Future of FinTech and Bank Partnerships
February 23, 2023

Jonathan L. Pompan
Venable LLP

Michael M. Aphibal
Venable LLP
Disclaimer

This presentation is provided for informational purposes only. The presentation is not intended to be an exhaustive review of all laws on any subject. Venable LLP and the individual presenter(s) are not responsible for any errors in or omissions from the information provided.

Nothing in this presentation should be construed as legal advice from Venable LLP or the individual presenter, nor is the presentation a substitute for legal counsel on any matter. Legal advice must be tailored to specific facts and circumstances. No attendee of this presentation should act or refrain from acting solely on the basis of any information included in this presentation. Attendees should seek appropriate legal or other professional advice on legal matters specific to their business.

The views and opinions in this presentation are those of the presenter and do not necessarily represent the official policy or positions of Venable LLP or of its clients.
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.
- 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.
How Did We Get Here?
A bank partnership is an arrangement through 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:
Other State Challenges

- Maryland Credit Services Business Act licensing
- Iowa targets state-chartered bank loans
- Colorado enforcement action and consent order against marketplace lenders
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
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.
Thank you for attending!

Michael Aphibal  
Associate  
Venable LLP  
Washington, DC  
mnaphibal@venable.com

Jonathan L. Pompan  
Partner  
Venable LLP  
Washington, DC  
jlpompan@venable.com