sturgell*"),[84] "the agency must 'make the records promptly available' to the [FOIA] requester."[85]

Second, the Board asserts exemption four, which applies to: 1) "trade secrets and commercial or financial information"; 2) "obtained from a person"; and 3) "privileged or confidential."[86] Here, exemption four's second and third elements are in dispute. Only "an individual, partnership, corporation, association, or public or private organization other than an agency" is a person within the meaning of exemption four.[87] A submission is 'confidential' under exemption four if disclosure "is likely to" either:[88] 1) "impair the Government's ability to

84. 128 S. Ct. 2161, 2167 (2008) (citing 5 U.S.C. § 552(b) (specifying exemptions to FOIA disclosure requirements)).

85. *Id.* (quoting 5 U.S.C. § 552(a)(3)(A)).

86. 5 U.S.C. § 552(b)(4).

87. 5 U.S.C. § 551(2) (2006) (defining a person).

88. Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (articulating the (1) impairment prong and the (2) substantial harm prong); *see also* Inner City Press/Community on Move v. Bd. of Governors of Fed. Reserve Sys., 463 F.3d 239, 244 (2d Cir. 2006) (explaining *National Parks* test to "determine whether information is confidential for the purposes of Exemption 4"); Nadler v. FDIC, 92 F.3d 93, 95-96 (2d Cir. 1996) (describing "two-part test" meant to determine "whether information is 'privileged or confidential'"); Cont'l Stock Transfer & Trust Co. v. SEC, 566 F.2d 373, 375 (2d Cir. 1977) (per curiam). In the D.C. Circuit, *Critical Mass Energy Project v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), subjects voluntary submissions to a "less-demanding" standard. *See* Contract Freighters v. Sec'y of U.S. Dep't of Transp., 260 F.3d 858, 862-63 (8th Cir. 2001) (stating as such); *see Critical Mass*, 975 F.2d at 885 (Ginsburg, J., dissenting) (lamenting, "[n]o longer is it necessary to show in each case how disclosure will significantly harm some relevant private or governmental interest" (internal quotations omitted)). Under *Critical Mass*, if a voluntary submitter "would not customarily release [the information] to the public," it is confidential under Exemption Four. *Id.* at 880. Even if the *Critical Mass* standard applies, however, a mandatory submission remains subject to the "stringent" *National Parks* standard. *Contract Freighters*, 260 F.3d at 862-63. The Second Circuit Court of Appeals has yet to decide whether to adopt *Critical Mass* and its standard. *See Inner City Press*, 463 F.3d at 245 n.6; *Nadler*, 92 F.3d at 96 n.1. Here, the underlying dispute centers around *who* provided the material at issue to the Board, rather than *how* (i.e. voluntarily or compulsory) it was provided. *See infra* text accompanying note 294-96. In any event, the records at issue here are logically submitted only on a compulsory basis. SCLF borrowers must identify themselves and their collateral to secure a loan, the Reserve Banks must keep records of this SCLF lending and the Board must monitor

obtain necessary information in the future"[89], or 2) "cause substantial harm to the competitive position of the person from whom the information was obtained."[90] The Board suggests there is also a third basis for confidentiality, 'program effectiveness,' but the legal support for such a proposition is scant.[91]

Alternatively, the Board asserted exemption five, which the appellate court will address if it holds that exemption four is inapplicable. Material qualifies under exemption five[92] if it meets each of the following three core requirements: 1) it is either[93] a) inter-agency, or b) intra-agency;[94] 2) it is either a) memoranda, or b) letters; and it is 3)

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it. Accordingly, this Note presumes the *National Parks* confidentiality standard applies to this information submitted on a compulsory basis regardless of whether *Critical Mass* controls voluntarily submitted information.

89. *National Parks*, 498 F. 2d at 770. "Generally, there is no impairment when the government can compel disclosure of the information." Aguirre v. SEC, 551 F. Supp. 2d 33 (D.D.C. 2008) (citing *Critical Mass*, 975 F.2d at 878); "When submissions are compelled, the government's ability to procure information usually is not impaired because a statute or other mandate ensures future compliance." N.Y. Pub. Interest Research Group v. EPA, 249 F. Supp. 2d 327, 335 (S.D.N.Y. 2003).

90. *National Parks*, 498 F.2d at 770. *See* Judicial Watch, Inc. v. FDA, 449 F.3d 141, 148 (D.C. Cir. 2006). In this case the FDA required drug companies "to submit volumes of information related to a drug's development, composition, safety, and manufacture" pursuant to 21 U.S.C. § 355(b)(1) (2006). *Id*. The court held the "submission-dependent nature of the [drug] approval process means Exemption 4 extends to at least some information contained in" pharmaceutical applications. *Id.* The court was concerned about the potential for an applicant's competitors to use publicly disclosed application material to avoid the substantial investment of time and effort the submitting company put into both the drug and the application. Competitors could even "bring to market a product competitive with" the submitter's product. *Id.* at 148-49.

91. *See infra* text accompanying notes 328-70.

92. Exemption Five applies to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (2006 & 2009 Supp.).

93. Stewart v. U. S. Dep't of the Interior, 554 F.3d 1236, 1239 (10th Cir. 2009) (stating requirement "a document must be the product of a government agency").

94. "[T]he most natural meaning of the phrase 'intra-agency memorandum' is a memorandum that is addressed both to and from employees of a single agency." DOJ v. Julian, 486 U.S. 1, 18, n.1 (1988) (Scalia, J., dissenting) (approvingly referenced in U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 9 (2001)); Nat'l Inst. of Military Justice v. U.S. Dep't of Defense, 512 F.3d 677, 683 (D.C. Cir.) (comments by non-governmental lawyers solicited by the Department of Defense for their experience and qualifications were "intra-agency"), *cert. denied*, 129

privileged in the civil discovery context[95] by virtue of the application of a recognized privilege.[96] All of these elements are potentially at issue here, however this Note discusses only the closest question under exemption five: the nature of the Board's exemption five 'monetary policy' privilege.

Because an exemption four analysis is contingent upon a finding that 'agency records' are at issue, and exemption five's temporary exemption only applies if exemption four's permanent exemption does not, this Note will evaluate the issues in the order laid out above.[97] The first few issues discussed; 'agency records,' the evidentiary burden of proof courts require to sustain agency withholding under FOIA exemptions and the 'obtained from a person' requirement under the FOIA's fourth exemption; are best described as threshold 'structural arguments.' After careful analysis, this Note reveals the Board's 'agency records' and 'obtained from a person' arguments are unlikely to prevail.

The Board's 'qualitative' arguments,[98] such as confidentiality under exemption four and the scope of the Board's privilege under exemption five, present closer legal questions. The Board's argument the SCLF records are 'confidential' under exemption four's 'substantial competitive harm' prong is particularly compelling. The court will need to determine whether the 'stigma' associated with borrowing from a Fed SCLF puts (depending on the court's findings with respect to whether the records are 'agency records' and 'obtained from a person') the Reserve Bank or SCLF borrower at risk of 'substantial competitive harm.' Both the Reserve Bank and some SCLF borrowers raise the specter of debilitating bank runs "potentially destroying not merely the [SCLF borrowing] institution's competitive position but its viability."[99]

S. Ct. 775 (2008)).

95. United States v. Weber Aircraft Corp., 465 U.S. 792, 799-800 (1984); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148 (1975) ("Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency.").

96. Baker & Hostetler LLP v. U.S. Dep't of Commerce, 473 F.3d 312, 321 (D.C. Cir. 2006) ("Exemption 5 incorporates the traditional privileges that the Government could assert in civil litigation against a private litigant.").

97. Contingent to the Federal Reserve Board carrying the same legal arguments on its appeal as it did in the district court.

98. *See infra* notes 233-39 and accompanying text.

99. Clearing House Intervention Memo, *supra* note 76, at 13 (internal quotations omitted); *see* id. at 3 & text accompanying n.235 (quoting Declaration of Brian F.

Yet if, as a former investment banker and hedge fund operator argued in *The Wall Street Journal* recently, "[t]here is no longer a stigma associated with borrowing from the Fed," [100] or "'the disclosure of individual borrowers' names . . . would 'undermine the value of the facilities that [the New York Fed is] providing,'" as New York Fed President William Dudley stated in response to a question posed by this Note's author,[101] the legal requirements to prove 'substantial competitive harm' under exemption four are not met. Ultimately, this Note concludes SCLF disclosure is compelled by the FOIA.

I. STRUCTURAL JUSTIFICATIONS FOR NON-DISCLOSURE

The records at issue concern accounting for specific Reserve Bank credit extensions under the SCLF.[102] This data is reported daily to senior leadership at the Board and the New York Fed by the Board's Monetary Affairs unit. It is obtained from "raw data provided to Board staff on a daily basis by the Reserve Banks"[103] and distributed to "high level" staff within the Board's Monetary Affairs unit and Reserve Bank Operations and Payment Systems ("RBOPS").

The reports include the following: A) an "[o]rigination [r]eport"[104] detailing the previous business day's individual loans by[105] 1) borrower,

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Madigan at ¶ 14, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, 2009 U.S. Dist. LEXIS 74942 (S.D.N.Y. Aug. 24, 2009) [hereinafter Madigan Declaration] (filed in support of FRB Summary Judgment Memo)).

100. Ann Lee, *The Banking System Is Still Broken*, WALL ST. J., Oct. 16, 2009, at A17.

101. Michael S. Derby, *Fed Dudley: Rates To Stay 'Exceptionally Low' for Extended Period*, DOW JONES NEWSWIRES, Oct. 5, 2009, *available at* http://online.wsj.com/article/BT-CO-20091005-715011.html; Scott Lanman & Michael McKee, *Fed's Dudley Signals Concern About Risks of Slower Inflation*, BLOOMBERG, Oct. 6, 2009, http://www.bloomberg.com/apps/news?pid=20601103&sid=ajJnMfOvDIpw.

102. Mintz Declaration, *supra* note 80, at Attachment "Index of Withheld Material, Fox News FOIA Request 2009-73."

103. Reserve Banks obtain this information from records of transactions with borrowing institutions. *Id.*

104. *Id.*

105. This list is not exhaustive. Only the most important components of the report, based on the author's judgment, are listed here. *Id.*

2) individual loan amounts, and 3) maturity dates;[106] B) a "[r]emaining [t]erm [r]eport"[107] detailing 1) all loans by[108] a) borrower, b) amount and c) origination and maturity date, and 2) aggregate credit[109] a) outstanding, and b) maturing on a specific date; and 3) an "[e]mergency [c]redit [r]eport'[110] detailing 1) individual a) borrowers b) loan amounts c) maturity dates for each loan, and 2) aggregate a) emergency credit outstanding and b) credit by type of facility.

It is apparent Board employees take raw Reserve Bank data and distill it into a coherent picture of SCLF activity. The bulk of the records at issue detail Reserve Bank §13(3) lending initiated by the Board. In fact, the only lending the Reserve Banks can initiate independently through the discount window comprises less than 10% of known SCLF lending as of June 2009.[111] In short, largely Board-initiated activity carried out by the Reserve Banks is reported by the Reserve Banks to the Board, where Board employees synthesize the information and share it with Board and Reserve Bank employees. These facts inform the court's analysis of three of the Board's arguments: 'agency records,' 'obtained from a person' under exemption four and the inter- or intra-agency requirement of exemption five.

A. Agency Records

The Board claims that "Board records subject to FOIA" are limited to "a very narrow category of documents located at the [Reserve Banks]."[112] Specifically, the Board argues "the establishment and administration of" the SCLF is "not a function 'performed for or on behalf of the Board,'"[113] as it says is required under its regulations defining Board records. To arrive at this conclusion, the Board conveniently relies on only one of two possible definitions of Board records in its regulations: "[A]ll information coming into the possession and

106. *Id.* at 1-2.

107. *Id.* at 2.

108. Mintz Declaration, *supra* note 80, at Attachment "Index of Withheld Material, Fox News FOIA Request 2009-73," at 2-3.

109. *Id.*

110. *Id.* at 3-4. These are Federal Reserve Act Section 13(3) facilities "administered by the FRBNY" and include: PDCF, TSLF, AMLF, AIG, CPFF, and Bear Stearns. *Id*. at 4.

111. June 10 Report, *supra* note 40, at 1 tbl. 1.

112. Memorandum of Points and Authorities, *supra* note 22, at 40.

113. Thro Declaration, *supra* note 80, at ¶ 21.

under the control of . . . any [Reserve Bank], or any officer, employee, or agent of . . . any [Reserve Bank]. . . in the performance of functions for or on behalf of the [Board]."[114] From this regulation, the Board "interprets the words 'for or on behalf of the Board' to mean 'under delegated authority from the Board.'"[115]

1. Board's Regulations Defining 'Agency Records'

The Board regulations defining "Records of the Board" are—at best—an unintelligible mess.[116] Reading the language naturally, a nearly impossible task, the following definition of Board 'agency records' under the Board regulation emerges: "[A]ll information"[117] within the Board's "official files"—defined as "the Board's central records"[118]—falls under the Board regulation's separate definition of "Records of the Board"[119] if "any [Reserve Bank], or any officer, employee, or agent of . . . any Reserve Bank"[120] 1) obtains it "in the performance of functions for or on behalf of the Board; or"[121] 2) maintains it "for administrative reasons in the regular course of business" at "any division or office of the [Board] or any [Reserve Bank] in connection with the transaction of any official business."[122] This division reflects the most logical distinction between the two

114. 12 C.F.R. § 261.2(i)(1)(i) (2009).

115. Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384, 394 (S.D.N.Y. 2009) (internal citations omitted); *see* Memorandum of Points and Authorities, *supra* note 22, at 50.

116. 12 C.F.R. § 261.2 (i)(1) (2009) reads as follows:

> Records of the Board include:
>
> (i) In written form, or in nonwritten or machine-readable form; all information coming into the possession and under the control of the Board, any Board member, any Federal Reserve Bank, or any officer, employee, or agent of the Board or of any Federal Reserve Bank, in the performance of functions for or on behalf of the Board that constitute part of the Board's official files; or
>
> (ii) That are maintained for administrative reasons in the regular course of business in official files in any division or office of the Board or any Federal Reserve Bank in connection with the transaction of any official business.

Id.

117. *Id.* § 261.2(i)(1)(i).

118. *Id.* § 261.2 (a).

119. *Id.* § 261.2(i)(1)).

120. *Id.* § 261.2(i)(1)(i)).

121. *Id.*

122. 12 C.F.R. § 261.2(i)(1)(ii) (2009).

possible definitions: the first addresses the circumstances under which the Fed received the information, and the second involves the reason the Fed keeps the information. The term "central records" is undefined within the "Definitions" portion[123] of the Board's regulations prescribing "Rules Regarding Availability of Information."[124]

Ultimately, the *Fox* Court was persuaded "the [Board's] interpretations of its own regulations are reasonable and consistent."[125] Concluding that only Reserve Bank records reflecting a Reserve Bank's exercise of a function delegated to the Reserve Bank by the Board are Board records,[126] the *Fox* Court held "records of [Reserve Bank] lending are not Board records"[127] which are "responsive to" a FOIA request for "agency records"[128] served upon the Board.[129] The *Fox* court reasoned that "the [Reserve Banks] lend money pursuant to their own mandate," so "records of their lending are not [Board] records."[130]

The *Bloomberg* court took a different approach. It found that the Board's FOIA regulations mean if "a record is kept in the Board's official files at a [Reserve Bank], the Secretary of the Board is its official custodian, regardless of its subject matter, and thus it qualifies as a Board 'agency record.'"[131] Because the Board did not search any New York Fed records, the *Bloomberg* court concluded that "the Board improperly withheld agency records in response to a FOIA request by conducting an inadequate search."[132] It ordered the Board to search the New York Fed for records "that constitute 'Records of the Board' under the "plain language meaning" of the Board's FOIA regulations.[133] In the *Bloomberg* court's view, Board records are the Board's central

123. *Id.* § 261.2.

124. 12 C.F.R. § 261 (2009).

125. Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384, 396 (S.D.N.Y. 2009).

126. "Thus, not all records kept by the FRBs are records of the Board; only those reflecting delegated functions . . . ." *Id.* at 395.

127. *Id.* at 394.

128. 5 U.S.C. § 552(a)(3) (2006 & 2009 Supp.) (defining the term "search" under the FOIA). "In responding . . . to a [FOIA] request for records, an agency shall make reasonable efforts to search for the records . . . ." *Id.* § 552(a)(3)(L).

129. *See Fox News Network*, 639 F. Supp. 2d at 396.

130. *Id.* at 394.

131. Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, at *9, 2009 U.S. Dist. LEXIS 74942, at *26 (S.D.N.Y. Aug. 24, 2009) (citing 12 C.F.R. § 261.3(a) (2009)).

132. *Id.* at *27.

133. *Id.* at **26-27 (ordering search under 12 C.F.R. § 261.2(i)(1) (2009)).

records[134] maintained in the performance of functions for or on behalf of the Board.[135] A Board attorney who told Judge Preska, after her decision in *Bloomberg*, the Fed[136] was determining the issue of "what records would fall under a 'delegated function'" was interrupted and told by the Judge, ". . . that's not the standard."[137]

2. Should a Deferential Standard of Review Be Applied?

Essential to the *Fox* Court's holding was the Board's interpretation of its own regulations.[138] Relying on *Bruh v. Bessemer Venture Partners III L.P.* ("*Bruh*"),[139] the *Fox* court deferred to the "longstanding practice"[140] of the Board interpreting its own regulations and assumed such an interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[141]

a. The Rationale for Deference

The basis for according deference to an agency's interpretation of an administrative regulation is the Supreme Court's landmark decision in *Bowles v. Seminole Rock & Sand Co.* ("*Seminole Rock*").[142] The "essential element" of the Court's holding, upholding the agency's position,[143] was the Court's independent application of the regulatory language to the facts at issue.[144] The Court also noted the agency's

134. *Id.* (citing 12 C.F.R. § 261.2(a) (2009)).

135. *Id*.

136. Searching under the standard Preska rejected was "a task assigned to the New York Fed." *See* Mark Pittman, *Federal Reserve Says Disclosing Loans Will Hurt Banks*, BLOOMBERG, Aug. 27, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a0iqF4X4hNCg.

137. *Id.*

138. Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384, 396 (S.D.N.Y. 2009).

139. 464 F.3d 202 (2d Cir. 2006).

140. *Fox News Network*, 639 F. Supp. 2d at 394 (internal citations omitted).

141. *Id*. (quoting Bruh v. Bessemer Venture Partners III, 464 F.3d 202, 207 (2006) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945))).

142. 325 U.S. 410 (1945).

143. The rule "clearly applies to the facts of this case" as the agency contended. *Id.* at 415.

144. *See id.* at 414-17.

interpretation was clearly explained in a bulletin widely distributed to affected parties,[145] and the agency "uniformly" took the position.[146] Under these circumstances, the Court explained, "[a]ny doubts concerning" the Court's and the agency's interpretation of the regulation were "removed by reference to the administrative construction."[147]

Since *Seminole Rock*, in *Chevron v. NRDC* ("*Chevron*"),[148] the Supreme Court has adopted a deferential test to an agency's statutory construction.[149] Courts must defer to a reasonable statutory construction by the agency charged with its implementation, even when the agency's reading differs from what the court believes is the best statutory interpretation.[150]

Both *Chevron* and *Seminole Rock* stand for the proposition that deference to an agency interpretation must be grounded in agency policymaking prerogative and expertise. As the Court explained in *Chevron*:

> [I]t is entirely appropriate for executive branch agencies within this political branch of the Government to make such *policy choices* resolving the competing interests which Congress itself either inadvertently did not resolve, or *intentionally left* to be resolved by

145. This bulletin, "entitled 'What Every Retailer Should Know About the General Maximum Price Regulation,' was made available to manufacturers as well as to wholesalers and retailers." *Id*. at 417.

146. *Id*.

147. *Id*.

148. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

149. *Id*. at 842-43. The Supreme Court characterized the *Chevron* test as "deferential" in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 979 (2005). Commentators interpret *Chevron* as "a vehicle to determine whether Congress has left a gap in a statutory scheme for an agency to fill with regulations, and whether the agency's subsequent regulations comport with congressional intent." *See* Shay Ellen Zeemer, *FMLA Notice Requirements and the* Chevron *Test: Maintaining a Hard-Fought Balance*, 55 VAND. L. REV. 261, 263 (2002) (citing *Chevron*, 467 U.S. at 842-43).

150. In *Nat'l Cable*, the Court held *Chevron* "requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Nat'l Cable*, 545 U.S. at 980 (citing *Chevron*, 467 U.S. at 843-44); *see* Barnhart v. Thomas, 540 U.S. 20, 26, 29 (2003) (upholding a Social Security Administration procedure based upon its regulatory construction of a statute despite "undesirable results").

> the agency charged with the administration of the statute *in light of everyday realities*.[151]

After *Chevron,* the Court "has supported *Seminole Rock* deference by a similar presumption: 'Because applying an agency's regulation to complex or changing circumstances calls upon the agency's *unique expertise* and *policymaking prerogatives*, we presume that the power authoritatively to interpret its own regulations is a component of the agency's *delegated* lawmaking powers."[152] So, deference to an agency's interpretation of the law is only appropriate under circumstances where the agency has both a policymaking prerogative and expertise. Agencies are typically found to have a policymaking prerogative, entitling their statutory interpretations to deference when the enabling statute for the agency authority explicitly delegates specific rulemaking functions to the agency. In *United States v. Mead Corp.*,[153] the Supreme Court observed "a congressional delegation warrants *Chevron* deference [only] when the delegation 'produces regulations or rulings for which deference is claimed.'"[154] For example, in *Bruh*, the Second Circuit Court of Appeals addressed a statute[155] which "explicitly delegated" to the Securities and Exchange Commission ("SEC") the "policymaking authority to exempt certain transactions 'as not comprehended within [the statute's] purpose'" and " . . . admonish[ed] the courts that the statute 'shall not be construed' otherwise."[156] There, the court found, "[C]ongress clearly left open a 'gap'" in the statute "for the SEC to fill" with regulatory language.[157] The court held the SEC's statutory construction, as applied into the facts in *Bruh*, was "not plainly erroneous,

151. *Chevron*, 467 U.S. at 865-66 (internal citations omitted) (emphasis added).

152. Bruh v. Bessemer Venture Partners III, 464 F.3d 202 (2d Cir. 2006) (emphasis added) (quoting Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991)).

153. 533 U.S. 218 (2001).

154. Sai Kwan Wong v. Doar, 571 F.3d 247, 259 (2d Cir. 2009) (internal alterations and citations omitted) (quoting United States v. Mead Corp., 533 U.S. 213, 229 (discussing forms of congressional delegation to agencies)).

155. Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (2006). The statute at issue was intended to prevent "the unfair use of information" by corporate insiders. *Bruh*, 464 F.3d at 205.

156. *Bruh*, 464 F.3d at 208 (quoting 15 U.S.C. § 78p(b) (2006)).

157. Roth v. Perseus, LLC, 522 F.3d 242, 249 (2d Cir. 2009) (quoting *Chevron*, 467 U.S. at 843-44).

and [was] therefore controlling."[158] Under such circumstances, the SEC's "views are entitled to 'controlling weight' unless the regulation is 'arbitrary, capricious, or manifestly contrary to the statute.'"[159] Where a statute contains no explicit delegation to an agency, a policymaking prerogative requires—at an absolute minimum—political accountability.[160]

Indicia of agency expertise include technical complexity of a federal program and the extent of an agency's discretion under its enabling statute.[161] In *Bruh*, the SEC had expertise in regulating dynamic and fast moving markets where statutory disputes typically involve complex applications of principles Congress only articulates at a more elementary level.[162]

b. Deference to the Board's FOIA Regulations is Inappropriate

The *Fox* court accorded *Seminole Rock* deference to the Board's FOIA regulations.[163] Doing so constitutes clear error.

First, these Board regulations should be evaluated based on their adherence to FOIA, not the FRA. The Board's FOIA regulations unnecessarily conflate FOIA and the FRA.[164] The Board's FOIA regulations define the term "agency records," a term of art under FOIA litigation.[165] Only in extremely limited circumstances, such as litigation

158. Bruh v. Bessemer Venture Partners III, 464 F.3d 202, 206 (2d Cir. 2006).

159. *Roth*, 522 F.3d at 249 (2d Cir. 2009) (quoting Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843-44 (1984)).

160. *C.f. Bruh*, 464 F.3d at 208 (quoting *Chevron*, 467 U.S. at 865-66).

> While agencies are not directly *accountable* to the people, the Chief Executive is, and it is entirely appropriate for this *political* branch of the Government to make such *policy choices* resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Id. (emphasis added).

161. *C.f.* Sai Kwan Wong v. Doar, 571 F.3d 247, 259 (2d Cir. 2009) (citing Dickson v. Hood, 391 F.3d 581, 590 (5th Cir. 2004)).

162. *See supra* notes 152 & 159 and accompanying text.

163. *See supra* notes 125 & 142 and accompanying text.

164. *See infra* notes 194-202 and accompanying text for a comprehensive discussion of the regulations and the FRB's attempt to link them with the FRA.

165. *C.f.* DOJ v. Tax Analysts, 492 U.S. 136 (1989) (Supreme Court rulings explaining "agency records" under the FOIA); Kissinger v. Reporters Comm. for Freedom of Press, 445 U.S. 136 (1980). Where a statute includes "a term of art at common law and we must presume that the Congress used it as such, *mutatis mutandis*,

between the Board and an individual Reserve Bank over the custody or use of records, is it conceivable the FRA would inform the distinction between Board 'agency records' and Reserve Bank records. The Board's concerns about the 'systemic risk' presented by banks 'stigmatized' by disclosure of their SCLF borrowings and its impact on the effectiveness of Fed operations are best characterized as a: 1) a factual dispute over the extent to which the Board's FOIA compliance interferes with the Board's ability to fulfill its FRA mandate; 2) a legal dispute over whether interference with this FRA mandate is a cognizable interest under the FOIA.[166] The question, then, is whether the FRB's 'agency records' regulations are a permissible construction of the FOIA.

Second, no deference to the Board's 'agency records' regulations is appropriate under FOIA. Unlike the circumstances at issue in *Bruh*, where the SEC had an *exclusive* and *genuine* claim to expertise in the field to which the regulation was applicable, the FOIA is a generic statute administered by nearly all federal government agencies.[167] Generally, "[w]hen a statute is administered by more than one agency, a particular agency's interpretation is not entitled to *Chevron* [or *Seminole Rock*] deference."[168] This is because, "[w]here a statute is generic, two bases for the *Chevron* [or *Seminole Rock*] presumption of implied delegation are lacking: specialized agency expertise and the greater likelihood of achieving a unified view through the agency than through review in multiple courts."[169] Naturally, agency interpretations of the FOIA are not entitled to deference. As the D.C. Circuit Court of Appeals explained in *Collins v. National Transportation Safety Board*,[170] "FOIA['s] . . . broadly sprawling applicability undermines any basis for deference, and courts must therefore review interpretative

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when it imported the term into the field of bank regulation." Rapaport v. Dep't of Treasury, Office of Thrift Supervision, 59 F.3d 212, 217 (D.C. Cir. 1995).

166. The Board raises, and *Fox News Network* addresses, these concerns under the purported "program effectiveness" prong of Exemption Four.

167. *See* Collins v. Nat'l Transp. Safety Bd., 351 F.3d 1246, 1252-53 (D.C. Cir. 2003).

168. Proffitt v. FDIC, 200 F.3d 855, 860 (D.C. Cir. 2000) (citing Bowen v. Am. Hosp. Ass'n, 476 U.S. 610, 643 n.30 (1986)). "[B]ecause multiple agencies promulgated rules under statute, 'there is thus not the same basis for deference predicated on expertise as we found' in *Chevron*." *Id*. (paraphrasing and quoting *Bowen*).

169. *Collins*, 351 F.3d at 1252-53.

170. *Id.*

questions de novo."[171]

The Board is no more expert in the classification, retention and review of financial records of financial institutions than the many other federal agencies with similar duties and responsibilities. Agencies such as the Comptroller of the Currency ("OCC"), the Federal Deposit Insurance Corporation ("FDIC") and the Office of Thrift Supervision in the Treasury Department ("OTS") are also responsible for administering FOIA in this context. A substantial and well-reasoned line of cases in both the D.C. and Second circuits establish that the interpretation of any one of these agencies on matters involving the administration of a banking statute is not entitled to deference.[172] Nor is the Board alone in administering FOIA in the context of a complex organizational structure with unique traits and exemptions.[173]

Federal courts, not administrative agencies, are ultimately responsible for construing FOIA.[174] If agencies, as opposed to the courts or Congress,[175] had the luxury of defining the meaning of key terms under FOIA, the result would be "an intolerable situation in which different agencies could adopt inconsistent interpretations of the FOIA and substantially complicate the administration of the Act."[176] In *Public Citizen Health Research Group v. FDA* ("*Public Citizen*")[177] the D.C.

171. *Id*. at 1253.

172. This has occurred in the context of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989), and the associated Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1811 (2006). *See* Thornton v. Office of the Comptroller of the Currency, 514 F.3d 1328, 1331 (D.C. Cir. 2008) (affording *de novo* review of the OCC's interpretation of FIRREA provisions "because multiple agencies besides the [OCC] administer the act, including the [FRB], the [FDIC], and the [OTS]"); *Proffitt*, 200 F.3d at 863 n.7; Cousin v. U.S. Dep't of the Treasury, Office of Thrift Supervision, 73 F.3d 1242, 1249 (2d Cir. 1996); Rapaport v. U.S. Dep't of the Treasury, Office of Thrift Supervision, 59 F.3d 212, 215-17 (D.C. Cir. 1995); Wachtel v. U.S. Dep't of the Treasury, Office of Thrift Supervision, 982 F.2d 581, 585 (D.C. Cir. l993).

173. *See*, *e.g.*, Kissinger v. Reporters Comm. for Freedom of Press, 445 U.S. 136 (1980) (Oval Office); U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001) (Bureau of Indian Affairs); Ryan v. U.S. Dep't of Justice, 617 F.2d 781 (D.C. Cir. 1980) (Congress).

174. *See Kissinger*, 489 U.S. at 755; Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1287 (D.C. Cir. 1983) (citing 5 U.S.C. § 552(a)(4)(B)).

175. *See infra* text accompanying notes 181-85.

176. *Pub. Citizen*, 704 F.2d at 1287.

177. *Id.* at 1280.

Circuit Court of Appeals rejected[178] a Food and Drug Administration ("FDA") FOIA regulation[179] defining the term 'trade secret' under exemption 4[180] in a manner so narrow it "would classify virtually all undisclosed health and safety testing data as trade secrets."[181] There, neither the FOIA nor other statutes[182] defined the term and the legislative history of the FOIA was "similarly unhelpful."[183] The court encountered "substantial problems" because the term was "defined both broadly and narrowly at common law."[184] The court concluded that Congress intended for the language to be construed narrowly. The court noted the absence of evidence in the legislative history suggesting Congress intended to define 'trade secrets' broadly[185] and the addition of another 'prong' for 'commercial or financial information'[186] in the same statute.[187] Most importantly, the agency's broad interpretation of the FOIA exemption's scope was "ill-suited for the public law context in which FOIA determinations must be made."[188]

Where, as here, the requisite agency expertise and policymaking prerogative is lacking in a court's evaluation of an agency policy issued by the agency to fill a statutory gap left by Congress,[189] an agency's

178. *Id*. at 1287 (stating "we are not bound by the agency's interpretive regulation").

179. 21 C.F.R. § 20.61(a) (2009) (defining an exemption 4 "trade secret" as "any formula, pattern, device, or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it").

180. The exemption applies to "trade secrets *and* commercial or financial information . . . ." 5 U.S.C. § 552(b)(4) (2006 & 2009 Supp.) (emphasis added).

181. Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1286 (D.C. Cir. 1983).

182. *See*, *e.g.*, 21 C.F.R. § 20.61(a) (2009).

183. *Public Citizen*, 704 F.2d at 1286.

184. *Id*. Under the circumstances, the court concluded its choice of definitions was "relatively unconstrained by prior administrative or judicial actions." *Id*. at 1287.

185. *Id*. at 1289.

186. *Id.*

187. Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1289 (D.C. Cir. 1983).

188. *Id*.

189. It should be noted that *Doar*, which serves as the basis of this Note's contemporary interpretation of *Skidmore*, *infra* note 190, involved an informal agency policy. At issue in *Doar* was a challenge to State Medicaid Manual Section 3259.7, an informal rule issued by the Department of Health and Human Services' Centers for Medicare and Medicaid Services. Sai Kwan Wong v. Doar, 571 F.3d 247 (2d Cir. 2009). Keep in mind, however, the informal nature of the pamphlet (in conjunction with

interpretations of an act it administers are evaluated under a *Skidmore v. Swift & Co.* ("*Skidmore*")[190] standard producing "'a spectrum of judicial responses, from great respect at one end to near indifference at the other'. . . ."[191] In *Skidmore*, the Supreme Court held "an agency's 'rulings, interpretations and opinions' of an act administered by the agency, 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[192] Like the FOIA denial, an agency action reviewed de novo under the FOIA,[193] the *Fox* court should have scrutinized the Board's FOIA regulations.

c. There Is No 'Delegated Authority' Requirement

Even if the Board's FOIA regulations are not accorded deference, they are still of concern to the courts. Here, the Board relies exclusively on the first definition of 'agency records' and "interprets the words 'for or on behalf of the Board' to mean 'under delegated authority from the Board.'"[194] "[T]he Board interprets the statutory definition of its records," the *Fox* court noted, "[p]remised on" the FRA's division of functions between the Board and the Reserve Banks.[195] "The history and structure of the Fed, the Board, and the Reserve Banks, bolster the Board's statutory interpretation."[196]

The Board's convoluted argument brings to mind Justice Robert H. Jackson's famous line: "I give up. Now I realize fully what Mark Twain

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a regulation) the Supreme Court found so important in *Seminole Rock*. *See supra* notes 142-47 and accompanying text.

190. 323 U.S. 134, 140 (1944).

191. *Doar*, 571 F.3d at 260 (quoting United States v. Mead Corp., 533 U.S. 218, 228 (citations omitted)).

192. *Id.* at 250 (quoting and paraphrasing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

193. *See* DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 755 (1989) (explaining, "[u]nlike the review of other agency action . . . the FOIA expressly places the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo'" (quoting 5 U.S.C. § 552(a)(4)(B))).

194. Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384, 394 (S.D.N.Y. 2009) (internal citations omitted); *see* Memorandum of Points and Authorities, *supra* note 22, at 50.

195. *Id.* at 395. "In the FRA, Congress divided the powers of the Fed between the [Board], which is a federal agency, and the [Reserve Banks], which were established as regional banks." *Id*.

196. *Id*.

meant when he said, 'The more you explain it the more I don't understand it.'"[197,198] The D.C. Circuit Court of Appeals applied Jackson's language in *Wachtel v. Office of Thrift Supervision*[199] to the OTS argument a statute's definition of "affirmative action" was not "limited at all by what might be thought to be a definition of affirmative action" in the statute, but was instead "instead, as more free-floating, not necessarily bound to Congress' elaboration of the phrase in" the statute.[200] Here, as in *Wachtel*, the Board's definition relies on its own construction of a term—'agency records'—in a statute (FOIA) interpreted and administered by many agencies. In *Wachtel*, at least the OTS made its argument in an enforcement order and relied on an agency interpretation of a statute germane to the issue at hand. Here, however, the Board makes its argument in a FOIA suit by reference to its interpretation of a regulation—which is not entitled to deference—based on a statute, the FRA, attenuated from the FOIA litigation at hand. Courts should and can be much more skeptical of the Board's convoluted constructions of its regulations and FOIA.

The Board's attempt to construct its statutory function in a manner where it can act with no oversight should be vanquished with the same forceful dismissal a U.S. District Court judge served the Office of the Vice President under similar circumstances:

> [I]t 'borders on the absurd' to believe that Congress statutorily defined Vice-Presidential records and required the Vice President to implement steps to preserve them, but denied any judicial review to prevent the Vice President from using a different definition for Vice-Presidential records.[201]

The Board, like the Vice President, "has discretion concerning the decision to create or dispose of" records, but absent from this discretion is the "ability to change the definition" agency records or activities provided by Congress when carrying out the FOIA.[202]

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197. SEC v. Chenery Corp., 332 U.S. 194 (1947) (Jackson, J., dissenting)

198. *Id*. at 214.

199. 982 F.2d 581 (D.C. Cir. 1993).

200. *Id.* at 585.

201. Citizens for Responsibility & Ethics in Washington v. Cheney, 593 F. Supp. 2d 194, 216 (D.D.C. 2009) (expanding on similar language in Am. Historical Ass'n v. Peterson, 876 F. Supp. 1300, 1315 (D.D.C. 1995)).

202. "It is clear . . . the Vice President has discretion concerning the decision to

3. The Board's 'Agency Records' Argument Under Common Law

After courts properly evaluate, without deference, the Board's FOIA regulations and strip the Board of the 'delegated authority' layer of obfuscation, the courts take up the issue at common law. Recall the two *Tax Analysts* requirements for 'agency records' at common law are agency creation or procurement and control.

Both the *Fox*[203] and *Bloomberg*[204] courts rejected the common law 'constructive obtainment'[205] theory under which the extensive supervision of private parties "indicates that these private firms acted on behalf of" the agency in creating the material and the degree of such supervision is the basis for the control inquiry.[206] Because the FOIA "deals with 'agency records,' not information in the abstract,"[207] 'agency records' must fall under the agency's actual, rather than theoretical, control. Thus, the "FOIA applies to records which have been in fact obtained, and not to records which merely could have been obtained."[208] This rationale led the Supreme Court to hold, in *Forsham v. Harris*,[209] privately generated materials maintained by an institution receiving federal funds are not subject to the FOIA. After all, a funding agency is under no obligation to demand data from private parties it contracts with.[210] "[W]ithout first establishing that the agency has created or ob-

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create or dispose of Vice-Presidential records, and even how he chooses to preserve them," the Court noted in *Cheney*. *Id.* at 220. "But absent from the Vice President's discretion is his ability to change the definition of Vice-Presidential records provided by Congress when exercising his" PRA obligations. *Id*.

203. Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384, 396 (S.D.N.Y. 2009) (holding "what an agency has an ability to obtain, but has not obtained, is irrelevant" (citing Forsham v. Harris, 445 U.S. 169, 182 (1980))).

204. Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, at *10, 2009 U.S. Dist. LEXIS 74942, at *21 (S.D.N.Y. Aug. 24, 2009) (quoting *Forsham*, 445 U.S. at 186).

205. *Id.*

206. Burka v. U.S. Dep't of Health & Human Servs., 87 F.3d 508, 515 (D.C. Cir. 1996) (rejecting Health & Human Services' Exemption 5 argument and remanding).

207. *Forsham*, 445 U.S. at 185.

208. *Id*. at 186.

209. 445 U.S. 169 (1980).

210. *Id*. at 177 (holding privately generated materials maintained by an institution receiving grant funds are not subject to FOIA and concluding a grantor agency is not obligated to demand such data). The Court rejected claims study related materials produced by a private institution were within the scope of FOIA because: the institution "received its funds from a federal agency and was subject to some supervision by the

tained the document, reliance or use is similarly irrelevant", the *Forsham* court noted.[211]

The viability of the Board's 'agency records' argument comes down to more than just the mechanics of the Fed. The *Fox* court found that "[t]he [Fed] is structured to empower local institutions to lend, while permitting federal oversight. The Board has the authority to promulgate the rules and regulations to which the Reserve Banks must adhere." [212] The Fed "is constituted to reflect both public and private interests."[213] The Fed's founders sought to insulate the Board, a government agency,[214] by incorporating the privately owned Reserve Banks "as a buffer against an absorption of [central] banking by the government."[215] The Board is "endowed by legislative mandate with a substantial degree of independence within government."[216] The Board's

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agency in its use of those funds;" the agency supervising the grant "had sufficient authority under its grant agreement to have obtained the data had it chosen to do so;" or because the data "formed the basis for" the published report of the study which was relied on by a regulatory agency. *Id*. at 177.

211. *Id.* at 186.

212. Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384, 395 (S.D.N.Y. 2009).

213. Riegle v. Fed. Open Mkt. Comm'n, 656 F.2d 873, 875 (D.C. Cir. 1981).

214. Memorandum of Points and Authorities, *supra* note 22, at 34; Albrecht v. Comm. on Employee Benefits of the Fed. Reserve Employee Benefits Sys., 357 F.3d 62, 65-66 (D.C. Cir. 2004) (characterizing the Board as a "governmental entity"). *See* 44 U.S.C. § 3502(5) (2006 & 2008 Supp.) (defining the term "independent regulatory agency" to include the Board for purposes of the Paperwork Reduction Act of 1995, Pub. L. No. 104-13 § 2, 109 Stat. 164 (1995)); Free Enter. Fund v. Public Co. Accounting Oversight Bd., 537 F.3d 667, 686 (D.C. Cir. 2008) (including "Federal Reserve" within its listing of independent regulatory agencies) (citing 44 U.S.C. § 3502(5) (2008 Supp.)); Lewis v. United States, 680 F.2d 1239, 1241 (9th Cir. 1982). *See generally* 12 U.S.C. §§ 241 *et seq.* (2006); *but c.f.* Research Triangle Inst. v. Bd. of Governors of the Fed. Reserve, 132 F.3d 985, 989 (4th Cir. 1997) (concluding "money used to fund the [FRB] . . . 'shall not be construed to be Government funds or appropriated moneys'" (quoting 12 U.S.C. § 244 (2006))).

215. ALFRED JEROME CLIFFORD, THE INDEPENDENCE OF THE FEDERAL RESERVE SYSTEM 26 (1965).

216. WYATT C. WELLS, ECONOMIST IN AN UNCERTAIN WORLD: ARTHUR F. BURNS AND THE FEDERAL RESERVE,1970-78 128 (1994) (citing ARTHUR BURNS, REFLECTIONS OF AN ECONOMIC POLICYMAKER: SPEECHES AND CONGRESSIONAL STATEMENTS, 1969-1978 346 (1978)). Former FRB Chairman Arthur Burns gloated, "[f]reedom from the daily pressures of the political process has given the Federal Reserve the opportunity to make the hard choices that continually confront those who are responsible for economic and financial policies." *Id*.

role in Reserve Bank lending, however, goes beyond mere 'oversight.' In fact, beginning with the Banking Act of 1933,[217] after which Reserve Banks were, for the first time, prohibited from transacting in the open market except in accordance with Board regulations, the trend has been towards greater Board control over Reserve Bank-executed Fed operations as opposed to less.[218]

This trend towards Board control is demonstrated by the fact 90% of known SCLF lending requires Board approval under § 13(3). This says all the court needs to know about the extent to which the SCLF are really carried out at the behest of the Board incident to a government operation.[219] Moreover, the SCLF lending at issue took place during a period where high-level Board executives were so intimately involved in the mechanics of the banking system, any distinction between the Board and much of the SCLF lending out of the Reserve Banks is cosmetic. As in the latter half of the Great Depression,[220] the line between Treasury and the Board has blurred. Indeed, the Fed and the Treasury issued a joint press release reiterating the difference between fiscal and monetary policy.[221] The press release acknowledged the extent to which the Board was "working closely and cooperatively with the Treasury and other agencies" in intervening to "prevent the failure of [specific] institutions that could cause systemic damage, and to foster the stabilization and repair of the financial system."[222] All forms of wealth are affected to some degree by Fed monetary policy.[223] To the extent

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217. 12 U.S.C § 227 (2006).

218. Reuss v. Balles, 584 F.2d 461, 463 (D.C. Cir. 1978). Leaving each Reserve Board "free . . . to decline to participate in [open market] operations approved by the [FOMC]" proved too "permissive." *Id*. at 463-64.

219. June 10 Report, *supra* note 40, at 1 tbl. 1.

220. JAMES GRANT, MONEY OF THE MIND: BORROWING & LENDING IN AMERICA FROM THE CIVIL WAR TO MICHAEL MILKEN 216 (Farrar Strauss Giroux 1992). The Fed sought to erode the "forms and conventions" of the gold standard, smooth out the business cycle and serve as the lender of last resort. The government already controlled the Fed and its reserve banks "in fact" at this point. *Id*.

221. Joint Statement, *supra* note 18.

222. *Id*. at para. 1.

223. *See Reuss*, 584 F.2d at 469-70. *Reuss* addressed, among other claims, the possibility the FOMC's "pervasive regulatory authority" might deprive "a holder of certain marketable bonds" of property "without due process of the law." *Id*. at 468. The claimant, a United States Congressman, argued the FOMC's effect on interest rates and the rate of inflation could reduce the value of his bonds in several ways. *Id*. at 462, 468-69 & n.23. The *Reuss* Court held the claimant lacked standing to sue as a bondholder. *Id*. at 470.

SCLF lending means Fed policy is enriching some more than others, akin to fiscal policy normally administered by politically accountable government officials,[224] it should be subject to the 'sunshine' under the FOIA.

This perception, that the Board's SCLF lending is carried out by the government, is reinforced by shocking revelations that the Treasury Secretary, ostensibly at the direction of Board Chairman Ben Bernanke, ordered a bank merger by invoking Board regulatory authority. Former Treasury Secretary Henry Paulson said in his "strong message", "that it would be unthinkable for" for Bank of America ("BOA") to invoke its right to call off the pending merger with Merrill-Lynch ("ML") in the event of a 'material adverse change,' included reference to the Fed's power to oust BOA management.[225] Paulson said his statement "reinforc[ed] the view. . . expressed by the [Board], as Bank of America's regulator."[226] This episode, if indicative of typical Board interaction with SCLF borrowers, is sufficient to create a strong presumption that every interaction between financial institutions and the Fed is in furtherance of some Board—and consequently government—objective.

The ML-BOA episode also reveals the extent to which the Board exerts actual control over the timing and extent of SCLF borrowers' disclosure. Details about the "accelerating fourth quarter loss" at ML and BOA's "concerns" about consummating the transaction[227] did not begin trickling out until a month after BOA's chief Ken Lewis raised the issues in a heated dialogue with Fed officials and the Treasury Secretary.[228] The merger was announced in September, approved by shareholders in December, and consummated with $20 billion in

224. *See*, *e.g.*, Joint Statement, *supra* note 18.

225. The order of this language is inverted for clarity, but the meaning is the same. *Bank of America and Merrill Lynch: Hearing Before Comm. on H. Oversight and Government Reform*, 111th Cong. (2009) (statement of Henry M. Paulson, Jr., Former Secretary U.S. Department of Treasury).

226. This Fed power, in Paulson's view, "could be . . . and should be" used against the "management and board of a regulated entity that triggered . . . destabilization within their own institution . . ." by undertaking such a "destructive action for which there was no reasonable legal basis and which would show a lack of judgment." *Id.* at 3-4.

227. *Id*.

228. Dan Fitzpatrick et al., *In Merrill Deal, U.S. Played Hardball*, WALL ST. J., Feb. 5, 2009, at A1.

additional aid and $118 billion in protection against losses on troubled assets in January.[229] In this context, Bernanke testified that "disclosure obligations belong squarely with [BOA], and the [Board] did not interfere in the company's disclosure decisions."[230] Still, the Fed's "legitimate interest in knowing when [BOA or Merrill] intended to disclose the [Merrill] losses" in light of the "potential for a strong, adverse market reaction" meant "[i]f federal assistance to stabilize [BOAMerrill] were to be effective, the necessary facilities would have to be in place as of the disclosure date."[231] If the Board can dictate the timing of disclosure by a private party, it can certainly control the disclosures of Reserve Banks it is charged with overseeing.

The circumstances of the SCLF lending and the resulting paper trail are well within the traditional 'agency records' requirements under the *Forsham* and *Tax Analysts* regime.

III. QUALITATIVE ARGUMENTS FOR NONDISCLOSURE

Once the court determines 'agency records' are at issue, a court's 'qualitative' analysis of the rationale for nondisclosure supersedes the 'structural' issues which primarily guided the court's 'agency records' determination.[232]

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229. *Id*.; *see also* Michael R. Crittenden, *Fed Emails Bash BofA Chief in Tussle Over Merrill Deal*, WALL ST. J., June 11, 2009, at A1; Michael R. Crittenden & Dan Fitzpatrick, *Lewis Takes Heat but Defends Merrill Deal: Lawmakers Question BofA's CEO on Role of Federal Officials; Paulson, Bernake Next Up?*, WALL ST. J., June 12, 2009, at C1. The government's Securities and Exchange Commission attempted to bury the ML-BOA nondisclosure episode in a settlement rejected by a U.S. District Court judge as:

> [S]uggest[ing] a rather cynical relationship between the parties: the S.E.C. gets to claim that it is exposing wrongdoing on the part of the Bank of America in a high-profile merger; the Bank's management gets to claim that they have been coerced into an onerous settlement by overzealous regulators. And all this is done at the expense, not only of the shareholders, but also of the truth.

SEC v. Bank of Am. Corp., 2009 U.S. Dist. LEXIS 83502, at *15 (S.D.N.Y. Sept. 14, 2009). This settlement would have transferred BOA shareholders' money back to the government without punishing the actual wrongdoers. A true enforcement action would have targeted BOA's Lewis for his cowardly conduct and former Treasury Secretary Paulson for engaging in sovereign securities fraud.

230. *Acquisition of Merrill Lynch by Bank of America: Hearing Before the Comm. on H. Oversight and Government Reform*, 111th Cong. (2009) (statement of Ben S. Bernanke, Chairman, Federal Reserve).

231. *Id.*

232. Compare the "agency records" requirements in *supra* text accompanying notes

The qualitative rationale for nondisclosure, ostensibly, is that "the Fed is mindful of the stigma that might be associated with being named by the Fed as a borrower, which could be interpreted as a sign of weakness."[233] The Board's Director of Monetary Affairs ("MA")[234] submitted an affidavit in the *Bloomberg* case supporting the Board's stigma justification, in which he argued that,

> [T]he publication of such information would lead to an increased reluctance of borrowers to use such facilities. As a result, the ability of the [Reserve Bank's] lending to serve as a safety valve in relieving liquidity strains for individual depository institutions and the banking system, and to complement open market operations . . . would be reduced.[235]

The government's concern about stigmatizing financial institutions is not confined to Fed assistance. The motivation for forcing all of the biggest banks to take $250 billion in Treasury equity stakes in the fall of 2008, under a program dubbed 'TARP,'[236] was informed by fears depositors and creditors would interpret an injection of government

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82 (creation or procurement) and 83 (control), with the exemption four confidentiality requirements in *supra* text accompanying notes 89 (disclosure would impair the government's ability to collect information in the future) and 90 (disclosure would cause substantial competitive harm). The "agency records" analysis is a determination of "what is where," while the exemption arguments are concerned with "why are the records where they are," "what might transpire if they are disclosed" and "why." But see Exemption Four's "obtained from a person" requirement, *supra* text accompanying note 86, and Exemption Five's inter- or intra-agency requirements, *supra* text accompanying note 94, both of which are more akin to the structural "agency records" arguments than confidentiality under Exemption Four or deliberative and leading up to a contract in Exemption Five. Overall, however, the analysis of records under the FOIA exemptions is more intellectually challenging and qualitative in nature than the "agency records" issue. But for the inclusion of a delegation requirement in the Board's regulations, which made "agency records" somewhat interesting here, there would be little beyond factual declarations about document locations to discuss under a traditional "agency records" analysis.

233. Brian Blackstone, *Fed Makes $2.7 Billion, Offers Details on Loans*, WALL ST. J., June 11, 2009, at A2.

234. Madigan Declaration, *supra* note 99, at ¶ 14 (discussing Section 13(3) lending and the TAF).

235. *Id.*

236. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

capital as a sign of weakness.[237] When the TARP plan was announced, Senator Chuck Schumer said he hoped "[w]idespread bank participation will reduce the risk that depositors may flee or that other institutions will refuse to do business with banks that accept or request public capital."[238] Other observers share the government's fear, warning that the situation could be "very bad" if financial institutions were stigmatized.[239]

Disclosure proponents, including a former Commodities and Futures Trading Commission commissioner and chairman who submitted a brief in the *Bloomberg* case,[240] argue that there was no stigma attached to SCLF borrowing during this macroeconomic liquidity shock. "The illiquidity that has plagued the financial markets . . . is largely systemic, due in part to uncertainty regarding the values of assets and liabilities, many of which are held by financial entities across various sectors and regions . . . the signal sent when institutions access the funds is not idiosyncratic or particular to the financial institution for whom the information is disclosed."[241]

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237. Interestingly, Treasury Secretary Henry Paulson "actively opposed the idea of investing in banks" while Bernanke "was an early advocate." Deborah Solomon et al., *U.S. to Buy Stakes in Nation's Largest Banks; Recipients Include Citi, Bank of America, Goldman; Government Pressures All to Accept Money as Part of Broadened Rescue Effort*, WALL ST. J., Oct. 14, 2008, at A1. Paulson feared a program of direct equity investments in banks would require the government to pick winners and losers, expose the banks to government meddling and discourage participation "because of the perceived stigma" associated with such public investments. *Id.*

238. Charles Schumer, *How to Rescue the Banks*, WALL ST. J., Oct. 14, 2008, at A21 (arguing "we need to start by persuading a substantial cross section of major banks, even those in relatively good health, to accept capital"). The participation of healthy banks was viewed by supporters as "TARP's best feature" while critics lambasted it as a "silly idea . . . from a Treasury that claims to trust markets and encourage transparency." Steven Pearlstein, *Hank Paulson's $125 Billion Mistake*, WASH. POST, Oct. 31, 2008, at D1; *see also* Allan Sloan, *An Excess of Bashing*, WASH. POST, Mar. 17, 2009, at D1.

239. Sloan, *supra* note 238 (urging critics to "act like grown-ups and stop pointing fingers until the danger passes" and warning the "financial system and economy are on the edge of the abyss, as they were in September").

240. Declaration of Sharon Brown-Hruska, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, 2009 U.S. Dist. LEXIS 74942 (S.D.N.Y. Aug. 24, 2009) (filed in support of FRB Summary Judgment Memo). Brown-Hruska is a research economist and former CFTC commissioner and chairman. *Id.* at ¶ 3. She notes her "deep appreciation for and understanding of the charge of federal agencies to promote their efficient function while seeking to maintain stability and confidence." *Id.* at ¶ 3.

241. *Id*. at ¶ 17.

If revelations about an institution's SCLF borrowing are a sign of the borrower's instability, the consequences of disclosure are not the result of stigma. In fact, an economist who has studied bank panics during the Great Depression[242] argues disclosure in times of financial distress can have a positive economic impact by pointing borrowers to banks with the resources to lend.[243] In addition, savvy customers and investors "are quite capable of sniffing out weak financial institutions long before managements come clean."[244] If the market's reaction to greater transparency in FOMC decision-making[245] is any indication, markets are likely to rely more on actual SCLF data than other sources of information about the health of banks[246] with the possible result of less conjecture and volatility.[247] There is a substantial economic case for disclosure of SCLF lending.

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242. Telephone Interview with Joseph R. Mason, Moyse/LBA Chair of Banking, Ourso School of Business, Louisiana State University (Mar. 4, 2009) (on file with author).

243. *Id*.

244. Pearlstein, *supra* note 238. While Pearlstein was discussing investors, keep in mind depositors who maintain a balance in excess of the federally insured amount or invest in bank debt such as certificates of deposit are also "investors."

245. Beginning in May of 1999, the FOMC began releasing "a forward-looking element, in the form of an outlook for the monetary policy stance initially, and a balance-of-risks assessment concerning inflationary pressures and economic conditions in the 'foreseeable future'" immediately after its meetings. Michael Ehrmann & Marcel Fratzscher, *Transparency, Disclosure and the Federal Reserve* 5 (Eur. Cent. Bank, Frankfurt, F.R.G., Working Paper Series, 2005).

246. *C.f. id*. at 27. Before possible greater FOMC "communication . . . such as speeches, interviews and testimonies by FOMC members . . . exerted a significantly larger impact on financial markets . . . . [and] markets reacted more strongly to releases of macroeconomic fundamentals . . . . In this sense, markets may merely have *shifted their attention from other types of information* . . . to the statements and balance-of-risks assessments of the FOMC decisions themselves to obtain the relevant information." *Id*. (emphasis added).

247. Specifically, Ehrmann and Fratzscher found "volatility induced by FOMC meetings has been significantly lower since" the adoption of the disclosure measures discussed. *Id. See supra* text accompanying note 245. "[M]arkets have anticipated monetary policy decisions equally well under both regimes, when comparing the expectations just before each meeting with the actual decisions." *Id*. at 26. "[M]arkets anticipate the next monetary policy decision earlier under the new disclosure regime, such that market interest rates move by a smaller magnitude over the whole inter-meeting period under the new regime." *Id*. at 27. Such findings support the arguments of Pearlstein, *supra* note 238, and Mason, *supra* text accompanying note 242.

Such concerns do not appear to be holding back Board Chairman Ben Bernanke's Fed. The Fed's § 13(3) lending authority is vague, but it is now being stretched as never before.[248] In a statement, the importance of which cannot be overstated, Bernanke said the Fed stands behind every large financial institution with the potential to endanger the stability of the financial system:

> [T]he Federal Reserve . . . will take any necessary and appropriate steps to ensure that our banking institutions have the capital and liquidity necessary to function well in even a severe economic downturn. Moreover, we have reiterated the U.S. government's determination to ensure that systemically important financial institutions continue to be able to meet their commitments.[249]

This rationale for SCLF lending, predicated on 'systemic risk,'[250] is effectively the policy of the Fed. It is grounded in Bernanke's observation[251] that the early 1930's banking panic[252] exacerbated the Great Depression,[253] when 9,000 banks failed from 1930-1933.[254]

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248. *See*, *e.g.*, Justin Lahart, *Central Banks Are Creatures of Financial Crises: From the BOE to the Fed, Institutions That Sprang from Burst Bubbles Adopt New Shapes in Current Convulsions*, WALL ST. J., Jan. 27, 2009, at A12 (noting the Fed "has come to the rescue so many times that even seasoned central-bank watchers have trouble keeping track"); *see supra* text accompanying notes 16-28 (describing extent of Fed lending) and notes 26-34 (describing specific SCLF programs to carry out this lending).

249. Ben S. Bernake, Chairman, Fed. Reserve Sys., Financial Reform to Address Systemic Risk, Address Before Council on Foreign Relations (Mar. 10, 2009) (transcript available at http://www.federalreserve.gov/newsevents/speech/bernanke 20090310a.htm).

250. Systemic risk is defined as serious insolvency and liquidity problems with the potential to jeopardize the stability of entire financial system. Jean-Charles Rochet & Jean Tirole, *Controlling Risk in Payment Systems*, *in* WHY ARE THERE SO MANY BANKING CRISES? 159, 162 (Jean-Charles Rochet ed., Princeton Univ. Press 2008); *see also* Mareclo Dabos, *Too Big to Fail in the Banking Industry: A Survey*, *in* TOO BIG TO FAIL 141, 143 (Benton E. Gup ed., Greenwood 2004) (highlighting systemic risks as the: "potential spillover effects leading to widespread depositor runs, impairment of public confidence in the broader financial system, or serious disruptions in domestic and international payment and settlement systems").

251. "[P]roblems of the financial system tended to lead output declines . . . ." Ben S. Bernanke, *Nonmonetary Effects of the Financial Crisis in the Propagation of the Great Depression*, 73(3) AM. ECON. REV. 257 (1983).

252. *See* CHARLES P. KINDLEBERGER, THE WORLD IN DEPRESSION: 1929-1939 195-96 (Univ. of Cal. Press 1986) (explaining the highlights of the banking panic).

253. Lending is essential to Bernanke's ability to keep his "public vow" to famed economist Milton Friedman: "Regarding the Great Depression, you're right, we did it.

Tragically, the money stock fell over one-third between 1929 and 1933[255] and commercial deposits fell 42% or $18 billion.[256] These bank failures made borrowing impossible for most individuals and small businesses.[257] This banking crisis combined with a debt crisis, as debtors were unable to pay off existing obligations.[258] Some Great Depression scholarship suggests the banking collapse of 1933 was caused in part by[259] congressionally mandated Reconstruction Finance Corporation[260] ("RFC") disclosure requirements.[261] In Bernanke's view,

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We're very sorry. But thanks to you, we won't do it again." Wessel, *supra* note 13. Bernanke's research built on Friedman's work. *See*, *e.g.*, Ben S. Bernake, Governor, Fed. Reserve Sys., Money, Gold, and the Great Depression, Remarks at the H. Parker Willis Lecture in Economic Policy (Mar. 2, 2004) (transcript available at http://www.federalreserve.gov/boarddocs/speeches/2004/200403022/default.htm) (describing Friedman and Schwartz's arguments as "highly influential" and saying they "deserve enormous credit for bringing the role of monetary factors to the fore").

254. MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES: 1867-1960 351 (Princeton Univ. Press 1971).

255. "[T]he demand for the sum of deposits and currency was reduced by the diminished attractiveness of deposits [because] of the bank failures." *Id.* at 353.

256. *Id.*

257. The "banking crisis" is the inability of bank borrowers to access needed credit. Bank borrowers are defined as "those whose liabilities are too few to be publicly traded." Bernanke, *supra* note 251, at 51.

258. The debt crisis was defined as a "progressive erosion of borrowers' collateral relative to debt burdens." *Id*. at 53.

259. *See*, *e.g.*, KINDLEBERGER, *supra* note 252, at 194 (arguing Bank Panic had "complex political roots" in the RFC disclosure). The RFC was largely unsuccessful. "Beyond doubt, the continuation of suspensions among banks of all types, long after the [RFC] had ample opportunity to aid, was depressing." J. Franklin Ebersole, *One Year of the Reconstruction Finance Corporation*, 47 Q. J. ECON. 3 464, 478-79 (1933). "Probably the detailed monthly reports after July, 1932, did direct the public's attention to some of the weaker spots, but it is rather far fetched to assume that complete deferment of publicity would have restored insolvent banks to solvency. The banking situation in general was too desperate to stand or fall upon the mere issue of publicity. There had been too much concealment too long." *Id*. at 479.

260. Reconstruction Finance Corporation (Strategic Material Loan) Act, 72 Pub. L. No. 2 , 47 Stat. 5 (1932) (repealed 1957). The RFC began liquidating in 1953 and dissolved in 1957. Reconstruction Finance Corporation Liquidation Act, 83 Pub. L. No. 163, 67 Stat. 230 (1953) (liquidating the RFC created under the Reconstruction Finance Corporation (Strategic Material Loan) Act by providing for RFC's continuation through the summer of 1954 and terminating its lending powers in the Fall of 1953); Reorganization Plan No. 1 of 1957, 22 Fed. Reg. 4633, 71 Stat. 647 (1957) (abolishing the RFC and transferring remaining functions to the Housing and Home Finance

the Great Depression teaches policymakers that a healthy and operational financial sector, fully capable of providing much needed 'financial intermediation' services, is essential to maintaining stability and economic growth.[262] Today's SCLF lending, 'systemic risk' policy and 'stigma' arguments are, in part, [263] a product of these lessons.

Agency, General Services Administration, Small Business Administration and Commerce Department). The RFC was an executive branch agency created during the Great Depression by President Herbert Hoover as "bank closings increased in size and currency hoarding became notorious . . . ." Ebersole, *supra* note 259, at 466; Joseph R. Mason, *The Political Economy of Reconstruction Finance Corporation Assistance During the Great Depression*, 40 EXPLORATIONS ECON. HIST. 101, 102 (2003).

261. In the summer of 1932, a few months before the banking crisis began in earnest, a RFC official gave Congress a dire warning: disclosure of the names of institution's borrowing from the RFC and the amount of their loans would be "decidedly harmful." 75 CONG. REC. 15,491 (1932) (statement of G.R. Cooksey, Secretary, Reconstruction Finance Corporation). The RFC argued the "particularly sensitive character" of the relationship between the public and their financial institutions meant disclosure "would undo much that has been accomplished by [the RFC] in preserving the credit structure of the Nation and, in a large measure, restrict its usefulness in the future." *Id.* Congress ignored these warnings and RFC disclosure provisions were "designed merely to criticize" the first RFC Chairman, Charles Dawes, whose own bank borrowed heavily shortly after his resignation. FRANK FREIDEL, FRANKLIN D. ROOSEVELT 180 (Little Brown 1973). Publication of current lists of RFC borrowers on a monthly basis began in November 1932. Ebersole, *supra* note 259, at 474. As the banking crisis intensified in January of 1933, for example, *supra* text accompanying note 253, the RFC was ordered to disclose the names of all 4,000 financial institutions which had borrowed from the RFC since July of 1932.

262. "[B]ecause markets for financial claims are incomplete, intermediation between some classes of borrowers and lenders requires nontrivial market-making and information-gathering services." Bernanke, *supra* note 251, at 42. "The disruptions of [the] 1930-33 . . . [banking panic] reduced the effectiveness of the financial sector as a whole in performing these [essential intermediation] services. As the real costs of intermediation increased, some borrowers . . . found credit to be expensive and difficult to obtain." *Id.* "[G]iven the policy followed by the [Fed], the [bank] failures were the mechanism through which a drastic decline was produced in the stock of money," Milton Friedman concluded. *See* FRIEDMAN & SCHWARTZ, *supra* note 254, at 351. Friedman argued the Fed failed to take drastic enough action to revive the banking sector because Board members and other Fed officials regarded the failures as bad management and an inevitable result of excess. *See id.* at 358-59. Friedman concluded these views reflected the following four factors: (1) the FRS had "no feeling of responsibility" for non FRS member banks; (2) Most influential bankers were big banks who hated smaller banks; (3) Most failures were non-FRS members; (4) Few large member banks failed. *Id.* Unable to access new credit or pay off old debts, consumers cut back and businesses retrenched. Ogden L. Mills, then-Treasury Undersecretary, lamented, "deflation has proceeded much too far. Every additional decline in credit and

A. Evidentiary Burden

The Board's economic arguments about 'stigma' must withstand the court's application of the law establishing the government's evidentiary burden. "The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought . . . have not been 'improperly' 'withheld'"[264] under a FOIA exemption. This requirement logically places the burden of "justifying the withholding on the only party able to explain it."[265] To justify withholding under exemptions

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prices and securities brings with it further bank failures, and bank failures in their turn lead to further contraction in credit and prices." Ebersole, *supra* note 259, at 468 n.2 (quoting 134 COMMERCIAL & FIN. CHRON. 784-85 (Jan. 30, 1932)). Bernanke concluded that "the effects of this credit squeeze on aggregate demand helped convert the severe but not unprecedented downturn of 1929-30 into a protracted depression." Bernanke, *supra* note 251, at 42.

263. Another reason for non-disclosure of the SCLF lending, arguably of equal importance to the Board's "stigma" and "systemic risk" arguments, is political expediency. "[T]he refusal of [the legislative and executive branch and the FRS] to deal with each other in a rational, coherent way is itself very destructive . . . to be blunt, I think both sides like it like that, I don't think the President and the Congress want to consult with the Federal Reserve in any serious way about fiscal policy. I think they have seen the Fed as this spooky temple that will clean up the mess if they are having excesses and they don't want to be responsible for that." *The Federal Reserve Accountability Act of 1993: Hearing Before H. Comm. on Banking, Fin. and Urban Affairs*, 103rd Cong. 41 (1993) (statement of William Greider, Author, *Secrets of the Temple*). If the Board and the U.S. Treasury leadership can take unpopular but needed—in their view—steps to arrest the crisis, Fed secrecy affords economic policymakers the luxury of acting without provoking a public outcry. "[O]ne mistake has been the degree to which recession-fighting has gotten mixed up with the system-bracing that should have been the preoccupation of the technocrats, with the less said to the broader public the better," opined columnist Holman W. Jenkins in the *Wall Street Journal*. Holman W. Jenkins, Jr., *How Democracy Ruined the Bailout*, WALL ST. J., Feb. 18, 2009, at A15. "Had matters simply been left in the hands of the Federal Reserve and fellow bank regulators, the 'crisis' might have become fodder for little more than future late-night reminiscences by retired bureaucrats, pleasuring themselves with how closely the world came to burning down without the public ever knowing it." *Id.* The appealing counterargument to such practical considerations, in a democracy such as the United States, is "[i]t is very hard for any public official to go home and explain that $2.2 trillion of your money was lent out and we don't know where it went." Jon Hilsenrath & Corey Boles, *Senate Seeks Names of Finance Firms Receiving Fed Aid*, WALL ST. J., Apr. 2, 2009, http://online.wsj.com/article/SB123870067196983547.html#articleTabs%3Darticle (quoting Vermont Senator Bernie Sanders).

264. DOJ v. Tax Analysts, 492 U.S. 136, 142 n.3 (1989).

265. *Id*. (quoting S. REP. NO. 89-813, at 8 (1965); H.R. REP. NO. 89-1497, at 9

four and five, the court's method of evaluating the strength of the Board's economic arguments is particularly important.

"[I]t is the function of the federal courts to distill facts and make conclusions" the Second Circuit Court of Appeals noted in *Grand Central Partnership, Inc. v. Cuomo* ("*Grand Central*").[266] In FOIA cases, district courts "may grant summary judgment in favor of an agency 'on the basis of agency affidavits if they contain *reasonable specificity* of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.'"[267]

As applied by the *Grand Central* court, the standard is flexible and dependent upon an agency's ability to attribute any questionable justifications for withholding material to an affiant with personal knowledge.[268] An e-mail exchange[269] between agency employees discussing the investigation into alleged improprieties by the FOIA requester[270] was held exempt from disclosure under exemption five[271] on the basis of an affidavit submitted by an agency employee and the court's in camera review[272] of the document.[273] The affiant claimed he personally "relied upon the advice and opinions expressed in these discussions in deciding to impose" sanctions on the FOIA requester and "in formulating my recommendation" on the issue to the agency

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(1966)).

266. 166 F.3d 473, 480 (2d Cir. 1999).

267. *Id*. at 478 (quoting Gallant v. NLRB, 26 F.3d 168, 171 (D.C. Cir. 1994)).

268. *C.f. id*. at 480-83. In making an "agency records" factual determination, the court rejected the conclusions of an agency affiant without personal knowledge of the records at issue even though the affidavit stated the withheld material was "integral" to the agency's ongoing investigation of the FOIA requester, was used by agency staff "in the ongoing decision making process with respect to this investigation," and "reflect[ed] internal discussions among [agency] officials preceding" the decisions. *Id.* The court held such an affidavit provided an insufficient factual basis to determine whether contested items were "agency records" or personal materials. *Id*.

269. The case refers to "an e-mail" but everything else in this discussion, which is limited to "document 4" appears to encompass multiple documents. It seems logical to assume this was an e-mail exchange.

270. Grand Cent. P'ship v. Cuomo, 166 F.3d 473, 482 (2d Cir. 1999).

271. *Id*. at 483 (holding material is pre-decisional and deliberative as required for nondisclosure under exemption five); *see supra* text accompanying note 70 for a description of exemption five and the applicable standard.

272. *Grand Cent. P'ship*, 166 F.3d at 482.

273. *Id*. at 483 & n.3.

headquarters.[274] The court had reason to believe the affiant sought to withhold the material because it would reveal political machinations which would embarrass the agency.[275] Despite such 'red flags,' the *Grand Central* court determined additional witnesses were unnecessary[276] and concluded the material "directly related to the three agency decisions" detailed in the agency affiant's affidavit and "had a direct bearing on the actual exercise of a policy judgment."[277]

The Board relies on *Comstock International (U.S.A.), Inc. v. Export-Import Bank*[278] because it apparently puts such a low evidentiary burden on an exemption four request. Board affidavits about the economic impact of disclosure are sufficient in light of the *Comstock* court's conclusion "that [Export-Import Bank ("EIB")][279] affidavits offer[ed] specific factual or evidentiary material to satisfy [the independent federal agency's] burden under exemption [four]."[280]

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274. *Id*. at 483.

275. Nearly a year after "several newspapers published reports" the FOIA requesting organization "used abusive and sometimes violent tactics to remove homeless persons from public spaces," *id*. at 477, the agency terminated a grant, required the return of grant funds and imposed a limited sanction. *Id*. at 483 n.3. Six months later, approximately eighteen months after the negative press coverage, the organization voided the sanction. *Id*. Where, as in *Grand Central*, the organization which was the object of these supposedly confidential investigative reports sought the material's disclosure, something is amiss. In all likelihood, the material would have revealed the agency's motivations for imposing the sanctions was the agency's perceived need to take ceremonial action to appease a constituency out for vengeance long enough for the issue to die before rolling the decision back when the heat was off. Unfortunately, the likelihood the agency affiant was motivated by such nefarious considerations is an inappropriate basis for weighing the merits of the claimed FOIA exemption. *See* Loving v. U.S. Dep't of Defense, 550 F.3d 32, 39 (D.C. Cir. 2009) (internal quotations omitted) (explaining "the requester's identity matters only where . . . the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege" (citing DOJ v. Reporters Committee for the Freedom of the Press, 489 U.S. 749, 771, (1989); United Techs. Corp. v. FAA, 102 F.3d 688, 692 (2d Cir. 1996))); *but see infra* text accompanying note 418 (stating nondisclosure often accompanies agency impropriety).

276. *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 483 n.4 (2d Cir. 1999).

277. *Id*. at 483.

278. 464 F. Supp. 804 (D.D.C. 1979).

279. *Id.* at 808.

280. Federal Reserve Bank's Reply and Opposition to Plaintiff's Cross Motion for Summary Judgment at 12 n.7, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, 2009 U.S. Dist. LEXIS 74942

Comstock involved a FOIA request for disclosure of a loan agreement, detailing the terms and conditions under which EIB extended credit and loan guarantees for[281] an oil and gas development company wholly owned by a foreign government[282] for the purchase of goods and services for a project[283] to expand an oil pipeline in the foreign country.[284] The EIB, an independent federal agency, seeks to facilitate and finance exports and imports between the United States and other countries through the provision of loans, guarantees, and other forms of financial assistance.[285] EIB argued disclosure of the loan agreement "would significantly impair its ability to promote United States exports." Specifically, according to the EIB: "[P]otential loan applicants might seek financing outside the United States because of their unwillingness to subject themselves to the possible risk of disclosure" and impair EIB's ability to compete with other government-supported export credit unions; "[B]orrowers would be less inclined to make concessions that could be disclosed to a future lender" and impair EIB's ability to negotiate loan agreements; and commercial banks would be hesitant to participate on joint loan agreements with EIB "impairing [EIB's] ability to control overall financing of transactions." The district court held "circumstances justify nondisclosure of the loan agreement."[286]

In the same vein, the Board says it "met its burden of demonstrating that the documents are exempt under the [purported program effectiveness[287]] prong" of exemption four.[288] The Board offers an affidavit from the Board's Director of Monetary Affairs[289] predicting an increased reluctance by borrowers to use the Board's emergency facilities would impair the "safety valve role" of the discount window[290]

(S.D.N.Y. Aug. 24, 2009) (internal citations omitted (citing *Comstock*, 464 F. Supp. at 808)) [hereinafter Fed Reply and Opposition].

281. *Comstock*, 464 F. Supp. at 805-6.

282. *Id*. at 805.

283. Comstock Int'l (U.S.A.), Inc. v. Export-Import Bank, 464 F. Supp. 804, 806 (D.D.C. 1979).

284. *Id*. at 805.

285. *Id*. *See also infra* text accompanying note 304.

286. *Comstock*, 464 F. Supp. at 808.

287. *See infra* text accompanying notes 328-71.

288. Fed Reply and Opposition, *supra* note 280, at 12.

289. Madigan Declaration, *supra* note 99.

290. Interestingly, the Board's memo only relies on the Declaration of FRB employee Brian F. Madigan for a discussion of the DW, *id.*, but relies on the Declaration of FRBNY employee Susan E. McLaughlin for the DW and PDCF. *See* McLaughlin Declaration, *supra* note 32. Fed Reply and Opposition, *supra* note 280, at

and "greatly complicate[]" the Board's ability to manipulate short-term interest rates or and otherwise make it "more difficult" for the Fed to achieve its statutory objectives.[291] The Board also offers an affidavit from a senior vice president in the New York Fed's Markets group[292] charged with overseeing the discount window and PDCF arguing "disclosure of details regarding which institutions are availing themselves of the discount window and the PDCF . . . would cause financial institutions to avoid using these liquidity tools – even when needed – to alleviate market pressures." [293]

A court's view of the legal sufficiency of such Board statements, in light of *Grand Central* and *Comstock*, forms the heart of the exemption four and five analyses which follow.

B. Exemption Four

If the court gets to exemption four, it will have determined the records at issue are 'agency records.'[294] Once the court establishes the SCLF records are 'agency records,' the court will turn to the first element necessary to qualify for nondisclosure under exemption four: the withheld material must be 'obtained from a person.'[295] If the court concludes the Board SCLF records at issue are 'obtained from a person,' then the court must determine if disclosure of the records would implicate exemption four's confidentiality requirement.[296] These issues are discussed in turn.

1. Obtained From a Person Under Exemption Four

The Board argues Board staff obtained the information used to prepare the records at issue from the Reserve Banks, which in turn

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291. Fed Reply and Opposition, *supra* note 280, at 12 (citing Madigan Declaration, *supra* note 99 (internal quotations omitted)).

292. McLaughlin Declaration, *supra* note 32.

293. Fed Reply and Opposition, *supra* note 280 (citing McLaughlin Declaration, *supra* note 32 (internal quotations omitted)).

294. Recall, only "agency records" are subject to the FOIA. *See* Kissinger v. Reporters Comm. for Freedom of Press, 445 U.S. 136 (1980).

295. *See supra* text accompanying note 86.

296. *See id.* Confidentiality is a better fit under these circumstances than trade secrets.

obtained and derived that information from records of transactions with SCLF borrowers. The Board's 'obtained from a person' argument makes three presumptions: the SCLF borrowers at issue are the source of the information contained within the SCLF records at issue; the records are submitted by the SCLF borrowers to the Reserve Banks; and the Reserve Banks provide the information to the Board.[297]

The process by which the SCLF records at issue are generated[298] led the *Fox* and *Bloomberg* courts to different conclusions.[299] The only overlap between the information SCLF borrowers supplied upon application to the Reserve Banks for SCLF loans and the records at issue is the identity of the SCLF borrower, Judge Preska reasoned in *Bloomberg*. Everything else was "generated . . . from statistics [the Reserve Banks] kept concerning the [SCLF] lending programs."[300] Therefore, according to the *Bloomberg* court, the SCLF records are not 'obtained from a person'[301] under the "plain language meaning of obtain."[302] These same facts led the *Fox* court to conclude the SCLF borrowers provide their identity, the amount they wish to borrow and the collateral they wish to pledge and found such "information . . . originated with the borrower and is reflected in the [requested] data . . ." Accordingly, Judge Hellerstein held the information "was 'obtained

297. Memorandum of Points and Authorities, *supra* note 22, at 16; Fed Reply and Opposition, *supra* note 280, at 12.

298. *See supra* note 113 and accompanying text.

299. *Compare* Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, at *13, 2009 U.S. Dist. LEXIS 74942, at *40 (holding "[t]he Board has not met its burden of showing that the information . . . was obtained from a person and, indeed, has raised no material issue of fact"), *with* Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384, 399 (S.D.N.Y. 2009) (holding the Board's SCLF information "was 'obtained from' the [SCLF] borrower").

300. *Bloomberg*, 2009 WL 2599336, at *12, 2009 U.S. Dist. LEXIS 74942, at *38.

301. "The fact that the [Reserve Banks] themselves generated the information contained in the Remaining Term Reports is sufficient to vitiate the applicability of Exemption 4 with respect to that information." *Id.* at *13, 2009 U.S. Dist. LEXIS 74942, at *39. "It is evident from the Board's own testimony that the bulk of the information contained in the Remaining Term Reports was generated by the [New York Fed] and other [Reserve Banks] operating [discount window] programs." *Id.* at *12, 2009 U.S. Dist. LEXIS 74942, at *38.

302. *Id.* at *12, 2009 U.S. Dist. LEXIS 74942, at *36 (defining "obtained" as "[t]o come into the possession of; to procure; to get, acquire, or secure," *id*. at n.13 (quoting OXFORD ENGLISH DICTIONARY (2009)), and "to gain or attain possession or disposal of usually by some planned action or method," *id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (2009)).

from' the SCLF borrower.[303]

Essentially, the *Fox* and *Bloomberg* courts disagree about the significance of what happens in between a SCLF loan origination and the production of the records at issue by Board staff. The following two examples shed light on this process.

The Export-Import Bank ("EIB")—which provides guarantees, insurance, and extensions of credit on competitive terms to American exporters[304]—obtained exporters'[305] "financial status and/or export plans"[306] from a person [307] the District Court for the District of Columbia held in *Judicial Watch, Inc. v. Export-Import Bank*.[308] At issue was a FOIA request directed towards the EIB.[309] The court concluded the EIB "obtained the information from the insurance applicants themselves, commercial lenders for the applicant, or a purchaser of the goods at issue."[310]

The Small Business Administration's ("SBA") records of 1,800 individual loan amounts, balances outstanding and payment, collection, or discharge status[311] was not provided by the borrowers to the government,"[312] the U.S. District Court for the Western District of New York held in *Buffalo Evening News, Inc. v. Small Business Administration* ("*Buffalo*").[313] The SBA generated this information "in the course of its involvement with its borrowers."[314] The routine records kept by the SBA in the course of administering the accounts "in no way implicates any of the financial information [the borrowers] provided . . . to the government."[315] "[T]he only connection between" these SBA

303. *Fox News Network*, 639 F. Supp. 2d at 399.

304. Judicial Watch, Inc. v. Export-Import Bank, 108 F. Supp. 2d 19, 24 (D.D.C. 2000). The EIB is supposed to play a bigger role where private financing and insurance is unavailable because of risk factors specific to the importing country. *Id*.

305. Specifically "insurance applicant's." *Id*. at 28.

306. *Id.*

307. *Id.* at 28.

308. *Id.*

309. Judicial Watch, Inc. v. Export-Import Bank, 108 F. Supp. 2d 19, 23-24 (D.D.C. 2000).

310. *Id.* at 28.

311. *See* Buffalo Evening News, Inc. v. Small Bus. Admin., 666 F. Supp. 467, 467-68 (W.D.N.Y 1987).

312. *Id.* at 469.

313. *Id.* at 467.

314. *Id.* at 469.

315. *Id.* The *Buffalo* Court used the same language to discuss the FOIA requester's

loan servicing records "and the information obtained from the borrower" is that "a loan was granted by the SBA presumably on the basis of the financial records submitted by the borrower. . . . [N]othing more or less is established by the release of the requested records, much less the contents of the records submitted by the borrowers."[316]

a. SCLF Lending Records are Not 'Obtained From a Person'

The *Buffalo* court's reasoning is compelling because it captures the key distinction between 'banking,' the preservation of which is the Board's sole objective in making SCLF loans, and 'administrative' functions incidental to Board objectives. In *Foster Poultry Farms, Inc. v. Suntrust Bank* ("*Foster*"),[317] the court detailed the proper use of a borrower's confidential information at each step of the loan process. Beginning with the loan application, then origination and ultimately servicing, the *Foster* decision highlights the changing nature of the same class of information. In *Foster*, a business approached its bank in order to obtain funds to acquire a competitor.[318] In doing so, the borrower engaged the bank "to provide financial services"[319] Uncertainty about the availability of this financing represents the breakdown in the 'financial intermediation' function—where banks evaluate credit risks so buyers and sellers can go about their business—Bernanke said exacerbated the Great Depression. If the SCLF lending supports a functioning financial *services* market, capable of providing credit to worthy borrowers, then Bernanke's SCLF lending will have succeeded.[320]

The Board's interest in the Reserve Bank records has almost nothing to do with repayment. As the Board points out, the Reserve Banks have sole discretion to implement the SCLF lending. The Reserve Banks extend the SCLF loans to the borrowers to advance the Board's—and the government's—interest in a vibrant market for

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argument. *Id*. at 468 (quoting Miami Herald Publ'g Co. v. Small Bus. Admin., 670 F.2d 610 (5th Cir. 1982)).

316. *Id*. at 468-69 (internal citations and quotations omitted).

317. No. 1:04-cv-5513, 2008 U.S. Dist. LEXIS 2733 (E.D. Cal. Jan. 14, 2008).

318. *Id*. at *16.

319. The borrower in *Foster*, for example, engaged its bank to provide "financial services" in the form of: (1) arranging for additional banks to fill out participation for the entire amount of the letter of credit; (2) to act as the issuing bank of the letter of credit; and (3) to act as administrative agent for the credit. *Id*. at **9-10.

320. *See supra* notes 257 and 262 and accompanying text.

financial *services*, not merely repayment of the loans. The Reserve Banks report the loan details at issue to the Board to evaluate whether the SCLF lending is having the intended effect on *services* and the information about the loan details is only incidental to either the Reserve Banks or the Board. The reports at issue here fall within the *Buffalo* framework.

Necessary to the courts 'agency records' holding is a court finding the SCLF records were either created or obtained by the Board and are within the Board's control.[321] If the court decided the Board created the material for purposes of 'agency records,'[322] the exemption four obtained from a person discussion can end there. If not, and the court found the SCLF records at issue are 'obtained' from the Reserve Banks, then the division of functions highlighted by *Foster* and the Board's view of systemic risk suggest the SCLF records are obtained from the Reserve Banks acting in a purely administrative capacity under the reasoning in *Buffalo*. Accordingly, such administrative records are obtained from the Reserve Banks incident to a government function and are not 'obtained from a person' for purposes of exemption four.

2. Confidential

If the *Fox* court's view of the 'obtained from a person' issue prevails over the *Bloomberg* court's holding, the appellate court's exemption four analysis would proceed to confidentiality. Under the widely accepted[323] 'confidentiality' standard the D.C. Circuit Court of Appeals laid out in *National Parks & Conservation Ass'n v. Morton*,[324] a submission is 'confidential' under exemption four if disclosure "is likely to" either impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained.[325] *National Parks* involved a request for disclosure of audits and other financial materials the National Park Service required its concessioners

321. *See*, *e.g.*, DOJ v. Tax Analysts, 492 U.S. 136 (1989); Kissinger v. Reporters Comm. for Freedom of Press, 445 U.S. 150-51 (1980).

322. Recall the reports at issue are created internally by the Board from the Reserve Banks' raw data. *See supra* text accompanying note 103.

323. *But see supra* note 88 and accompanying text (discussing Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc)).

324. 498 F.2d 765, 770 (D.C. Cir. 1974).

325. *Id.* at 770. *See supra* notes 88-90 and accompanying text.

to submit. The court found the concessioners had an interest in non-disclosure, and concluded exemption four protected their private interests to the extent the submitters would be at a competitive disadvantage as a result of publication. The court held the application of exemption four could not protect the government's interests "[s]ince the concessioners are required to provide this financial information to the government, there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future."[326] The court then remanded for a determination of whether disclosure would harm the interests of the submitters.[327]

The SCLF borrowing records at issue here are not confidential within the meaning of exemption four. First, the Board fails to prove disclosure will result in 'substantial competitive harm' to the interests of the submitting Reserve Bank. Second, the government's ability to collect information from the Reserve Banks in the future will not be impaired. Yet before these issues can be discussed, the court must dispense with the Board's 'program effectiveness' argument.

a. Purported Program Effectiveness Prong

The Board contends a purported 'program effectiveness' prong of the *National Parks* confidentiality test justifies withholding of the SCLF records as confidential under exemption four. "[D]isclosure of borrower names, loan amounts, and terms of individual loans would impair the Board's ability . . . to complement open market operations in achieving target short term interest rates. . . relieve liquidity strains in individual institutions and the banking system under section . . .and to utilize . . . lending facilities to address unusual and exigent circumstances."[328] This argument suffers from two fatal flaws. First, the case law discussing the 'program effectiveness' prong is thin at best. Second, the evidence raises substantial questions about whether the effectiveness of Fed monetary policy would actually be impaired by disclosure of the SCLF records at issue.

The Board foolishly relies[329] on a footnote in *National Parks*[330] to

326. *National Parks*, 498 F.2d at 770.

327. *Id.* at 770-71.

328. Fed Reply and Opposition, *supra* note 280, at 11 (citing Memorandum of Points and Authorities, *supra* note 22, at 26-30).

329. *Id.* at 11-15.

330. 498 F.2d 765, 770 n.17 (D.C. Cir. 1974).

argue "program effectiveness" is the "third prong" of exemption four in the Second Circuit.[331] Essentially, any program effectiveness argument is grounded in the belief that "the Government should not be precluded from invoking the protection of exemption [four] merely because the asserted interest is not precisely one of those two identified in *National Parks* [ ]."[332] Yet the Second Circuit Court of Appeals explicitly declined to adopt the 'program effectiveness' footnote of *National Parks* in *Nadler v. FDIC*.[333] The Second Circuit adopted the *National Parks* formulation in *Continental Stock Transfer & Trust Co. v. SEC*[334] which cited to a later D.C. Circuit case, *Charles River Park, Inc. v. Department of Housing and Urban Development*,[335] and referenced *National Parks* with a "See also."[336] The *Continental Stock* court goes on to refer to "the test formulated in *Charles River Park*."[337] 'Program effectiveness' is certainly not the law of the Second Circuit.

The strongest holding in favor of a 'program effectiveness' prong is the First Circuit Court of Appeals holding in *9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System* ("*9 to 5*").[338] The *9 to 5* court felt many government interests are cognizable under exemption four.[339] Exemption four protects "infor-

331. The Federal Reserve Bank says Bloomberg's argument such "program effectiveness "is not good law in this [Second] Circuit is unfounded." Fed Reply and Opposition, *supra* note 280, at 13-14.

332. 9 to 5 Organization for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys., 721 F.2d 1, 9-10 (1st Cir. 1983).

333. Nadler v. FDIC, 92 F.3d 93, 96 (2d Cir. 1996) (declining to "reach the issue" of whether the scope of "other governmental interests" extends to "program effectiveness" and affirming non-disclosure based on risk of harm to submitter).

334. 566 F.2d 373, 375 (2d Cir. 1977) (per curiam); *but see* Inner City Press/Community on Move v. Bd. of Governors of Fed. Reserve Sys., 463 F.3d 239, 244 (2d Cir. 2006) (stating "this Circuit has adopted a two-part test formulated by the District of Columbia Circuit in *National Parks*").

335. 519 F.2d 935 (D.C. Cir. 1975). While *Charles River Park* refers to *National Parks*, it does not specifically reference *National Parks* footnote 17.

336. 566 F.2d at 375 (2d Cir. 1977).

337. *Id.*

338. 721 F.2d 1, 10-11 (1st Cir. 1983).

339. *Id.* at 9 (finding no limitation in *National Parks* "on the number of legitimate interests which are protected by exemption 4"); *accord* Washington Post Co. v. U.S. Dep't of Health & Human Servs., 865 F.2d 320, 327 (D.C. Cir. 1989) (noting "[o]ther interests may indeed be considered under exemption 4" (citing Critical Mass Energy Project v. NRC, 830 F.2d 278, 286 (D.C. Cir. 1987) (finding government interest in administrative efficiency and effectiveness), *rev'd on other grounds by* 975 F.2d 871,

mation which would be particularly helpful to agency officials in carrying out their mandate" the *9 to 5* court noted.[340] Specifically, the *9 to 5* court held the Boston Reserve Bank's "legitimate governmental interest of efficient operation"[341] meant the Reserve Bank should receive access to regional salary data it could not access under circumstances where the information might have to be disclosed publicly.[342] The *9 to 5* court reasoned "it would do violence to the statutory purpose of exemption [four] were the Government to be disadvantaged by disclosing information which serves a valuable purpose and is useful for the effective execution of its statutory responsibilities."[343]

Those cases where courts adopt 'program effectiveness' offer far more clear-cut cases for government efficiency in the ordinary course of agency business, such as an employer's need for access to the salary data at issue in *9 to 5*, than the speculative economic-policy based claims raised by the Board here. Courts have recognized the value of maintaining the secrecy of materials submitted to the Department of Commerce by companies hoping to obtain export licenses for use "in the enforcement of export laws."[344] Importantly, neither *9 to 5 Women*[345]

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879 (D.C. Cir. 1992) (offering "[n]o opinion as to whether any other governmental or private interest might also fall within the exemption's protection")).

340. 9 to 5 Organization for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys., 721 F.2d 1, 10 (1st Cir. 1983).

341. *Id*. at 11.

342. A private organization composed of approximately 40 of the region's largest employers compiled salary and wage data obtained from each of its members and distributed the results of the survey to each member of the group. Members of the organization explicitly agree to treat the salary information contained in the surveys as confidential and to refrain from making the information available to the public. Members who violate this pledge of confidentiality are subject to expulsion from the group. *Id.* at 3.

343. *Id.* at 11.

344. Durnan v. U.S. Dep't of Commerce, 777 F. Supp. 965, 967 (D.D.C. 1991) (concluding documents, drawings, technical data, designs, formulations, blueprints, engineering and process drawings given to the Bureau of Export Administration by a private company seeking a license to export certain copper foil technology is "used in the enforcement of export laws" and falls within Exemption 4). The *Durnan* Court found a government explanation of the need to keep "information about technology and entities being investigated" for use "in the enforcement of export laws" would "impair the government's ability to obtain necessary information in the future." *Id.*; Africa Fund v. Mosbacher, No. 92 Civ. 289 (JFK), 1993 U.S. Dist. LEXIS 7044, at *22 (S.D.N.Y. May 26, 1993) (finding disclosure would "[i]mpinge upon the agency's receipt of substantial information that potential exporters voluntarily submit when seeking export licenses and that the agency finds invaluable in making policy and

nor the export cases[346] based their holding squarely the application of a three-part confidentiality test with a 'program effectiveness' prong as the Board urges here.[347]

Only a small number of cases have been decided on "program effectiveness" grounds. The *Comstock*[348] holding[349] is interpreted by some courts as a "program effectiveness" decision. As construed in the District Court for the Southern District of New York, the *Comstock* court "held that Exemption Four was available because disclosure would impair the agency's ability to execute its statutory mandate. Commercial banks and borrowers were reluctant to negotiate loan agreements with the agency absent assurances of confidentiality, and the Court found that this reluctance would interfere with the agency's ability to promote United States exports."[350] While *Comstock* effectively applied a "program effectiveness" prong of *National Parks*, the language of the *Comstock* holding has more to do with the agency's burden of proof to justify nondisclosure than the legal proposition the evidence is offered to prove.[351]

In *Public Citizen Health Research Group v. National Institutes of*

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maintaining effective export controls").

345. 721 F.2d at 5.

346. *Durnan*, 777 F. Supp. at 967 (citing Greenberg v. FDA, 803 F.2d 1213, 1216 (D.C. Cir. 1986) (applying the traditional two-part *National Parks* test)); *Africa Fund*, 1993 U.S. Dist. LEXIS 7044, at *20 (describing *National Parks* as the "primary test" and discussing program effectiveness as "[i]t has also been held that documents are subject to Exemption 4 if their disclosure would undermine the agency's effective execution of its statutory responsibilities" (internal quotations omitted) (citing *9 to 5*, 721 F.2d at 11; Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974))).

347. FRB's Reply and Opposition to Plaintiff's Cross Motion for Summary Judgment at 11, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, 2009 U.S. Dist. LEXIS 74942 (S.D.N.Y. Aug. 24, 2009) (arguing "the Board properly withheld 231 pages of loan information on individual borrowers under the so-called "third prong" or "program effectiveness" branch of Exemption 4").

348. Comstock Int'l (U.S.A.), Inc. v. Export-Import Bank, 464 F. Supp. 804 (D.D.C. 1979).

349. *Id.*

350. Nadler v. FDIC, 899 F. Supp. 158, 162 (S.D.N.Y. 1995).

351. The actual holding in *Comstock* is found in this sentence: "The Court concludes that the affidavits offered by Eximbank offer 'specific factual or evidentiary material' to satisfy defendant's burden of proving that circumstances justify nondisclosure of the loan agreement." *Comstock*, 464 F. Supp. at 808.

Health ("*NIH*"),[352] the District Court for the District of Columbia found that "[i]mpairment of the effectiveness of a government program is a proper factor for consideration in conducting an analysis under FOIA exemption [four]."[353] At issue in *NIH* was a request for information about the medical research agency's revenues from royalties based on externally sponsored research. The request also sought information detailing the arrangements giving rise to these royalties.[354] The royalties arose in the course of research conducted by agency employees who work, pursuant to statute,[355] at agency laboratories receiving private funding. This arrangement, intended to lead to "inventions [of] 'early stage technologies' that otherwise would not be further developed," requires the government to agree to license the invention arising out of the collaborative research to the outside party at the outset of the project. If the agency decides to patent an invention, it markets the invention to commercial partners and negotiates a licensing agreement providing for "consideration" in the form of royalties. Consistent with the program's objectives, these "[l]icensing decisions are not simply based on who will pay the highest royalties, but who can best develop and commercialize the technology."[356] In overseeing litigation arising from a FOIA request contested by a private partner of the agency, the District Court for the District of Columbia faced a claim "the licensing program's [statutory] effectiveness would be diminished if the information was released."[357] Reasoning the "function of commercializing invention is left up to the private sector" by the policy and objective of one statute[358] under a collaborative arrangement encouraged by another statute,[359] the court held "if the royalty information were disclosed, the effectiveness of

352. Pub. Citizen Health Research Group v. Nat'l Insts. of Health, 209 F. Supp. 2d 37 (D.D.C. 2002).

353. *Id.* at 52 (citing Critical Mass Energy Project v. NRC, 975 F.2d 871, 879 (D.C. Cir. 1992) (offering "no opinion as to whether any other governmental or private interest might also fall within the exemption's protection").

354. *Id.* at 39.

355. Federal Technology Transfer Act ("FTTA"), 15 U.S.C. § 3710a (2006).

356. *Nat'l Insts. of Health*, 209 F. Supp. 2d at 40.

357. *Id.* at 51.

358. Bayh-Dole Act, 35 U.S.C. § 200 (2006) ("It is the policy and objective of the Congress to use the patent system to promote the utilization of inventions arising from federally supported research or development; to encourage maximum participation of small business firms in federally supported research and development efforts; to promote collaboration between commercial concerns and nonprofit organizations, including universities.").

359. 15 U.S.C. § 3710a (2006).

Defendant's licensing program would be impaired."[360]

The D.C. Circuit Court of Appeals dicta in *Washington Post v. Department of Health and Human Services* ("*Washington Post*")[361] suggests that "other interests [i.e. program effectiveness] can be introduced into the balance only as factors weighing against disclosure" just as *National Parks* "capture[d]. . . the most obvious interests that Congress was seeking to protect" in exemption four, serious competitive harm and impairment of government information-gathering.[362] The *Washington Post* court held "a genuine issue of material fact exists" as to the impact of limited personal disclosure requirements on the government's ability to spur participation of scientists in National Cancer Institute peer review and research.[363] The government's argument was based, in part, on a survey of 49 consultants, out of a total of 467, whose financial interests would be subject to disclosure. Of those surveyed, five said they would decline to participate in the future and an additional five had a "clear objection to disclosure," but would still accept future service.[364] The district court conducted an exemption four inquiry with the intent of achieving "a rough balancing of the extent of impairment and the importance of the information against the public interest in disclosure."[365] By expressly finding "the extent of the government's impairment [if the scientists' financial information were to be disclosed] and the importance of the information [provided by the scientists] outweigh the public interest in disclosure,"[366] the district court improperly[367] "reinject[ed] the potential risk of [scientist] nonparticipation into the [exemption four] inquiry."[368]

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360. Pub. Citizen Health Research Group v. Nat'l Insts. of Health, 209 F. Supp. 2d 37, 52 (D.D.C. 2002).

361. Washington Post Co. v. U.S. Dep't of Health & Human Servs., 865 F.2d 320 (D.C. Cir. 1989).

362. *Id.* at 327.

363. *Id.* at 321 (finding summary judgment inappropriate).

364. *Id.* at 323.

365. *Id.* at 323 n.4 (internal quotations and citations omitted).

366. Washington Post Co. v. U.S. Dep't of Health & Human Servs., 865 F.2d 320, 324 (D.C. Cir. 1989) (internal quotations omitted).

367. The district court thought such a factor "to be proper under the exemption 4 'confidentiality' analysis." *Id.* at 323.

368. *Id*. "In performing that balance, we caution that in *this* case, there is no longer any room on the scales for weighing the possibility that public disclosure . . . will cause some scientists to decline service on the NCI's peer review committees altogether. Whatever validity this contention of 'nonparticipation' might have . . . if similar

> Importantly, the appellate court criticized the district court for allowing "the risk of future scientist nonparticipation to *diminish* the overall public interest in disclosure that would be balanced against the negative factors. Such an approach could not have been intended by the drafters of exemption 4 for it would allow courts to count anti-disclosure factors on both sides of the scale, adding weight to the impairment side *and* reducing the weight on the disclosure side. The thrust of FOIA is distinctly in the opposite direction, and exemption 4 contemplates a straightforward balance of the pros and the cons of disclosure in any particular case.[369]

Washington Post is not an ideal case to cite for those arguing in favor of exemption four, even those seeking the benefit of its dicta[370] suggesting other interests can be incorporated in a *National Parks* analysis, because the case requires courts to conduct legitimate factual inquiries into the basis for FOIA exemption four and significantly narrowed the possibility of any of the *National Parks* considerations serving as a basis for nondisclosure to situations "when the affirmative interests in disclosure on the one side are outweighed by the factors identified in *National Parks* (and its progeny) militating against disclosure on the other side. More simply put, 'minor' disadvantages flowing from disclosure 'cannot overcome the disclosure mandate of FOIA.'"[371]

Given the rejection of 'program effectiveness' by the *Nadler* court in the Second Circuit Court of Appeals and the D.C. Circuit Court of Appeals tepid response to similar arguments in *Washington Post*, 'program effectiveness' is not sufficiently well established to justify nondisclosure here.

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litigation were commenced in the future . . . for the purpose of this action the issue of nonparticipation was waived by the government when it abandoned the claim before this court. *Id.* at 327 (emphasis in original, internal quotation marks omitted) (quoting Washington Post Co. v. U.S. Dep't of Health & Human Servs., 690 F.2d 252, 268 n.51 (D.C. Cir. 1982) (noting the court did not address the government's need to attract qualified scientists because the government did not raise "that specific interest in the *National Parks I* test")).

369. *Id.* at 327-28.

370. The court did not actually issue a holding on "program effectiveness," but remanded for development of a more complete factual record. *Id.* at 328.

371. *Id.* at 327 (quoting Washington Post Co. v. U.S. Dep't of Health & Human Servs., 690 F.2d 252, 269 (D.C. Cir. 1982)).

b. Substantial Competitive Harm

If the court's analysis proceeds to 'confidentiality' under exemption four, the Board's 'agency records' argument will have failed but its 'obtained from a person test' arguments will have prevailed. As a result, the 'substantial competitive harm' inquiry will view the 'submitter' as either the Reserve Bank or the SCLF borrower. This prong of the *National Parks* test protects the interests of the submitter, so the court's view of the applicable submitter assumes particular importance. To prove disclosure has the potential to subject the submitter to the risk of 'substantial competitive harm' under exemption four, "a party need only demonstrate the existence of actual competition and the likelihood of substantial competitive injury."[372] "[T]he important point for competitive harm in the FOIA context . . . is that it be limited to harm flowing from the affirmative use of proprietary information *by competitors."*[373] An analysis of the 'substantial competitive harm' to the submitter under each scenario, Reserve Bank or SCLF borrower, follows in turn.

i. Harm to Reserve Banks

This argument can be put to rest by citing to the statutory authority for the Fed's SCLF lending. Because the records at issue involve SCLF lending records, the applicable 'competitive harm' inquiry should focus on the market to serve as 'lender of last resort.' Yet FRA § 13(3) requires a showing the SCLF borrower is "unable to secure adequate credit accommodations from other banking institutions."[374] The Reserve Banks simply cannot face competition to serve as 'lenders of last resort.'

Substantial competitive harm to a government agency competing in the private market can arise in the absence of competition with the government agency only in very rare situations. In *NIH* the court was confronted with such circumstances. There, despite a few notable exceptions where it was "extremely competitive" to partner with the agency, the applicable market of private sector entities competing to

372. Gulf & W. Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979).

373. Pub. Citizen Health Research Group v. Nat'l Insts. of Health, 209 F. Supp. 2d 37, 47 (D.D.C. 2002) (quoting Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983)).

374. 12 U.S.C. § 343 (2006).

fulfill the agency's objectives regularly operated with only one interested participant.[375] The court found disclosure would result in "a diminution in the number of [private] firms willing to engage in partnership"[376] with the agency, which "would cease to be an attractive or viable licensor of patented technology."[377] As a result, the court held the agency "substantially demonstrated that the effectiveness of the [agency's] licensingprogram would be critically impaired" by disclosure.[378]

The *NIH* circumstances are somewhat analogous to those at issue here. Evidence even teetering institutions in serious need of cash would turn to alternatives to the Reserve Banks indicates competition in the market for distressed lending, but not to provide the § 13(3) lender of last resort function the SCLFs are supposed to fill.[379] Unlike the facts in *NIH*, where the government was competing to attract firms to fulfill its objectives, the nature of SCLF lending means competition to provide the 13(3) lending at issue is nonexistent.

Disclosure of SCLF borrowing might make it more difficult for the Reserve Banks to coax institutions with other options into tapping the SCLFs. Disclosure might, as the New York Fed's President William Dudley fears, "undermine the value of the facilities that [the New York Fed is] providing."[380] Perhaps it will be more difficult for the Fed to achieve FOMC and Board liquidity and interest rate objectives.[381] Maybe banks will be reluctant to borrow from the Fed in a liquidity crunch.[382] These justifications are insufficient to prove 'substantial competitive harm' to the Reserve Banks required here. First, as established, any 'competitive harm' does not occur in the applicable market: §13(3) lending. Second, the Fed has a variety of tools other than SCLF lending at its disposal, in particular FOMC operations. Even if disclosure were to entirely destroy the utility of SCLF lending, the Fed is not driven 'out of the business' of injecting liquidity into financial markets or institutions. For these reasons the Reserve Banks do not suffer 'substantial competitive harm' as a result of disclosure.

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375. *Nat'l Insts. of Health*, 209 F. Supp. 2d at 54.
376. *Id.*
377. *Id.* at 53.
378. *Id.* at 54.
379. *See supra* text accompanying note 28.
380. *See supra* text accompanying note 101.
381. *See supra* text accompanying note 328.
382. *See supra* text accompanying note 235.

ii. Harm To SCLF Borrowers

The Fed's borrowers are hardly subject to substantial competitive harm by borrowing at favorable rates, [383] maintaining liquidity when none is otherwise available, and staying in business. If claims the claims at issue in *Buffalo*, that small businesses "will reject the low interest loans sponsored by the [Small Business Administration ("SBA")] on a wholesale basis [are] of questionable legitimacy on its face and [are] wholly unsupported by any evidence submitted by the SBA,"[384] than similar claims in relation to the Board's too big to fail institutions are preposterous. In *Buffalo* the court found "[t]here is virtually no equivalent alternative source for the type of low cost debt financing one is able to obtain from the SBA"[385] for small businesses.

Similarly, here there is no equivalent alternative source of low cost debt financing that the world's largest banks can obtain from the Fed. Goldman Sachs paid dearly, especially compared to Paulson's Treasury, for its 2008 cash infusion from Warren Buffet. [386] Importantly, the Buffet investment did not come until two days after Goldman converted to a bank holding company, putting a wider variety of Fed SCLFs within Goldman's reach.[387] Similarly, Citibank made concessions considered significant at the time in exchange for a substantial cash infusion in 2007.[388] These examples demonstrate the reality of the marketplace

383. *See*, *e.g.*, Mark Gongloff, *Banks Profit from U.S. Guarantee*, WALL ST. J., July 27, 2009, at C1.

384. Buffalo Evening News, Inc. v. Small Bus. Admin., 666 F. Supp. 467, 471 (W.D.N.Y. 1987) (internal citations omitted) (rejecting claims disclosure would harm the SBA's ability to conduct its own business as intended by Congress). The court also held the SBA failed to establish the likelihood of competitive injury to its borrowers as required by *National Parks*. The court held a class of SBA documents was not "privileged or confidential" within the meaning of Exemption 4. *Id.*

385. *Id.*

386. *'Distasteful' Capital*, WALL ST. J., Oct. 15, 2008, at A18 (arguing terms of Treasury's TARP infusions are "somewhat more generous to the banks than outside investors such as Warren Buffett have recently demanded"); John Paulson, *The Public Deserves a Better Deal*, WALL ST. J., Sept. 26, 2008, at A19.

387. *See*, *e.g.*, Holman W. Jenkins Jr., *The Weekend Interview with Lloyd Blankfein: The Bank Everyone Loves to Hate*, WALL ST. J., Oct. 10, 2009, at A13 (recounting "[t]he firm sped up . . . [its] application before the Fed to become a bank holding company . . . . Two days later, [the firm] raised $5 billion from Warren Buffett . . . .").

388. *Citi of Arabia*, WALL ST. J., Nov. 29, 2007, at A18 (arguing "[g]iven the 11% the bank is paying Abu Dhabi, Citigroup's other equity holders might also be better off

when §13(3) SCLFs are under consideration: private capital is either nonexistent, prohibitively costly or, at the least, available on terms which are significantly less favorable than those available from a Fed SCLF.

Where 'systemic risk' is truly an issue, banks will tap the SCLFs in spite of any concerns about stigma because it is the only way to ensure their survival. If faced with a stark choice between a bank run financed or tempered by the Fed's SCLFs and a humiliating bank failure,[389] no sane bank executive—the submitter whose confidentiality interests are protected by exemption four in this context—would choose the latter. The events of the past year prove the point. At the beginning of 2008, the competitive landscape for publicly traded investment banks,[390] the applicable market for many SCLF borrowers,[391] was comprised of five firms. Two, Lehman Brothers and Bear Stearns, were unable to borrow from the Fed during the market panic[392] and failed. A third firm, Merrill Lynch, merged to avoid the same fate as Lehman.[393] The two remaining firms, Morgan Stanley and Goldman Sachs, survived and have returned to profitability.[394] Fed borrowing, meanwhile, is arguably now correlated with success instead of stigma.[395] No economic actor is exposed to the risk of 'substantial competitive harm' by disclosure of their willingness to take a risk free profit by reinvesting the proceeds of dirt

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down the road had they taken a dividend cut instead").

389. Lehman Brothers former chief executive officer, Richard Fuld, Jr., lost a personal fortune when his firm filed for bankruptcy in September of 2008. Fuld now spends his days dealing with Lehman-related litigation and struggles to secure clients at the small boutique he recently started with two assistants and an aide. Susanne Craig & Ianthe Jeanne Dugan, *From Lehman's Wreckage, New Lives*, WALL ST. J., Sept. 12, 2009, at A1. Lehman's failure put Fuld and the rest of Lehman's staff at a competitive disadvantage in the investment banking marketplace.

390. Here, the market was arguably defined as independent investment banks unburdened by large commercial banking operations. At the beginning of 2008, the leading such firms were Bear Stearns, Goldman Sachs, Lehman Brothers, Merrill Lynch, and Morgan Stanley.

391. Many SCLF programs, such as the PDCF and TSLF discussed *supra* at note 32, are explicitly targeted at the investment banking industry.

392. *See* KELLY, *supra* note 44 (discussing Bear Stearns liquidity problems and the creation of Fed facilities after the Bear's failure); James Stewart, *supra* note 29 (describing Lehman's woes and apparent inability to post sufficient collateral for a Fed loan).

393. *See* Stewart, *supra* note 29.

394. *See*, *e.g.*, Jenkins, *supra* note 387.

395. *See supra* text accompanying note 100.

cheap Fed loans in highly rated government securities. Profits attributable to the Fed's lending are windfalls in the purest sense.[396] The ultimate 'substantial competitive harm' faced by large firms amidst the 2008 financial crisis—failure—resulted from financial firms *inability* to borrow from the Fed.[397]

c. Impairment of Government's Ability to Collect Information

The impairment prong of the *National Parks* confidentiality test is concerned with the quality of information submitted to the government. In *Inner City Press/Community on the Move v. Board of Governors of the Federal Reserve System* ("*Inner City Press*"),[398] the Second Circuit Court of Appeals applied the *National Parks*' presumption against impairment in the case of information submitted on a compulsory basis[399] to a FOIA request for the disclosure of a bank's customer list.[400] The court held "an agency must both possess and exercise the legal authority to obtain information for the resulting submission of information to be deemed 'mandatory.'"[401] Because the Board "did not exercise any authority to compel" or make a separate request for the bank's customer list, the court found the bank voluntarily submitted the

396. *See* Simon Nixon, *Windfalls Show That Bonus Tax Makes Sense*, WALL ST. J., Oct. 20, 2009, at C10.

397. Both Wessel and Stewart discuss the role Paulson's public vow *not* to put forward public money for Lehman Brothers played in the firms downfall. WESSEL, *supra* note 12; Stewart, *supra* note 29.

398. 463 F.3d 239 (2d Cir. 2006).

399. "If a person is compelled to submit information . . . there is presumably no danger that public disclosure will impair the ability of the Government to obtain the information in the future." *Inner City Press*, 463 F.3d at 245 (quoting Nat'l Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) (internal quotations and marks omitted)).

400. The immediate issue on appeal was whether exemption four applied to the names of an acquiring bank's "customers that engage in subprime lending." *Id.* at 243. The requesters originally sought specific terms and amounts of credit extended under loans to, as well as descriptions of other services provided for, these subprime lending customers by the acquiring bank. This information comprised a "Confidential Exhibit" submitted to the FRB in connection with a bank merger application. The FRB's approval of the merger was required under the Bank Holding Company Act (BHCA), 12 U.S.C. § 1842 (2006). *Inner City Press*, 463 F.3d at 242-43.

401. *Inner City Press*, 463 F.3d at 247-48 (outlining the definition of "mandatory" under the *National Parks* test).

information to the Board.[402] The requested information was held confidential under the 'impairment' prong.[403] In *National Parks* the mandatory nature of the submission meant the court could not deem the impairment prong was implicated. The *Inner City Press* decision reflected the court's reluctance—shared by the *Critical Mass* court—to dictate the Board's approach to gathering information[404] or set a standard likely to diminish the quality of information submitted on a mandatory basis.[405]

The government's ability to collect information in the future is not impaired by non-participation of private parties in a government activity even when such participation furthers government objectives. In *Washington Post Co. v. U.S. Department of Health & Human Services* ("*Washington Post*")[406] the D.C. Circuit Court of Appeals held the government's fear "qualified [scientists who consult for the National Cancer Institute[407]] might forego participation in the peer review process altogether if their listing of financial interests were made publicly available" was "irrelevant to the question of 'impairment'—that is, to

402. The Board's request was "'too amorphous' to be considered a demand." *Id.* at 248 (agreeing with the District Court's finding the FRB "did not compel" the bank's submission in the case). The court noted the Board's regulatory enabling statutes allowed the FRB to request "some information" from the bank and similar institutions, but found "it is unclear whether the Board is permitted to compel specific information such as client lists." *Id.* at 246 n.7. The court explicitly rejected the notion that "mere legal authority to compel the production of information . . . is sufficient for that submission of information to be deemed mandatory" out of concern such a "standard would result in an undesirable general presumption against impairment." *Id*. at 246-47

403. *Id.* at 248.

404. *Compare* Critical Mass Energy Project v. NRC, 975 F.2d 871, 880 (D.C. Cir. 1992) ("[N]o provision in FOIA . . . obliges agencies to exercise their regulatory authority in a manner that will maximize the amount of information that will be made available to the public."), *with* Inner City Press/Community on the Move v. Bd. of Governors of the Fed. Reserve Sys., 463 F.3d 239, 247 (2d Cir. 2006) (quoting same *Critical Mass* language to support its finding there is "no reason for interfering with the government's discretion as to how to exercise its regulatory authority to collect necessary information").

405. *Compare Critical Mass*, 975 F.2d at 878 ("[d]ealing with a FOIA request for information the provider is required to supply, the governmental impact inquiry will focus on the possible effect of disclosure on its quality"), *with Inner City Press*, 463 F.3d at 247 (fearing bank's knowledge their information might be subject to disclosure is likely to deter submissions and make them more "likely submit the bare minimum required").

406. 865 F.2d 320 (D.C. Cir. 1989).

407. *Id.* at 321 (discussing background).

whether those scientists who *do* become involved with NCI committees will narrowly construe the financial disclosure requests."[408] *Washington Post* was a precursor to *Critical Mass* and informed the D.C. Circuit's reasoning "there are circumstances in which disclosure could affect the reliability of such data."[409] This is because the interest in gathering information within the *National Parks* test involves only the reliability and provision of the information itself. Impairment of participation in the activity giving rise to the information collection is simply not impairment of the government's information collection objectives.

C. Exemption Five

If the Board's arguments under both 'agency records' and exemption four fail, the Board makes a last ditch effort to salvage its secrecy under exemption five. In the seminal case regarding the Fed's monetary policy disclosure obligations, *Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill* (*Merrill*"),[410] the Supreme Court held that instructions[411] to the New York Fed account manager charged with

408. *Id.* at 323. The Court did find "[t]he issue of whether disclosure of the financial information . . . would seriously impair the government's ability to gather the information it needs from participating scientists in the future is a disputed factual issue that does not lend itself to disposition by means of summary judgment on the present record." *Id.* at 328.

409. Critical Mass Energy Project v. NRC, 975 F.2d 871, 878 (D.C. Cir. 1992) (citing Washington Post Co. v. U.S. Dep't of Health & Human Servs., 690 F.2d 252, 268-69 (D.C. Cir. 1982) (discussing possible effect of disclosure on accuracy of statements filed by consultants)).

410. 443 U.S. 340 (1979).

411. The document, referred to as a "Domestic Policy Directive," indicated "in general terms" whether the FOMC wished to follow an expansionary, deflationary, or unchanged monetary policy in the period ahead." *Id.* at 344-45. "[G]eneral phrases" were the "operative language" of the DPDs, which also included "specific tolerance ranges for the growth in the money supply and for the federal funds rate." *Id.* at n.6. To implement this authority, the FOMC's "combined investment pool for all Federal Reserve banks, known as the System Open Market Account" ("SOMA") carried out open market operations on behalf of the Federal Reserve System. The SOMA was directed by a senior officer of the New York Fed, who serves as an "Account Manager," *id.* at 345, and is "guided" in the "day-to-day operations" of the SOMA by the DPD and a daily conference call with FOMC staff and at least one FOMC member. *Id.* at 346. "Subject to this oversight, the Manager has broad discretion in implementing the Committee's policy." *Id.* The policy is carried out in "open market operations" ordered and directed by SOMA account managers through trades with dealers in United States

carrying out the FOMC's open market operations[412] could be released with "a slight delay" if the District Court concluded that "immediate release . . . would significantly harm the government's monetary functions or commercial interests."[413] The scope of the holding was limited. The Court did "not consider whether, or to what extent" [414] the monetary policy directives at issue would qualify as "inter-agency or intra-agency memorandums,"[415] exempt from disclosure under FOIA's exemption five even though the information "can fairly be described as containing confidential commercial information generated in the process of awarding a contract."[416] Expanding on the Court's statement in *EPA v. Mink*, where the Court observed "the discovery rules can only be applied under Exemption 5 by way of rough analogies,"[417] the *Merrill* Court held that "the sensitivity of the commercial secrets involved, and the harm that would be inflicted upon the Government by premature disclosure, should continue to serve as relevant criteria in determining

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Government and federal agency securities (i.e. bond traders). *Id*. This is substantially the same today, although the Fed now typically releases the target range after the meeting and minutes, along with the DPD, three weeks later. *See*, *e.g.*, Press Release, Federal Reserve Bank, FOMC Statement (June 24, 2009) (stating the FOMC "will maintain the target range for the federal funds rate at 0 to 1/4 percent and continues to anticipate that economic conditions are likely to warrant exceptionally low levels of the federal funds rate for an extended period"), *available at* http://www.federalreserve.gov/newsevents/press/monetary/20090624a.htm; Board of Governors of the Federal Reserve System, Minutes of the Federal Open Market Committee, June 23-24, 2009 (noting "[t]he release of the April FOMC minutes three weeks later prompted a reversal of" a market trend towards rising Treasury yields "as market participants reportedly focused on" a policy suggestion revealed in the minutes about possible future adjustments to the size of a FOMC initiative), *available at* http://www.federalreserve.gov/monetarypolicy/fomcminutes20090624.htm.

412. By purchasing securities on the Fed's behalf, the total volume of commercial bank reserves is increased, spurring additional lending and investment while driving down interest rates. The FOMC purchases securities to stimulate spending and investment in the economy. The opposite is true when the Fed sells securities, and the money supply tightens. Merrill v. Fed. Open Mkt. Comm. of Fed. Reserve Sys., 565 F.2d 778, 781 n.4 (D.C. Cir. 1977).

413. *Merrill*, 443 U.S. at 363 (holding exemption 5 would be applicable). The Court found "the District Court made no findings about the impact of immediate disclosure of the Domestic Policy Directives and tolerance ranges." *Id.*

414. *Id*. at 364.

415. 5 U.S.C. § 552(b)(5) (2006 & 2009 Supp.).

416. Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 362 (1979).

417. *Id.* (quoting EPA v. Mink, 410 U.S. 73, 86 (1973)).

the applicability of this Exemption 5 privilege"[418] and remanded the case to the District Court with instructions to determine if the materials "are protected against immediate disclosure in the civil discovery process."[419]

Here, the Board asserts a *Merrill* privilege "analogous to the qualified privilege for confidential commercial information available in civil discovery . . . ."[420] The Board says this *Merrill* privilege protects "'sensitive information not otherwise available . . . immediate release of [which] . . . would significantly harm the Government's monetary functions or commercial interests. . . .'"[421] In fact, any *Merrill* exemption is temporary[422] and limited to "confidential commercial information generated *in the process of* awarding a contract."[423]

1. Exemption Five is No Longer Applicable

Exemption Five does not last forever. At a minimum, the exemption five privilege "applies only as long as the harm from disclosure exists."[424] The Board tactfully says it is "difficult to pinpoint such a date with certainty,"[425] but Bloomberg[426] and Fox[427] can be

418. *Id*. at 363.

419. *Id*. at 362.

420. Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, at *15, 2009 U.S. Dist. LEXIS 74942, at *49 (S.D.N.Y. Aug. 24, 2009).

421. *Id*. at *15, 2009 U.S. Dist. LEXIS 74942, at **49-50.

422. Memorandum of Law in Opposition to Motion of Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment at 39, Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys., No. 08 Civ. 9595 (LAP), 2009 WL 2599336, 2009 U.S. Dist. LEXIS 74942 (S.D.N.Y. Aug. 24, 2009) [hereinafter Memorandum of Law in Opposition].

423. Fed. Open Market Comm. of Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 360 (1979).

424. Fed Reply and Opposition, *supra* note 280, at 24 (citing *Merrill*, 443 U.S. at 360); Memorandum of Law in Opposition, *supra* note 422, at 39.

425. Fed Reply and Opposition, *supra* note 280, at 24.

426. "The Board . . . seeks to keep secret, indefinitely, all aspects of the Loan Records and the Bear Records." Memorandum of Law in Opposition, *supra* note 422, at 39.

427. Memorandum of Law in Support of Plaintiff Fox News Network's Motion for Summary Judgment at 20, Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys., 639 F. Supp. 2d 384 (S.D.N.Y. 2009) (arguing "[a] fortiori, this Court should reject the Board's attempt to rely upon Exemption 5 in this case, which seeks to justify withholding disclosure indefinitely").

forgiven if they think that the Board intends to assert the exemption five privilege indefinitely. The Board initially cited *Government Land Bank v. General Services Administration*[428] and *Hack v. Department of Energy*[429] to support the proposition that "Exemption 5 'protects the government when it enters the marketplace as an ordinary buyer or seller.'"[430] Yet both of these cases "involve situations where the agency requested a slight delay in the release of a very limited information because the agency was acting in the short term to complete a discrete task based on the information."[431]

The exemption five issue is somewhat settled by *Merrill*. It was applicable, but disclosure is required as soon as the threat abates. The same reasons exemption four fails under the impairment prong, the absence of immediate systemic risk, mean exemption five is not applicable as soon as the SCLF borrower has tapped the facility and bolstered its finances.

IV. CONCLUSION

The Board's arguments for nondisclosure are a distraction from the elemental difference between an 'agency record' an a private commercial record. Court-ordered disclosure of financial information within the control of private parties is generally intended to ensure that the benefit of the information accrues to its rightful owners.[432] Disclosure is deemed problematic in the commercial context when premature or unauthorized disclosure destroys "any potential unrealized value" of a secret "which otherwise could and would have been kept

428. 671 F.2d 663 (1st Cir. 1982).

429. 538 F. Supp. 1098 (D.D.C. 1982).

430. Memorandum of Points and Authorities, *supra* note 22, at 32 (citing Gov't Land Bank v. Gen. Servs. Admin., 671 F.2d 663, 665 (1st Cir. 1982)).

431. Memorandum of Law in Opposition, *supra* note 422, at 39 (citing Gov't Land Bank v. Gen. Servs. Admin., 671 F.2d 663, 665 (1st Cir. 1982); Hack v. U.S. Dep't of Energy, 538 F. Supp. 1098 (D.D.C. 1982)).

432. *C.f. In re* Ivan F. Boesky Securs. Litig., 36 F.3d 255, 261 (2d Cir. 1994). In *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.*, the Court held a civil cause of action lied where another party's misappropriation of the plaintiff's information actually cost the plaintiff money. 967 F.2d 742, 749 (2d Cir. 1992). A "necessary element of the *Litton* decision" is "[d]isclosure in the absence of a duty to disclose caused the benefit of the information to pass" from "its rightful owners." In re *Boesky*, 36 F.3d at 261.

confidential indefinitely."[433] Nondisclosure in an active marketplace, however, often serves nefarious purposes and "is usually essential to the success of a manipulative scheme."[434] In the public sector, by contrast, many presume only "[g]overnment agencies whose mistakes cannot bear public scrutiny have found 'good cause' for secrecy."[435] Court-ordered disclosure of federal government agency records is a means for citizens to know "what their Government is up to" and its "central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny."[436] The Board-directed SCLF lending is a government operation and should be subject to public scrutiny under the FOIA. The FOIA affords limited protection from disclosure of 'agency records' under specifically enumerated exemptions. As of now the FOIA does not recognize a Board 'systemic risk' exemption, so the Board grasps for straws like the 'agency records' or 'obtained from a person' arguments in the hopes of contravening the FOIA rationale. It is the prerogative of Congress, not Board attorneys and pliable courts, to decide whether the FRB's SCLF lending should be treated differently under the FOIA.[437]

The FOIA is intended to serve as a check on unaccountable

433. In re *Boesky*, 36 F.3d at 263 (quoting FMC Corp. v. Boesky, 825 F. Supp. 623, 636 (S.D.N.Y. 1993)). The *Boesky* Court held a party with "no legitimate interest in keeping its financial projections confidential" to the detriment of its public shareholders precludes a finding of injury as a result of premature disclosure. *Id*.

434. Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 477 (1977). "'Manipulation' is 'virtually a term of art when used in connection with securities markets'" and "refers generally to practices . . . intended to mislead investors by artificially affecting market activity." *Id*. at 476 (quoting Ernst & Ernst v. Hochfelder, 425 U. S. 185, 199 (1976)).

435. News-Press v. U.S. Dep't of Homeland Sec., 489 F.3d 1173, 1190 (11th Cir. 2007) (quoting H.R. REP. NO. 89-1497, at 27 (1966)).

436. DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 774 (1989) (emphasis added). The Court in *Reporters Committee* held the "public interest in providing interested citizens with answers to their questions about," *id.* at 775, the criminal records of members of a family comprised of individuals allegedly tied to organized crime who controlled a "legitimate business [which] allegedly had obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman," *id.* at 757, "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Id.* at 775. The court explained it never found it "appropriate" to construe FOIA to order a Government agency to honor a request "for information about a particular private citizen," *id.* at 774-75, because FOIA was not intended to compel disclosure of "information about *private citizens* that happens to be in the warehouse of the Government." *Id.* at 774.

437. *See*, *e.g.*, U.S. Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 15 (2001) (declining to "read an 'Indian trust' exemption into the" FOIA).

government activities and the Fed is a check against economic ruin. The balance is delicate, and a healthy legal analysis of the Fed's disclosure obligations would keep in mind the words of Carter Glass, the father of the Fed:

> I distinctly am not appealing to the prejudice against great bankers. No man worthy to be a representative of the American people ought to deal with a problem of such magnitude without feeling profoundly the obligation to be fair and just to every interest involved. But so should the big bankers deal with us.[438]

Some unifying themes emerge from FOIA jurisprudence. The first is that the law is generally indifferent to the motives of the FOIA requester or the withholding agency. Here, however, the Fed is mounting a fact and economics intensive defense of nondisclosure in which circumstances are likely to play a greater role than they otherwise would. Second, FOIA is generally construed in favor of disclosure and the exemptions are actually quite narrow. The Fed's arguments straddle so many lines and the present dispute is so unique that the value of legal precedent is limited. As the agency records argument is unlikely to stand on facts or law and the parties essentially agree exemption five is applicable but disagree about its duration, the argument really comes down to exemption four. The Board's nondisclosure of SCLF lending should fail under exemption four because the systemic risk and stigma arguments are too speculative.

The Special Inspector General of TARP correctly concluded that disclosure should be the rule:

> Notwithstanding the Federal Reserve's warnings, the sky did not fall; there is no indication that AIG's disclosure undermined the stability of AIG or the market or damaged legitimate interests of the counterparties. The lesson that should be learned . . . is that the default position, whenever government funds are deployed in a crisis to support markets or institutions, should be that the public is entitled to know what is being done with Government funds. [439]

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438. RIXEY SMITH & NORMAN BEASLEY, CARTER GLASS: A BIOGRAPHY 455 (Ayer Publ'g 1970) (1939).

439. SIGTARP, *supra* note 5 at 31; *see also* Richard Teitelbaum & Hugh Son, BLOOMBERG, *New York Fed's Secret Choice to Pay for Swaps Hits Taxpayers*, Oct. 27, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a7T5HaOgYHpE (former St. Louis Fed president, William Poole: "[t]here should be a high bar against not disclosing. The taxpayer has every right to understand in detail what happened.").