

# 09-4083-cv(L)

## 09-4097-cv(CON)

To Be Argued By:  
ROBERT J. GIUFFRA, JR.

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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BLOOMBERG L.P.,

*Plaintiff-Appellee,*

—v.—

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

*Defendant-Appellant,*

—and—

THE CLEARING HOUSE ASSOCIATION L.L.C.,

*Intervenor-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF OF INTERVENOR-APPELLANT**  
**THE CLEARING HOUSE ASSOCIATION L.L.C.**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Intervenor-Appellant The Clearing House Association L.L.C. (the “Clearing House”) hereby certifies that the Clearing House is not a subsidiary of any other corporation. The Clearing House is a limited liability company and as such has no shareholders. Rather, each member holds a 10% limited liability interest in the Clearing House.

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## OTHER AUTHORITIES

Andrew Ross Sorkin, *Bids To Halt Financial Crisis Sharpen Landscape of Wall St.*, N.Y. Times, Sept. 14, 2008 ..... 11 n.8

Andrew Ross Sorkin, *In Sweeping Move Fed Backs Buyout and Wall St. Loans*, N.Y. Times, Mar. 17, 2008 ..... 11 n.8

Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Remarks Via Satellite at the Federal Reserve Bank of Atlanta Financial Markets Conference: Liquidity Provision by the Federal Reserve (May 13, 2008), *available at* <http://www.federalreserve.gov/newsevents/speech/bernanke20080513.htm> ..... 12-13, 16

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Daniel Dombey et al., *Fall in Markets as Bail-out Is Approved*, Fin. Times, Oct. 4, 2008 ..... 11-12 n.8

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Diya Gullapalli, *Investing in Funds: A Monthly Analysis—Low Yields Join Credit Worries as Big Issues for Money Funds*, Wall St. J., Mar. 2, 2009 ..... 19 n.18

Documentation for the Bank of England's Operations Under the Sterling Monetary Framework, Art. 16.3(a) (Oct. 2009), *available at* <http://www.bankofengland.co.uk/markets/money/documentation/090925full.pdf> ..... 15 n.14

Federal Deposit Insurance Corporation, <i>History of the Eighties—Lessons for the Future: An Examination of the Banking Crises of the 1980s and Early 1990s</i> (Dec. 1997), Volume I, available at <a href="http://www.fdic.gov/bank/historical/history/235_258.pdf">http://www.fdic.gov/bank/historical/history/235_258.pdf</a> .....	22
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James A. Clouse, <i>Recent Developments in Discount Window Policy</i> , 80 Fed. Res. Bull. 965 (1994).....	9-10 n.5, n.6
James R. Hagerty et al., <i>U.S. Seizes Mortgage Giants—Government Ousts CEOs of Fannie, Freddie; Promises Up to \$200 Billion in Capital</i> , Wall St. J., Sept. 8, 2008 .....	11 n.8
James R. Hagerty & Lingling Wei, <i>Countrywide Seeks Deposits to Fund Loans – Company to Expand Bank Arm in Latest Bid To Combat Credit Crunch</i> , Wall St. J., Sept. 19, 2007.....	19
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Jon Hilsenrath et al., <i>Crisis Mode: Paulson, Bernanke Strained for Consensus In Bailout</i> , Wall St. J., Nov. 10, 2008 .....	11 n.8
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Primary Dealer Credit Facility: Program Terms and Conditions, available at <a href="http://www.newyorkfed.org/markets/pdcf_terms.html">http://www.newyorkfed.org/markets/pdcf_terms.html</a> .....	16 n.15

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Term Securities Lending Facility: Program Terms and Conditions, *available at* [http://www.newyorkfed.org/markets/tslf\\_terms.html](http://www.newyorkfed.org/markets/tslf_terms.html). .....15 n.15

The Semi-Annual Monetary Policy Report to the Congress: Hearing Before the S. Comm. on Banking, Housing & Urban Affairs, 111th Cong. (Feb. 24, 2009) ..... 14-15

Treasury Committee, *The run on the Rock, 2007-08*, H.C. 56-1, (“House of Commons Report”), *available at* <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtreasy/56/56i.pdf>. ..... *passim*

This appeal arises from the judgment of the United States District Court for the Southern District of New York (Loretta A. Preska, *Chief Judge*), entered on August 26, 2009, denying the motion of the Defendant-Appellant Board of Governors of the Federal Reserve System (the “Board”) for summary judgment and granting the cross-motion of Plaintiff-Appellee Bloomberg L.P. (“Bloomberg”) for the same relief. The opinion supporting that judgment is reported at *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, No. 08 Civ. 9595, 2009 WL 2599336, --- F. Supp. 2d --- (S.D.N.Y. Aug. 24, 2009).

### **STATEMENT OF JURISDICTION**

The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331 because the action arises under a federal statute, *i.e.*, the Freedom of Information Act, 5 U.S.C. § 552.

On August 24, 2009, the District Court rendered an Opinion and Order granting Bloomberg’s cross-motion for summary judgment and, on August 26, 2009, entered judgment on that order. (SPA 48.) On September 17, 2009, the District Court granted the motion of The Clearing House Association L.L.C. (the “Clearing House”)<sup>1</sup> to intervene. (A 513.) On September 30, 2009, the Board and

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<sup>1</sup> The members of the Clearing House are: ABN Amro Bank N.V.; Bank of America, N.A.; The Bank of New York Mellon; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank USA, N.A.; JPMorgan Chase Bank, N.A.; UBS AG; U.S. Bank N.A.; and Wells Fargo Bank, N.A.

the Clearing House filed timely notices of appeal from the District Court's August 26 judgment. (A 521-23.)

This Court has appellate jurisdiction under 28 U.S.C. § 1291 because this appeal is from a final decision of the District Court.

### **STATEMENT OF THE ISSUES**

1. Whether, in ordering the Board to disclose the names, amounts and duration of emergency loans made to financial institutions during the current financial crisis, the District Court erred in holding that such information was not “privileged or confidential” under the competitive harm prong of Exemption 4 of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(b)(4). Specifically, did the District Court:

(a) apply the wrong legal standard by requiring the Board to show that the harm to financial institutions from disclosure of such information (i) must be “imminent,” as opposed to just “likely”; and (ii) must result from competitors’ use of the disclosed information; and

(b) impermissibly dismiss as “speculat[ive]” the Board’s substantial evidence and expert judgments—detailed in declarations of senior Board and Federal Reserve Bank (“FRB”) officials—of the likely competitive harm to financial institutions from public disclosure of their borrowings from the FRBs, as lenders of last resort.

2. Whether the District Court erred in refusing to recognize, as an additional basis for non-disclosure, the impact disclosure would have on the Board's ability to carry out its statutory mandate to oversee the Nation's central banking system, including by deterring financial institutions from accessing Board lending programs, particularly during a period of financial crisis.

3. Whether the District Court erred in holding that—except for the borrowers' names—the information contained in the Board's reports, including the amount and duration of any loan, was not “obtained from” the borrowing institutions, but was “generat[ed]” by the FRBs and, therefore, was not exempt from disclosure.

### **STATEMENT OF THE CASE**

Since August 2007, in response to the worst financial crisis since the Great Depression, the Board has authorized or expanded the FRBs' ability to provide loans through the Discount Window and other emergency lending programs (the “Fed Lending Programs”) to financial institutions, including members of the Clearing House. These programs have helped stabilize our Nation's fragile financial system, and the Board and the FRBs have released extensive information to the public about these programs, including about the terms of, and eligibility for, such loans and the amounts of aggregate lending.

Because the FRBs act as lenders of last resort when providing funding through the Fed Lending Programs, banks, other market participants and regulators have recognized that borrowers' use of such emergency lending programs marks them with a "stigma" of financial weakness. In fact, public disclosure that an institution has borrowed from a lender of last resort, such as an FRB, has had severe adverse consequences for individual borrowers, including sparking bank runs. In the early 1990s, for example, rumors that Citibank was borrowing at the Discount Window sparked runs at some of its Asian offices. More recently, in September 2007, British bank Northern Rock plc suffered a bank run after the British Broadcasting Corporation reported that Northern Rock had obtained emergency funding from the Bank of England.

As a result, to avoid the risk of serious competitive injury to financial institutions from disclosure of their need to access the Fed Lending Programs, particularly during a period of financial crisis, the Board and the FRBs have maintained their longstanding policy of not disclosing information about individual borrowers. Moreover, borrowers have participated in these programs with the expectation and understanding that the Board would protect their confidentiality. Board policy regarding the confidentiality of individual borrower use of the Discount Window has been in existence since 1913, when this lending program was put in place for emergency or other special funding. Other central banks

similarly do not disclose the identities of financial institutions that obtain short-term funding through government lending facilities.

Bloomberg, a leading global financial information news service, seeks to upset the Board's longstanding policy (and the expectations and understandings of borrowers) against public disclosure of individual bank borrowing. In responding to Bloomberg's FOIA request, the Board withheld internal "Remaining Term Reports" (the "Reports"), which reflect confidential information provided to FRBs by borrowing institutions, on the expectation of confidentiality, to obtain loans through the Fed Lending Programs. Specifically, the Reports list, among other things, (1) the names of the borrowing institutions; (2) the amount of the loans; (3) the duration of loans; and (4) the type of lending program borrowed from.

The Board properly withheld the Reports under FOIA Exemption 4, which authorizes government agencies to withhold records containing "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). After Bloomberg filed this action, the Board provided the District Court with extensive declarations from senior Board and FRB officials explaining that public disclosure of the individual borrowing of financial institutions (including Clearing House members) likely would result in substantial competitive harm to those institutions.

In ordering the Board to produce the Reports, the District Court applied the wrong standard, as evidenced by, among other things, (a) requiring the Board to establish that the competitive harm to individual borrowers from disclosure of the Reports would have to be “imminent,” as opposed to just “likely,” and (b) dismissing as “speculat[ive]” declarations from senior Board and FRB officials, notwithstanding their experience and expertise.

In addition, the District Court rejected the decision of another Southern District Judge, addressing virtually the same FOIA issues, which recognized the Board’s interest in efficiently executing its statutory responsibilities, including administering its lending programs during a financial crisis, as a basis for non-disclosure of the Reports to Fox News. *See Fox News Network, LLC v. Bd. of Governors of the Fed. Reserve Sys.*, 639 F. Supp. 2d 384 (S.D.N.Y. 2009), *appeal pending*, No. 09-3795-cv (2d Cir.).

Following the District Court’s erroneous (and unprecedented and unexpected) ruling below, the Clearing House promptly intervened to protect its members’ substantial interests in the confidential information they provided to the FRBs.<sup>2</sup>

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<sup>2</sup> Members of the Clearing House are among the world’s principal participants in the international banking and payment systems. The Clearing House frequently participates as a party in litigation to protect its members’ interests. *See, e.g., Cuomo v. Clearing House Ass’n, LLC*, 129 S. Ct. 2710, 2714 (2009) (reviewing challenge by the Clearing House to New York Attorney General’s investigation of

The District Court’s erroneous ruling, if left to stand, will impair the ability of Clearing House members to protect the confidential information that they have provided (and will provide in the future) to the FRBs in connection with the Fed Lending Programs. The likely competitive harm to Clearing House members from public disclosure of their need to access the Fed Lending Programs is demonstrated by the failures and near failures of financial institutions after disclosure of information, or even rumors, regarding their difficulty in obtaining funding. *See infra* at 17-22.

By imposing disclosure obligations on the Board not faced by other central banks, the District Court’s ruling threatens the ability of the Board and the FRBs to respond to future financial crises—in the near and longer term—to the detriment of the U.S. financial system. The FOIA requires the Board to respond to a request within 20 days, and interested third parties, such as news organizations, market analysts, and investors, would have every incentive to file

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lending practices of certain of its members and other national banks). The Clearing House, like other organizations of its type, has standing to bring this action on behalf of its members if, as here, “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Building & Constr. Trade Council of Buffalo, New York & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 144 (2d Cir. 2006) (quoting *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)). The holding companies of three Clearing House members have publicly disclosed limited information about their participation in the Fed Lending Programs. (A 153; A 360-61.)

numerous and successive FOIA requests at minimal cost. As a result, unless this Court reverses the decision below, financial institutions may elect not to participate in Fed Lending Programs out of fear that prompt public disclosure (within 20 days) of their participation will have adverse competitive consequences for them, up to and including catastrophic bank runs.

Because the District Court applied the wrong legal standard, and then disregarded the substantial Board evidence showing that public disclosure of the information in the Reports likely would inflict substantial competitive harm on borrowers who have accessed the Fed Lending Programs, the District Court's order should be reversed.

## **STATEMENT OF FACTS**

### **1. The Fed Lending Programs**

#### **A. The Discount Window<sup>3</sup>**

The Discount Window is an indispensable source of short-term funding for depository institutions.<sup>4</sup> Established in 1913, when the Federal

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<sup>3</sup> “Courts in general have long taken judicial notice of facts of common knowledge relating to banks and banking procedure.” *Kaggen v. IRS*, 71 F.3d 1018, 1021 (2d Cir. 1995).

<sup>4</sup> A “depository institution” is defined by statute under 12 U.S.C. § 461(b)(1)(A).

Reserve Act was passed,<sup>5</sup> the Discount Window “is a mechanism by which the twelve Federal Reserve Banks lend funds on a short-term basis, secured by collateral, to eligible depository institutions within their respective districts.” (A 67 ¶ 6.) The Discount Window serves, essentially, as a “back-up source of liquidity for institutions that may not have access to ordinary, market sources of funding on a short-term basis.” (A 74 ¶ 18.)

Precisely because the Discount Window can serve an emergency-lending function (thereby signaling an institution’s inability to fund itself), depository institutions traditionally have been reluctant to access this lending facility. Indeed, “[s]ince the mid-1980s, depository institutions have become quite reluctant to turn to the discount window because of concerns that their borrowing might become known to private market participants—even though the Federal Reserve treats the identity of borrowers in a highly confidential manner—and that such borrowing might be viewed as a sign of weakness.” Cheryl L. Edwards, *Open Market Operations in the 1990s*, 83 Fed. Res. Bull. 859, 859 (1997).<sup>6</sup>

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<sup>5</sup> Specifically, “[s]ections 10B and 13 of the Federal Reserve Act authorize the Federal Reserve Banks to extend discount window credit to depository institutions in the form of discounts and advances.” James A. Clouse, *Recent Developments in Discount Window Policy*, 80 Fed. Res. Bull. 965, 965 (1994).

<sup>6</sup> See also James A. Clouse, *Recent Developments in Discount Window Policy*, 80 Fed. Res. Bull. 965, 965 (1994) (“[C]hanges became evident during the 1980s in the willingness of healthy institutions to turn to the discount window. Many

Banks have, in other words, recognized that a “stigma” of financial weakness may attach to their use of the Discount Window. (A 74 ¶ 17.) That “stigma” can damage, if not destroy, an institution by triggering a “sudden outflow of deposits (a ‘run’), a loss of confidence by market analysts, a drop in the institution’s stock price, and a withdrawal of market sources of liquidity.” (*Id.*; see also A 90 ¶ 21.)

During periods of financial distress, the stigma from borrowing from a lender of last resort often intensifies because, during such periods, market participants have heightened concerns about the condition of financial institutions. (A 75 ¶ 19.) For instance, during the early 1990s, when many banks failed, banks were willing to pay very high rates in the private federal funds market rather than turn to the Discount Window. (*Id.*) The same was true following the financial crisis triggered by the 1998-1999 Russian debt default. (*Id.*)<sup>7</sup> The effects of that stigma were evidenced in the early 1990s, when rumors that Citibank was

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banks apparently became more reluctant to turn to the window for fear of provoking market concerns about their financial condition.”).

<sup>7</sup> See also Brian F. Madigan & William R. Nelson, *Proposed Revision to the Federal Reserve’s Discount Window Lending Programs*, 88 Fed. Res. Bull. 313, 319 (2002) (observing that, during the early 1990s, “many banks, even healthy institutions, were concerned that their borrowing would be viewed by other market participants as a sign of financial weakness.”).

borrowing at the Discount Window sparked runs at some of its offices in Asia. (A 76 ¶ 22.)

**B. The Current Economic Crisis and the Expansion of Government Emergency Lending Programs**

In August 2007, the U.S. economy experienced a severe financial crisis. By 2008, this crisis changed the face of the global financial services industry. Lehman Brothers and Washington Mutual declared bankruptcy; Bear Stearns and Wachovia were sold for far less than what their values were just days before the sale; two of the three largest bank failures in U.S. history occurred; Fannie Mae and Freddie Mac were placed into government conservatorship; the Federal Reserve provided a \$150 billion rescue package to AIG, which granted the federal government an 80% ownership stake in the company; Congress enacted a \$700 billion plus support program for the financial industry; and the Federal Deposit Insurance Corporation invoked its systemic risk authority to guarantee billions of dollars of obligations.<sup>8</sup>

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<sup>8</sup> See Andrew Ross Sorkin, *Bids To Halt Financial Crisis Sharpen Landscape of Wall St.*, N.Y. Times, Sept. 14, 2008, at A1; Andrew Ross Sorkin, *In Sweeping Move Fed Backs Buyout and Wall St. Loans*, N.Y. Times, Mar. 17, 2008, at A1; Greg Hitt & Damian Paletta, *U.S., Europe Push to Limit Crisis—Senate Plans Vote on Revised Rescue Package that Raises Limits on Deposit Insurance*, Wall St. J., Oct. 1, 2008, at A1; John Hilsenrath et al., *Crisis Mode: Paulson, Bernanke Strained for Consensus in Bailout*, Wall St. J., Nov. 10, 2008; James R. Hagerty et al., *U.S. Seizes Mortgage Giants—Government Ousts CEOs of Fannie, Freddie; Promises Up to \$200 Billion in Capital*, Wall St. J., Sept. 8, 2008, at A1; Matthew Karnitsching et al., *U.S. to Take Over AIG in \$85 Billion Bailout*, Wall St. J., Sept.

During the current financial crisis, banks experienced intense pressure to meet short-term liquidity needs. The Board reacted by encouraging greater use of the Discount Window. In August 2007, the Board reduced the rate charged on Discount Window loans and extended term financing for as long as 30 days. (A 269.) In March 2008, the Board extended term financing for as long as 90 days. (A 484.)

Nevertheless, according to Board Chairman Ben Bernanke, banks remained concerned that they would be stigmatized if they used the Discount Window:

[T]he efficacy of the discount window has been limited by the reluctance of depository institutions to use the window as a source of funding. The “stigma” associated with the discount window, which if anything intensifies during periods of crisis, arises primarily from banks’ concerns that market participants will draw adverse inferences about their financial condition if their borrowing from the Federal Reserve were to become known.

Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Remarks Via Satellite at the Federal Reserve Bank of Atlanta Financial Markets Conference:

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17, 2008, at A1; Daniel Dombey et al., *Fall in Markets as Bail-out Is Approved*, Fin. Times, Oct. 4, 2008, § 1, at 1; FDIC Announces Plan to Free Up Bank Liquidity, Oct. 14, 2008, available at <http://www.fdic.gov/news/news/press/2008/pr08100.html>.

Liquidity Provision by the Federal Reserve (May 13, 2008) (“Liquidity Provision by the Federal Reserve”).<sup>9</sup>

Banks in other countries likewise were concerned about the stigma that would attach to their use of central banks’ emergency lending facilities. As the Governor of the Bank of England observed:

A key lesson that central banks around the world have taken from the recent turmoil is that, in stressed conditions, any bank that is seen to come to the central bank to borrow—whether in regular standing facilities<sup>10</sup> against high-quality collateral or against wider collateral in a discount window or support operation—can become stigmatised in the market.

Treasury Committee, *The run on the Rock, 2007-08*, H.C. 56-1, ¶ 106 (“House of Commons Report”).<sup>11</sup>

In response to these concerns, the Board continued to follow its longstanding practice of not disclosing information concerning individual depository institutions’ use of the Discount Window—a practice in turn relied on by depository institutions, including Clearing House members, when accessing the

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<sup>9</sup> Available at <http://www.federalreserve.gov/newsevents/speech/bernanke20080513.htm>.

<sup>10</sup> A “standing facility” is a U.K. lending facility that is similar to the Discount Window. *See* House of Commons Report ¶ 82 (“The ‘discount window’ is similar to the UK ‘standing facility’ . . . , but accepts a much wider range of collateral.”).

<sup>11</sup> Available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtreasury/56/56i.pdf>.

Discount Window. Brian Madigan, Director of the Board's Division of Monetary Affairs, specifically advised the District Court that, except for Bear Stearns and AIG, "neither the Board nor the [FRBs] publicly disclose the names of borrowers at the [Discount Window]" or "other information that could lead to the identification of borrowers by counterparties, market analysts, news media organizations, or the public at large."<sup>12</sup> (A 73 ¶ 16.) Indeed, the FRBs' public Discount Window website states that "the Federal Reserve does not publish information about individual institutions' borrowings."<sup>13</sup>

The Board's practice of not disclosing the names of individual borrowers that access the Discount Window was informed by the Board's extensive central banking experience. Specifically, when testifying before the Senate Banking Committee in February 2009, Chairman Bernanke explained that "[h]undreds of years of central banking [experience]" taught that disclosing borrower names would pose a risk "that the market will say that there's something wrong with them, that there's a stigma of some kind, and the[ banks] will refuse to

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<sup>12</sup> Susan E. McLaughlin, Senior Vice President in the Markets Group at the Federal Reserve Bank of New York ("FRBNY"), similarly advised the District Court that there is an "explicit understanding" among the FRBNY and depository institutions that information about their Discount Window borrowing "will not be disclosed by either the borrowers or by the [FRBNY]." (A 89 ¶ 18.)

<sup>13</sup> Frequently Asked Questions, Discount Window Lending Programs, *available at* <http://www.frbdiscountwindow.org/dwfaqs.cfm#ps10>.

come to the window in the first place.”<sup>14</sup> The Semi-Annual Monetary Policy Report to the Congress: Hearing Before the S. Comm. on Banking, Housing & Urban Affairs, 111th Cong. (Feb. 24, 2009) (statements of Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys.).

During the financial crisis, the Board also introduced several new programs designed to make short-term funding more accessible or available to depository and other financial institutions. In December 2007, the Board unveiled the “Term Auction Facility,” or “TAF,” a form of Discount Window lending “which provides longer than overnight (‘term’) funding to depository institutions that are eligible for primary credit through an auction mechanism.” (A 69 ¶ 8.)

In early 2008, the Board created certain special credit and liquidity facilities, including the Primary Dealer Credit Facility (“PDCF”) and Term

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<sup>14</sup> Like Chairman Bernanke, the Chancellor of the Exchequer (who serves a role comparable to the U.S. Secretary of the Treasury) informed the House of Commons that, though there had been “‘interest in how much support the Bank of England is giving’” to financial institutions like Northern Rock, “‘in common with other central banks, it does not provide details of any operations because it believes that doing so would undermine its ability to provide such support.’” House of Commons Report ¶ 360; *see also* Documentation for the Bank of England’s Operations Under the Sterling Monetary Framework, Art. 16.3(a) (Oct. 2009) (permitting the Bank of England to make “general disclosure” regarding the Sterling Monetary Framework, its analogue to the Discount Window, provided “that such general disclosure does not identify or name the Participant”), *available at* <http://www.bankofengland.co.uk/markets/money/documentation/090925full.pdf>.

Securities Lending Facility (“TSLF”).<sup>15</sup> (A 67 ¶ 4; A 68 ¶ 7.) These programs, enacted under the emergency authority provided to the Board by section 13(3) of the Federal Reserve Act (A 68-69 ¶ 7), provided greater liquidity to “primary dealers,” *i.e.*, designated banks and securities broker-dealers with which the FRBNY trades U.S. government and other securities. (A 69 ¶ 9.)

The PDCF and TSLF programs have features similar to the Discount Window and TAF lending programs. The PDCF is a facility under which the FRBNY makes overnight funds available to primary dealers. (*Id.*) The PDCF, in effect, “provides primary dealers with a liquidity backstop similar to the discount window for depository institutions.” Ben S. Bernanke, Liquidity Provision by the Federal Reserve; *see also* A 69 ¶ 9. The TSLF is a program that “allows primary dealers to exchange less-liquid securities for Treasury securities for terms of 28 days.” Ben S. Bernanke, Liquidity Provision by the Federal Reserve; *see also* A 70 ¶ 10. The TSLF, like the TAF, is conducted through a competitive auction process. (A 95 ¶ 8.)

Because PDCF and TSLF borrowing is associated with accessing funds from a lender of last resort, such borrowing carries a stigma similar to

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<sup>15</sup> These programs will remain available to primary dealers until February 1, 2010, or longer, if conditions warrant. *See* Primary Dealer Credit Facility: Program Terms and Conditions, *available at* [http://www.newyorkfed.org/markets/pdcf\\_terms.html](http://www.newyorkfed.org/markets/pdcf_terms.html); Term Securities Lending Facility: Program Terms and Conditions, *available at* [http://www.newyorkfed.org/markets/tslf\\_terms.html](http://www.newyorkfed.org/markets/tslf_terms.html).

borrowing from the Discount Window. (A 76 ¶ 21; A 89 ¶ 19.) There is therefore an “explicit understanding” among the FRBNY and the primary dealers that information relating to PDCF and TSLF borrowing will not be publicly disclosed. (A 89 ¶ 18.)

## **2. The Harm to Financial Institutions From Disclosure of Their Use of Emergency Lending Facilities**

The longstanding concern of the Board and financial institutions about the stigma associated with accessing emergency government lending facilities is rooted in years of experience. That experience shows that when rumors of a financial institution’s weakness circulate—rumors that are triggered when, among other things, an institution turns to a lender of last resort—adverse consequences follow.<sup>16</sup>

In August 2007, a major U.K. clearing bank became “the centre of intense scrutiny” after the market learned that it had used the Bank of England’s standing facilities. House of Commons Report ¶ 105. Although the clearing

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<sup>16</sup> This Court may take judicial notice of facts during any point in the proceeding. *See* Fed. R. Evid. 201(f) (“Judicial notice may be taken at any stage of the proceeding.”); *see also* *Hotel Employees & Rest. Employees Union, Local 100 of New York, N.Y. & Vicinity, AFL-CIO v. City of New York Dep’t of Parks & Recreation*, 311 F.3d 534, 540 n.1 (2d Cir. 2002) (“The parties request that we take judicial notice of the facts contained in Edgar B. Young’s comprehensive history of the construction of Lincoln Center. Although the parties make this request for the first time on appeal, “[j]udicial notice may be taken at any stage of the proceeding.”) (quoting Fed. R. Evid. 201(f)).

bank's use of those facilities was apparently not related to its liquidity needs, "investors and the media searched for signs of weakness following the start of the turmoil in the capital markets," causing a "sharp fall in the company's share price." *Id.* ¶¶ 105, 139.

Moreover, in September 2007, U.K. bank Northern Rock plc *did* experience a bank run after the BBC reported that Northern Rock had asked for and received emergency financial support from the Bank of England. *Id.* ¶¶ 1, 147. The bank run began on the evening of September 13, following, "in the Chancellor of the Exchequer's words, 'the fairly dramatic news that a fairly well-known bank had gone to the Bank of England for help' and the run accelerated the following day." *Id.* ¶ 149. A U.K. Treasury Committee report concluded that the run "was largely triggered by the announcement of the Bank of England's support operation," demonstrating that the "level of stigmatisation" associated with the lending facility called its efficacy into doubt. *Id.* ¶ 213.<sup>17</sup>

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<sup>17</sup> Though the Bank of England and Northern Rock planned to formally announce this operation after it had taken place, the BBC—through a leak—reported this event first. House of Commons Report ¶ 147. The Chief Executive of Northern Rock lamented this leak, explaining that, "[h]ad the leak not happened and had we been able to announce on the Monday the facility with the Bank of England in a measured fashion, with full communication plans in place, undoubtedly there would have been some concern—a lot of concern—to many of our customers but we think it would have been considerably less than it was in the way that it came about." *Id.* ¶ 148.

In the United States, large financial institutions recently experienced runs of a similar sort, confirming that the survival of banks and other financial institutions can turn on the ephemeral nature of public confidence in those institutions. During the recent financial crisis, no less than six major U.S. financial institutions failed or nearly failed following rumors or reports of their financial weakness.<sup>18</sup>

**Countrywide Financial.** In August 2007, depositors rushed to withdraw funds amid fears over the home-mortgage lender's financial health. See James R. Hagerty & Lingling Wei, *Countrywide Seeks Deposits to Fund Loans – Company to Expand Bank Arm in Latest Bid To Combat Credit Crunch*, Wall St. J., Sept. 19, 2007, at A4. At Countrywide branches, depositors reportedly besieged bank representatives, “demanding to get their money out” in scenes “conjuring those grainy black-and-white images of Depression-era bank runs.” Sebastian Mallaby, *A Market Run on Rationality*, Wash. Post, Aug. 20, 2007, at A15.

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<sup>18</sup> Financial institutions were not the only ones affected by investor reactions to negative reports. Money-market funds (essentially short-term mutual funds that invest in highly liquid securities) also experienced investor runs during the financial crisis. See Diana B. Henriques, *Treasury to Guarantee Money Market Funds*, N.Y. Times, Sept. 20, 2008. Specifically, in September 2008, the collapse of prominent money-market fund Reserve Primary Fund “prompted panic in the world of money-market funds,” leading investors to pull more than \$200 billion out of such funds within two weeks. Diya Gullapalli, *Investing in Funds: A Monthly Analysis—Low Yields Join Credit Worries as Big Issues for Money Funds*, Wall St. J., Mar. 2, 2009, at R1.

Investors, too, discontinued purchasing Countrywide's commercial paper (*i.e.*, short-term bonds), causing the bank to suffer "the bond-market equivalent of a bank run." *Id.*

**Bear Stearns.** In March 2008, when rumors of Bear Stearns's illiquidity surfaced, Bear Stearns's counterparties "expressed increased concern regarding maintaining their ordinary course exposure" to the company and "a significant number of counterparties and lenders [became] unwilling to make [even] secured funding available to Bear Stearns on customary terms, which resulted in a sharp deterioration in Bear Stearns's liquidity position." (A 512.) One strategist analogized the counterparty "run" at Bear Stearns to the depositor run at Northern Rock. *See* Kate Kelley, Greg Ip & Robin Side 1, *Fed Races to Rescue Bear Stearns in Bid to Steady Financial System: Storied Firm Sees Stock Plunge 47%; J.P. Morgan Steps In*, Wall St. J., Mar. 15, 2008, at A1.

**IndyMac.** In July 2008, the third-largest bank failure in U.S. history occurred after depositors withdrew 1.3 billion dollars' worth of funds in 11 days from IndyMac, one of the largest savings and loan associations in the country. *See* Damian Paletta & David Enrich, *Crisis Deepens as Big Bank Fails—IndyMac Seized in Largest Bust in Two Decades*, Wall St. J., July 12, 2008, at A1. The Director of the Office of Thrift Supervision attributed that failure to comments

made by a Congressman, who, in the words of the OTS Director, gave the bank a “heart attack” after raising concerns about its solvency. *Id.*

**Lehman Brothers.** In September 2008, Lehman Brothers filed for bankruptcy after concerns over its subprime exposure “spooked” investors and creditors. (A 496.) The company’s CEO attributed the firm’s collapse to a “lack of confidence” and a “storm of fear enveloping the entire investment-banking field and our financial institutions generally.” (*Id.*) “With [its] stock price in free fall and the cost of buying protection against Lehman defaulting on its bonds skyrocketing,” observed one reporter, “it [was] clear that Lehman [was] not immune to the kind of panic that can put a financial institution, which depends on confidence, at risk.” Jenny Anderson & Ben White, *Wall St.’s Fears on Lehman Bros. Batter Markets*, N.Y. Times, Sept. 10, 2008, at A1.

**Washington Mutual.** In September 2008, the largest bank failure in U.S. history occurred after depositors, concerned over reports of the firm’s subprime exposure, “withdrew \$16.7 billion, leaving the bank without the money it needed to stay in business.” (A 490.) That event made clear that a depositor run “can destabilize even a large bank.” Binyamin Appelbaum, *Investors Flee From Banking Stocks; National City, Wachovia Plummet*, Wash. Post, Sept. 27, 2008, at D1.

**Wachovia.** In September 2008, Wachovia was “forced from existence,” in part, by “fleeing depositors.” (A 488.) Like Washington Mutual, the company “was ultimately laid low not by its mortgage losses but by a lack of cash. The bank basically foundered because people lost confidence in its ability to survive.” (A 490.) As FDIC chairman Sheila C. Bair observed: ““As the markets become more skittish, financial markets are all about confidence[;] even the strongest institutions can be subject to traditional runs.”” (A 491.)

These recent failures or near-failures evidence a well-documented phenomenon. Banking history is replete with examples of financial institutions failing when the public loses confidence in them. In 1984, for instance, Continental Illinois—the nation’s seventh-largest bank at the time—failed after rumors circulated about its financial health. See Federal Deposit Insurance Corporation, *History of the Eighties—Lessons for the Future: An Examination of the Banking Crises of the 1980s and Early 1990s* (Dec. 1997), Volume I, at 247 (“Among the factors that caused the run to start and made stopping it difficult, rumor was prominent.”).<sup>19</sup> Those rumors triggered a run on the bank that continued even after the Comptroller of the Currency stated that it was unaware of any significant changes in the bank’s operations that would substantiate the rumors. *Id.*

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<sup>19</sup> Available at [http://www.fdic.gov/bank/historical/history/235\\_258.pdf](http://www.fdic.gov/bank/historical/history/235_258.pdf).

### 3. Bloomberg's FOIA Request

On May 21, 2008, Bloomberg reporter Mark Pittman sent a FOIA request to the Board, asking for eleven categories of documents relating to securities posted between April 4, 2008 and May 20, 2008 as collateral for the Discount Window, the TAF, PDCF, and TSLF. (A 50-51.)

The Board produced documents responsive to item 11 of Bloomberg's request (which sought records identifying entities supplying pricing information), but determined that additional documents responsive to Bloomberg's request—the "Remaining Term Reports" (the "Reports") at issue in this appeal—were exempt from disclosure. These "Reports" were generated daily by the Monetary Affairs staff using weekly daily "data feeds" the Board received from each FRB "on the DW, TAF and SCLFs"—data feeds that the FRBs "had obtained and derived . . . from records of their transactions with borrowing institutions." (A 38 ¶ 11.) The Reports contained the following responsive information: (1) the name of the borrowing institution; (2) the amount of the individual loans; (3) the type of facility borrowed from (*i.e.*, the Discount Window, TAF, PDCF, or TSLF programs); and (4) the origination and maturity date of each loan. (A 57-58; A 38-39 ¶ 11.)

The Board concluded that the Reports contained no reasonably segregable non-exempt information, and, on December 8, 2008, officially withheld

them on the basis of FOIA Exemptions 4 and 5.<sup>20</sup> (By then, Bloomberg had already filed its complaint in the Southern District of New York.) In so doing, the Board informed Bloomberg that “the Board and the Federal Reserve Banks publish and regularly update information on Federal Reserve Bank lending activities.” (A 61.) But in the Board’s “considered judgment,” disclosing confidential information about individual borrowers was a “dangerous step,” especially in light of the “unprecedented” economic crisis. (A 63.)

#### **4. The District Court’s August 24 Opinion and Order**

On November 7, 2008, Bloomberg filed a complaint in the Southern District of New York, which it amended on November 25, seeking disclosure of documents responsive to its FOIA request. (A 2-3; A 9-21.)

The Board and Bloomberg each moved for summary judgment, submitting supporting declarations. Specifically, the Board submitted 38 pages of declarations from a senior Board official and two members of the FRBNY responsible for operational details for the Discount Window, PDCF, and TSLF. In response, Bloomberg submitted the expert declaration of Sharon Brown-Hruska, a Vice President in the Securities and Finance Practice of National Economic Research Associates, who described herself as an “expert in financial markets and

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<sup>20</sup> Whether the Board properly withheld the Reports under Exemption 5 is not at issue in this appeal.

their regulation.” (A 119 ¶ 2.) Notably, although Ms. Brown-Hruska served as Commissioner of the U.S. Commodity Futures Trading Commission (A 119-20 ¶ 3), she had not served at the Board, the FRBs, or any other banking agency. She thus had no firsthand experience with the Discount Window or other emergency lending facilities—or, indeed, the banking industry.

The Board and Bloomberg also submitted statements of material fact not in dispute; each challenged, in part, the other party’s account of the material facts not in dispute. (A 429-30; A 437-38.)

The District Court granted Bloomberg’s motion, denied the Board’s, and ordered the Board to disclose the Reports within five days. In so doing, it made three errors.

*First*, by applying an improperly heightened standard, the District Court erroneously dismissed the Board’s evidence as “speculat[ive]” or “[c]onject[ural]” (SPA 41), concluding that the Board failed even to raise “an issue of fact” on the question of competitive harm. (SPA 40.)

*Second*, by refusing to follow the First and D.C. Circuits’ guidance, as well as the holding reached by Judge Hellerstein on nearly identical facts, the District Court erroneously failed to recognize that Exemption 4 protects the Board’s ability effectively to administer its emergency lending programs. (SPA 37-38 n.15.)

*Third*, by relying on an inapposite district court case from the Western District of New York, *Buffalo Evening News, Inc. v. Small Business Administration*, 666 F. Supp. 467 (W.D.N.Y. 1987), the District Court incorrectly held that—with the exception of borrower names—the information contained in the Reports was not obtained from the borrowers. (SPA 35.)

## **5. The Stay and Intervention Motions**

On August 26, the Board moved the District Court to stay its order, submitting with that motion the declaration of Norman R. Nelson, General Counsel of the Clearing House. In that declaration, Mr. Nelson explained that the District Court's order would impair Clearing House members' ability to access emergency funds by greatly increasing the likelihood that customers, counterparties, and other market participants would draw negative inferences about their financial condition if they did so. (A 464-65 ¶¶ 3, 5.)

On August 28, the District Court granted the Board's motion for a stay pending the outcome of the Board's emergency stay application to be filed in this Court. (A 459-60.)

On September 9, 2009, the Clearing House moved to intervene on behalf of its members, who have a substantial interest in preventing public disclosure of their confidential information. (A 469-72.) The District Court granted that motion on September 17, 2009. (A 513.)

On September 30, 2009, the Board and the Clearing House filed their respective notices of appeal. (A 521-23.) That same day, the Board moved for an emergency stay pending the appeal and for an expedited briefing schedule, and on October 5, the Clearing House filed a memorandum of law in support of the Board's motion. By order dated October 6, 2009, this Court granted the Board's motion and set an expedited briefing schedule. This briefing followed.

### **STANDARD OF REVIEW**

This Court “review[s] *de novo* the district court’s grant of summary judgment in a FOIA case.” *Associated Press v. U.S. Dep’t of Defense*, 554 F.3d 274, 283 (2d Cir. 2009).

### **SUMMARY OF ARGUMENT**

***FOIA Standards.*** In enacting the Freedom of Information Act (“FOIA”), Congress recognized that “legitimate governmental and private interests could be harmed by release of certain types of information.” *FBI v. Abramson*, 456 U.S. 615, 621 (1982). “Balancing these private and public interests, Congress enacted nine exemptions to FOIA.” *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 872 (D.C. Cir. 1992) (en banc).

One of those exemptions—Exemption 4—protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). That exemption was “intended for the benefit

of persons who supply information as well as the agencies which gather it.” *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (“*National Parks I*”).

When a party asserts that the supplier of the information is likely to suffer competitive harm from disclosure, “[n]o actual adverse effect on competition need be shown”; “[t]he court need only exercise its judgment in view of the nature of the material sought and the competitive circumstances in which [the supplier] do[es] business, relying at least in part on relevant and credible opinion testimony.” *National Parks & Conservation Ass’n v. Kleppe*, 547 F.2d 673, 683 (D.C. Cir. 1976) (“*National Parks II*”).

Nor must a court “conduct a sophisticated economic analysis of the likely effects of disclosure.” *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 (D.C. Cir. 1983). “Evidence revealing ‘actual competition and the *likelihood* of substantial competitive injury’ is sufficient to bring commercial information within the realm of confidentiality.” *Id.* (quoting *Gulf & W. Indus. v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979)) (emphasis added).

***The District Court’s Legal Errors.*** The District Court made three errors, each of which independently merits reversal or remand.

*First*, the District Court erroneously held that the Board failed to show that disclosure of the Reports “will cause the borrowers to suffer *imminent*

competitive harm from the affirmative use of the disclosed information *by their competitors* or to raise an issue of fact on this question.” (SPA 40 (first emphasis added).) That holding contravenes two settled principles: (1) competitive harm need only be “likely”—not “imminent” or “certain”—to satisfy Exemption 4, as held by the D.C. Circuit, whose “formulation of Exemption Four” has been adopted by this Court, *Nadler v. FDIC*, 92 F.3d 93, 96 n.2 (2d Cir. 1996); and (2) competitive harm need not result from direct use of the disclosed information by competitors, as this Court held in *Nadler*, 92 F.3d at 97.

The District Court then applied a heightened standard to discount substantial evidence entitling the Board, not Bloomberg, to summary judgment. That evidence, reflected in detailed declarations from senior Board and FRB officials, demonstrated the *likely* competitive harm to borrowing institutions, including Clearing House members, from public disclosure of their identities and borrowings from the Fed Lending Programs. At the very least, this Board evidence raised issues of material fact concerning the competitive harm likely to result from the Reports’ disclosure. Reversal is warranted; remand, in the alternative, is needed.

*Second*, the District Court incorrectly refused to recognize, as an additional basis for non-disclosure, the Board’s interest in effectively administering the Fed Lending Programs—programs critical to stem the current

financial crisis. In doing so, the District Court failed to follow the First and D.C. Circuits, which have recognized that FOIA Exemption 4 was intended to protect the government from having to disclose information that would impair the “effective execution of its statutory responsibilities.” *9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Reserve Sys.*, 721 F.2d 1, 11 (1st Cir. 1983); *see also Critical Mass*, 975 F.2d at 879 (noting that prior panel had “adopted the First Circuit’s conclusion that [Exemption 4] also protects a governmental interest in administrative efficiency and effectiveness”).

While this Court has not yet had occasion to adopt the program effectiveness test, this is an ideal case for doing so. The Board submitted uncontradicted evidence that disclosure would deter institutions from using the Fed Lending Programs, thereby impairing its ability to inject liquidity into the financial system. (A 76 ¶¶ 21, 22; A 80-81 ¶¶ 27-29; A 91 ¶ 23; A 101 ¶ 26.) That is an eventuality that FOIA Exemption 4 was designed to avoid, as Judge Hellerstein recognized in *Fox News*, 639 F. Supp. 2d 384.

*Third*, the District Court erroneously held that—except for borrowers’ names—the Reports did not contain information “obtained from” them. But it is the borrowers who request a specific loan amount and decide when to ask for or bid on a loan, thereby setting its duration, or “term.” That the FRBs or the Board subsequently processed this information does not mean that it was not “obtained

from” the borrowing institutions, as Judge Hellerstein held on nearly identical facts and as the Third and D.C. Circuits have held in analogous situations. *See infra* at 49-50.

## ARGUMENT

### I. THE BOARD ESTABLISHED THAT DISCLOSURE OF THE REPORTS LIKELY WOULD CAUSE SUBSTANTIAL COMPETITIVE HARM TO BORROWERS.

“Exemption Four [of FOIA] applies if a tripartite test is satisfied: (1) The information for which exemption is sought must be a ‘trade secret[ ]’ or ‘commercial or financial’ in character; (2) it must be ‘obtained from a person’; and (3) it must be ‘privileged or confidential.’” *Nadler*, 92 F.3d at 95 (quoting 5 U.S.C. § 552(b)(4)) (internal citations omitted).

This Court has expressly “adopted” *National Parks I*’s two-pronged test for determining whether information is “privileged or confidential” under Exemption 4. *Nadler*, 92 F.3d at 96 n.2. Under that two-pronged test, information is “privileged or confidential” if its disclosure “‘is *likely* to have either of the following effects: (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.’” *United Techs. Corp. by Pratt & Whitney v. FAA*, 102 F.3d 688, 692 (2d Cir. 1996) (quoting *National Parks I*, 498 F.2d at 770) (emphasis added).

Here, the Board, relying on the second prong of the *National Parks* test, submitted persuasive evidence establishing that disclosing information about the borrowers to Bloomberg *likely* would cause them substantial competitive harm. In disregarding this evidence, the District Court improperly held the Board to higher legal standards than required under FOIA and then improperly applied those heightened standards.

**A. The District Applied the Wrong Legal Standards.**

**1. Competitive Harm Need Only Be “Likely,” not Certain or Imminent.**

The District Court erroneously required the Board to show that disclosure “*will* cause the borrowers to suffer *imminent* competitive harm.” (SPA 40 (emphasis added).) That heightened standard—far from being a slip of the pen—permeated the District Court’s discussion of competitive harm:

- “The agency must provide evidence that if the requested information is disclosed, competitive harm would be ‘*imminent*.’” (SPA 38 (emphasis added).)
- “Nor does the Board point to an *immediate* risk of competitive harm that will result from disclosure of the Remaining Term Reports.” (SPA 41 (emphasis added).)
- “Conjecture, without evidence of *imminent* harm, simply fails to meet the Board’s burden of showing that Exemption 4 applies.” (SPA 41 (emphasis added).)

For that “imminence” standard, the court cited a lone district court case, not even from this Circuit, *Iglesias v. CIA*, 525 F. Supp. 547, 559 (D.D.C.

1981). (SPA 38.) But *Iglesias* could not have departed from binding D.C. Circuit precedent. That precedent was set in *National Parks I*, whose “formulation of Exemption Four” has been expressly adopted by this Court. *Nadler*, 92 F.3d at 96 n.2. On this point, the D.C. Circuit in *National Parks I* was clear:

The exemption may be invoked for the benefit of the person who has provided commercial or financial information if it can be shown that public disclosure is *likely* to cause substantial competitive harm to his competitive position.

*National Parks I*, 498 F.2d at 770 (emphasis added).

Since then, the D.C. Circuit has emphasized repeatedly that the prospect of “likely”—not “certain” or “imminent”—competitive harm is the standard under FOIA Exemption 4. See *McDonnell Douglas Corp. v. U.S. Dep’t of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (“*National Parks I*, of course, *does not* require the party invoking Exemption 4 to prove disclosure certainly would cause it substantial competitive harm, but only that *disclosure would ‘likely’ do so.*”) (emphasis added); *Pub. Citizen*, 704 F.2d at 1291 (“[P]arties opposing disclosure *need not ‘show actual competitive harm’*; evidence revealing ‘actual competition and the likelihood of substantial competitive injury’ is sufficient to bring commercial information within the realm of confidentiality.”) (emphasis added) (quoting *Gulf & W. Indus.*, 615 F.2d at 530); see also James T. O’Reilly, *Federal Information Disclosure* § 14:67 (3d ed. 2000) (“A likelihood of

harm, not a certainty, is required.”) (citing *National Parks I*, 498 F.2d at 770). The Tenth Circuit has similarly agreed. See *Utah v. U.S. Dep’t of Interior*, 256 F.3d 967, 970 (10th Cir. 2001) (“[E]vidence demonstrating the existence of *potential* economic harm is sufficient.”) (emphasis in original) (citing *Pub. Citizen*, 704 F.2d at 1291).

That standard makes sense. Here, Bloomberg seeks to obtain highly confidential information about the extent to which individual borrowers have accessed the Fed Lending Programs. Because the actual disclosure of the requested information has not yet occurred, the inquiry into competitive harm necessarily must be prospective. See *National Parks II*, 547 F.2d at 683 (“No actual adverse effect on competition need be shown, nor could it be, for the requested documents have not been released.”); *McDonnell Douglas Corp. v. Nat’l Aeronautics & Space Admin.*, 180 F.3d 303, 307 (D.C. Cir. 1999) (“McDonnell Douglas has shown—as much as anyone can show before the event—that it is likely to suffer substantial competitive harm.”); *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973) (“An analysis sufficiently detailed [to substantiate the claimed exemption] would not have to contain factual descriptions that if made public would compromise the secret nature of the information”).

Because the inquiry into competitive harm must be forward-looking—*i.e.*, what will be the likely competitive harm from disclosure of the requested

information, a district court “need only exercise its judgment in view of the nature of the material sought and the competitive circumstances in which the [parties that have supplied the requested information] do business, relying at least in part on relevant and credible opinion testimony.” *National Parks II*, 547 F.2d at 683. The court “need not conduct a sophisticated economic analysis of the likely effects of disclosure.” *Pub. Citizen*, 704 F.2d at 1291.

Thus, in ordering the Board to produce borrower-by-borrower information about the use of the Fed Lending Programs during the worst financial crisis since the Great Depression, the District Court impermissibly set a high threshold and overrode the expert judgments of experienced Board and FRB officials about the likely impacts of such disclosures on borrowers.

**2. Competitive Harm Need not Result from a Competitor’s “Affirmative Use” of Confidential Information.**

The District Court also erroneously ruled that the Board had to show that the asserted competitive harm “will result from the *affirmative use of the information by competitors* of the person from whom the information was obtained, *not merely injuries to that person’s competitive position* in the marketplace or ‘embarrassing publicity attendant upon public revelations.’” (SPA 38-39 (quoting *Pub. Citizen*, 704 F.2d at 1291 n.30) (emphasis added).)

But this Court, in *Nadler*, 92 F.3d 93, rejected such a rigid construction of “competitive harm.” There, plaintiffs—two community

associations and their Congressman—claimed that the harm resulting from disclosing detailed commercial and financial terms of a joint-venture agreement was not “of a type” protected by Exemption 4, because the threatened harm was “political,” rather than “competitive,” in nature. *Id.* at 96. This Court disagreed, holding that the “fact that this harm would result from active hindrance by the Plaintiffs rather than directly by potential competitors does not affect the fairness considerations that underlie Exemption Four.” *Id.* at 97.

This Court had followed the same approach in *American Airlines, Inc. v. National Mediation Board*, 588 F.2d 863 (2d Cir. 1978), concluding that disclosure of membership information, which the union supplied to the National Mediation Board on a confidential basis, “would adversely affect the union’s competitive position vis-à-vis both other unions *and the employer itself.*” *Id.* at 871 (emphasis added).<sup>21</sup>

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<sup>21</sup> Other Circuits have also looked beyond the potential actions of competitors in assessing the likelihood of competitive harm under FOIA Exemption 4. *See Nat’l Parks II*, 547 F.2d at 684 (observing that, in addition to harm from competitors, “[s]uppliers, contractors, labor unions and creditors, too, could use [the requested] information to bargain for higher prices, wages or interest rates, while the concessioner’s unregulated competitors would not be similarly exposed”); *Utah*, 256 F.3d at 970 (upholding finding of competitive harm where supporting affidavit, in addition to showing possible misuse by competitors, noted that submitter of lease information “would be in a weaker position at the bargaining table in negotiating any future deals since its potential partners would know the financial and legal details of the [submitter’s] prior business agreements”).

Thus, the *only* authority upon which the District Court relied for its cramped view of competitive harm—that is, the dicta contained in footnote 30 of *Public Citizen*, 704 F.2d 1280—did not set a bright-line rule requiring affirmative competitor misuse. What matters, simply, is the “competitive significance of whatever information may be contained in the [requested] documents.” *Occidental Petroleum Corp v. SEC*, 873 F.2d 325, 341 (D.C. Cir. 1989).

Indeed, the D.C. Circuit has recognized that competitive harm can result from adverse customer reactions to disclosure. *See McDonnell Douglas Corp.*, 180 F.3d at 306-07 (crediting McDonnell Douglas’s argument that, in addition to harm from competitors, release of line-item pricing information “would permit its commercial *customers* to bargain down (‘ratchet down’) its prices more effectively”; “[*b*]oth of the reasons McDonnell Douglas advanced for claiming its line item prices were confidential commercial or financial information are indisputable”) (emphasis added); *see also Gen. Elec. Co. v. Dep’t of Air Force*, --- F. Supp. 2d ---, 2009 WL 2749359, at \*7 (D.D.C. Aug. 28, 2009) (“Regarding customer leverage, . . . this circuit has expressly found such leverage to have the potential to be substantially competitively harmful and therefore a basis for nondisclosure.”) (citing *McDonnell Douglas*, 180 F.3d at 305, 307).

As a matter of law, the District Court erred in limiting its consideration of “competitive harm” under FOIA Exemption 4 to harm from the

borrowers' own competitors, and not accounting for the likely impact that disclosure would have on the borrowing institutions' overall competitive *position* in the market, including with depositors and other customers, which would be seriously undermined by, among other things, causing depositor runs and withdrawals of market sources of liquidity. (A 74 ¶ 17; A 90 ¶ 21.)

**B. The Board Satisfied Its Burden of Showing Likely Competitive Harm.**

The District Court applied the wrong legal standards in concluding that the Board “essentially speculate[d] on how a borrower *might* enter a downward spiral of financial instability if its participation in the Federal Reserve lending programs were to be disclosed.” (SPA 41 (emphasis in original).) But “no actual adverse effect on competition need be shown, nor could it be,” *National Parks II*, 547 F.2d at 683, because the Board has not disclosed borrower identities.

The Board therefore relied—properly—on “relevant and credible opinion testimony,” *id.*, concerning the *likely* effects of disclosure on borrowers. Indeed, in Exemption 4 cases, courts “can rely solely on government affidavits so long as the affiants are knowledgeable about the information sought and the affidavits are detailed enough to allow the court to make an independent assessment of the government’s claim.” *Lion Raisins v. U.S. Dep’t of Agric.*, 354 F.3d 1072, 1079 (9th Cir. 2004).

The declarations that the Board submitted, which fully accord with the actual experience, as well as the concerns of Clearing House members, were based on personal knowledge, and relied on “expertise in commercial bank regulation that the courts do not have.” *Sec. Indus. Ass’n v. Bd. of Governors of the Fed. Reserve Sys.*, 716 F.2d 92, 102 (2d Cir. 1983). Brian Madigan is the current Director of the Board’s Division of Monetary Affairs, and has been with the Board since 1983. (A 65 ¶ 1.) His experience with Discount Window lending, and banks’ historical aversion to the stigma that attaches to it, is direct and extensive.<sup>22</sup> (A 66-67 ¶ 4; A 74 ¶ 17.) He was thus ideally qualified to attest to borrowers’ concerns about stigma, and the *likely* impact of that stigma should their identities and other details of their borrowing be revealed.<sup>23</sup>

Mr. Madigan further evidenced borrowers’ concerns about stigma by stating that, during the banking crisis of the early 1990s, and again during the global turbulence following the Russian debt default, banks were willing to pay

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<sup>22</sup> Mr. Madigan was also “actively involved” in the establishment of the TAF and other special credit and liquidity facilities. (A 67 ¶ 4.) And the other declarants, Susan E. McLaughlin and Lorie K. Logan, had personal knowledge of the FRBNY’s Discount Window, PDCF, and TSLF operations. (A 83-84 ¶¶ 1, 2, 4; A 93-94 ¶¶ 1, 2, 4.)

<sup>23</sup> Mr. Madigan’s knowledge about and experience with borrower stigma is especially significant given the unique circumstances of Bloomberg’s FOIA request. Individual borrowers could not have substantiated the Board’s evidence because the very act of coming forward would have disclosed what the borrowers seek to keep confidential—that is, their identities.

“very high rates . . . in the private federal funds market rather than borrow at the discount window.” (A 75 ¶ 19.) He also cited a specific example of a borrowing institution harmed by rumors concerning its use of the Discount Window: When rumors circulated in the early 1990s that Citibank might be borrowing from the Discount Window, runs were sparked at some of its Asian offices. (A 76 ¶ 22.)

Recent examples of institutional failures or near-failures, a phenomenon called to the District Court’s attention,<sup>24</sup> only confirm what the Board already showed. That phenomenon was evidenced most recently by the run on Northern Rock after the public learned that it had asked for and received emergency government support. *See supra* at 18-19. And, during the current financial crisis, no less than six major financial institutions failed or nearly failed due to rumors or reports of their financial weakness: depositors rushed to withdraw funds from Countrywide Financial, IndyMac, Washington Mutual, and Wachovia amid fears over their financial health; customers withdrew funds and counterparties discontinued dealings with Bear Stearns after rumors of its illiquidity circulated; and Lehman Brothers filed for bankruptcy as investors and

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<sup>24</sup> The Board’s December 9, 2008 denial letter specifically referenced the “loss of confidence” in and between institutions that had been “seen throughout this crisis.” (A 63.) Ms. McLaughlin likewise referred to what had been “apparent in recent months in the financial markets” when concluding that “rumors and speculation about the health of depository institutions would quickly spiral into market turmoil.” (A 90 ¶ 21.)

creditors lost confidence in the firm. *See supra* at 19-22. These are but recent examples of a well-documented phenomenon: Rumors of financial weakness can devastate a financial institution, as was evident during the 1984 Continental Illinois bank run. *See supra* at 22.

In response, Bloomberg cited a handful of instances in which borrowing institutions disclosed their participation in certain Fed Lending Programs. But those disclosures differ qualitatively from the information contained in the Reports, for several important reasons.

*First*, the disclosures cited by Bloomberg generally occurred in year-end 10-K releases filed in January, February, or March 2009—not within days of when financial institutions borrowed from the FRBs, as would occur if the decision below is affirmed. (A 153; A 355-81; A 387-95.)

*Second*, those limited disclosures were made on the borrowers' own terms—that is, at a moment when the borrowers were able to assess the market's likely reaction to the disclosure, and take steps, if necessary, to head off or quickly dispel unfounded rumors of their financial weakness.

*Third*, many of the disclosures cited by Bloomberg simply refer to the general availability and use of certain Fed Lending Programs. (A 153; A 356; A 361; A 375; A 388; A 394.) To the extent institutions disclosed amounts actually borrowed, they listed those numbers *in the aggregate*. (A 153; A 366; A 370; A

379.) Colonial Bancgroup, Inc., for example, stated in its 10-K year-end release that it had “purchased \$700 million in Federal Reserve TAF funds.” (A 370.) The Reports, on the other hand, reflect individual loans borrowed at specific times, and therefore provide detailed information about borrowing patterns and the context in which borrowing institutions sought emergency funding.

*Fourth*, while its evidence addresses the *fact* of public disclosure, Bloomberg is largely silent on the impact of public disclosure on the borrowing institutions. (*See, e.g.*, A 123 ¶ 11; A 153.) Indeed, Bloomberg’s declarant conceded that a coordinated voluntary disclosure in August 2007 by four of the largest (and presumably strongest) banks that they borrowed from the Discount Window, in a bid to lift market confidence, caused “a momentary decline in [stock] prices on the day of disclosure. . . .” (A 131 ¶ 128 & n.28.) This event certainly suggests that an unexpected and unsought release of this information could have more serious and long-term consequences, particularly during this time of market instability. (*See* A 75 ¶ 19.)

Nor is the information contained in the Reports “stale.” Bloomberg’s FOIA request, dated May 21, 2008, sought information up to and including *May 20, 2008*. (A 50.) The FOIA request did not seek information that was, for instance, 5 or 10 years old. Indeed, should this Court find Exemption 4 inapplicable on “staleness” grounds (an issue not addressed by the District Court

below, and thus not before this Court), the Board would be required to disclose similar information in real time for the next such FOIA request it receives if no other exemption applies. Disclosure here would thus dissuade *prospective* borrowers from accessing the Fed Lending Programs in the future, because of the risk that their identities and extent of their borrowing would be disclosed. Banks have historically avoided accessing the Discount Window despite the Board's policy of not disclosing borrowers' identities. *See supra* at 9, 13-15. Many prospective borrowers likely would turn away from the Fed Lending Programs altogether, undermining the programs' objectives, if their identities and details of their borrowing could be revealed through a FOIA request within days of such borrowing. *See* 5 U.S.C. § 552(a)(6)(A)(i) ("Each Agency . . . shall determine within 20 days . . . after receipt of any [FOIA] request whether to comply with such request"); 12 C.F.R. § 261.13(e) ("The time for response to requests shall be 20 working days," subject to certain exceptions).

**C. The Board Raised Genuine Issues of Material Fact Regarding the Likelihood of Competitive Harm.**

Because the District Court applied an erroneous legal standard to disregard the Board's substantial evidence, its judgment should be reversed. Indeed, in a case involving material withheld under Exemptions 6 and 7(C), this Court recently reversed a district court's grant of summary judgment, holding the requested information exempt from disclosure without remanding for further

proceedings. *See Associated Press*, 554 F.3d at 279 (“We conclude that the FOIA privacy exemptions protect [the requested] information from disclosure. We reverse.”).

The Board’s substantial evidence was plainly sufficient to warrant summary judgment in its favor. *See supra* at 38-40. But at the very least, the Board raised genuine issues of material fact requiring a remand. After all, when parties cross-move for summary judgment, “the court must evaluate each party’s motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.” *Hotel Employees & Rest. Employees Union*, 311 F.3d at 543 (internal quotation marks omitted). And where, as here, the Board raised issues of material fact regarding the likelihood of competitive harm, *see supra* at 38-40, summary judgment is improper. *See Sears, Roebuck & Co. v. Gen. Servs. Admin.*, 553 F.2d 1378, 1382 (D.C. Cir. 1977) (“Where there is a conflict in the affidavits as to what adverse consequences will flow from the revelation of the facts contained in the documents sought to be disclosed, then it appears that there is indeed a conflict regarding very material facts which calls for some type of adversary procedure. . . . Summary judgment was not appropriate.”); *see also Niagara Mohawk Power Corp. v. U.S. Dep’t of Energy*, 169 F.3d 16, 18 (D.D.C. 1999) (vacating summary judgment due to “genuine issue of material fact on the likelihood of substantial competitive

harm”); *In Defense of Animals v. U.S. Dep’t of Agric.*, 501 F. Supp. 2d 1, 7 (D.D.C. 2007) (declining to grant summary judgment where likelihood of substantial competitive harm was “hotly contested”).

Assuming this Court does not reverse the District Court’s judgment, it should, at the least, issue a remand for the District Court properly to resolve the genuine issues of material fact raised by the Board.<sup>25</sup>

## **II. THIS COURT SHOULD ADOPT THE “PROGRAM EFFECTIVENESS” TEST.**

A month before the District Court’s decision, Judge Hellerstein correctly observed that, among other things, disclosure of the Reports to Fox News “would undermine the Board’s mandate to provide stability to markets, especially during a financial crisis,” because borrowers would fear being stigmatized by accepting “publicly disclosed loans.” *Fox News*, 639 F. Supp. 2d at 402. The District Court erred in not holding the same.

This Court has not yet adopted the so-called “program effectiveness” test referenced in the D.C. Circuit’s decision in *National Parks I*. *See Nadler*, 92 F.3d at 96 n.2. It should now do so.

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<sup>25</sup> In the event of a remand, the Clearing House will present additional evidence substantiating the likely competitive harm that would result to its members from disclosure.

The First Circuit, in *9 to 5*, 721 F.2d 1, recognized that the legislative purposes identified in *National Parks I* radiated beyond a rigid application of the two-part *National Parks I* test. Instead, *National Parks I* meant to give voice to “Congress’ purpose to protect information which would be particularly helpful to agency officials in carrying out their mandate.” *Id.* at 10. The First Circuit therefore deferred to the Board’s “legitimate governmental interest of efficient operation,” explaining that the government should not be “disadvantaged by disclosing information which serves a valuable purpose and is useful for the effective execution of its statutory responsibilities.” *Id.* at 11. The D.C. Circuit has agreed. *See Critical Mass*, 975 F.2d at 879 (noting that prior panel had “adopted the First Circuit’s conclusion that [Exemption 4] also protects a governmental interest in administrative efficiency and effectiveness”).

Other courts, when confronted with government programs analogous to the Fed Lending Programs at issue here, have similarly applied Exemption 4 to protect those programs from the harm that could result from disclosing information confidentially supplied by third parties. *See Clarke v. U.S. Dep’t of Treasury*, Civ. No. 84-1873, 1986 WL 1234, at \*1, 2 (E.D. Pa. Jan. 28, 1986) (disclosure by Treasury Department of bondholder data including names of bondholders, coupon and maturity dates “would harm the national interest because investors would be less likely to purchase government bonds in the future if they knew the details of

their purchases would be subject to public disclosure.”); *Comstock Int’l (U.S.A.), Inc. v. Export-Import Bank of the U.S.*, 464 F. Supp. 804, 808 (D.D.C. 1979) (“disclosure would significantly impair [the Export-Import Bank’s] ability to promote United States exports” because “potential loan applicants might seek financing outside the United States because of their unwillingness to subject themselves to the possible risk of disclosure.”); *Judicial Watch, Inc. v. Export-Import Bank*, 108 F. Supp. 2d 19, 30 (D.D.C. 2000) (“There is a risk that foreign purchasers may seek financing outside of the United States, and thus would purchase non-U.S. goods if subjected to the risk of disclosure of their confidential commercial or financial information. This would interfere with the Bank’s ability to promote U.S. exports”); *Africa Fund v. Mosbacher*, No. 92 Civ. 289, 1993 WL 183736, at \*7 (S.D.N.Y. May 26, 1993) (deferring to uncontradicted declarations “that explain why disclosure of documents such as those plaintiff seeks would interfere with the export control system”).

Adopting the rationale of these cases makes full sense here, and would be consistent with this Court’s observation that agency promises of confidentiality, though “perhaps not binding upon the courts in their construction of the FOIA,” are “certainly entitled to the court’s careful consideration.” *American Airlines*, 588 F.2d at 871. That “careful consideration” is warranted because Clearing House members and other financial institutions have relied on the Board’s

longstanding practice not to disclose information about their borrowing, especially their identities. *See supra* at 9, 13-15; *see also* A 73 ¶ 16; A 89 ¶ 18; A 99 ¶ 20.

The Board’s uncontradicted evidence showed that disclosing borrower names would discourage institutions from accessing the Discount Window and other lending programs. (A 76 ¶¶ 21, 22; A 80-81 ¶¶ 27-29; A 91 ¶ 23; A 101 ¶ 26.) That evidence is confirmed by decades of industry and Board experience with the Discount Window. *See supra* at 8-11. If the Board were forced to breach its longstanding promise of confidentiality, financial institutions would simply turn away from the Discount Window and other lending programs, defeating the Board’s statutory objectives and its specific goal of injecting liquidity to counteract the credit crisis.

For these reasons, in addition to those discussed by the Board, *see* Br. of Defendant-Appellant at 35-39, this Court should adopt the “program effectiveness” test and rule that the Board’s uncontradicted evidence satisfied it.

**III. THE DISTRICT COURT ERRED IN FINDING THAT INFORMATION IN THE REPORTS, EXCEPT FOR BORROWERS’ NAMES, WAS NOT “OBTAINED FROM A PERSON.”**

The District Court held that—except for borrower names—the Board had not met its burden to show that the information in the Reports was not “obtained from a person.” (SPA 36.) The exception invalidated the conclusion

because, as shown above, the competitive harm likely to result from disclosure of borrower names *alone* is sufficient to exempt the entirety of the Reports.<sup>26</sup>

The District Court then compounded its error reasoning that the FRBs'<sup>27</sup> “generat[ion]” of the remainder of the information contained in the Reports—that is, “individual loan amounts extended by the FRBs, the types of FRB lending program borrowed from, and loan origination and maturity dates”—was “sufficient to vitiate the applicability of Exemption 4 with respect to that information.” (SPA 34-35.)

The District Court was wrong. On nearly identical facts, Judge Hellerstein correctly observed that, when interpreting Exemption 4, courts “look past formalities to ensure that even indirect disclosure does not jeopardize a person’s privacy.” *Fox News*, 639 F. Supp. 2d at 398. In doing so, Judge Hellerstein followed the Third Circuit’s reasoning that Exemption 4 does not cease to apply simply because the government processes information supplied by an

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<sup>26</sup> The Board has already shown that loan amounts cannot be disclosed on their own because, for large loans, they would effectively identify (or fuel damaging speculation regarding the identity of) their respective borrowers. (A 77-78 ¶ 24.) *See also* Br. of Defendant-Appellant at 42-43.

<sup>27</sup> The District Court did not rule on whether the FRBs are “persons” within the meaning of the statute, reasoning that the Board “intended to abandon” the argument. (SPA 33 n.12.) Assuming this Court were to reach that issue, the Clearing House joins the Board’s alternative argument that FRBs are “persons” and not “agenc[ies]” within the meaning of the FOIA. *See* Br. of Defendant-Appellant at 48-51.

outside party. *See OSHA Data/CIH v. U.S. Dep't of Labor*, 220 F.3d 153, 162 n.23 (3d Cir. 2000) (concluding that “a derived figure calculated by the [Department of Labor]”—*i.e.*, a lost-work-day-injury-and-illness rate—was “obtained from a person” because it was calculated “from individual components all of which are obtained from employers”). The D.C. Circuit has similarly observed that Exemption 4 shields from disclosure government reports “from which information supplied by [an outside party] could be extrapolated.” *Gulf & W. Indus., Inc.*, 615 F.2d at 530.<sup>28</sup>

The District Court either misapplied the law or misunderstood the facts when concluding otherwise.<sup>29</sup> The borrowers supply their names and request a loan. And, as discussed in the Board’s brief, *see* Br. of Defendant-Appellant at

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<sup>28</sup> *See also Judicial Watch*, 108 F. Supp. 2d at 28 (“[D]ocuments prepared by the federal government may be covered by Exemption 4 if they contain summaries or reformulations of information supplied by a source outside the government.”); *Clarke*, 1986 WL 1234, at \*1-2 (concluding that registered bondholder data—which consisted of “names and addresses of all registered, institutional owners” of bonds, as well as the “dollar amount, coupon and maturity date”—are “financial and obtained from persons outside the government”).

<sup>29</sup> *Buffalo Evening News*, 666 F. Supp. 467, the only case cited by the District Court for its conclusion, was decided on an entirely different (and unchallenged) premise: that Exemption 4 did not shield from disclosure the initial act of borrowing from the SBA. Indeed, the SBA in *Buffalo Evening News* had already disclosed borrower names; it sought only to protect the status of outstanding loans. *See id.* at 468-69. Thus, the FOIA request in *Buffalo Evening News* did not “implicate” the kind of “potentially ‘personal’ and sensitive financial information” at issue in this case. *Fox News*, 639 F. Supp. 2d at 399.

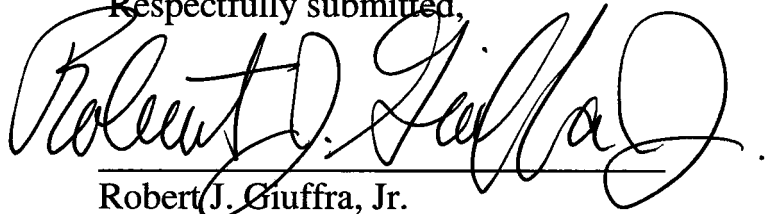
40-42, the borrowers ask for the loan amount, whether directly or through auction (subject to an overall auction maximum set by the Board). (A 69 ¶ 8; A 70 ¶ 11; A 87 ¶ 12; A 95 ¶¶ 8-9.) The borrowers determine the origination date of their loans, either by asking for Discount Window or PDCF credit on a particular date, or by choosing the date on which they participate in TSLF or TAF auctions. (A 69-70 ¶¶ 9-11; A 95 ¶ 7.) Their requests are subject to the upper limits of their pledged collateral, but the borrower otherwise specifies the loan amount and date, and that information is not generated by the FRBs. *See* Br. of Defendant-Appellant at 40-42.

Accordingly, the District Court erred in concluding that the FRBs' processing of information supplied by the borrowers meant that the information was no longer "obtained from" them.

## CONCLUSION

For the foregoing reasons, the Clearing House respectfully requests that this Court reverse the District Court's grant of summary judgment and hold the Reports exempt from disclosure. In the alternative, the Clearing House asks this Court to vacate the District Court's judgment and remand for further proceedings consistent with its decision.

Respectfully submitted,



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November 6, 2009

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) because the brief contains 11,963 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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**CERTIFICATE OF SERVICE**

**09-4083-cv(L), 09-4097-cv (CON)**

**Bloomberg L.P. v. Board of Governors of The Federal Reserve System**

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on this 6th day of November 2009.

/s/ Natasha R. Monell  
Natasha R. Monell, Esq.

## ANTI-VIRUS CERTIFICATION

Case Name: Bloomberg L.P. v. Board of Governors of The Federal Reserve

Docket Number: 09-4083-cv(L), 09-4097-cv (CON)

I, Natasha R. Monell, hereby certify that the Appellant's Brief submitted in PDF form as an e-mail attachment to **civilcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 11/6/2009) and found to be VIRUS FREE.

/s/ Natasha R. Monell

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