October 18, 2021

Via Electronic Submission
James Sheesley, Assistant Executive Secretary
Federal Deposit Insurance Corporation

Attention: Comments -- RIN 3064-ZA26

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

RE: ***Cross River's Comments, Proposed Interagency Guidance on Third-Party Relationships: Risk Management***
RIN 3064-ZA26

Dear Mr. Sheesley,

On behalf of Cross River Bank ("Cross River" or the "Bank"), I thank you for the opportunity to provide comments on the Proposed Interagency Guidance on Third-Party Relationships: Risk Management [released on July 13, 2021 as FIL-50-2021] (the "Proposed Guidance"). Cross River fully supports the Agencies' objective of establishing a uniform standard that provides a basis for sound risk management principles while removing unnecessary or duplicative regulatory requirements. A robust third-party risk management system is essential to not only protecting the integrity and security of the financial system but also for empowering and encouraging responsible innovation and modernization throughout the industry.

Cross River is a New Jersey State-chartered, FDIC-insured, financial institution that merges the trust and reliability of a community bank with the innovative offerings of a technology company. Since inception, the Bank has consistently partnered with leading technology companies to offer a suite of products that empowers consumers to take control of their financial health by facilitating access to affordable credit in a responsible manner.

Across the lending, payments and digital assets ecosystems, Cross River empowers a variety of partners to innovate and bring financial products into the mainstream, supported by the Bank's regulatory expertise and compliance core competencies. In fact, the Bank's robust regulatory and

compliance framework are part of Cross River's competitive advantage and key attractions for industry leaders choosing to partner with the Bank. Technology companies leverage the Bank's regulatory expertise, advance technological offerings, and culture of innovation to ensure the highest standards of consumer protections while fostering innovation. Cross River pioneered the responsible bank partnership model, setting the industry standard across the nation for successful onboarding and oversight of fintech partners.

Products and partnerships that promote transparency, affordability and flexibility equally contribute to a strong, resilient financial services system and economy as a whole. The characteristics of these products are at the heart of everything Cross River does, operating with the goal of empowering consumers to take control of their financial health and breaking predatory cycles of debt.

These partnerships, particularly in the lending ecosystem, have been directly responsible for expanded access to affordable credit, especially to underserved communities who may not qualify for traditional financial products, as well as increased financial inclusion. While legacy institutions, systems, and products with physical locations across the country have all but left behind communities who need them most, Cross River, a community bank with two branches in the Tri-State Area, has actively built a national footprint to serve the underserved. The FDIC in particular has helped to create guidance, that while never finalized, sets out meaningful parameters for establishing responsible lending partnerships. Specifically, FIL-50-2016 ("2016 Proposed Guidance") provided an appropriate framework for holistically viewing the management, roles and responsibilities of each party in the partnership. Cross River proactively adopted many of the principles reflected in the 2016 Proposed Guidance to ensure the highest standards of regulatory oversight, compliance, and best practices to protect the interests of consumers.

The 2016 Proposed Guidance equally exemplifies the importance of practical and thoughtful regulation that not only protects the stability of the financial system but also provides standards that do not prevent or stifle banks from innovating. In establishing new regulatory standards, it is imperative that the Agencies not create a burdensome and arbitrary framework that impedes innovation and frustrates the goals of financial inclusion that help build wealth. The future potential of these products is limitless in furthering economic equality, resiliency, and modernization. Proposed regulatory frameworks should not hinder the ability to bring the industry into a new era of inclusive financial services.

Lending is only one of the many business lines in which partnerships have had immense benefits for innovation and consumers. Further, with over two dozen partnerships in the payments space, Cross River has been able to offer ways to get consumers access to their funds in a faster, more efficient, and safer way than what has traditionally been available previously. Push-to-card and Real-Time Payments capabilities are two examples of how Cross River is empowering the next generation of payments solutions. Faster access to funds allows recipients to more easily manage their funds, pay bills and avoid the necessity for credit products to make up for gaps in waiting

time. Cross River continually provides the necessary technological infrastructure and regulatory expertise to bring these solutions and partnerships to life. The suite of payments capabilities offered by Cross River helps provide partners with the tools they need to effectively scale all while being supported by the Bank's regulatory compliance expertise. Cross River has redesigned how payments companies interact with the financial system, and built out technologically superior API capabilities providing additional flexibilities and ease for our partners. Our investment in responsible innovation has created more competitive products, lowered costs for our partners, and driven overall efficiency in our capabilities. The regulatory environment must continue to support this type of innovation and actively work to remove unnecessary barriers that prevent further modernization.

The digital assets space is another area that requires robust oversight and regulatory expertise to foster innovation, protect consumers, and drive the growth of the industry in a safe and sound manner. For years, Cross River has leveraged the Bank's regulatory expertise to ensure proper BSA/AML protocols are in place and help our partners establish their KYC programs to ensure that illicit activity is not facilitated through these new offerings. Throughout its history, Cross River has demonstrated that it is not necessary to sacrifice consumer protection or safety and soundness in order to develop and provide innovative, consumer-focused offerings. In fact, Cross River believes that these attributes complement one another and promote consistent and healthy growth throughout the industry. At the end of the day, the Bank is fully cognizant of the need to ensure the proper risk management oversight of its partners and holds them to the highest standards to ensure the integrity of the financial system is kept intact. The digital assets space is a perfect example of where the Agencies should avoid stifling future growth as the potential to innovate is endless and financial institutions are well-equipped to manage any potential risks. The regulatory regime should not only embrace this type of development, but should proactively and strongly encourage institutions to partake in providing these new offerings.

While larger institutions may have the resources and capabilities necessary to acquire companies that build new solutions, develop new solutions internally and independently, or partner with other institutions, for smaller institutions, especially community banks, this may be economically unfeasible. Establishing and building long-standing partnerships has allowed Cross River to grow and compete with larger, multinational counterparts. As the industry continues to undergo rapid digital transformation, institutions of all sizes understand the importance of offering modern and convenient products to their customers. Community banks must have an equal opportunity to compete in the realities of this new economy and responsible partnerships often provide the best avenue for such competition.

Unfortunately, there is a misconception by some in the industry who believe these partnerships provide an opportunity to intentionally evade applicable laws and regulations and exploit vulnerable consumers. While there are undoubtably bad actors in the space who seek to abuse the regulatory framework and create predatory schemes as opposed to true partnerships, the

reality is these actors make up only a small fraction of an industry committed to improving the financial health of hardworking American families. Through the entirety of the partnership life cycle, Cross River ensures that the Bank's partners are held to the highest regulatory standards with the appropriate compliance frameworks in place. Cross River has a track record of ending or rejecting partnership opportunities with companies who are unwilling to comply with the Bank's rigorous and robust oversight framework. The Bank stands as proof that these partnerships can be effective in creating financial inclusion, resiliency, and innovation without sacrificing any compliance or safety and soundness standards.

Cross River believes that unambiguous regulatory standards and guidance could be used as another important tool to promote healthy and responsible partnerships, while simultaneously weeding out those institutions that seek to exploit vulnerable consumers and abuse the U.S. financial system. Clarity in these responsibilities and standards often helps to limit unintended compliance concerns and prevent responsible institutions from violating applicable requirements. For example, at the end of August, the Agencies released supplemental guidance for community banks on conducting due diligence on fintech companies. Guidance like this helps institutions better understand the holistic picture and approach they should take to partnering with fintech or other third-party companies while preventing undue risks. Guidance frameworks of this nature help to provide clear operating practices for financial institutions, while providing the flexibility necessary to tailor programs appropriate for the size, complexity, and risk portfolio of the institution.

The Proposed Guidance provides a more comprehensive list of issues and areas of consideration banks wishing to partner with third parties should generally account for. Cross River supports the Agencies' efforts to create more consistency and clarity surrounding third-party risk management principles that foster responsible innovation. While uniformity in this regard is critical to preventing arbitrary and burdensome requirements, discretion must be given to institutions to implement risk-based controls appropriate to the totality of the attendant circumstances. This is critical to both the success of financial institutions and future rulemaking.

Cross River believes that many factors discussed in the Proposed Guidance adequately address the risks institutions should identify and address when engaging in business relationships with third-party partners. The Bank further believes that additional, more specific guidance surrounding the considerations of responsible partnerships, particularly in the context of bank – third-party fintech consumer lending relationships, would be beneficial to help institutions continue to innovate safely; addressing methods that help promote financial inclusion, stability, transparency, and affordability. However, there are components of the Proposed Guidance that may unintentionally cast an overly-broad scope over certain relationships including non-contractual relationships, fourth-party relationships and relationships with affiliates/subsidiaries that should be revised to better achieve the Agencies' policy goals.

Please see below a more detailed explanation of Cross River's recommendations and comments for your consideration.

Questions for Comment

Question 1. To what extent does the guidance provide sufficient utility, relevance, comprehensiveness, and clarity for banking organizations with different risk profiles and organizational structures? In what areas should the level of detail be increased or reduced? In particular, to what extent is the level of detail in the guidance's examples helpful for banking organizations as they design and evaluate their third-party risk-management practices?

The Proposed Guidance largely provides necessary and sufficient utility, relevance, comprehensiveness, and clarity for banking organizations. The Agencies appropriately recognize the ability of banks of different size, complexities, and portfolios to make determinations for themselves and have a level of autonomy and discretion in establishing risk management practices consistent with the overall strategy and risk tolerance of the institution. The Proposed Guidance targets very relevant factors and considerations that are timely, as the industry continues to undergo drastic digital transformations that reshape how products and services are offered and delivered.

As previously discussed, third-party relationships play a critical role in the modernization of the financial services ecosystem, help smaller community banks compete nationally, and offer a wide range of benefits for consumers. The Proposed Guidance provides a comprehensive list of factors institutions should take into consideration as they continue or begin to engage with various types of vendors, partners, and service providers.

While flexibility and discretion in certain aspects of these relationships is absolutely paramount in minimizing arbitrary or burdensome barriers to innovation, certain clarifications are needed, or should be established, to promote responsible innovation and partnerships, particularly in the lending space. The Agencies should increase details around ways to specifically identify practices that promote partnerships designed to improve the financial well-being of consumers and distinguish those partnerships from others that create riskier or even predatory behavior. The 2016 proposed Guidance, while never formally finalized, provided a thorough, thoughtful, and practical approach for managing these risks and largely established the roles and responsibilities of each partner within the relationship. Additionally, the Agencies should examine the totality of the circumstances when viewing these lending partnerships and focus on items such as the financial institutions' continued monitoring of the partner, the review and approval of credit, marketing, and other critical policies implemented by the third-party, the financial institutions' willingness to retain a reasonable percentage of the originated loans on their own balance sheet (i.e., "skin-in-the-game"), the interest rates charged to consumers on these products, and the licensure and reporting requirements established for the third-party. Institutions and partners that adopt these robust compliance and oversight standards are able to provide affordable, responsible and transparent credit products that are consistent with the principles of safety and soundness and consumer protection. While the Agencies may not have the statutory authority to impose a national rate cap, they could articulate that lending products offered in excess of [36% APR as calculated under the Military Lending Act], should be more highly scrutinized and

examined to ensure nefarious "rent-a-bank" schemes are not exploiting vulnerable consumers. Rent-a-bank schemes are drastically different from responsible partnerships and those willing to undergo the serious compliance and oversight procedures discussed above. The agencies should establish this clarity to unambiguously distinguish between the two types of relationships. Articulating clear guidance in this regard will improve growth in the industry and remove existing ambiguities that stifle innovation and create costly regulatory barriers within the industry.

Additional clarity is also required in determining and refining the definition of "critical activities". Again, while discretion in this assessment is necessary and appropriate for banks to appropriately tailor their programs to the attendant risks, the Proposed Guidance uses the word "significant" in defining which activities are critical, but that adjective is subjective which gives rise to a vague and unclear expectation. For example, critical or significant activities were historically defined in the context of a traditional bank and the activities performed by third-parties, such as core banking, statement processing, etc. While each bank must oversee these partnerships utilizing a risk-based approach, it does not make sense that every partnership is deemed to be a "significant" activity within the meaning of the Proposed Guidance, as the practical burden of such a designation could, as a matter of practice, dissuade banks from expanding their product offerings to meet the needs of consumers.

The Proposed Guidance should clarify the intended regulatory meaning of the adjective "significant" in this context to provide institutions with better insight into the Agencies' expectations. This clarity will allow financial institutions to better gauge which activities are "critical activities" and how banks should tier and manage potential risk in a way that would be appropriate, effective, and satisfactory to the Agencies. The Proposed Guidance correctly articulates that not all relationships present the same level of risk between different financial institutions, even if the same activity is being compared. Banks need the appropriate discretion to rank and manage the risks posed by partnerships depending on a host of bank-specific factors and strategic goals.

Relatedly, the Agencies should clarify their expectations around contracts with third parties involving critical activities that should be approved by a bank's board of directors. The Proposed Guidance provides that the board (or designated committee reporting to the board) should be aware of and approve contracts with third parties involving critical activities before execution.

As written in the Proposed Guidance, however, it is unclear whether every contract with a third party that is engaged in a critical activity should be approved by the bank's board or whether this expectation only applies to those contracts that involve critical activities.

Given the important oversight function of a bank's board, Cross River believes that the Agencies' expectations for approval by a bank's board of contracts with third parties should be expressly limited to only apply to those contracts that actually involve critical activities – not to all contracts with a third party that is otherwise involved with critical activities (but where the subject contract does not itself involve critical activities).

As noted below, Cross River believes that FAQs 8 and 26 are consistent with the foregoing view but that this issue – which contracts should be approved by a bank's board – should be incorporated directly into the Proposed Guidance itself.

Specifically, FAQ 8 specifies that a bank may either assign a criticality or risk level to an overall third-party relationship or may identify critical activities and the third parties associated with the critical activities. In either case, FAQ 8 provides that either approach will meet regulatory expectations. FAQ 8 also acknowledges that not every relationship involving critical activities is necessarily a critical third-party relationship and that the mere involvement in a critical activity does not necessarily make a third party a critical third party. Cross River believes that this guidance should be incorporated directly into the Proposed Guidance and not merely provided in an FAQ.

Similarly, FAQ 26 provides that a bank's board should approve contracts with third parties that involve critical activities. FAQ 26 also provides that the purpose of having a bank's board approve critical third-party contracts is to ensure that the board understands "the benefits and risks associated with engaging third parties for critical services." Cross River believes that this principal should be clarified to make clear that it only applies to contracts involving critical activities and requests that this principal be incorporated directly into the Proposed Guidance and not merely provided in an FAQ.

As the Agencies have acknowledged throughout the Proposed Guidance, financial institutions require the adequate flexibility based on their size, complexity, and risk appetite to make certain determinations in relation to facilitating third-party relationships. As currently written, aspects of the Proposed Guidance create an unnecessarily (and inappropriately) wide scope for particular relationships including management of fourth-party relationships as well as those with affiliates. The Proposed Guidance discusses that the potential absence of a direct relationship with a fourth-party may affect an institution's ability to adequately assess risk. However, many of these risks can be or are actively addressed in contract negotiation where it will typically be established (e.g., by use of "Permitted Subcontracting" and "Permitted Subcontractor" concepts) when it is appropriate (or inappropriate) to subcontract certain activities. Fourth-party subcontractors which do not play a role in any material or critical activity between the financial institution or third-party partner inherently pose less risk, and it would be inappropriate to require enhanced due diligence on these subcontractors based solely upon the fact that the services are being provided by a fourth party. For example, a third-party partner may subcontract out its own payroll service processing to a subcontractor, but that activity poses little to no risk to the ability of the third party to offer products and services to the bank and has no bearing on the safety and soundness of the financial system. Financial institutions should not be required to perform enhanced due diligence on this type of activity and, more importantly, should be given the discretion in determining how to manage these types of relationships without having to meet an overly-prescriptive standard.

In looking at different types of third-party arrangements, it is critical to look at and understand the nature and nuances between the different types of relationships. Affiliates, subsidiaries, and the banking organization's holding company, should not be treated the same as a third-party vendor or unaffiliated partner. The very nature of these relationships is drastically different given the inherent corporate relationships and should not be conflated with other types of partners or vendors. It would be both unnecessary and inappropriate to require financial institutions to conduct the same levels of risk management assessment and due diligence over affiliates, the banking organization's holding company and subsidiaries as required for other third-party vendors and partners as many of these entities are heavily-regulated and audited and are already subject to bank oversight due to the regulatory landscape such entities function within.

Question 2. What other aspects of third-party relationships, if any, should the guidance consider?

As previously discussed, the Agencies should look at aspects of third-party partnerships that are specifically related to consumer lending arrangements. Access to affordable credit is a key pillar of financial inclusion and the ability to build wealth. Affordable credit helps to break cycles of debt and eliminates the need for financial products that perpetuate unhealthy spending behavior. Rational interest rates are key to economic resiliency and promoting products that support a consumer's ability to repay without imposing excessive fees or perpetuating revolving dept traps.

There are a number of ways the Agencies could distinguish between responsible, transparent and affordable financial products and those products that are the result of "rent-a-bank" schemes that often exploit and take advantage of hard-working American families. Identifying key factors that are consistent amongst responsible partnerships, which ensure that the requisite levels of oversight, monitoring, and transparency are met will help to promote responsible partnerships and ensure they are empowered to continue offering solutions that greatly benefit the financial health of American consumers.

Appropriate regulatory standards and guidance for partnerships of this nature should address the responsibilities of the parties throughout the entire third-party relationship lifecycle including things such as operational risk, compliance, continuous oversight, and risk management. Cross River's recent agreement with the Colorado Attorney General[1] firmly establishes these criteria and provides an avenue to foster healthy, responsible lending partnerships. Specifically, the agreement governs the responsibility of financial institutions to review and ultimately approve credit, marketing, and other key practices to ensure compliance with all applicable regulations including fair lending requirements. Additionally, the fintech partner agrees to subject itself to continuous oversight, not only at the initial onset of the due diligence process, but throughout the entirety of the lifecycle of the partnership. The agreement also establishes the responsibility

[1] *See* https://coag.gov/app/uploads/2020/08/Avant-Marlette-Colorado-Fully-Executed-AOD.pdf

of the Bank to originate the loan and provide the funding, whereas the fintech partner may not agree in advance to purchase every loan originated through this partnership. This specific requirement ensures that banks are lending with their own money, can appropriately tailor risks in their lending portfolio, and are also investing in their own products by retaining a percentage of the loans (i.e., have “skin-in-the-game”). Cross River firmly believes that retaining reasonable percentages of the loans it originates encourages responsible lending practices and ensures that banks that follow this model stand behind their offerings.

The agreement further covers the necessity of appropriate oversight by both federal and state regulators to ensure transparency and accountability. Given the structure of the agreement and responsibilities of each party, the robust compliance requirements provide a framework to ensure there are no questions regarding requirements and expectations. The authority of both the federal and state regulators are clearly respected, and licensure requirements firmly established. This comprehensive approach minimizes gaps and parties are unable to claim they were unaware of their responsibilities. Protocols of this nature help to ensure the security of the financial system and consumer protection standards.

Lastly, but arguably most importantly, the agreement also establishes a 36% rate cap, which is above Colorado’s state usury limits; providing an avenue to expand access to affordable and responsible credit to consumers who are most desperately in need. It is important to note that the ability to offer consumer loans above the state’s usury cap was conditioned on the oversight and involvement of the bank partner. The agreement allows for product offerings at rational interest rates that enable banks to offer innovative, competitive, transparent and responsible products to consumers, which help to lower consumer costs. Not only do these factors create safeguards needed to promote responsible partnerships, but the framework unequivocally establishes the bank as the true lender, resolving ongoing regulatory uncertainty and debate.

Question 4. To what extent does the discussion of “business arrangement” in the proposed guidance provide sufficient clarity to permit banking organizations to identify those arrangements for which the guidance is appropriate? What change or additional clarification, if any, would be helpful?

The discussion surrounding “business arrangement” provides sufficient clarity to permit banking organizations to identify arrangements for which the Proposed Guidance would apply. However, the circumstances described as to what may constitute a business arrangement should be narrowed to appropriately limit the current overly-broad scope of arrangements that may trigger the Proposed Guidance’s application. Specifically, the Proposed Guidance states that neither a written contract nor monetary exchange is necessary to establish a business arrangement subject to the Proposed Guidance. This instruction creates an unnecessarily broad set of circumstances under which enhanced due diligence, significant contracting requirements and ongoing monitoring and oversight would be necessary.

Cross River recommends that business arrangements be limited to scenarios where a contractual relationship exists between the financial institution and third-party partner or vendor. This clarification will still fully cover the entire scope of relationships and arrangements that may pose a risk to financial institutions, American consumers or the U.S. financial system while eliminating arbitrary, costly, and time-consuming requirements that prevent financial institutions from efficiently using resources. Additionally, we note that it is highly unlikely that any form of material or significant relationship that would materially raise a bank's risk exposure would be conducted without the existence of a direct contractual obligation. Valuable resources should not be allocated for immaterial, non-business arrangements.

Question 8. In what ways could the proposed description of critical activities be clarified or improved?

When evaluating the nature and definition of critical activities it is imperative banks have the appropriate discretion to identify, categorize and manage the risk portfolio of their various third-party partners. It is crucial that the Agencies do not take an overly prescriptive approach to this analysis and arbitrarily define as critical activities those that do not take into consideration the nature, size, complexities, and risk appetite of the individual institutions. As all activities are risk-based based upon the risk appetite of each particular bank, some activities deemed critical for one institution may not be critical for another and institutions should not be forced to take a single "cookie cutter" approach. Further, not all relationships present the same level of risk to all banking organizations. Even if identical activities are being compared, the determination of whether those activities are critical will be fact-and-circumstances-based and specific to each individual institution.

As previously discussed in question 1, it would be extremely useful to clarify the meaning of the word "significant" in the context of defining critical activities. The standard expressed in the Proposed Guidance (i.e., "Critical activities" are significant bank functions or other activities that: (i) could cause a banking organization to face significant risk if the third party fails to meet expectations; (ii) could have significant customer impacts; (iii) require significant investment in resources to implement the third-party relationship and manage the risk; or (iv) could have a major impact on bank operations if the banking organization has to find an alternate third party or if the outsourced activity has to be brought in-house), is subject to interpretation and does not provide institutions with the requisite insight needed to appropriately manage the risks the Agencies are attempting to identify and mitigate. A bank's governance protocol should be given the flexibility to appropriately tailor and implement the appropriate level of risk governance and mitigants to ensure the necessary oversight of truly critical relationships.

A clear understanding of how the Agencies interpret the term "significant" will help institutions appropriately identify, rank and manage risks and tailor internal protocols to properly address these concerns. With this additional clarity, resources can then be appropriately allocated to

develop appropriate oversight and management programs for third parties providing support for critical activities. A bank's governance protocol should be trusted and implemented to provide the appropriate and necessary oversight of these types of critical relationships.

Question 10. What revisions to the proposed guidance, if any, would better assist banking organizations in assessing third-party risk as technologies evolve?

Cross River believes that the Guidance should be supplemented to address matters regarding fintech partners' proprietary underwriting models (including AI learning models). Cross River understands that in the bank - fintech partnership model, banks must be aware of, and understand, the criteria used by the fintechs' proprietary underwriting models (including for matters related to regulatory compliance). The Proposed Guidance should recognize that often, it is the fintech partners that own and maintain these proprietary models, and banks have their own processes to ensure that the models do not violate applicable fair lending laws and regulations.

Understandably, fintech partners are concerned about maintaining confidentiality should their underwriting models be shared with the banks' regulators. In order to address these concerns, the Guidance should reflect that any such sharing will be maintained by the regulators in strict confidence (and not disclosed to the public). In examining the use of this technology the regulators should understand the nature of these relationships and where ownership lies over aspects of the fundamental technology and its deployment. To allow for the successful adaptation of this continuously evolving technology, and prevent stifling innovation, the Proposed Guidance should address aspects of the relationship that banks do control, including regularly-scheduled audits and oversight, and avoid establishing requirements and responsibilities for financial institutions concerning processes they do not own.

Question 11. What additional information, if any, could the proposed guidance provide to banking organizations in managing the risk associated with third-party platforms that directly engage with end customers?

No additional information is necessary for managing risks associated with third-party platforms that directly engage with end customers. Cross River fully believes that banks are ultimately responsible for the relationship between the end customer and the bank, even if a third-party partner is involved. At the end of the day, it is the bank that has the direct client relationship with the customer and ultimately owns the relationship, product, and associated risk management process. For example, Cross River partners with a number of fintech platforms in the consumer lending ecosystem. While the fintech partners may have a relationship with the borrower (e.g., the fintech partner may service the loan), it is Cross River that originates and funds the loan, owns the end-to-end lifecycle of the loans that it retains on its balance sheet, and oversees all aspects

of risk including things such as operational risk and compliance risk. Cross River is the true lender and owns the relationship with the customer. The Bank's risk management practices and responsibilities remain the same, regardless of our partners' involvement and engagement with the end customer. This fact is true of any product offered through the Bank whether it be lending, deposit taking, payments services or other fintech banking products.

Question 12. What risk management practices do banking organizations find most effective in managing business arrangements in which a third party engages in activities for which there are regulatory compliance requirements? How could the guidance further assist banking organizations in appropriately managing the compliance risks of these business arrangements?

Cross River strongly believes that initial and ongoing periodic risk assessments and monitoring are the most effective ways to manage third-party activities which pose the greatest regulatory compliance risk to banking organizations. Generally, this allows banks to hone in on particularly high areas of risk and monitor for any variances that may deviate from the bank's risk appetite. Effective risk management practices should include validating the third party's controls and independently testing and monitoring those controls according to a schedule or cadence determined by the risk level presented by the activity. By having a third-party create and implement its own robust compliance management systems ("CMS"), and the bank perform its own independent monitoring and testing of the third-party's CMS, identification of regulatory compliance risks can occur quickly and creates a more collaborative and transparent relationship between the bank and the fintech partner.

Cross River strongly believes that the Proposed Guidance should explicitly authorize the CMS approach discussed above (i.e., with the third party performing the initial CMS testing and monitoring and the bank overseeing and monitoring such activity and findings).

For example, the fintech partner would conduct monitoring on its complaints, identify trends and escalate issues and the bank, in turn, would review the adequacy of this monitoring to ensure that proper controls are in place and issues are escalated and remediated appropriately. That is not to say that banks should not re-perform testing in certain, high-risk, circumstances or when an issue arises, but it should not be the standard to require banks to reperform all of the monitoring and testing that is already being performed by the partner.

To require both the third party and the bank to be equally responsible for performance of CMS testing and monitoring would drain the resources of both parties, be duplicative, and would add no value.

In contrast, the Proposed Guidance should provide examples of certain minimum "best practices" such as conducting regularly-scheduled joint third party – bank regulatory compliance meetings where identified potential regulatory risks are reported, discussed and addressed.

Additionally, while there are major players in the fintech space today that have the necessary capital to support a high demand of resources required to implement their own robust CMS, many fintechs are startups. Many of those startups do not have a large amount of compliance resources nor the capital to meet the resource requirements necessary by the Proposed Guidance.

With regard to these smaller, more resource-constrained fintechs, Cross River feels that the Proposed Guidance should provide banks with the ability to supplement the fintech partner's compliance resources by the banks' performance of CMS testing and monitoring of the fintech partners' operations or by hiring a third-party vendor to perform such work until the fintechs are adequately resourced to perform these functions on their own. This approach would lower the barrier-for-entry thereby reducing the time these fintech platforms can help the American consumer.

Further, where possible, to minimize regulatory burdens and unnecessary and duplicative costs, information sharing between institutions should be encouraged. Establishing a consortium and process in which information can be relied on between multiple institutions during the due diligence phase of establishing a third-party relationship will help to eliminate many time and resource-draining procedures that ultimately do not contribute to enhanced safety and soundness or financial stability as a whole.

Question 13. In what ways, if any, could the discussion of shared due diligence in the proposed guidance provide better clarity to banking organizations regarding third-party due diligence activities?

Shared due diligence may help to minimize extensive costs, time and resources being dedicated to onboarding third parties without sacrificing high compliance standards or requirements. Conducting a thorough onboarding process that heavily scrutinizes future partnerships is both costly and at times a slower process, regardless of the size or complexity of the institution. Through this process, Cross River performs its due diligence and the associated qualitative assessment as to not only the potential business opportunity, but also the associated reputational risks, business soundness, applicable licensure status, cybersecurity protocols and overall health and stability of, potential partners.

By sharing aspects of the due diligence processes, institutions may reliably reduce the resources necessary to onboard third-party partners and vendors and increase the speed and efficiency of getting products to market – thereby helping the American consumer meet their responsible credit needs. Collaboration among banking institutions that use the same third party, which the Agencies appreciate can improve risk management while lowering costs, will provide an opportunity to remove existing barriers for entry. While the Proposed Guidance clearly states that institutions must abide by applicable antitrust laws when collaborating, the Agencies should

specify what types of information can be specifically relied on when shared to remove the necessity for an institution to complete similar due diligence of its own.

Cross River understands that collaboration and reliance on the provided information does not relieve the institution receiving the information from needing to implement the appropriate protocols to analyze such material in the context of the bank's particular business goals and risk tolerance, manage risk and maintain oversight of the third-party. Clarity in this regard would help reduce initial burdens of onboarding while simultaneously requiring ongoing monitoring appropriately tailored to the overall risk posed by the third-party and the activity they are supporting. Ultimately information sharing would help to remove costly barriers that slow down third-party onboarding and ultimately hinder innovation. It is critical that a more-efficient system of information sharing be established to modernize industry-wide practices.

Question 14. In what ways, if any, could the proposed guidance further address due diligence options, including those that may be more cost effective? In what ways, if any, could the proposed guidance provide better clarity to banking organizations conducting due diligence, including working with utilities, consortiums, or standard-setting organizations?

As discussed in our response to question 13, the collaboration of institutions with respect to due diligence can not only increase the efficiency and speed of safely onboarding third-party partners, but help to lower costs. This is especially helpful for smaller institutions and would allow them to more efficiently allocate funds to other pressing matters or developing projects that contribute to innovation. Identifying trusted consortiums, trade groups, or standard-setting organizations that industry participants can reasonably rely on should be encouraged, as they have the potential to drastically simplify tedious internal processes that are both expensive and time-consuming for the bank and third party alike. This policy would help remove barriers and burdensome costs without sacrificing the need for appropriate safeguards and risk management procedures.

The Proposed Guidance should clarify how these identified groups could widely share information between financial institutions and regulators to satisfy existing requirements (perhaps by the establishment and maintenance of a robust compliance certification process and industry-recognized accreditation standard). Clearly establishing the role of these organizations, the information they can share to minimize duplicative due diligence efforts, and ways in which industry participants could rely on this information would all be helpful towards creating a more cost-effective, industry-wide application.

Question 15. How could the proposed guidance be enhanced to provide more clarity on conducting due diligence for subcontractor relationships? To what extent would changing the terms used in explaining matters involving subcontractors (for example, fourth parties) enhance

the understandability and effectiveness of this proposed guidance? What other practices or principles regarding subcontractors should be addressed in the proposed guidance?

The Proposed Guidance should make clear that financial institutions maintain the discretion on requiring enhanced due diligence requirements for subcontractors / fourth parties based on the facts and circumstances of the applicable partnerships, contractual obligations, and nature of the fourth parties' relationship to the services provided to the bank by the third-party partner. The use of continued subcontracting may create a chain of service providers for a banking organization, where the organization does not have a direct relationship.

The nature of a chain of service providers does not inherently create undue or worrisome risks, if they are not conducting critical activities or working with third parties that are themselves assisting in providing critical activities. Even if subcontractors are used by third parties performing critical activities, the potential for enhanced risk is only present to the extent that the subcontractor is providing services related to the critical activity itself. Subcontractors providing additional unrelated services do not necessarily introduce enhanced risk and should not automatically trigger requirements for additional due diligence by the financial institution. Ultimately, the parties have the ability to negotiate the permissibility / availability of subcontractor use in the relevant relationship agreement, and the use of certain / all subcontractors can be explicitly prohibited for certain designated activities.

The Agencies should leave that discretion entirely in the hands of financial institutions and their partners based on the attendant facts and circumstances of the particular relationship. It would be inappropriate to create a universal generic standard in this regard and would be impractical and overly-burdensome for institutions to implement.

Question 16. What factors should a banking organization consider in determining the types of subcontracting it is comfortable accepting in a third-party relationship? What additional factors are relevant when the relationship involves a critical activity?

Determining the types of subcontracting activity financial institutions are comfortable accepting in third-party relationships is fact-and-circumstance-specific to each individual relationship and institution. Financial institutions must take a holistic approach in evaluating what activities would be appropriate or inappropriate for allowing their third-party partners to subcontract.

Generally, relationships that support critical activities of the bank should undergo a higher-degree of scrutiny and be cautiously evaluated to determine if it is appropriate to have a fourth-party subcontractor involved in supporting such an activity. If the financial institution does in fact determine that subcontracting for such a critical activity should be permitted, increased transparency and a higher-degree of information sharing would be appropriate to ensure the activity is being conducted as anticipated and ensure the financial institution is not being exposed to any additional unnecessary risks.

The contractual obligations can explicitly address this concern and deem such subcontracting impermissible, if necessary. If, however, the subcontractors are providing services unrelated or unaffiliated with critical activities, additional requirements should not be automatically triggered and discretion should be provided to financial institutions under these circumstances. Ultimately, institutions must account for the potential risks posed by subcontractors and adequately establish protocols designed to mitigate such risk. If the fourth parties do not touch critical activities and pose no additional risks, financial institutions should not be subject to any additional requirements or enhanced due diligence requirements. It is critical that financial institutions be afforded the necessary flexibility and discretion to measure risk and avoid allocating valuable resources to unnecessary and overly-burdensome tasks. Effective allocation of resources helps to promote responsible innovation, modernized offerings and necessary growth throughout the industry.

Question 18. To what extent should the concepts discussed in the OCC's 2020 FAQs be incorporated into the guidance? What would be the best way to incorporate the concepts?

Aspects of the OCC's 2020 FAQs can be helpful in providing additional clarity with respect to some of the ambiguities in the Proposed Guidance and can easily be incorporated into the appropriate sections of the Guidance. Most importantly, the theme reflected throughout the FAQs discussing financial institutions' discretion to make decisions and acknowledgment that there is no one way to universally implement onboarding and monitoring / compliance systems is an important point that cannot be over-emphasized. While other aspects of the FAQs support and are consistent with the overall Proposed Guidance, the Agencies should take the opportunity to formalize these overarching concepts.

FAQ 4, related to data aggregation, customer-permissioned data, and screen-scraping practices would be helpful to incorporate into the Proposed Guidance to give financial institutions a more holistic picture of how to navigate partnerships in this capacity, especially as these activities continue to gain prominence throughout the industry. Additional clarity should be added to the Proposed Guidance with regard to data ownership and usage while engaging with these providers (in light of the providers' relationship with end customers). Clearly identifying the roles and responsibilities of each party in these types of relationships will help to avoid any unintended noncompliance.

As noted above, FAQ 8 specifies that a bank may either assign a criticality or risk level to an overall third-party relationship or may identify critical activities and the third parties associated with the critical activities. In either case, FAQ 8 provides that either approach will meet regulatory expectations. FAQ 8 also acknowledges that not every relationship involving critical activities is necessarily a critical third-party relationship and that the mere involvement in a critical activity does not necessarily make a third party a critical third party. Cross River believes that this guidance should be incorporated directly into the Proposed Guidance and not merely provided

in an FAQ. FAQ 11 specifically speaks to a third party's use of subcontractors and a financial institution's ability to obtain reports provided by third-party partners for purposes of evaluating whether the third party has effective oversight of its subcontractors. Reliance on these reports or a certification process would be helpful in minimizing unnecessary additional procedures for financial institutions, especially for subcontractors who are unrelated to any form of critical activity.

FAQ 19 should also be incorporated and supplements Cross River's recommendations for managing healthy and responsible third-party lending partnerships. This particular FAQ, in addition to the recommendations described, provides the Agencies with powerful tools to not only promote financial inclusion, and expand access to affordable credit and modernized solutions, but equally provides an avenue, alongside existing powers, to effectively remove predatory behavior from the industry. A lack of clear guidance and standards creates opportunities for high-interest, predatory loans that perpetuate cycles of debt and can have devasting effects on consumers' financial well-being. It is essential that the Agencies use the Proposed Guidance as an opportunity to empower banks, especially community banks, to offer solutions that lower costs for consumers, increase competition and provide products that are compliant with the principles of consumer protection.

As noted above, FAQ 26 provides that a bank's board should approve contracts with third parties that involve critical activities. FAQ 26 also provides that the purpose of having a bank's board approve critical third-party contracts is to ensure that the board understands "the benefits and risks associated with engaging third parties for critical services." Cross River believes that this principal should be clarified to make clear that it only applies to contracts involving critical activities and requests that this principal be incorporated directly into the Proposed Guidance and not merely provided in an FAQ.

Conclusion

Cross River appreciates the opportunity to provide comments on the Proposed Guidance. We applaud the Agencies' efforts to create a uniform, concise, and consistent approach for managing risks that may be associated with partnering with third parties. Responsible partnerships are key to economic growth, competition throughout the industry, and providing opportunities for consumers to take control of their financial health. These partnerships promote financial inclusion and contribute to a strong, resilient financial system. Without the opportunity to innovate and partner with third parties, many consumers would continue to be excluded from the legacy financial system, unable to obtain affordable financial products and be forced to rely on high-interest, high-cost, predatory debt traps.

It is critical that in developing applicable guidance frameworks, the Agencies create a system that fosters innovation and allows partnerships to achieve their true and full potential of financial inclusion. The industry understands that establishing these third-party relationships requires robust initial due diligence and contract negotiation, and continuous oversight and monitoring

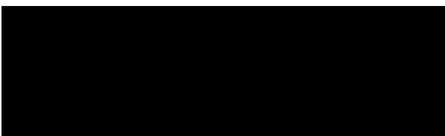
designed to uphold the highest regulatory standards that protect the health of American consumers and the overall U.S. financial system. Cross River fully embraces this responsibility of onboarding and empowering these partners in order to ensure the highest levels of compliance.

Partnerships provide pockets of opportunities to explore previously unthought-of solutions that can be scaled and adopted across the industry. The Agencies should encourage this behavior in a safe and responsible manner and work hand-in-hand with the industry to provide avenues that embrace innovation. It is critical that the regulatory environment allows financial institutions to be agile, nimble, resourceful and most of all encourages institutions to reimagine and redesign how modern solutions are delivered. Stagnation and regulatory arbitrage create barriers to creativity and prevent institutions from reaching their full potential. The overarching regulatory regime should not prevent innovation from blossoming, but rather support and encourage the ability to redesign the industry in a more-efficient and cost-effective manner. Ultimately, consumers bear the brunt of the adverse impacts when the industry is unable to create more competitive, affordable and accessible solutions. It is imperative that banks be given the tools and discretion needed to provide consumers with a suite of products that removes frictions for access and participation in the financial system.

The Bank welcomes the opportunity to continue to collaborate with the Agencies and serve as a partner. Transparency, communication, and coordination between industry and regulators is essential to the success of any future rulemaking.

If you have any additional questions, please do not hesitate to contact Arlen Gelbard, EVP and General Counsel at agelbard@crossriverbank.com or 201-808-7189. We look forward to continuing engaging in dialogue and serving as a resource for the Agencies in the future.

Sincerely,



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