



Bank Partnerships and Compliance: What Third Party Vendors Need to Know

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Bank Partnership Model

- Fintech and Bank offer credit to consumers and businesses in a joint venture arrangement
 - Fintech is typically responsible for marketing, servicing, collecting
 - Fintech is typically responsible for compliance with applicable law
 - Bank is the creditor and lender of record
 - Fintech or affiliate is typically required to purchase from bank substantial economic interest in the credit
 - Bank oversees fintech's performance
 - Revenues and losses allocated based on risk and responsibility allocation

Advantages

- Bank usury limitations are governed by federal law
 - Preemption of state rate and fee limitations
 - “Exportation” authority
- Many state licensing requirements do not apply
- Additional preemption for federally-chartered institutions

Bank Usury Laws

Banks may charge interest at the rate legally-allowable in the State or Territory where they are located

- National Banks
 - Section 85 of the National Bank Act (12 U.S.C. §85)
- FDIC-Insured State Banks
 - Section 27 of the Federal Deposit Insurance Act (12 U.S.C. § 1831d)
- Federal and State Savings Associations
 - Section 4(g) of the Home Owners' Loan Act (12 U.S.C. § 1463(g))

Rate Exportation

- Case law, OCC preemption opinions, other regulatory guidance developed since 1978 have solidified bank interest rate exportation power
 - *Marquette Nat. Bank v First of Omaha Svc. Corp*, 439 U.S. 299 (1978)

Legal Responsibility

- Customers must be bank customers, so bank is legally responsible for the relationship
 - Bank authority applies only if bank is the lender and in direct privity with customers
 - Bank is legally responsible for compliance with law and customer contract
 - Bank can delegate responsibility but not liability
 - Fintech will indemnify bank, subject to legal limitations

Sponsor Bank Oversight

- Banking organizations are subject to regulatory expectations on managing third-party relationships:
 - [OCC Bulletin 2013-29: Third-Party Relationships: Risk Management Guidance](#)
 - [OCC, Third-Party Relationships: Frequently Asked Questions to Supplement OCC Bulletin 2013-29 \(2020\)](#)
 - [Proposed Interagency Guidance on Third-Party Relationships: Risk Management, 2021](#)
 - [Interagency Guide for Community Banks: Conducting Due Diligence on Financial Technology Companies A Guide for Community Banks, 2021](#)
 - [Federal Reserve, Community Bank Access to Innovation through Partnerships, 2021](#)
 - [Interagency Computer-Security Incident Notification Requirements for Banking Organizations and Their Bank Service Providers, 2021](#)
 - [CFPB, Compliance Bulletin and Policy Guidance; 2016-02, Service Providers](#)

Sponsor Bank Pre-Approval Requirements / Due Diligence

- Product design
- Marketing strategy, media and advertising
- Application process
- Customer agreement/terms and conditions
- Disclosures
- Credit Policy and Changes to Credit Policy
- Pricing terms
- Customer life-cycle

Sponsor Bank Monitoring and Audit

- Financial performance and capacity
- Compliance with contract
- Customer complaints
- Litigation
- Risk model validation and review
 - Supervisory Guidance on Model Risk Management - Federal Reserve SR 11-7; adopted by the FDIC in Financial Institution Letter 22-2017

Legal Best Practices

- Develop risk-based compliance management system
 - Board involvement – “culture of compliance”
 - Hire and empower qualified compliance officer and support staff
 - Identify applicable state, local and federal laws and adopt policies to comply
 - Provide/require relevant compliance training
 - Institute appropriate internal controls
 - Institute quality control and audit processes
 - Adopt formal complaint management policy and process
 - Annual independent testing or audit of CMS
 - Independent testing/validation of risk models
 - CFPB Consumer Financial Protection Circular 2022-03 re: adverse action notification requirements

Development and Distribution of Customer Media

- Review and sign-off by compliance and legal, as appropriate
- Controls for use of customer media, including distribution by third parties
- Review comparison sites and identify potentially misleading information
- Periodic third-party compliance review

Complaint Management

- Develop process for identifying, responding to and reporting complaints
- Monitor social media and respond as appropriate
- Establish policies and processes for responding to “elevated complaints”
 - Regulatory complaints
 - Attorney letters
 - Better Business Bureau complaints
- Track and report litigation and arbitration

Operational Best Practices

- Identify vendors and adopt risk-based vendor management policy and practices
 - Critical vs. non-critical vendors
 - Onboarding due diligence
 - Policies, procedures, internal controls, training
 - Financial and operational capacity
 - Monitoring for compliance with contract and applicable law
 - Assess potential for customer harm

Audit, Testing and Quality Control

- Establish formal policy and process for independent review
- On a risk-basis, engage independent third party review
- Develop policies and controls for change management
 - Customer media
 - System settings
 - Risk models
 - State law changes
- Prepare for and manage regulatory exams and audits
 - Interim check-ins
 - Promptly address identified issues

Examination by Bank Regulators

- Banking regulators will have authority to examine fintech partners in most cases.
 - “The agencies generally have authority to examine and regulate banking-related functions or operations performed by third parties for a banking organization to the same extent as if they were performed by the banking organization itself.”
 - Proposed Interagency Guidance on Third-Party Relationships: Risk Management Guidance, 86 Fed. Reg. 38182, 38193 (July 19, 2021) (citing 12 U.S.C. 1464(d)(7)(D) and 1867(c)(1))

Rent-a-Charter Risks

- “True Lender” claims
 - Have bank maintain sufficient economic interest
 - Implement appropriate bank controls
- “Valid when made” claims

Wind-Down and Transition Considerations

- Ownership of customer data
- Transfer to successor financial institution
- Transition period
- Minimize customer burden
- Network identifier (BIN/ICA) transfers

Questions/Discussion

If you would like to ask a question, you can ASK or type your question into the CHAT feature NOW.