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*Submitted Electronically – <http://www.regulations.gov>*

September 14, 2017

Ms. Monica Jackson  
Office of the Executive Secretary  
Consumer Financial Protection Bureau  
1700 G Street, NW  
Washington, DC 20002

Re: Docket No. CFPB-2017-0011 Notice and Request for Information on the  
Small Business Lending Market

Dear Ms. Jackson:

The Independent Community Bankers of America (ICBA)<sup>1</sup> appreciates the opportunity to comment on the Consumer Financial Protection Bureau's ("Bureau") request for information on the small business lending market. Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Section 1071) amends the Equal Credit Opportunity Act (ECOA) to require financial institutions to compile, maintain, and report information concerning credit applications made by women-owned, minority-owned, and small businesses.

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<sup>1</sup> The Independent Community Bankers of America®, the nation's voice for more than 5,700 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services.

With 52,000 locations, nationwide, community banks employ 760,000 Americans, hold \$4.7 trillion in assets, \$3.7 trillion in deposits, and \$3.2 trillion in loans to consumers, small businesses, and the agricultural community. For more information, visit ICBA's website at [www.icba.org](http://www.icba.org).

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## Background

The purpose of Section 1071 is to facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned and small businesses.<sup>2</sup> Section 1071 requires financial institutions to inquire whether a credit applicant is a woman-owned, minority-owned, or small business and maintain a record of the responses, separate from the application and accompanying information.<sup>3</sup> Additionally, a financial institution must collect specific data for each applicant, including information about the credit being applied for, the business of the applicant, and certain information about the principal owners of the business. The Bureau also has authority to require any additional data that the Bureau determines would aid in fulfilling the purposes of Section 1071.<sup>4</sup>

Additionally, where feasible, no loan underwriter or other employee of a financial institution involved in making any determination regarding the credit application may have access to the information provided by the applicant in response to the inquiry. If such employee should have access to the information, the financial institution must provide notice that informs the applicant that the employee involved in the decision-making process has access to the information. The financial institution must also provide notice that the financial institution may not discriminate on the basis of such information.<sup>5</sup>

In preparation of fulfilling this statutory directive, the Bureau is conducting outreach and research to further develop its understanding of the small business lending market. The Bureau is seeking to understand the institutions in this market as well as the underwriting approaches, credit products, and types of applicants in the market and is seeking comment in these areas.

Section 1071 gives the Bureau authority to exempt any class of financial institutions from these requirements.

## ICBA Comments

ICBA urges the Bureau to utilize its authority and exempt community banks from the requirements of Section 1071. Small business lending is very important to community banks and imposing data collection requirements on community bank small business lending will significantly degrade the ability of community banks to offer small businesses the type of credit they need in a timely and economically efficient manner. The cost of this new mandate will be disproportionately high for

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<sup>2</sup> 15 U.S.C. 1691c-2(a)

<sup>3</sup> 15 U.S.C. 1691c-2(b)

<sup>4</sup> 15 U.S.C.1691c-2€(2)(H)

<sup>5</sup> 15 U.S.C. 1691c-2(d)

community banks that simply do not have the scale to spread compliance costs over a large asset base and will result in negatively impacting those the statute is trying to help – women-owned, minority-owned and small businesses.

### Summary of ICBA Position

- ICBA strongly urges the Bureau to exempt community banks from the requirements of Section 1071.
- Community banks have a strong track record of providing access to credit and take their fair lending obligations very seriously. They are prodigious small business lenders and they serve a critical role in the well-being of their small business customer base.
- Imposing any new data collection and reporting requirements under Section 1071 on community bank small business lenders would negatively impact small business lending and lead to unfortunate, unintended consequences for small business owners seeking credit.
- Requiring lenders to limit access to information provided under Section 1071 by underwriters negatively impacts and disproportionately penalizes community bank lenders. Community banks do not have the staff, nor the capital, to segregate the information collection from the decision-making process.
- ICBA urges the Bureau to carefully balance privacy concerns with the public interest as it moves forward with implementing Section 1071. The collection and public disclosure of certain personal data should not be allowed to harm small business owners by making them vulnerable to invasions of privacy. The privacy of applicants in small communities where an applicant's identity may be easily deduced could be compromised, despite the suppression of personally-identifying information.
- The nature of small business lending is very nuanced and cannot be categorized or analyzed by data points. The factors used in a small business loan determination would be difficult to quantify.
- Despite using a process which has no inference of discrimination, the use of data points may show differential results, subjecting community banks to further scrutiny from regulators or a legal claim. Not only will community banks expend substantial amounts of money defending an unsubstantiated claim or additional regulatory scrutiny, they will face reputational damage.

- There is no standard application for small business loans. Unlike other types of consumer credit, each small business has its own distinctive characteristics with unique credit needs. Existing business lending practices do not conform to a standard data collection practice and would require extraordinary change to comply.
- Community banks will be challenged with ensuring their employees are adequately trained to be able to identify the vast number and variations of small business lending.
- ICBA urges the Bureau to limit data reporting to what is statutorily mandated by Congress.
- The definition of small business should be narrowly tailored and simplified to ensure that both business owners and bank employees will be able to identify those applicants to which this data collection applies.
- ICBA recommends the Bureau continue its outreach with stakeholders to fully understand the small business lending market before issuing any proposed rulemaking.

### Community Banks Should Be Exempt from Section 1071

Community banks are prodigious small business lenders and provide small business credit in good times as well as challenging times. Community banks have a strong track record of providing access to credit in the communities in which they are located and take their fair lending obligations very seriously. The viability of community banks is linked to the success of small business customers in their communities, and community banks serve a critical role in the well-being of their small business customer base. The type of small business lending in which community banks engage simply cannot be duplicated by a bank based outside the community.

Imposing any new data collection and reporting requirements under Section 1071 on community bank small business lenders would negatively impact small business lending and lead to unfortunate, unintended consequences for small business owners seeking credit. ICBA strongly urges the Bureau to exempt community banks from rules under Section 1071.

Unlike the residential mortgage market, where there is a standard portfolio of products, each small business has its own unique characteristics. As a result, there is no standard application for small business loans. The current small

business lending process for community banks would not conform to a standard data collection process.

Community banks would have to create and develop an entirely new small business lending process to accommodate a new data collection and reporting rulemaking and remove the nuanced and unique nature of community bank small business lending. Community banks would need to revert to a check-the-box system and algorithm where small businesses either meet a predetermined set of standardized credentials or do not. Homogenization of small business lending would drive various small business credit out of small banks and significantly reduce access to credit for the businesses that need it most – small businesses with unique credit needs.

Especially during this time, when we need to strengthen economic growth, we must look for ways to expand rather than thwart credit availability to small business owners and would-be entrepreneurs. These potential borrowers deserve access to credit to expand their businesses or to start a small business. These new reporting requirements will choke community banks' ability to provide credit that meet the needs of the small businesses in their communities.

Additionally, community banks are already spending significant resources complying with a number of statutory and regulatory requirements. Often, the impact of regulations places a burden on community banks that are disproportionate to the benefits of the additional requirements.

As previously noted, the intent of Section 1071 is to facilitate enforcement of fair lending laws and identify the needs and opportunities of women-owned, minority-owned and small businesses. However, considering the uniqueness of every small business loan and the relatively small number of loans made, inferences drawn about a particular community bank's portfolio will likely be meaningless. Additionally, collecting small business data from community banks that, while make more than half of small business loans by dollar volume, hold less than 20% of the total number of outstanding loans<sup>6</sup> would not provide sufficient data to capture the intended information.

ICBA has advocated for, and will continue to advocate for, the repeal of Section 1071. Small businesses are an integral part of economic growth and job creation, and lawmakers should work to ensure this market has access to capital. Creating additional regulatory scrutiny only serves to limit community banks' ability to lend to small businesses. The Department of Treasury also supports the repeal of Section 1071. In a recent report on the financial system, the Treasury Department stated, "Although financial institutions are not currently required to gather such information, many lenders have expressed concern that this requirement will be costly to implement, will directly contribute to higher small business borrowing costs, and reduce access to small business loans. The provisions in this section of Dodd-Frank pertaining to small businesses should be

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<sup>6</sup> FDIC Call Report Data Q2 2017

repealed to ensure that the intended benefits do not inadvertently reduce the ability of small businesses to access credit at a reasonable cost.”<sup>7</sup>

### Limitation on Access to Information by Underwriters

Section 1071 states that where feasible, no loan underwriter or other officer or employee involved in making any determination concerning a credit application shall have access to any information provided by the applicant under this provision.

The Bureau is seeking information on the challenges financial institutions foresee in complying with this requirement with respect to applications by small businesses, as well as identifying situations in which it may not be feasible to limit underwriter access to this information.

Such a requirement clearly places a disproportionate burden and expense on community banks. Unlike the large financial institutions, community banks have small staff that often have multiple functions. They cannot afford to hire several people to process small business credit. It is common for the same employee that meets with an applicant and gathers information during the application process to make or participate in the credit decision. As such, it would be extraordinarily costly to segregate the information collection and storage process from the decision-making process.

In addition to increasing staff to ensure the information collection is segregated from the decision-making process, community banks would have to develop a separate database to store and report such information. This would require community banks to increase its systems capabilities so that information is stored separately and reported from a discrete system.

Section 1071 does provide an alternative, if it is not feasible to limit access to such information. It states that if a financial institution determines that a loan underwriter or employee should have access to any requested information, the bank must provide notice to the applicant of the access as well as notice that the financial institution may not discriminate based on the information.

While promising in its intent, such a provision merely highlights the negative impact to community banks and disproportionately penalizes small lenders. Large financial institutions have the capacity and staff to separate the information collection and decision-making functions in its small business lending departments and most do so today. The institutions for which such segregation is not feasible are community banks. As a result, the additional costs and burdens of providing these notices are limited to the community banks.

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<sup>7</sup> U.S. Department of Treasury, A Financial System That Creates Economic Opportunities, p. 108 (June 12, 2017)

Additionally, having only certain lenders – the small institutions – provide such notices would jar the public’s confidence in community bank lenders. When a small business owner receives a notice stating that a lender receives specific racial, ethnic and gender information about him or her and that the lender may not discriminate based on that information, it can prejudice a small business owner from obtaining credit from such lender. Especially if the small business owner does not receive the same notice from a larger institution.

ICBA strongly urges the Bureau to exempt community banks from the provisions of Section 1071, including the requirement to provide additional notices when it is not feasible create a firewall between the information collected and the underwriters making the credit decision.

### Privacy

Section 1071 specifies several data points - including race, gender and ethnicity of the principal owner, census tract of the business, type purpose and amount of credit being applied for, and gross annual revenue of the business - that financial institutions must compile and make available to members of the public upon request.<sup>8</sup>

The Bureau is exploring options which protect applicant and borrower privacy, as well as the confidentiality interests of the financial institutions, and is seeking feedback to understand privacy concerns related to the potential disclosure of the data points.

ICBA urges the Bureau to carefully consider privacy issues as it moves forward with implementing Section 1071 and protect the privacy interests of applicants and borrowers by exempting community banks from small business collection. While greater transparency can be helpful in formulating policy, it can also be dangerous for small business owners and their financial health.

Privacy concerns must be balanced with the public interest. The collection and public disclosure of this data should not be allowed to harm small business owners by making them vulnerable to invasions of privacy. Collecting and publicizing this sensitive data could make it too easy to discern the identity of individual small business owners, especially those located in rural and less populated areas or with unique business credit needs. For these loans, it would not be difficult for someone to compare and cross-reference public records with the public data to identify the small business borrower.

Additionally, and just as concerning, is the potential identification of small business owners who may be discriminated against by potential customers because of their gender, race or ethnicity. Disclosing information that enables the general public to identify the owner of a business including the business

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<sup>8</sup> 15 U.S.C. 1691c-2(f)(2)(B) Information shall be made available to any member of the public, upon request, in the form required under regulations prescribed by the Bureau.

owner's race, gender and ethnicity, may unintentionally target a small business. This is an unfortunate and troubling time in which, all too often, businesses are being targeted and boycotted simply because of the business owner's ethnicity or race. It is especially troubling to know that "hate groups" or groups that advocate and practice hostility or violence towards members of a specific race, ethnicity, gender would have access to this information and could access it for the sole purpose of targeting a small business. Small business owners in areas in which there are a limited number and type of business would be particularly vulnerable. ICBA is deeply troubled that such disclosure can be dangerous to both the business owners and their financial wellbeing.

Furthermore, advances in technology will allow those that request small business loan information to integrate the data with other publicly available data to target them for identity theft. This, of all times, is not the time to make business owners more vulnerable to privacy breaches and identity theft.

ICBA urges the Bureau to examine the potential privacy issues that exist with requiring community bank small business data to be collected and disclosed. Additionally, special consideration about privacy should be given to community banks that serve customers in rural and underserved areas.

#### Misinterpretation and Incorrect Conclusions from Data

Section 1071 mandates that several data points are collected, maintained and submitted annually to the Bureau. The information that is compiled and maintained must also be annually made available to the public in a form and manner determined by the Bureau. The information must also be made available to the public upon request.

The data points collected and maintained include:

- The amount of the credit applied for;
- The type and purpose of credit being applied for;
- The gross annual revenue of the business in the last fiscal year;
- The race, gender, and ethnicity of the principal owner; and
- The type of action taken with respect to the application.

The Bureau is requesting feedback regarding any concerns financial institutions have about the possibility of misinterpretations or incorrect conclusions being drawn by regulators or the public from the collection and release of these data.

The nature of small business lending is very nuanced and cannot be categorized or analyzed by synthesized data points. One cannot determine whether fair lending laws have been violated by simply evaluating data points such as the amount of credit requested, gender, race and ethnicity of applicant, and the denial rates. Many factors go into a small business loan determination, which would be difficult to quantify. Community banks have shared with ICBA that small business credit requests are evaluated on many different factors – any one



of which may or may not be applicable to that particular request. Factors such as the level of competition for the specific type of business in the surrounding area; the level of experience and qualifications the bank has in a particular business type; the time of year a request is made for certain seasonal businesses; and the experience and business plans of the applicant may be considered when a small business lending decision is made.

Despite using a process which has no inference of discrimination, such analysis will inevitably show disparities which cannot be explained through data points or through reports or publicly available information. At a minimum, this information will subject community banks to further scrutiny from regulators. Such scrutiny would require community banks to spend additional time and resources defending their small business lending practices. Community banks would need to pull staff away from their banking duties and dedicate their time to reviewing files with their regulators to justify their decision. A process that could take weeks or months. Even if they succeed at proving they did not violate any fair lending laws, their reputations would already be harmed.

The use of these data points to evaluate compliance with fair lending laws could also trigger banking agency citations or referrals to the Department of Justice for alleged fair lending violations or at least the initial stages of a legal claim. Not only will community banks face reputational damage in these instances, they simply cannot afford to withstand protracted Department of Justice claims or litigation.

The primary objective of most lenders, as with most businesses, is to minimize the risk of ever facing such a challenge. A lawsuit or agency citation alleging lending discrimination is a very serious charge and can cause an immediate reputational injury and business disruption caused by the need to defend such charges. The mere allegation of a possible discrimination charge is still newsworthy even if there is no reasonable inference that a bank discriminated. Furthermore, community banks are particularly vulnerable to reputational damage in these instances because they are locally based institutions and are held accountable to their customers because—as friends and neighbors—their livelihoods depend on honest dealing. As their customers' friends and neighbors, community bankers cannot afford to jeopardize the public trust, which would put their businesses and livelihoods at risk.

Additionally, defending against these types of claims raises significant challenges to community bank small business lenders. Placed in this situation, a community bank often considers, and accepts, a settlement as a matter of sound business judgment. Although a community bank may successfully show that the small business loan decision is justified and discrimination had no bearing on the decision and ultimately prevail, defending allegations of discrimination is typically very expensive. Even if a community bank prevails in the early stages of a lawsuit, it would still have to expend substantial amounts of money, and suffer the reputational consequences of a discrimination charge.

## Technological and Other Challenges in Collecting and Reporting Data

In an effort to understand more about the impact small business lending data collection will have on the lending institutions and small business industry, the Bureau is seeking information on the technological and other challenges financial institutions foresee in collecting and reporting this data.

Imposing these data collection and reporting requirements on community banks will create a unique implementation challenge, require major operational changes, increase in staff and significant coordination with vendors to build and maintain systems.

Unlike other types of consumer credit, where there is a standard application process, each small business has its own distinctive characteristics with unique credit needs. As a result, there is no standard application for small business loans. Rather, the small business lending process for community banks begins with a loan interview between the small business owner or business owner's representative and community banker. Information is shared about the business owner's credit needs, purpose, background, business type, and commitment. Financial information is collected and, if possible, a communication or letter is sent to the business owner letting him or her know under what conditions the bank could approve the loan. Information such as collateral, if any, that is needed, the potential terms of the loan, and costs of the loan would be included in such a communication. There is no application that is completed. Such a practice would not conform to a standard data collection process and would require extraordinary change to the community bank small business lending process.

Furthermore, collecting and reporting data points on small business lending is not a matter of simply adding entries onto a Home Mortgage Disclosure Act (HMDA) reporting form. Often, if small business loan data is not housed in paper files, they are housed on a separate processing system from mortgage loans. These systems are not linked and do not access information from each other, making the HMDA system inaccessible for this purpose.

Additionally, the HMDA reporting system would not be able to accommodate wide variety of types of small business credit. Unlike HMDA data, which is triggered by a mortgage collateral, small business credit comes in many forms. Community banks would have to create and develop an entirely new small business lending infrastructure to accommodate a new data collection and reporting rulemaking. Because community banks do not have the capital to absorb the increased expense of such an undertaking, community banks' ability to adequately serve their small business customers will be quashed and small business owners will be directly impacted.

Community banks will also be challenged with ensuring their employees are adequately trained to be able to identify the vast number and variations of small business lending. Providing employees with the significant training necessary so that they understand when a data collection is triggered will be extremely costly. There are many types of small businesses and regardless of the “small business” definition ultimately used in this rulemaking, bank employees would require some advanced business acumen to understand and determine to whom the definition applies.

The small business lending market is complex and it will also be difficult for employees to identify when a request of credit will be used for business purposes. For example, a sole proprietor may request a home equity line of credit on her home, jointly owned with her spouse who has no ownership in her business, for the purpose of expanding her business. An employee would be required to parse out whether such a request triggers a data collection. There are many other similar examples of credit requests that are not clearly identified as business loans, including an advance on one’s credit card, a car or truck purchased for both business and personal use and an unsecured personal loan with a vague or nondescript purpose.

Additionally, in some instances, businesses may send a designated representative to request credit. The representative may not have certain information, such as the ethnicity or race of the principal owner, and may find it difficult and intrusive to find out.

Section 1071 requires financial institutions maintain specific, itemized information for each minority-owned, woman-owned and small business credit applicant. There must be a firewall between the information collected under this provision and the employees involved in the credit decision, which would require a separate data and filing system. Furthermore, in compiling and maintaining these records, a financial institution may not include any personally identifiable information, including the name, address (other than the census tract), telephone number, and electronic mail address.<sup>9</sup>

This would require community banks to not only develop and maintain a discreet system for the sole purpose of housing this information, but to also create a system that would enable an examiner or auditor to cross reference the Section 1071 data with the actual loan file. Cross referencing these two systems is important not only for an examiner or auditor evaluating fair lending compliance, but also for the bank itself, to defend against potential allegations of fair lending violations. As previously stated, community banks do not have the capital to invest in developing and maintaining a discreet system to house a separate set of files and data sets. Nor do they have the extra staff required to maintain independent files and cross-reference each file as would be needed in the ordinary course of compliance management.

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<sup>9</sup> 15 U.S.C. 1691c-2(e)

## Data Points

Section 1071 specifies particular data points that financial institutions must compile and maintain, submit annually to the Bureau, and make available to the public upon request unless otherwise determined by the Bureau. A financial institution must compile and maintain a record of the following information for each woman-owned, minority-owned, or small business:

- Application number, and date on which the application was received;
- The type and purpose of the loan or other credit being applied for;
- The amount of credit or credit limit applied for;
- The amount of the credit transaction or credit limit approved;
- The type of action taken and the date of such action with respect to the application;
- The census tract in which the principal place of business is located;
- The gross annual revenue of the business in the last fiscal year of the business applicant preceding the date of the application;
- The race, sex, and ethnicity of the principal owners of the business; and
- Any additional information the Bureau determines would aid in fulfilling the purpose of this section.<sup>10</sup>

The Bureau also has authority to require any additional data that the Bureau determines would aid in fulfilling the purposes of Section 1071.<sup>11</sup> The Bureau is exploring how to implement the statutorily-mandated data points and is considering whether supplementing these data points with additional discretionary data points would serve the purposes of Section 1071.

The data points include information about the credit being applied for, the business of the applicant, and certain information about the principal owners of the business.

As previously noted, community bank small business lending is very nuanced and difficult to standardize into data points. Community banks have direct knowledge and understanding of their communities and are able to customize and tailor their small business lending to their customers' needs. Requiring the collection of specific data points for every business loan request would inundate community banks. Adding additional discretionary points would only exacerbate the burdens placed on small lenders. ICBA urges the Bureau to limit data reporting to what is statutorily mandated by Congress.

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<sup>10</sup> 15 U.S.C. 1691c-2(e)

<sup>11</sup> 15 U.S.C. 1691c-2(e)(2)(H)

## Small Business Definition

Section 1071 defines “small business” as having the same meaning as the term “small business concern” in section 3 of the Small Business Act (15 U.S.C. 632).<sup>12</sup> This section sets forth a multi-part definition of “small business concern” that authorizes the Small Business Administration (SBA) to establish detailed size standards meeting certain criteria as well as permitting the SBA to approve size standards developed by other federal agencies that meet certain requirements. The Bureau is considering developing a definition of small business that is tailored to the needs of this data collection rule.

While there is little consistency in how small business are defined, the SBA’s industry-specific size standards organized by the six-digit North American Industry Classification System (NAICS standards)<sup>13</sup> are primarily used by federal agencies. The NAICS system classifies businesses into detailed categories based on various criteria, including industry, sector, business type and primary activities. The thresholds to determine whether a business is defined as a “small business” varies depending on these classifications.

The NAICS standard is too broad and complex for the purposes of Section 1071. It would be difficult for bank employees to identify a small business using the various factors involved in the NAICS standard. Additionally, such a system would require business credit applicants to understand and provide additional complex information about the business simply to determine whether they are defined as a small business. This will not only create additional confusion and place an additional burden on small business owners.

Additionally, bank employees would need to be trained in identifying the various industries and the commensurate thresholds to determine if a particular applicant is considered a small business for purposes of this rule. The small business definition should be narrowly tailored and simplified to ensure that both business owners and bank employees will be able to identify those applicants to which this data collection applies.

## Continued Outreach Needed

ICBA urges the Bureau to continue collecting information about the small business lending market and the impact Section 1071 will have on community bank small business lenders before issuing any rulemaking. It is clear that this market is complex and it is important to understand the market dynamics before potentially increasing small business borrowing costs, and reducing access to small business loans. ICBA recommends that the Bureau continue its outreach to all stakeholders and hold a Small Business Advocacy Review (SBAR) panel under the Small Business Regulatory Enforcement Fairness Act (SBRFA). ICBA looks forward to participating in these outreach efforts.

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<sup>12</sup> 15 U.S.C. 1691c-2(h)(2)

<sup>13</sup> 13 CFR 121.201

Thank you for the opportunity to respond to this request for information. Please contact me at [Lilly.Thomas@icba.org](mailto:Lilly.Thomas@icba.org) or (202) 659-8111 with any questions regarding our comments.

Sincerely,

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Lilly Thomas  
Senior Vice President and Senior Regulatory Counsel