



October 27, 2016

Federal Deposit Insurance Corporation  
550 17th Street, N.W.  
Washington, D.C. 20429-9990

By email: [thirdparty lending@fdic.gov](mailto:thirdparty lending@fdic.gov)

Re: FIL-50-2016, Proposed Guidance for Third-Party Lending

Ladies and Gentlemen:

WebBank, an FDIC-insured Utah-chartered bank, welcomes the opportunity to comment on the FDIC's proposed "Examination Guidance for Third-Party Lending" (the "Guidance"), released in connection with FIL-50-2016 (July 29, 2016). We welcome the FDIC's release of the Guidance and strongly support finalization of the Guidance. We believe it is important for the FDIC to set clear guidance for these types of programs so that banks and non-banks can work together, with confidence about the application of the regulatory structure and requirements, to offer responsible and innovative banking products to consumers. The FDIC has previously issued guidance that addresses these types of lending programs, and the FDIC's authority over the programs as well as the third parties that assist banks in these programs, but we believe there is significant value in the new Guidance to give a clear structure for the exercise of the FDIC's authority in this area.

**Background.** WebBank's principal business line is the operation of strategic partnership programs, through which WebBank offers consumer and business credit under program agreements with third-party servicing companies ("Third Party Servicers"). WebBank has built a team with substantial experience and expertise in managing these Third Party Servicer relationships. The Bank's senior leadership team has deep experience in the banking industry generally, and specifically in the management of third-party relationships. WebBank, under the management of this current leadership team, has offered these programs since 2008, and key members of the team have even longer experience in this area at a prior employer. WebBank's strategic partnership team is specifically dedicated to diligencing, onboarding, managing, monitoring, and maintaining these strategic partnerships with the Third Party Servicers.

The history of WebBank's business begins with private label financing, and WebBank has several long standing private label programs where the Bank provides financing to purchasers of products and the merchant (or an affiliate) acts as the Bank's Third Party Servicer. WebBank is also a principal member of MasterCard, and has offered consumer credit card programs. The Bank serves as the issuing bank for closed-loop credit products that can be used at multiple merchants. The Bank has participated in marketplace lending platforms since their inception, and is now the issuing bank for the loans issued through three of the largest consumer marketplace platforms.

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WebBank has developed, and continues to refine, a comprehensive program to manage its relationships with Third Party Servicers. This program is based on the risks that the relationships pose to the Bank and consumers – including strategic risk, operational risk, credit risk, compliance risk, information security risk, and reputational risk. WebBank’s Board of Directors has adopted a comprehensive policy governing the oversight of the Third Party Servicers, which governs all stages of the engagement of a Third Party Servicer: diligence of new relationships, contracting with new Third Party Servicers, oversight and monitoring of Third Party Servicers, ongoing review of the relationships, and termination of relationships. WebBank’s oversight covers numerous topics, including: credit underwriting and performance; compliance with consumer protection laws including privacy laws; complaint response and monitoring; compliance with the Bank Secrecy Act and related requirements; liquidity exposure; profitability; information technology, information security, and business continuity; and monitoring of vendors used by the Third Party Servicers.

**WebBank’s Response to the Guidance.** We believe that the Guidance is well founded and appropriate. We offer a few specific comments below, but in general we urge the FDIC to finalize the Guidance. We believe that WebBank has already built processes and procedures to comply with the Guidance, and that the Guidance presents an appropriate framework for banks to follow when entering into these relationships.

The FDIC has the authority to examine the third parties that participate in the programs that banks offer. Under the Bank Service Company Act, the FDIC’s supervisory authority extends to third parties providing services to banks. 12 U.S.C. § 1867(c). That would include, in the case of WebBank, its Third Party Servicers. The FDIC has previously released guidance on its supervision of third party service providers. *See* Guidance For Managing Third-Party Risk (FIL-44-2008). The FDIC has also issued more specific guidance relating to programs where banks originate loans with third party relationships. *See, e.g.*, “Marketplace Lending,” FDIC Supervisory Insights (Winter 2015) (noting this model as an origination structure for marketplace loans); FDIC Advisory on Effective Risk Management Practices for Purchased Loans and Purchased Loan Participations (FIL-49-2015) (discussing bank purchases of loans originated through such relationships); FDIC Examination Manual, Chapter 14, “Credit Card issuing Rent-a-Bins” (discussing bank issuance of credit cards through relationships with third parties). Thus, there is no doubt that these relationships, and the products offered through these relationships, are subject to the FDIC’s authority and supervision.

It is important, building on this foundation of prior authority, for the FDIC to finalize the new Guidance. The new Guidance provides a clear framework within which banks, such as WebBank, can offer innovative and responsible products to customers. These types of relationships between banks and non-bank innovators have facilitated the development of valuable new credit products in the marketplace – including the development and expansion of marketplace lending programs that have offered many Americans the ability to access reasonable cost loans to refinance debt and make major purchases. These products are fair and transparent, and can reduce costs to consumers while leveraging technology to provide a financial service in a form that consumers’ desire. Final Guidance can help remove regulatory and legal uncertainty, demonstrating that these products are extensively supervised by the FDIC and within the ambit of the bank regulatory structure. That certainty can give all stakeholders the confidence to continue to support these products.

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**Response to Questions 1 through 4.** The types of relationships that WebBank has with Third Party Servicers appear to fall under the first category of third-party lending arrangements identified by the FDIC in the guidance, which the FDIC labels as “insured institutions originating loans for third parties.” We urge the FDIC to modify this terminology, as it is not correct to say that the bank is originating a loan “for” another party. Rather, in all cases WebBank is originating the loans for itself and using its own funds, and WebBank could hold the loans to maturity. Indeed, WebBank does hold some of the loans that it originates for its long-term investment. And, in the case of credit card and other open-end relationships, WebBank also maintains a contractual relationship with the borrower and will extend additional credit. Thus, we recommend that the FDIC label this category as “insured institutions originating loans for potential sale to third parties.”

We also urge the FDIC to delete the last sentence of footnote three from the Guidance. The law is straightforward. It clearly establishes an FDIC-insured bank’s ability to export interest under Section 27 of the Federal Deposit Insurance Act, 12 U.S.C. § 1831d (“Section 27”). Moreover, a court has specifically held that Section 27 applied to a consumer credit account issued by WebBank as part of a program between WebBank and a Third Party Servicer. *See Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 2d 1359 (D. Utah. 2014). The *Sawyer* court rejected the plaintiff’s attempt to argue that the Third Party Servicer – rather than WebBank – was the lender. Courts have reached similar conclusions in other cases that have attempted to challenge responsible lending products that are offered and supervised by regulated banks. As noted above, these types of lending programs have repeatedly been recognized by the FDIC as bank activities. *See supra*, page 2; *see also* “Opportunities and Challenges in Online Marketplace Lending,” white paper released by the Treasury Department, May 10, 2016.<sup>1</sup> Thus, we urge the FDIC to support the straightforward application of Section 27 to these programs, just as the OCC recently supported the application of the National Bank Act’s rate exportation provision, 12 U.S.C. § 85, to national bank programs in the amicus brief filed with the Supreme Court in the *Madden* litigation (available at <http://www.scotusblog.com/wp-content/uploads/2016/06/midland.invite.18.pdf>).

WebBank’s programs are all mainstream lending programs, where the consumer APR is 36% or less. As described above, WebBank actively manages and supervises all of its Third Party Servicers for the programs that it offers. These programs are within the scope of Section 27’s authority.

**Response to Question 7.** WebBank requests that the FDIC consider a modification to the conclusion in the Guidance that the FDIC’s *Expanded Guidance for Subprime Lending* would apply to all subprime programs in third-party lending arrangements. Applying all aspects of the *Expanded Guidance* to all subprime programs offered through third-party programs is not necessary, as in many cases the banks offering such programs have substantially mitigated certain of the risks identified in the guidance. Rather, the FDIC should instead apply the *Expanded Guidance* to subprime programs on a risk-based approach, where the facts of the program indicate substantial risks to the insured bank consistent with the guidance.

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<sup>1</sup> Available at

[https://www.treasury.gov/connect/blog/Documents/Opportunities\\_and\\_Challenges\\_in\\_Online\\_Marketplace\\_Lending\\_white\\_paper.pdf](https://www.treasury.gov/connect/blog/Documents/Opportunities_and_Challenges_in_Online_Marketplace_Lending_white_paper.pdf).



**Response to Question 9.** WebBank requests that the FDIC consider modifying the portion of the Guidance that establishes a 12-month examination cycle with concurrent risk management and consumer protection examinations for institutions with significant third-party lending programs. In its RMS Manual of Examination Policies, the FDIC already outlines a risk-based approach to determining examination frequency, within the parameters established by federal law. This approach should be followed for banks offering third-party lending programs as well. In particular, for institutions that have demonstrated an ability to effectively manage these relationships, a standard exam cycle may be appropriate.

Thus, we suggest that the FDIC maintain a risk-based approach in setting the examination and visitation schedule for each institution.

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To conclude, we support the issuance and finalization of the Guidance, with modest modifications. We believe that this Guidance will be helpful to insured institutions and the third parties with which institutions work, to provide greater clarity in understanding regulatory expectations and properly structuring and supervising these arrangements.

Sincerely,

John H. McNamara  
Executive Chairman

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