Future of FinTech and Bank Partnerships

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Today’s Session

How Did We Get Here: What Is a Bank Partnership and How Do They Work?

Legal and Regulatory Challenges

Practical Opportunities and Risk

What’s on the Horizon?

Why Is This important?

- The legal and regulatory landscape for bank partnerships continues to evolve.
  - The doctrine of federal preemption allows federally insured depository institutions to charge the rates and fees allowed in the state where they are located, export those rates and fees to other states, and preempt any conflicting state laws.
  - State banks are afforded preemption under 12 U.S.C. § 1831d; national banks are afforded preemption under 12 U.S.C. § 85.
- As the economy shifts, the business and consumer benefits and opportunities for bank partnerships will continue to evolve.
- Collaboration may bring growth in deposits, loans, and non-interest income through innovative partnerships while driving customer adoption and customer engagement.
- Yet, bank partnerships require a combination of financial resources, management experience, compliance staff, consumer need, and other factors to succeed.

OLA
Online Lenders Alliance

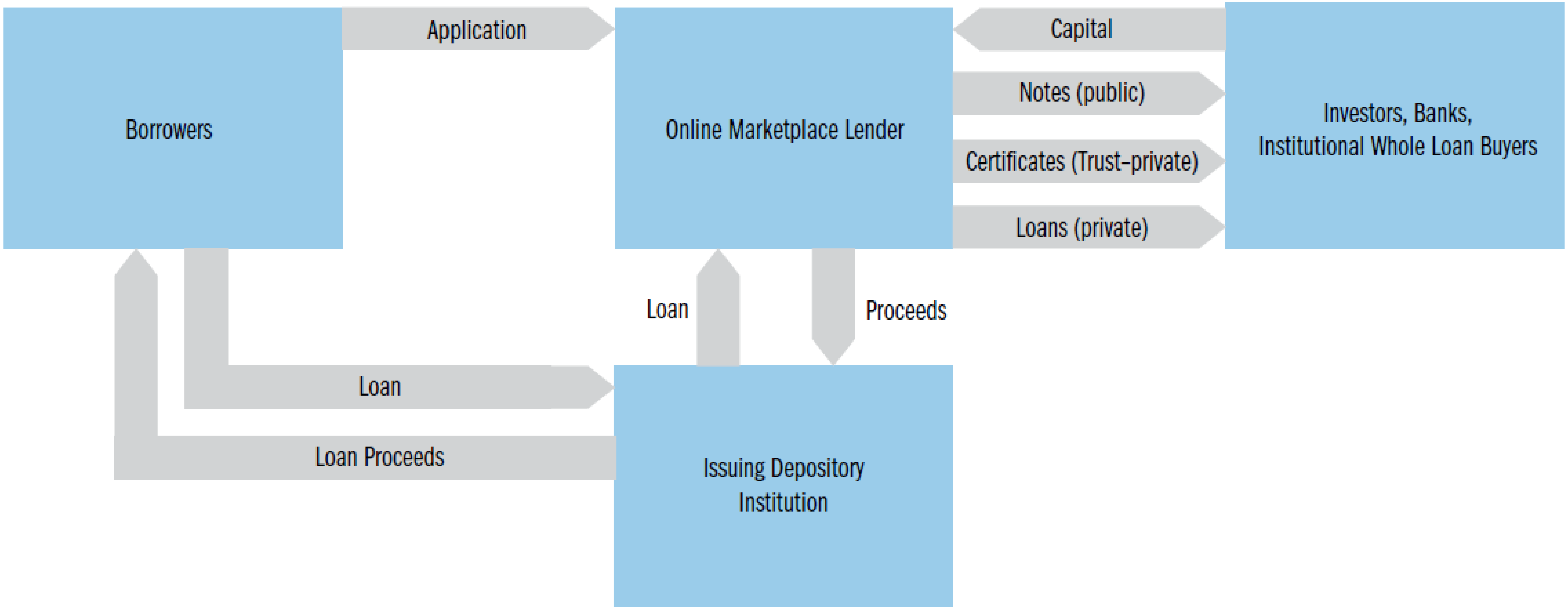
How Did We Get Here?

What Is a Bank Partnership?

A bank partnership is an arrangement though which a state or federal depository institution partners with a nonbank company to assist the bank in originating loans. Banks may also partner with financial technology companies for various support services, including technology and underwriting.

How Do They Work?

(Sample Model; Actual Models May Vary)



U.S. Dep't of the Treasury, Opportunities and Challenges in Online Marketplace Lending 6 (May 10, 2026).

Reasons Why Bank Partnerships Are Used

- Leveraging of existing bank platforms and services
- Establishing products and services that expand markets, and consumer inclusion; incidentally, may help to minimize licensing requirements for non-bank partners
  - Money transmission
  - Lending / usury
  - Payment network requirements
- Some business models will require an even closer relationship
  - Bank-partner lending model
  - Third-party sender for ACH transactions

Legal and Regulatory Challenges

Legal and Regulatory Challenges

- Valid When Made
  - Under the "Valid When Made" principle, an assignee may continue to charge an interest rate that was permissible when the bank originated the loan, even if the assignee could not collect that interest rate had the assignee made the loan directly.
- True Lender
  - The "True Lender" principle is a claim made by private litigants or regulators that the *true lender* of a loan is not actually the bank but a nonbank lender.

Challenges to Valid-When-Made Principle

- In *Madden v. Midland Funding LLC*, the Second Circuit held that a secondary market purchaser of bank credit card debt could not continue to charge the contract rate of interest imposed by the bank that initially extended credit.
- The *Madden* case has been criticized for its invalidation of the long-standing Valid-When-Made principle.
- The OCC and FDIC have published rules to resolve the issue.

True Lender Challenges

- True Lender
  - Historically, courts use a *Form Test* or a *Substance Test* to determine the true lender of a loan.
  - The OCC attempted to resolve the uncertainty of True Lender challenges by promulgating a "form test" rule for True Lender questions. The rule was repealed by Congress under the Congressional Review Act (would have been 12 C.F.R. 7.1031).

States Enact Predominant Interest Test

- States, by statute, have specified the *Predominant Interest Test* as the method to determine the true lender of a loan.
  - Found in an early Georgia statute. Similar statutes in Nevada and New Hampshire.
  - In 2021, Illinois adopted the test. Maine and New Mexico followed.

- Sample of laws adopting the *Predominant Interest Test* as of Feb. 21, 2023:
  - Georgia: Ga. Code Ann. § 16-17-1.
  - Illinois: 815 Ill. Comp. Stat. Ann. 123/15-5-15.
  - Maine: Me. Rev. Stat. tit. 9-A, § 2-702.
  - Nevada: Nev. Rev. Stat. Ann. §§ 604A.200, 604A.5064, 675.035.
  - New Hampshire: N.H. Rev. Stat. Ann. § 399-A:2.
  - New Mexico: N.M. Stat. Ann. § 58-15-3.

Other State Challenges

- Maryland Credit Services Business Act licensing
- Iowa targets state-chartered bank loans
- Colorado enforcement action and consent order against marketplace lenders

Colorado "Model" Safe Harbor for Bank Partnerships

- The consent order between the Colorado Administrator of the Uniform Consumer Credit Code and the marketplace lenders led to the development of a safe harbor for structuring the bank partnership lending program.
- Some of the safe harbor criteria include:
  - Bank retains oversight over the program.
  - Bank is identified as the lender for the loans.
  - Maximum 36% APR for loans.
  - Restrictions on the commitments that the nonbank may make to purchase loans from the bank or to indemnify the bank for losses.

Continued Focus on Bank Partnership Issues

- **"True Lender"** – *OppFi v. CA DFPI* (and *CA DFPI v. OppFi*), putting the "predominate economic interest test" to the test.

- **Consumer Financial Protection Bureau** – "Some lenders employing rent-a-bank schemes have unusually high default rates, which raise questions about whether their products set borrowers up for failure. And our complaints database reveals a range of other significant consumer protection concerns with certain loans associated with bank partnerships." – CFPB Deputy Director Zixta Martinez's Keynote Address at the Consumer Federation of America's 2022 Consumer Assembly (June 15, 2022).

Understanding the Legal Framework

- Depending on the types of financial services at issue, relevant federal and state laws include those that address:
  - AML and Economic Sanctions
  - Money Transmission/Lending Laws
    - Origination
    - Broker & Lead Generation Issues
  - Consumer and Business Lending
  - Securities and Investments
  - General Consumer Protection Laws (Credit Reporting, Debt Collection, etc.)
  - Privacy and Data Security
  - Prohibitions on Unfair, Deceptive, or Abusive Acts or Practices (see, e.g., CFPB entered a Consent Order against GreenSky, LLC)
  - And More!

Practical Opportunities and Risks

Pros and Cons to Bank Partnerships

- **Pros**:
  - **Licensing**: Non-bank partner may not be required to obtain state licensure in most jurisdictions (or at least minimal licensure, depending on states of operation).
  - **Interest Rate Exportation**: Loans may be made at the highest interest rate permitted by the state in which the bank is located.
  - **Profit Sharing**: Non-bank partner may have the option to share in the profit generated by the loans through various methods, including whole-loan purchases or purchases of participation interests in the loan proceeds.

Pros and Cons to Bank Partnerships

- **Cons**:
  - State attorneys general and federal regulators have been vocal in criticizing so-called rent-a-charter schemes whereby non-bank partner performs most (if not all) of the lending activities, but still try to claim that the bank is the "true lender" for loan origination purposes.
  - Risk may vary depending on whether a bank partner is a state or national chartered bank. The ability of a state-chartered bank to export its home interest rate to certain states remains unclear.
  - Non-bank partner would be subject to bank oversight, policies, and potential oversight by the bank's regulator.

Working with Bank Partners

- What does a potential bank partner expect?
- Take due diligence seriously and vet potential business partners.
  - Review your partner's products, services, financials, and management.
  - Check for regulatory or private enforcement actions.
  - Review regulatory risk (nature of service / compliance program / culture of compliance).
- Protect yourself when drafting agreements
  - Intellectual property
  - Confidentiality
  - Data security
  - Non-compete and non-solicitation
  - Termination rights
  - Business continuity

Working with Bank Partners

Get the most out of your discussions with potential bank partners by:

1. Understanding what you want out of the relationship;
2. Being familiar with the laws and regulations applicable to your business;
3. Confirming a commitment to compliance; and
4. Arriving with policies and procedures in hand and a framework for a compliance program.

What’s on the Horizon?

Questions/Discussion

If you would like to ask a question, you can ASK or type your question into the CHAT feature NOW.

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Thank you for attending!

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