affirm

Via Electronic Mail

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Attention: Comments-RIN 3064–ZA26,
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Washington, DC 20219
Docket ID OCC-2021-0011

Re: Proposed Interagency Guidance on Third-Party Relationships: Risk Management. Docket No. OP-1752; FDIC RIN 3064-ZA026; Docket ID OCC-2021-0011

To Whom it May Concern:

Affirm, Inc.,[1] submits this letter in response to the request for comment by the Board of Governors of the Federal Reserve System (Federal Reserve), Federal Deposit Insurance Corporation (FDIC), and Office of the Comptroller of the Currency (OCC) on proposed guidance for managing the risks associated with third-party relationships.

Affirm believes that well-regulated responsible partnerships between financial institutions and technology companies are key contributors to macroeconomic stability, the financial health of consumers, and financial inclusion. These partnerships offer credit products that promote access and opportunity for millions of Americans, especially low and moderate income ("LMI")

[1] Affirm was founded in 2012 with a vision of creating a modern financial services company and network based on trust and transparency. Affirm first developed and launched a no-fee Point of Sale (POS) installment loan product in August 2014. Since then, Affirm has improved access to these loans through increasing its merchant base, continuously innovating underwriting and fraud identification models, and providing multiple channels of delivery. Affirm's technology-driven approach to underwriting has also allowed for increased credit access to consumers whose FICO scores may not fully represent their creditworthiness

borrowers that would otherwise be left vulnerable to predatory lenders and high rate products. In addition, the sustainable growth of responsible partnerships ensures technological innovation is regulated and subject to the oversight of banking regulators.

Affirm is able to offer affordable and honest financial products that improve people's lives, in large part through a viable and well-regulated bank partner model. Affirm aligns its success with the borrower's success –only when a customer successfully repays a loan does Affirm benefit. Unlike other payment options that have compounding interest and unexpected costs, Affirm discloses upfront exactly what consumers will owe each month and in total—no hidden fees and no surprises. With this model of sound underwriting, fraud mitigation, advanced technology, analytics, and servicing capabilities, Affirm reaches a broad population of consumers throughout the credit spectrum, including credit worthy LMI borrowers. Affirm provides: (1) unsecured lending products with terms up to 48 months and rates that currently range from 0% to 30% APR; (2) Retail savings products for U.S.-based consumers provided in partnership with Cross River Bank ("CRB"), an FDIC-insured New Jersey state-chartered bank; and (3) a marketplace platform that is designed to create value for both consumers and merchants. These pro-consumer, innovative offerings are created and facilitated in large part by responsible bank partnerships, and as such, are part of a broader suite of innovative products that expand access for communities that have been traditionally underserved or credit invisible. This access helps promote an overall more inclusive and resilient financial system.[2]

The Proposed Guidance presents an important opportunity for the Agencies to promote these responsible partnerships, while simultaneously cracking down on predatory practices and products that are detrimental to consumer health and financial well-being. Without access to the objectively responsible and affordable credit products that bank partnerships create, the financial health and economic well-being of LMI and underserved consumers is very much at risk. As such, if the interests of LMI consumers are prioritized, it is not a tenable position to categorically do away with the bank partner model. Underserved borrowers deserve better.

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[2] See, *Testimony Before the Senate Banking Committee By Charles W. Calomiris*, Henry Kaufman Professor of Financial Institutions, Columbia University April 28, 2021 (Appendix A)

Affirm respectfully submits the following comments and welcomes the opportunity to provide input and engage with the Agencies to promote regulatory guidance that fosters innovation that is inextricably tied to financial inclusion and consumer success. The Proposed Guidance is a key opportunity to promote responsible bank-fintech lending partnerships as a means to drive financial inclusion, and link innovation with pro-consumer policy, while also providing the necessary safeguards to protect consumers from predatory lending. Affirm is supportive of the past work of the FDIC, in particular FIL-50, when it helped create guidance, while not finalized, that put forth substantive and meaningful guidelines for lending partnerships.[3] This guidance, along with emerging research,[4] continually demonstrates that you do not have to sacrifice consumer protection for the sake of innovation. In fact, quite the contrary, harnessing technological innovation to promote financial inclusion, under the purview of regulatory oversight, is best accomplished by well-regulated responsible partnerships. We agree with consumer advocates that identify APR as a central component of assessing affordable and responsible lending,[5] yet we strongly disagree with those that would sacrifice strides in financial inclusion for LMI borrowers, by hamstringing the efficiency and pro-consumer elements of the bank partner model. Affirm is committed to bringing positive change to the consumer financial marketplace, and recognizes that as technology increases the size and scope of financial services available to consumers, it has also increased the potential for the proliferation of predatory lenders; unfair and misleading practices; convoluted and hidden terms and conditions; as well as many other financial pitfalls for consumers. This is why Affirm strongly believes this Proposed Guidance is an opportunity to harness the benefits of innovation and technology for consumer well-being, market competition, and fairness, while also preventing predatory lenders from harming consumers and the broader economic system. We explain these recommendations more fully in the discussion that follows.

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[3] Specifically, FIL-50 provides a helpful and appropriate framework for comprehensively considering the oversight of each entity in the partnership.

[4] See, *Testimony Before the Senate Banking Committee By Charles W. Calomiris*, Henry Kaufman Professor of Financial Institutions, Columbia University April 28, 2021 (Appendix A)

[5] See, *Why 36%? The History, Use, and Purpose of the 36% Interest Rate Cap*, National Consumer Law Center (2013) Available at https://www.nclc.org/images/pdf/pr-reports/why36pct.pdf ; Center for Responsible Lending Supports Senator Durbin's New Bill to Cap Interest Rates Nationwide at No Higher than 36% APR Press Release, Center for Responsible Press Release, " (April , 29, 2019); *The Debt Trap of Triple-Digit Interest Rate Loans: Payday, Car-Title, and High-Cost Installment Loans,* Center for Responsible Lending, "Each year, payday and car-title loans drain $8 billion in fees from consumers in the states where they are legal. […] In states that cap annual interest for these loans at 36% or less, consumers save over $5 billion in fees every year—$2.3 billion from payday lending, plus another $2.8 billion from car-title lending." (March 2019)

The Agencies should seize this opportunity to promote responsible partnership lending, while also protecting consumers from predatory lending.

Affirm, as well as other responsible lenders, would not be able to serve as many consumers as possible without a viable and sustainable bank partner model. Even more important for the broader credit system, products that are lower than 36%, such as Affirm's products, play a critical role in driving financial inclusion.

The Proposed Guidance could protect consumer access to affordable and responsible credit by establishing and identifying unambiguous standards of fair, responsible, and affordable partnerships. This would tremendously benefit consumers and help protect them from predatory schemes, all the while eliminating industry practices and products that are detrimental to consumer financial health. The Proposed Guidance can address these standards even without directly addressing partnerships between banking organizations and fintech firms. In fact, by identifying such standards, it would assist and encourage supervisory staff with standards that can be used in a variety of third party relationships.[6] This framework would also clarify supervisory expectations and requirements, enabling supervisory staff to promote responsible bank lending partnerships and supervised institutions to be better equipped in managing risk and ensuring regulatory compliance. This framework would be able to effectively eliminate predatory lending and harmful credit products from the banking system, while supporting responsible partnerships that can continue to help facilitate access to high-quality, low-cost credit. As important as it is to protect consumers from predatory lending, it is just as important to ensure affordable and viable credit products are available.[7]

We recommend that the Agencies incorporate the following suggestions into the Proposed Guidance:

- The Proposed Guidance should address how the very terms and quality of compliance of loan products offered in conjunction with third parties may themselves signify problems with the safety and soundness of banking organizations. Lending products with annual

[6] The following recommendations generally respond to questions 1, 2, 6, 9, and 11 in the Proposed Guidance.
[7] See, *What Happens when Loans Become Legally Void? Evidence from a Natural Experiment, Colleen Honigsberg* Robert J. Jackson, Jr. Richard Squire* (2016), available at https://www-cdn.law.stanford.edu/wp-content/uploads/2017/04/Honigsberg_et_al_12.7.2016.pdf

percentage rates (APRs) of greater than 36 percent (i.e., above the Military Lending Act threshold) can trap borrowers in ever growing debt-traps, forcing them to continually reborrow and roll over loan payments.[8] These products not only threaten consumers, but may also pose broader and longer-term material risks to banking organizations. Such longer-term risks are significant considerations within a third-party risk management framework, and should be addressed in the Proposed Guidance. By clarifying the difference between responsible and predatory uses of the "issuing bank model" of third-party lending arrangements, this guidance document would promote responsible bank-fintech lending partnerships and curb predatory lenders.

- The guidance should also go farther and outline ways that banking institutions can maintain ongoing engagement throughout the life cycle of the loan –such as that the banking organization should neither expect nor receive super-indemnification for loan performance or that, in a forward-flow relationship with known providers, neither the purchase nor the sale of loans should be mandated or guaranteed.

- The Proposed Guidance should provide bright lines for appropriate lending standards for bank-fintech partnerships. These responsible lending standards should include origination, funding, compliance, continuous oversight, and risk management. Notwithstanding the fact that the Agencies do not have the statutory authority to set interest rate caps on personal consumer loans, this guidance should indicate that personal consumer loans with certain features (defined below) are presumed to be, or are more likely to be, unsafe or predatory practices that perpetuate cycles of debt. These presumptions would be based on the fact that key identifiable loan features threaten consumer financial health. Affirm supports the contention that banks that originate loans with these problematic traits, through partnerships or otherwise, should become subject to additional supervisory oversight, with particular focus on consumer protection and safety and soundness perspectives. The Proposed Guidance should identify specific product features that will signal an examiners'

[8] While no national mandate or formalized rate exists at the federal level, the practice of capping interest rates at 36% has been long standing practice embraced by responsible bank partnerships, consumer advocates, various States (as evidenced by ballot initiatives). The accepted threshold of 36% has not been arbitrarily adopted, as the legitimacy of the cap derives from its prominence in existing federal laws such as the Military Lending Act and Truth in Lending Act.

scrutiny of a specific program to determine whether the program has safety and soundness and consumer protection concerns. Specifically, the Proposed Guidance should identify that the following loan program features, depending on the specific circumstances, trigger heightened focus of a program or product:

- High interest rates, defined as rates above those set forth in the Military Lending Act.
- Loan fees that essentially are, in effect, a high APR.
- Programs that involve frequent and continual renewals or refinancing, especially where the renewal includes capitalizing additional fees.
- Programs that contain non-amortization clauses, or other non-transparent terms.
- The presence of practices that insulate the banking organization from the consequences of potentially unsafe and unsound underwriting standards (e.g., unrestricted sale guarantees).

- This responsible lending guidance, including these features, should then be incorporated into the FFIEC Information Technology Handbook. Banking organizations would benefit from standardized, consistent, and clear guidance and examination modules across their federal and state regulatory agencies.

- Institutions and partners that adopt rigorous requirements and are able to provide affordable, responsible and transparent credit products, consistent with the principles of safety and soundness and consumer protection, should be empowered to innovate and harness financial inclusion. The agencies should establish a clear unambiguous line between responsible partnerships and predatory partnerships.

Affirm believes that unambiguous regulatory standards and guidance are not only broadly beneficial for consumers, industry participants, and financial institutions, but also could be used as a means to promote healthy and responsible partnerships, while simultaneously protecting consumers from predatory lending. Clarity in these responsibilities and standards often help to limit unintended compliance lapses and would prevent responsible institutions from violating relevant requirements. An example of such clarification is the recent bank regulatory agency guide, *Conducting Due Diligence on Financial Technology Companies*,[9] that was intended to help community banks assess risks when considering relationships with financial technology companies. This type of regulatory clarification is a welcome reference point and will be a tremendously helpful resource in developing various risk models.

Key to building wealth and facilitating positive economic mobility is the availability of affordable credit at responsible interest rates. In this Proposed Guidance, the Agencies have a unique opportunity to promote financial inclusion and innovation tied to consumer health, while also curbing predatory lending practices.

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If you have any additional questions, please do not hesitate to contact me at katherine.adkins@affirm.com. We look forward to continued engagement, and to serve as a resource for the Agencies in the future.

Sincerely,

Katherine Adkins
Chief Legal Officer
Affirm, Inc.

[9] Conducting Due Diligence on Financial Technology Firms: A Guide for Community Banks, available at https://www.federalreserve.gov/publications/conducting-due-diligence-on-financial-technology-firms.htm (The partnership risk assessment, according to the report, correctly identifies that it should be a part of the bank's due diligence process according to : (1) Business Experience and Qualifications; (2) Financial Condition; (3) Legal and Regulatory Compliance; (4) Risk Management and Controls; (5) Information Security; (6) Operational Resilience.)