

October 14, 2021

Via email to comments@fdic .gov

James P. Sheesley
Assistant Executive Secretary
Attention: Comments-RIN 3064-ZA26
Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Via regulations.gov

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW
Suite 3E-218
Washington, DC 20219

Re: Proposed Interagency Guidance on Third-Party Relationships: Risk Management
FDIC RIN 3064-ZA26
Docket ID OCC-2021-0011

Ladies and Gentlemen:

Marlette Funding, LLC (“Marlette”) hereby submits its comments to the interagency proposed guidance on managing risks in third-party relationships, 86 Fed. Reg. 38182 (July 19, 2021) (the “Proposal”). The Proposal provides important clarification on the relationships between banks and their third-party service providers, and Marlette supports the Proposal. Marlette submits this comment letter to urge the FDIC and the OCC, in the course of finalizing the Proposal, to provide additional direction to banks and their service providers on constructing responsible relationships that deliver valuable products and services to consumers within the scope of federal banking law.

Marlette operates the Best Egg consumer-lending platform, and is a financial technology (or “fintech”) provider seeking better ways to assist banks in making money accessible to consumers. Marlette’s team mixes decades of banking experience with deep customer knowledge and smart technology to deliver lending-related digital products, services, and experiences to consumers on behalf of banks in a more relevant way. Marlette works with banks, facilitating the banks’ origination of consumer loans through the Best Egg platform. The Best Egg platform provides a frictionless online personal loan experience where qualified applicants can instantly view loan offers with no impact to their credit scores and receive funds from a bank in as little as one business day. Since March 2014, the online loan platform has helped banks deliver over \$14 billion of prime loans, including particularly to underserved consumers, with strong credit performance.

Marlette is a member of the American Fintech Council, a group of innovative companies that have brought new and beneficial consumer financial products to consumers across the country. Marlette joins and fully supports the comments that are being submitted separately by the American Fintech Council.

Marlette currently works with three banks: Cross River Bank, a state-chartered, FDIC-insured bank that originates closed-end installment loans through the Best Egg platform; Blue Ridge Bank, a national bank that originates closed-end installment loans through the Best Egg platform; and First Bank & Trust of Brookings, South Dakota, a state-chartered, FDIC-insured bank that

originates credit cards accounts through the Best Egg platform. Some of the loans and receivables originated through the platform are sold to third-party investors, or included in securitization transactions. Marlette, like other fintech companies, has faced litigation arguing that these relationships with banks are inconsistent with acceptable lending practices –arguing that Marlette, a service provider to the banks, is the true lender based on a “predominate economic interest” or similar theory. The Proposal should be finalized to confirm that banks’ engaging of servicing providers is permissible and fully consistent with a bank’s operation under applicable federal banking law, including the National Bank Act and the Federal Deposit Insurance Act.

In 2016, the FDIC issued proposed guidance address third-party lending.¹ That proposed guidance established specific principles that FDIC-supervised should follow in relationships that facilitate lending programs, such as the Best Egg platform. We urge the FDIC and OCC to adopt those principles either in the final third-party risk management guidance or in a separate interagency statement.

In so doing, we also urge the FDIC and OCC to provide guidance to banks to consider the consumer benefits of specific products and services, as part of their evaluation of these types of lending programs and their oversight of service providers. Fintech partnerships provide banks with opportunities to expand their offerings of beneficial services, including the types of loans offered through the Best Egg platform – offering interest rates below the 36% MAPR cap of the Military Lending Act; using sound underwriting to avoid ensnaring consumer in cycles of debt; and providing clear disclosures of terms and conditions. The final guidance should recognize that these types of products are inherently less risky to the banks that offer them. On the other hand, the guidance should provide that banks engaging service providers to offer potentially abusive consumer products – with high interest rates or fees, difficult to understand terms, or leading to cycles of refinancing of the same debt – will be expected to perform additional diligence and risk assessment on such proposals.

Similarly, the guidance should directly address the supervisory expectation that banks involved in fintech partnership must take an active role in managing and supervising those programs and the fintech partners that facilitate them. Marlette benefits from this type of involvement by the banks with which it partners – providing a level of oversight that works to ensure consistent practices that benefit consumers. In the past, so-called “rent a bank” arrangements resulted in abusive practice in the consumer lending space because the banks did not actively engage with their service providers. The agencies should ensure that the bank that supervise are actively engaged, and are supervised in a manner that prohibits such practices.

The Best Egg platform was previously challenged in litigation brought in Colorado, with the state Administrator of the Uniform Consumer Credit Code arguing that Marlette was the “true lender” of the loans offered through the Best Egg platform. In 2020, Marlette and the other parties to that litigation reached a precedent-setting settlement with the Administrator, agreeing on a path that allowed for continued offering of loans to Colorado borrowers. The settlement creates a framework to ensure responsible lending – requiring bank oversight and supervision,

¹ FDIC FIL-50-2016, “Examination Guidance for Third-Party Lending” (proposed July 29, 2016), <https://www.fdic.gov/news/financial-institution-letters/2016/fil16050a.pdf>.

consumer disclosures, limits on maximum interest rates, and structural criteria ensuring involvement of the bank in the program. We urge the FDIC and OCC to consider this framework as a way to ensure that banks properly supervise and control their third-party relationships in the context of fintech partnerships.

To conclude, Marlette supports the Proposal, and urges that it be finalized promptly and include additional guidance for bank/fintech partnerships. If we can provide any additional assistance to the FDIC in connection with this matter, please contact the undersigned at (302) 449-4905 or frank.borchert@bestegg.com or contact our outside counsel in this matter, John Van De Weert at Sidley Austin LLP, (202) 736-8094 or jvandeweert@sidley.com.

Sincerely,

A large black rectangular redaction box covering the signature area.

Frank R. Borchert, III
Chief Administrative Officer and Chief Legal Officer