November 3, 2023

Mr. Craig Cellini
Rules Coordinator, Office of the General Counsel
Illinois Department of Financial and Professional Regulations
320 West Washington, 2nd Floor
Springfield, IL 62786

Regarding: September 25, 2023, Department of Financial and Professional Regulation's Second Notice of Proposed Rulemaking for the Illinois Community Reinvestment Act

Dear Mr. Cellini,

The Mortgage Bankers Association (MBA)[1] and the Illinois Mortgage Bankers Association (IMBA)[2] are writing to express significant concerns with the content and apparent direction of the Second Notice of Proposed Rulemaking (SNPR) released during late September by the Illinois Department of Financial and Professional Regulation (IDFPR) to implement Public Law 101-657 of 2021, the Illinois Community Reinvestment Act (ILCRA). Our comments are informed by our review of the released documents and subsequent meetings with both IDFPR Banking Division leadership and staff of the Illinois Legislature's Joint Committee on Administrative Rules (JCAR). We strongly urge IDFPR to delay further rulemaking on CRA implementation until the issues raised by the real estate finance industry – which will be paying the cost of an entirely new examination by IDFPR – are addressed.

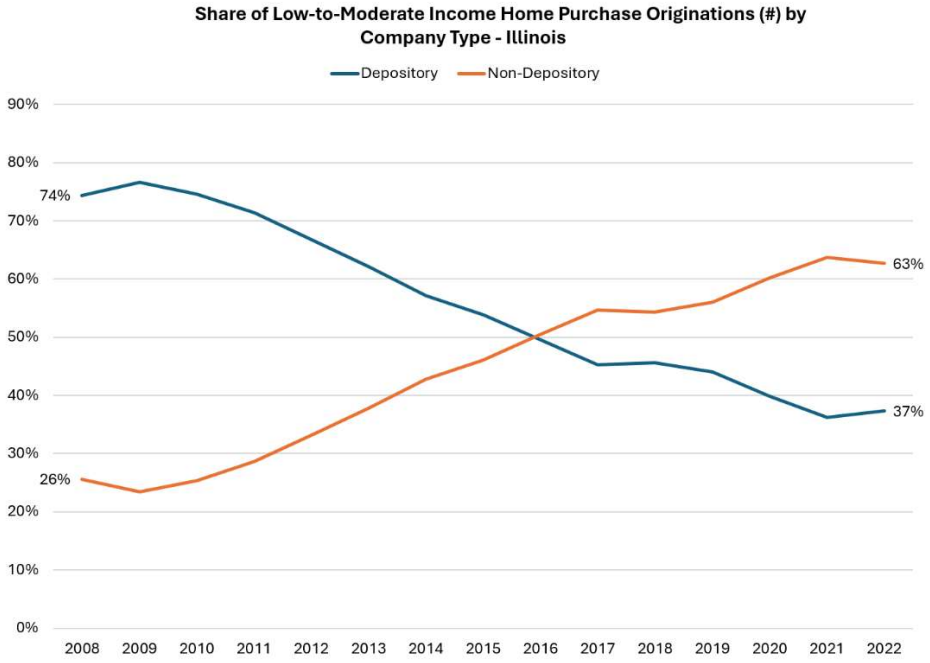
[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 300,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,200 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

[2] The Illinois Mortgage Bankers Association (IMBA) is the oldest state non-for-profit trade association of mortgage bankers. Since 1920, the IMBA has continuously promoted mortgage banking and real estate financing and safeguarded and protected Illinois borrowers and its members, which include non-depository mortgage bankers, community and national banks, credit unions, title and mortgage insurance companies, mortgage servicers and secondary market mortgage loan purchasers, including government sponsored entities such as Fannie Mae, Freddie Mac and the Federal Home Loan Bank of Chicago, and state agencies, such as the Illinois Housing Development Authority. The IMBA has undertaken such activities by promoting mortgage education of applicants, borrowers and its membership, by making known the mortgage industry views, practices, activities and products available to its members and to the general public, and by representing the interests of its members and Illinois borrowers before legislative authorities, regulatory bodies and the courts. www.imba.org

Please note this letter supplements our previously provided testimony and written comments submitted on December 16, 2023.[3] MBA and IMBA and their members are committed to providing fair and equitable access to credit and continue to work with government and private sector stakeholders to develop new products and strategies to reach underserved markets and communities.

At the start, we are troubled to see IDFPR moving forward at this time with rules related to our depository community bank members. We reiterate our strong recommendation that any Illinois rulemaking currently underway apropos to state chartered banks that are already subject to federal CRA rules should be paused until the current update to those rules – which were only made public on October 24, 2023 – is fully implemented. IDFPR should use this time to better align proposed state regulations with these new federal rules to minimize demands on IDFPR staff and our member companies alike.[4]

We also are concerned about IDFPR's clear change of direction in the SNPR for mortgage banking companies from what had been a productive rulemaking process centered on the principles of aligning with existing requirements from other states and leveraging existing data sources. Independent mortgage banks (IMBs) do not take in a penny in deposits from low- and moderate-income (LMI) communities but take on significant risk in order to deliver affordable mortgage credit to those borrowers. Indeed, as demonstrated by a basic review of federal Home Mortgage Act Data (HMDA) data over the last decade (see MBA analysis below), existing IMB outreach to these Illinois borrowers has resulted in a growing and disproportionately larger share of mortgage lending to LMI borrowers. Importantly, IMBs have achieved these results in Illinois WITHOUT any costly CRA mandates.[5]



[3]https://www.mba.org/docs/default-source/policy/state-relations/mba_imba_comments_on_idfpr_cra_anpr_12-16-21.pdf?sfvrsn=8b5818a9_1

[4] https://www.federalreserve.gov/consumerscommunities/community-reinvestment-act-final-rule.htm

[5] MBA maintains HMDA data sheets for all states at www.mba.org/StateCRA

Based on our review of the SNPR, it is our shared view that IDFPR has diverged from: 1) the language of the enacted CRA statute; 2) its own public commentary about its direction for the rules in written public statements and stakeholder meetings dating back to the Spring of 2021; and 3) the proposed rules released for comment in December 2022.

MBA and IMBA have significant concerns with several changes in the regulatory direction by IDFPR that diverge from the prior version of the rule and the underlying statute, including:

- Expansion of the CRA to a race-based construct, beyond the income-based construct in the proposed rule and the statute;
- Revised language that proposes to hold lenders accountable for decisions made by independent appraisers;
- Limited effort to address regulatory burden and use objective measurement standards, including rejecting MBA's suggestion to use on Home Mortgage Disclosure Act (HMDA) lending data as the independent objective metric for assessing lending activities and establishing annual examination priorities;
- Establishment of an unnecessarily narrow approach that could upend lending to LMI borrowers by limiting CRA credit provided to both the lender and the purchaser in the correspondent lending channel; and
- Commissioning of a new "disparity study" developed by "pro bono" authors without any assurances in the rule that the process would be conducted by independent neutral parties and open for public comment.

With respect to the core principle of alignment, it is important to note that since the beginning of the rulemaking process IDFPR has stated publicly that it intended to emulate the regulatory structure of Massachusetts — the only other state to implement a CRA mandate for IMBs. Indeed, this policy direction was explicitly stated and on display in IDFPR's first public meeting to implement the CRA – a May 2021 webinar for stakeholders. The key expert speakers were not IDFPR staff, but instead leaders from the Massachusetts Banking Department. In fact, Francisco Menchaca, IDFPR Director of the Division of Financial Institutions said in his announcement of this event, "we are committed to further developing the path established by other states that have previously passed state CRAs."[6]

Close adherence to Massachusetts was also evident from IDFPR's proposed rules released during December 2022 where entire portions were replicated word for word. Our organizations expressed support for this approach for two reasons. Emulation of Massachusetts rules in effect for over a decade offered the promise of familiarity for our member companies and consistency among expensive state requirements. The cost of compliance with a second burdensome examination regime cannot simply be absorbed by our member companies. Without alignment, the unique Illinois CRA exam expenses, which will be significant, will raise the cost of credit for the state's borrowers.

Fair Housing Concerns; Unprecedented Move to Race-Based Lending Review

The SNPR added a review of lending patterns based on race and other protected class characteristics. This change is unprecedented, was never exposed to public comment before, and is unnecessary. Adding race as a metric for CRA is no small matter and creates significant additional compliance risk for mortgage lenders. There are already substantial and robust state

[6]https://idfpr.illinois.gov/content/dam/soi/en/web/idfpr/news/2021/2021-05-28-cra-discussion-press-release.pdf

and federal fair housing and anti-discrimination laws upon which the IDFPR, the Illinois Attorney General and federal regulators such as the Justice Department, the Consumer Financial Protection Bureau (CFPB) and the Department of Housing and Urban Development's (HUD) Office of Fair Housing may use to hold mortgage lenders accountable and severely punish for acts of racial bias. Our organizations believe there is a significant burden on IDFPR to explain in detail why the existing framework of federal and state anti-discrimination examination and enforcement tools is insufficient before the SNPR progresses.

IDFPR must be much more explicit in how it intends to proceed with its plan for race-based and protected class evaluations of mortgage lenders within the CRA construct. The wide body of existing policy and enforcement tools, which our organizations unequivocally support, are the appropriate means of preventing housing discrimination. Currently, it is illegal under every state or federal fair housing law and regulation to consider race or any other protected class in the extension of mortgage credit.

IDFPR should also explain why after a year and a half of stakeholder meetings and reflection on public hearing testimony and responses to its Advanced Notice of Proposed Rulemaking (ANPR) it chooses this moment to make its plans public to include race and other protected class-based measures as part of CRA evaluations. Such a significant paradigm shift should have been made earlier in the process and opened for public comment. Consequently, MBA and the IMBA believe much deeper stakeholder engagement is necessary before proceeding with any future rulemaking for IMBs that contemplates bringing race into a CRA regulatory review.

Holding Lenders Accountable for the Decisions Made by Independent Appraisers is Inappropriate

Further complicating the SNPR is the attempt to begin holding lenders accountable for actions of bias by independent appraisers or actions of appraisal bias lenders "should have known" about. It is critical to state that such a sweeping provision runs entirely in conflict with federal policies separating lenders and appraisers to avoid even the appearance of collusion in the valuation of residential real estate. For example, Congress has intentionally placed firm boundaries between appraisers and lenders, including the Dodd-Frank Consumer Protection Act and similar requirements exist in the policy mandates of the federal government's affordable housing programs. For example, appraiser independence is part of Fannie Mae's handbooks, and not only must lenders comply with these policies, but they must also promptly refer any violations to the applicable State appraiser certifying and licensing agency or other regulatory body. Moreover, they must:

> *…adopt written policies, procedures, and disciplinary rules and implement adequate training programs to ensure compliance with these Appraiser Independence Requirements. Additionally, the Seller must ensure that any third parties, including but not limited to appraisal management companies or Correspondent lenders, involved in the origination of a Mortgage or the sale and delivery of a Mortgage to Fannie Mae are also in compliance with these Appraiser Independence Requirements.*
> *…*
> *(2) Restricted parties [originators or anyone compensated in transaction] are prohibited from:*
> > *(a) Ordering, managing, or defining the scope of work for an appraisal assignment;*

> *(b) Selecting, retaining, recommending, or influencing the selection of any appraiser for a particular appraisal assignment or for inclusion on a list or panel of appraisers approved or forbidden to perform appraisals for the Seller; or*
> *(c) Having any substantive communications with an appraiser or appraisal management company relating to or having an impact on valuation.*
>
> *Notwithstanding the foregoing, any party, including any Restricted Party, may request an Independent Party to provide additional information or explanation about the basis for a valuation, or to correct factual errors in an appraisal report.*[7]

Any actions taken by the lender to root out any potential bias could be seen as collusion or persuasion in violation of the Dodd Frank Act and investor guidelines. Section 1055.240(c)(1) wrongfully places liability on the lender for any potential bias found in the appraisal process. While some instances of bias may be overt and evident to the lender, it is far more likely the lender may not have any indicators of bias. Considering the established boundaries outlined above, the SNPR should be amended to remove this liability. The many state and federal fair lending laws already in practice provide avenues for regulators to hold lenders accountable for any known bias in the mortgage process. MBA suggests amending the proposal to the original proposed rules by striking the following:

> *(1) Discrimination against applicants on a prohibited basis in violation, for example of the Equal Credit Opportunity Act or Fair Housing Act~~, including, for example, relying on or giving force or effect to discriminatory appraisals to deny loan applications where the covered financial institution knew or should have known of the discrimination~~;*

Importance of Relying on HMDA Data

MBA and IMBA are concerned that IDFPR is considering using sources of data other than the federal Home Mortgage Disclosure Act (HMDA), which is released annually by the Consumer Financial Protection Bureau, in its evaluation of our member companies. We strongly oppose the use of any other data set to evaluate mortgage lending during a CRA exam. We believe that the annual HMDA data set offers the best tool for establishing not only clear and objective metrics, but also an incentive for lenders to strengthen their already robust lending to Illinois' LMI borrowers. Moreover, using or creating alternative data sets rather than HMDA (which is available for free from the CFPB) is likely to be an unnecessarily expensive cost for IDFPR and industry alike. Thus, data alignment also has a virtue with respect to Illinois taxpayer interests.

As stated in our December 2022 letter in response to the Advanced Notice of Proposed Rulemaking (ANPR), IDFPR should comply with the important aspects of the Illinois Administrative Procedures Act (APA). Notably, the APA's requirement for the IDFPR to consider efforts to:

- Consolidate or simplify the rule's compliance or reporting requirements; and
- Establish performance standards to replace design or operational standards.[8]

Consistent with the above requirements, we again urge IDFPR to:

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[7] https://singlefamily.fanniemae.com/media/4711/display#:~:text=The%20Seller%20must%20separate%20its,of%20the%20Seller's%20appraisal%20functions.

[8] 5 ILCS 100/5-30

1. Develop performance-based metrics/standards that are readily available from unbiased federal HMDA data; and,

2. Prioritize CRA examinations in Illinois in a manner that devotes examination resources to those institutions that do not meet those clearly verifiable performance benchmarks. The HMDA data set is reported annually and is publicly available to regulators, industry, and consumers advocates. Given the limited resources of federal and state government agencies, IDFPR should establish a CRA examination regime that eliminates duplicative activity or subjective mandates, and instead relies on marketplace results as its foundation.

Our organizations suggest IDFPR work with the independent and nonpartisan Urban Institute to objectively identify statewide averages in Illinois for lending to LMI borrowers. Our core recommendation remains that regulatory implementation should focus on establishing exam priorities for IMBs that will provide appropriate incentives and rewards for IMBs that have already demonstrated strong lending performance to LMI and minority communities. Specifically, IDFPR should:

- Weight IMB CRA exams most heavily on their lending activities (as opposed to service or investment tests);
- Establish a presumption of compliance for IMBs that meet or beat established benchmarks based on the overall statewide averages for lending to LMI borrowers or LMI communities; and
- Provide for extended examination cycles for IMBs whose prior-year federal Home Mortgage Disclosure Act (HMDA) data exceed those same statewide benchmarks.

Specifically, that benchmark should be the proportion of home purchase loans originated by all lenders operating in Illinois to LMI borrowers (as defined by IDFPR using HMDA data) in the state. If a lender meets or exceeds the overall state proportion of home purchase loans to LMI borrowers for that year, they should receive a rating of "satisfactory" or higher. IDFPR can easily access the Urban Institute most recent analysis, *An Assessment of Lending to LMI and Minority Neighborhoods and Borrowers; Performance of Independent Mortgage Banks in the Context of CRA Reform*[9], via its Housing Finance Policy Center at http://www.urban.org/.

<u>Inappropriate Limits on CRA Credit to Only Loan Origination and Initial Sale of Loan</u>

Given that SNPR includes a provision to strictly limit only a loan's origination and initial sale to an investor as counting towards CRA credit, it is vital to first provide context on the IMB business model and its remarkable success in delivering credit to LMI borrowers in a well-regulated marketplace. The language on this limitation, it is important to note, is also confusing and perhaps contradictory.

IMB's use a combination of their own capital, plus short-term borrowings, known as "warehouse lines," to fund individual mortgages. The warehouse lines are short-term credit facilities secured by the funded loans until the loans are sold to an investor – typically in one to three weeks. The vast majority of IMBs' loans are sold to larger lenders ("aggregators"), directly to Fannie Mae or

[9] https://img03.en25.com/Web/MortgageBankersAssociation/%7Bfdbd5a9f-27ab-4aff-ab1d-36e88e482bce%7D_URBAN_2023_LMI_and_Minority_Neighborhoods_FINAL.pdf

Freddie Mac (the GSEs), or issued as securities guaranteed by Ginnie Mae. Aggregators include banks and other financial institutions that either hold loans in their portfolios or sell into the agency market. Also, some IMBs sell into private-label securitizations.

Federal CRA and Massachusetts do not restrict the credit for loans to avoid disrupting the secondary market. The purchases of these loans keep the liquidity in the market moving. Mortgage lending has largely shifted to IMBs since the 2008 crisis, but banks play a pivotal role in providing the liquidity to keep funds available for IMBs to continue to lend. Without this movement in the secondary market, the small IMBs who are embedded in the communities CRA aims to assist will suffer the most. The proposed limitation would also have the direct effect of limiting sources of capital for IMBs overall. The result is likely to increase the cost of credit and reduce the options for mortgages among Illinois LMI borrowers.

As noted, the SNPR includes conflicting requirements around the credit for CRA loans in the secondary market. In Section 1055.220 (a)(2) it clearly states the origination and initial purchase qualify for CRA credit, however in (c) *Third Party Lending* it states you cannot count the origination and subsequent purchase for the same loan. It appears the intent of this section is to show that an organization cannot count the origination or purchase respectively more than once, but the language interpretation restricts it to one credit across the board. MBA requests IDFPR strike (c) and add (a)(3) detailed below:

> *(a)(2) The Secretary considers originations and initial purchases of loans as reported by the ~~mortgage lender~~ covered mortgage licensee under HMDA. The Secretary will also consider any other loan data the ~~mortgage lender~~ covered mortgage licensee may choose to provide.*
>
> *(3) Any loans arranged by a covered mortgage licensee that does not fund its own loans may be claimed by that covered mortgage licensee and by the funding covered mortgage licensee or depository institution for origination credit.*
>
> *~~(c) Third-party lending. No mortgage lender~~ covered mortgage licensee ~~may include a loan origination or a loan purchase for may not be included for consideration if another mortgage lender~~ covered mortgage licensee ~~or depository institution claims the same loan origination or purchase under this Part or the state or federal Community Reinvestment Act.~~*

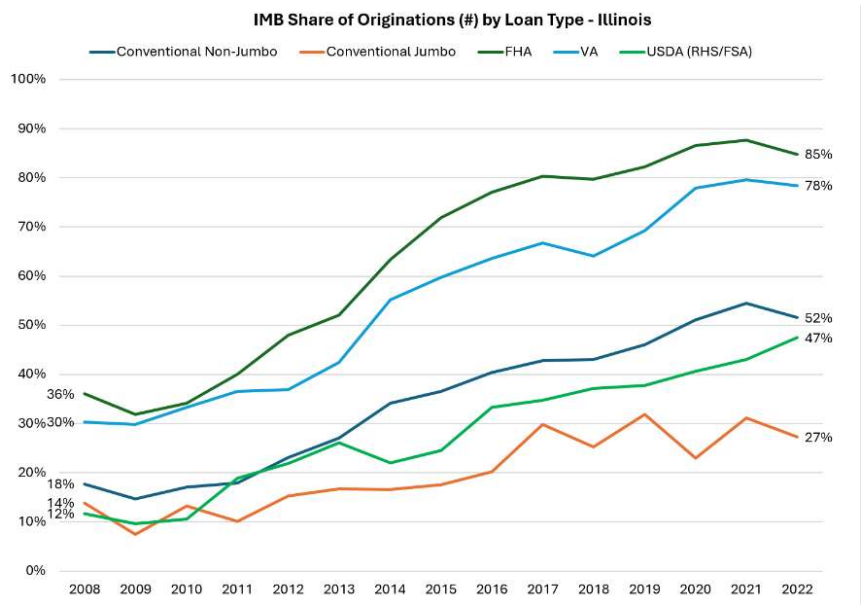
Few Specifics Provided Regarding Newly Proposed Disparity Study

The SNPR included a new provision in Section 1055.210 for IDFPR to retain qualified persons to design and conduct a Disparity Study (Study) to locate geographies exhibiting significant disparities by race or other protected characteristics and develop methods and procedures to identify policies causing the disparate impact, discrimination, or effects. The study then may be used as a tool to draw conclusions that will be used to augment lender examination metrics.

This newly proposed Study is problematic for a number of reasons. First, the Study is in and of itself a significant regulatory construct that was not part of the original proposed rule, or the ANPR. It was also not included by the Illinois Legislature in the CRA statute, and thus not part of the IDFR's legal scope for regulatory implementation. IDFPR has said it will rely on "pro-bono" experts, but provided no information on how they will be selected. Nor does the SNPR and its supporting materials guarantee that the authors of the report will be nonpartisan and

independent of any lobbying entity. The wall between advocacy and consultant is necessary to ensure the absence of bias for or against industry's current lending practices. Our organizations are also concerned that the work of developing the Study will not be a public process with opportunities for stakeholder input. Lastly, IDFPR has not explained how it will evaluate recommendations in the Study to be used in the CRA examination process.

The Study aims to identify policies or disparities and develop methods to cure them. However, IMBs in Illinois are originating the overwhelming share of federal government affordable housing program loans – Federal Housing Administration, the Rural Housing Service of the U.S. Department of Agriculture, and the Veterans' Administration Loan Guarantee Program (see below[10]) in the state. These programs establish their lending guidelines and scrutinize IMBs to ensure compliance. IMBs must adhere to these requirements and investor guidelines to originate, insure, and sell loans in the secondary market. IMBs cannot adopt new guidelines or policies based on the results of the disparity study unless those investors and guarantors will buy or insure the loans. Thus, while IMBs incur risk in origination loans among these programs, they do not create the programs themselves.



The language in the SNPR also says nothing with respect to considering the data provided by lenders as confidential. The Study would require lenders in the state to provide confidential data with no certainty of it being anonymized or any steps taken to protect the lender or individual data being provided. This is in conflict with the terms of use agreement established by the Nationwide Multistate Licensing System (NMLS) stating the disclosure of data outside of the system can only be provided to state or federal agencies who certify they have mortgage or industry oversight and are subject to legal authority to comply with the federal SAFE Act.[11]

[10] MBA maintains HMDA data sheets for all states at www.mba.org/StateCRA

[11]https://mortgage.nationwidelicensingsystem.org/about/policies/NMLS%20Document%20Library/State%20Agency%20Terms%20of%20Use.pdf

More Analysis Necessary Regarding the Cost of Implementation

The financial burden of implementing the Illinois CRA regulatory framework for credit unions, state-chartered banks, and IMBs will be significant. That cost burden is effectively the cost of any new data collection and an invoice each IMB operating in the state will receive post their CRA examination. These payments will be in addition to the invoice IDFPR will deliver to any institution also subject to a supervisory examination. The SNPR describes the calculation of those CRA exam fees as pro rata calculation follows:

> *Each mortgage lender's pro rata share of an assessment shall be the percentage that the total number of loans shown on the mortgage lender's Mortgage Call Report bears to the total number of loans of all mortgage lenders covered by the ILCRA. Each mortgage lender's pro rata share of a surcharge shall be the percentage that the number of loans shown on the mortgage lender's Mortgage Call Report bears to the total number of loans of all mortgage lenders subject to a surcharge and covered by the ILCRA*.[12]

IDFPR stated that it will bill IMBs $2,200 per day for CRA exams, for which it expects payment within 30 days after receipt of the billing. However, despite these specifics, IDFPR has not disclosed its anticipated impact on individual IMBs nor the anticipated costs to this group of lenders. These costs will disproportionately impact smaller lenders among our member companies, and it is only fair that IDFPR provide a clearer analysis of this new expensive burden of doing business in Illinois.

In closing, MBA and the IMBA strongly urge IDFPR to delay further rulemaking on CRA implementation until the issues industry has raised are addressed. Please contact us to further discuss the industry views provided in this letter.

Respectfully,

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[12] Part 1055, Section 1055.460 (b)