October 18, 2021

By electronic submission to regs.comments@federalreserve.gov

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Proposed Interagency Guidance on Third-Party Relationships: Risk Management Docket No. Op-1752

Dear Sirs and Madams:

The Online Lenders Alliance (OLA) welcomes the opportunity to respond to the request for comments regarding ***"Proposed Interagency Guidance on Third-Party Relationships: Risk Management."***

OLA represents the growing industry of innovative companies that develop and deploy pioneering financial technology, including proprietary underwriting methods, sophisticated data analytics and non-traditional delivery channels, to offer online consumer loans and related products and services. OLA's members include online lenders, vendors and service providers to lenders, consumer reporting agencies, payment processors and online marketing firms. Fintech companies are at the vanguard of innovative online tools that reach new customers, prevent, and mitigate fraud, manage credit risk, and service loans. Online lenders provide benefits to consumers, particularly those in underserved communities, with fast, safe, and convenient choices that simply are not available through traditional lending markets.

Much of the innovation undertaken by OLA members has given consumers greater control over their financial future. This is especially the case when it comes to accessing capital. Whether purchasing a home, starting a business, financing an education, or even paying for auto repairs, the ability to find and secure credit is often a determining factor in a consumer's financial wellbeing. Fintech companies, working as third-party service providers to federally insured depository institutions, have helped those banks create a new financial service landscape that is aiding consumer and small business in finding and securing credit.

Bank Fintech Partnerships

Banks routinely rely on relationships with third parties to deliver financial services more broadly, more efficiently, and with less risk to both borrowers and the banks. Those banks that lack the technical know-how to market, underwrite, originate, service and collect loans over the internet can bridge these challenges by engaging with a fintech company. Many fintech's have spent years developing innovative technology and analytics for these specific tasks. The fintech's' investment of time and resources allows the banks to benefit from their expertise. These engagements allow banks to deploy their own capital to originate loans to borrowers they otherwise could not reach, thereby providing broader access to credit for consumers and small businesses.

The ability to leverage these relationships, to reach new customers and obtain greater portfolio risk diversification is especially beneficial to smaller or community banks. Nonbank fintech providers bring expertise in electronic and internet marketing of loans, innovative underwriting and credit risk assessment techniques, and online banking and servicing of loans that many banks do not possess. These arrangements can enable a smaller bank to make greater use of the internet to originate loans. They can also open marketing opportunities beyond consumer loans to small businesses and borrowers outside of the bank's traditional product offerings and state footprint. Borrowers of lesser credit quality, whether thin-file or no-file, can benefit from the algorithms and greater use of non-traditional credit information employed by fintech firms. These new technologies can allow a bank to better target and more accurately customize product offerings, increasing overall efficiencies. All of this translates into greater competition among providers and lower costs of credit, resulting in more options and access to credit for borrowers.

The Center for Financial Services Innovation, in a comment letter to the Federal Deposit Insurance Corporation (FDIC), characterized this as a "win-win-win" for all involved, including borrowers. Banks win because they can serve a broader and deeper segment of the consumer market than they otherwise could. Third-party fintech providers win by creating an opportunity to offer products and services to consumers that they would not otherwise reach. Borrowers win because they "get access to high-quality credit that they otherwise would not." These relationships also allow smaller and more rural banks to broaden the set of products and services they can offer.[1]

The FDIC, in proposed examination guidance for third-party lending programs, echoed these sentiments: "Third-party lending arrangements may provide institutions with the ability to supplement, enhance, or expedite lending services for their customers. Engaging in third-party lending arrangements may also enable institutions to lower costs of delivering credit products and to achieve strategic or profitability goals."[2]

The ultimate promise of fintech – delivering safer, more transparent, lower cost and more convenient financial products and services over the internet and mobile devices – depends on the

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1 CFSI Comment Letter on Proposed Guidance for Third-Party Lending (Oct. 27, 2016), https://cfsinnovation.org/research/cfsi-comment-letter-on-proposed-guidance-for-third-party-lending/.

2 FDIC, Proposed Guidance: Examination Guidance for Third-Party Lending (July 29, 2016), https://www.fdic.gov/news/news/financial/2016/fil16050a.pdf.

ability of banks, particularly community banks, to cooperate with third-party fintech providers to offer financial products and services to consumers. OLA supports the use of the proposed third-party guidance to structure these partnerships and encourage banks to connect with nonbanks in the offering of financial services over the internet.

Use of Guidance to Strengthen Banks' Ability to Work with Fintech Companies

The Office of the Comptroller of the Currency (OCC) and the FDIC should be commended for their work to support banks' ability to work with fintech firms. A revolution in digital technology is transforming the ways in which consumers and small businesses access banking and financial products. This has been made possible through the joint efforts of banks and fintech to find better ways to serve the market. The proposed third-party guidance should be used as a vehicle to further support those working relationships.

As policymakers continue to consider oversight of this evolving marketplace, OLA believes that regulators should utilize the existing tools at their disposal to reiterate that bank-fintech third-party agreements rest on strong, well-established legal standing. Reaffirming this in the proposed guidance will address one of the greatest current impediments to the growth of these relationships.

New technologies utilized by fintech companies allow a bank to extend credit to a wider range of customers than might otherwise be possible under legacy FICO-only systems, more accurately customize marketing and product offerings, and increase access to credit while at the same time introducing greater operational efficiencies. All of this translates into greater competition among providers and lower costs of credit, resulting in more options and access to credit for consumers.

Unfortunately, recent trends are threatening the ability of banks to engage in these endeavors with fintech firms, escalating the continued uncertainty in the marketplace. This creates challenges for banks, fintech firms and investors. Without certainty, these market participants may no longer be willing to enter such transactions, thereby depriving banks, the economy and – most importantly – borrowers of the many benefits that these third-party vendor agreements provide.

There is a strong and immediate need for formal direction from federal regulators to clarify the ability of federally regulated banks to engage with fintech firms. In the continuing absence of clear direction from the federal bank agencies, lawsuits and enforcement actions threaten to shut down the opportunity for sustainable arrangements between nonbank fintech providers and federally regulated banks.

Many of the questions raised over these relationships hinge on differing interpretations of a straightforward question: When is a loan "made?" Two federal banking statutes, Section 85 of the National Bank Act (NBA) and Section 27 of the Federal Deposit Insurance Act (FDIA), use similar language and concepts. Under Section 85, the question of which party is the lender is predicated on what it means to "take, receive, reserve and charge on any loan or discount

made."[3] Although challenges to these engagements generally have come under Section 27 of the FDIA, which applies to state-chartered depository institutions, Section 85 and Section 27 are frequently cited and discussed together in court opinions and construed *in pari materia*.[4] Thus, an adverse interpretation of what it means to make a loan under either statute has a detrimental impact on national and state-chartered banks. At a minimum, a negative finding chills national banks' ability to work with fintech firms in offering innovative products and services to consumers.

In making this request for interpretation, consider the following passage from The U.S. Supreme Court's decision in *Smiley v. Citibank (S.D.)*:

> "We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows'.[5]

These clarifications are important because they determine the enforcement and supervisory regime to which a bank is subject. Without such clarifications, the industry may find itself confronted by a broad and inconsistent range of regularity frameworks that in some cases might even void the loan or make it uncollectible, meaning that the lender may not be able to recover its principal, much less its costs and profit.

In short, reinforcement either through the proposed third-party guidance or as a separate formal interpretation of Section 85 of the National Bank Act (NBA) and Section 27 of the Federal Deposit Insurance Act (FDIA), finding that these partnerships are both consistent with and fostered by federal law, would provide much-needed clarity that would preserve the many benefits such third party vendor agreements generate for consumers and the economy in general.

Greater Clarification Needed in Proposed Guidance

With banks of all sizes routinely relying on third parties to provide critical services, a robust regime of third-party supervision has been established by the federal banking agencies. This ensures that activities that occur outside of the bank are examined and supervised to the same extent as if they were being conducted by the bank itself. This protects both borrowers and the financial system.

Bank-sponsored programs with fintech firms are no exception, and both the OCC and FDIC have published detailed guidance as to how these relationships should be managed and supervised.

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[3] 12 U.S.C. § 85 (emphasis added).

[4] General Counsel's Opinion No. 10.

[5] 517 U.S. 735, 740, 741 (1998).

Such guidance clearly states that any loan issued by a bank – including those that benefit from the technology of a fintech partner – face the same high level of scrutiny and regulation that any other loan issued by the bank faces. This ensures borrowers are protected and supervision is appropriate; it also enables borrowers to choose to work with a federally supervised lender, giving them greater confidence and security.

The proposed third-party guidance is consistent with these past endeavors by regulators. It offers a framework based on sound risk management principles that banking organizations supervised by the agencies may use when assessing and managing risks associated with third-party relationships. However, OLA encourages the regulators to consider clarify a number of areas that will ensure the guidelines meet their safety and soundness goals without unduly burdening banks' ability to work with fintech companies through third party arrangements.

Categorization of Vendors

The proposed guidance describes third-party relationships as business arrangements between a banking organization and another entity, by contract or otherwise, including relationships with vendors, fintech companies, affiliates, and the banking organization's holding company.

Although a helpful start, greater explanation is needed when defining what constitutes a critical vendor and identifying the specific additional steps and safeguards a financial institution must implement to monitor these relationships. Such additional clarification is important not just from the standpoint of ensuring the institution is doing its due diligence, but to avoid instances where a bank could misclassify a vendor as critical, thus causing a financial institution to misdirect vendor management resources to an entity when not warranted. Providing additional criteria on what factors constitute a critical vendor would help both the bank and fintech make these determinations.

Determining Appropriate Due Diligence Levels

A key component of risk management is determining the level of risk posed by a third-party relationship and then establishing the necessary level of investigation required to mitigate that risk. The proposed guidance specifies that banking organizations should adopt third-party risk management processes commensurate with the identified level of risk and complexity from the third-party relationships.

However, this calculation can be subjective and open to varying interpretations. For example, does the utilization of a vendor questionnaire constitute proper due diligence? This illustrates the challenges many organizations face in determining when they have done enough to satisfy a regulator's due diligence expectations. This can quickly lead to escalating costs without assurance that the criteria have been met. The proposed guidance does little to provide any new clarity.

In addition, the guidance fails to address issues pertaining to how far down the chain of subcontractors a company needs to go to have reasonably satisfied its due diligence. This is of particular concern because the cost burden for many small fintechs may either preclude them from engaging as a third-party vendor to a bank or result in banks bypassing small fintech companies all together, choosing to only work with the larger entities that the bank may view as having the financial resources necessary to contend with extensive due diligence costs.

To avoid this scenario, the proposed guidelines should include standards for which due diligence functions regulators view as acceptable to be automated. Regulators should also consider a process for preclearance of vendors like what the FDIC proposed in its July 24, 2020, "***Request for Information on Standard Setting and Voluntary Certification Models and Third -Party Providers of Technology and Other Services.***" This proposal sought to establish a system to support financial institutions' efforts to manage risk and perform due diligence by pre-certifying or assessing certain aspects of risk models and certain operations of third-party providers of technology and other services.[6] A voluntary certification program could foster innovation, removing some of the barriers and uncertainty that limit many banks from working with third party fintech vendors.

Ensuring Fair Access to Financial Services

Section 3N of the guidance allows regulators to direct a financial institution to terminate a relationship with a third-party provider. This section lacks specific parameters regarding the criteria that could lead to such terminations. OLA is concerned that this provision could target some fintech companies solely based on a perceived reputational risk.

A notable example of such unfair targeting was Operation Choke Point, which was purportedly rooted in safety and soundness principles similar to those outlined in section N of the proposed guidance. However, the true goal of Operation Choke Point was to target a group of legitimately licensed businesses that some senior agency officials viewed as undesirable to certain constituencies. The targeted industries included the online lending industry due to its work in the small-dollar lending market. In many instances, pressure from regulators coerced financial institutions into ending their relationships with fintech companies. Although there have been actions taken to end these practices, OLA continues to receive anecdotal evidence from its members that the industry still is finding its access to financial services curtailed, with no satisfactory explanation from their banks.

To avoid future barriers to banking services, Section N should be revised to clarify that financial institutions have an obligation to provide fair access to financial services and set clear parameters for when a regulator may direct the termination of relationship with a third-party provider.

Guidance Should Have the Ability to Keep Pace with Evolving Data Standards

The generation of electronic financial data has been essential to the growth of our nation's financial infrastructure for over two decades. This is true for both banks and nonbank providers. In the current compliance environment, entities need to be careful about how they acquire, store, and share data, especially as it pertains to identity and financial information. This requires extraordinary attention, not just to the means and mechanisms used to collect such data, but also to the ways in which such data might be stolen, lost or damaged.

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[6] Request for Information on Standard Setting and Voluntary Certification for Models and Third-Party Providers of Technology and Other Services, RIN 3064–ZA18 https://www.fdic.gov/news/press-releases/2020/pr20083a.pdf

Currently, fintech companies must comply with provisions of security and privacy polices, including Gramm/Leach/Bliley, to the extent that they obtain and disclose personally identifiable financial information from banks. They may also be subject to supervision by financial regulators such as FFIEC.

Fintech companies have developed many of the products that have proven indispensable to ensuring strong security protocols for banks. The guidance should recognize these developments and provide the industry with the flexibility and space for innovation to continue. This will give companies of all sizes the ability to take a risk-based approach to innovation, tailoring what works best for their specific business models, practices, and customer needs. This is particularly critical for startup companies, enabling them to devote limited resources to meeting the needs of their customers rather than complying with prescriptive guidance that are a mismatch for their risk profiles. In the current environment of remote work, regulators need to provide clear standards to help fintech firms address security in ways that take into account physical security as well as remote work environments.

Most importantly, regulators should state clearly that borrowers have the right to access their data for any purpose and can determine with whom they choose to share that data. This could be addressed directly in the guidance or by updating the OCC's 2020 FAQs.

In conclusion, the OLA supports updating the guidance to provide more consistency across the board to how banking organizations should manage risks associated with third-party relationships. These efforts, in conjunction with ongoing work to support bank/fintech third-party agreements, will enable borrowers and small businesses to obtain much-needed credit.

OLA appreciates this opportunity to offer input on these key issues. If you have questions or need additional information, please feel free to contact me at mday@OLADC.org

Respectfully submitted,

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