



October 27, 2016

**VIA EMail to [thirdparty lending@fdic.gov](mailto:thirdparty lending@fdic.gov)**

Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street, NW  
Washington, DC 20429

Re: Cross River Bank Comments on the  
FDIC Proposed Examination Guidance  
on Third-Party Lending Relationships

Ladies and Gentlemen:

Cross River Bank (“Bank”) is a Federal Deposit Insurance Corporation (“FDIC”)-insured nonmember New Jersey chartered commercial bank headquartered in Teaneck, New Jersey. The Bank appreciates the opportunity to comment on the FDIC’s proposed Guidance for Third-Party Lending (FIL-50-20-16) (“Proposed Guidance”).

The Bank recognizes the important role that the FDIC plays in supervising institutions and appreciates its recognition that the use of technology has in facilitating credit to more American consumers and small businesses. Specifically, since the financial crisis in 2008, many institutions have withdrawn from the unsecured consumer lending sector creating a void in which a large segment of individuals have limited access to traditional credit. In turn, this has led to the advent of various types of alternative models to meet these needs, including the non-bank financial company direct lending and marketplace lending platform (“MPL”) models.

From a regulatory perspective, institutions, such as the Bank, have relied upon the general guidance promulgated by the banking regulators applicable to third-party arrangements. As a result, there has been no consistency or certainty that the approach taken by individual institutions will be satisfactory in the context of a regulatory examination. Accordingly, the Bank commends the FDIC for proposing an overall uniform regulatory framework for all FDIC-regulated institutions which originate loans in “partnership” with third-party lending platforms. This Proposed Guidance will also serve to assist the institutions with their due diligence and monitoring, by clarifying the FDIC’s regulatory expectations for all third parties involved in lending arrangements and is consistent with the Bank’s strong advocacy in support of effective

and meaningful consumer protections and regulatory oversight. In our comments, we aim to highlight the role the Bank plays as a leader in responsible innovation and providing credit to Americans, including to borrowers with limited credit histories and to historically underserved communities.

The Bank was founded in 2008 to operate as an independent community bank offering a broad range of services and deposit and loan products to the public. Over the past several years, the Bank has developed key strategic partnerships with financial technology leaders to build fully-compliant and integrated solutions catering to the online lending and payment processing industries. The Bank believes in working with partners who demonstrate that they operate in a lawful and fully compliant manner and provide the highest levels of consumer protection and transparency.

Marketplace Lending is a significant component of the Bank's strategic business plan. At the highest level, each MPL partner operates a platform through which it markets Bank originated loans to the public. Since commencing its MPL lending business in 2013, the Bank has always understood that as the lender, it is responsible for all aspects of the origination process and has in place the dedicated resources, systems, policies and procedures to ensure that the entire lending process is performed in a safe and sound manner, in accordance with existing supervisory guidance, and in compliance with applicable laws, rules and regulations. To the extent that certain aspects of the lending process are performed by third parties, the Bank performs such due diligence and ongoing monitoring to ensure the same level of compliance as if it were performing those functions internally. Currently, the Bank has established relationships with more than 15 leaders in the marketplace lending platform arena.

It is a central tenet of the Bank's strategic plan that a strong third-party lending risk management program and comprehensive third-party lending policies be implemented and maintained. The Bank concurs with the FDIC that institutions desiring to enter into third-party lending platform relationships should first establish a risk management program and then maintain effective management oversight commensurate with the risk and complexity of the institution's third-party lending platform activities. The Bank's third-party lending platform risk management program is comprehensive and the cumulative result of many years of experience working with third-party lending platforms. The Bank also has extensive management and operational knowledge to properly evaluate third-party lending platform programs and to manage and mitigate the potential the risks to the Bank associated with various third-party lending platform models. Most importantly, the Bank adheres to the FDIC's directive that the evaluation of an institution's lending activities conducted with third-party lending platform relationships should be accomplished as if the activities were performed by the institution itself, resting ultimate responsibility on the Bank's board of directors and senior management.

Set forth below are the Bank's comments to the proposed guidance for third-party lending.

### **Third-Party Lending Definition and Scope of Guidance**

The Bank generally agrees with the scope of the Proposed Guidance and the description of services performed by third parties.

- However, for certain services (such as credit underwriting and origination, regulatory compliance and loan contract issuance), it should be clarified that an institution may rely on the third-party providers, so long as the institution has conducted an independent due diligence review of such services and established effective policies and procedures to manage the associated risk.

The Proposed Guidance describes three (3) categories of third-party lending platform arrangements. Here, the Bank believes that the descriptions pose potential issues, including but not limited to the following:

- While the categorizations may describe particular arrangements between institutions and third parties, the Bank believes that the descriptions are overly broad and do not account for the many factual differences and complexities associated with such relationships.
- The descriptions, as written, could expose certain institutions/arrangements to claims (or positions taken) by individuals, courts or state governments that the arrangement presents potential “true lender” issues. Accordingly, it is the Bank’s view that these categorizations may require further thought and discussion.
- The first category arguably describes a “rent-a-charter” arrangement – this is inconsistent with the apparent purpose of the Proposed Guidance, i.e., that the institution is responsible for all aspects of the entire lending process, whether or not a portion is actually performed by a third-party.
- The second category should similarly be revised, as it describes third parties as lenders – the Bank presumes that the intent of the Proposed Guidance is to reinforce the fact that the institution in these arrangements is the originating lender (and not the third-party).
- The third category, as written, ostensibly describes the institution’s purchase of software which is used for lending or “white-label” services. Accordingly, the Bank believes that this category also requires reconsideration.
- The Bank believes that the amount/percentage of retention of loans originated with the involvement of a third-party should have no bearing on the nature and level of due diligence or oversight required – and instead should always be based on the level of risk
- Since the Proposed Guidance does not distinguish any regulatory obligations or manner of treatment based on the categories set forth, we would suggest that they be presented as examples of arrangements, rather than specific categories.

### **Potential Risks Arising from Third-Party Lending Relationships**

The Bank agrees that all third-party suppliers of services to a bank present various potential risks which must be identified, evaluated, measured, monitored and mitigated. The Bank generally agrees with the list of safety and soundness and compliance risks identified by the FDIC that may be present to varying degrees in third-party lending platform relationships. As the FDIC acknowledged however, these are potential risks; not all of the identified risks may be present in all third-party lending platform relationships.

### **Third-Party Lending Risk Management Program**

As noted above, the Bank maintains a comprehensive third-party lending platform risk management program which incorporates all of the elements identified by the FDIC for the development of an effective third-party lending platform risk management program.

- Specifically, the Bank is concerned with the requirement (in the Due Diligence section) that requires the review of all available information. Both initial due diligence and ongoing monitoring is and should be risk-based, and as such, it should be within the institution's reasonable judgement as to what information to consider and evaluate.
- Regarding the evaluation of effectiveness of operations and controls of the third-party, language should be added to clarify that for a third-party with no existing operations, the initial due diligence may be based upon a review of documentation and discussions with management. This should be followed up with an audit conducted within 12 months of commencement of operations.

The Bank generally agrees with the Proposed Guidance's definition of "significant" third-party lending platform relationships.

- However, the Bank does not believe that simply by having multiple third-party relationships in all cases should rise to the level of "significant". To the extent the relationships are deemed "significant" by the institution and its board of directors, then ongoing oversight of its third parties should be conducted in a commercially reasonable manner and not mandatorily imposed. The determination of "significant" will be accomplished through initial due diligence and ongoing evaluations and/or audits of the relationships in accordance with the risk program.

### **Supervisory Considerations**

In credit underwriting:

- Given the significant advances made in data analytics and modeling, the Bank invites the FDIC to make concerted efforts to understand and accept "alternative" underwriting criteria (both positive and negative), that would allow for more accurate underwriting and decisioning, and would be acceptable when evaluating compliance with the requirements of fair lending.
- The Bank is concerned about the requirement to include sold loans in various analyses. Once the loans are sold, it is possible that the institution may not have access to, or the ability to obtain, performance statistics or related information. While the Bank does not

take issue with the rationale for inclusion, there needs to be a reasonable efforts standard if the third-party or the institution is not servicing the loan or owns the loan.

- In order to reduce the risk to lenders of “loan stacking” (when a borrower applies for loans through different MPLs at the same time and does not disclose same), the Bank suggests that the FDIC allow for technological development and limited information sharing among lenders to identify such individuals on a real-time basis.

Regarding applicability of Subprime Guidance:

- The Bank understands the rationale for addressing application of the Subprime Guidance, but believes that the elimination of the threshold requirement for application of Subprime Guidance to all third-party lending platforms is not appropriate. In other words, it is the Bank’s view that a materiality threshold be established for the application of the Subprime Guidance; if not, the existence of even a handful of Subprime loans would trigger application of extensive regulations.

### **Examination Procedures**

Regarding the examination cycle:

- The Bank suggests that whether institutions engaging in significant third-party lending platform activity should be examined on a 12-month examination cycle that otherwise qualify for an 18-month examination should be determined by the FDIC on a case by case basis.
- The determination should be based on a number of factors such as an institution’s overall risk profile associated with the particular third-party relationship, historical composite ratings, regulatory and consumer compliance record and the effectiveness of the institution’s third-party lender risk management program and management oversight.
- Finally, the Bank suggests that the words “at least” be deleted, as that implies that examinations should be done even more frequently than 12 months.

The Bank understands the FDIC’s supervisory interest in conducting targeted examinations of significant third-party lending platform arrangements and other third parties.

- The Bank believes that such targeted examinations should be on a case by case basis where warranted in situations where financial institutions have not established a strong risk management program with ongoing board and management oversight or where there are findings in the normal examination process of safety and soundness concerns or possible violations of law and regulations. These third parties are not regulated by the FDIC and the prospect of targeted examinations in the absence of compelling reasons (including the FDIC’s formal designation of the third-party as an “institution-affiliated party”) could result in a third-party determining not to engage with an institution and pursue other means of funding.

An institution's third-party risk management program should include a thorough and independent assessment of third-party loans to determine compliance with consumer compliance regulations, underwriting and loan administration guidelines and credit quality. The Bank, for example, maintains reports on such matters that are presented to the board of directors and made available for review during the examination process.

- The Bank believes that transaction testing should also be on a case by case basis in cases where there are indications of non-compliance of applicable law and regulations or with the terms and conditions of the third-party's agreement with an institution.

Once again, the Bank appreciates the opportunity to submit these comments and assist the FDIC in developing its guidance for third-party lending platform relationships. Should you wish to discuss any of the above or desire any clarification, please let us know and we will make ourselves available.

Very truly yours,

**CROSS RIVER BANK**

A handwritten signature in black ink, appearing to read "G. Gade", is enclosed within a large, hand-drawn oval scribble.

Gilles Gade  
Chairman & CEO