CENTER FOR CAPITAL MARKETS COMPETITIVENESS.

Will Gardner
DIRECTOR

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5571
WGardner@USChamber.com

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Ann E. Misback
Secretary
Board of Governors
of the Federal Reserve System
Washington, DC 20551

James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
Washington, DC 20429

Chief Counsel's Office
Office of the Comptroller of the Currency
Washington, DC 20219

***Re: Proposed Interagency Guidance on Third-Party Relationships: Risk Management* (Docket ID: OCC-2021-0011)**

Dear Sir or Madam:

The U.S. Chamber of Commerce's ("Chamber") Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to comment on the interagency guidance ("Guidance") issued by the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) (collectively, "the Agencies") regarding third-party relationships.

The interagency notice states that, while the Agencies have separately issued guidance on third-party relationships in the past, they are seeking to promote consistency with this updated Guidance. The Chamber applauds this approach and appreciates the opportunity to offer comments to help promote that consistency.

Banks increasingly rely on third parties to provide a range of essential services and activities, and these relationships can take many forms. The interactions between banks and third parties are complex. Regulators need to allow flexibility in these relationships to protect the confidentiality of consumer data and to allow banks to function as safely and effectively as possible while still providing a robust array of products and services for consumers and businesses.

While the Guidance makes numerous suggestions about many types of relationships and how banks should manage them, there remain some points that require clarification, including what constitutes a third-party relationship and how these relationships will be interpreted by the Agencies. While it is the Agencies' stated goal to promote consistency, the Chamber has some concerns that the Guidance does not make that clear in certain areas and offers comments to aid in providing that clarity for banks.

To that end, we address the following issues that could aid in promoting consistency and flexibility:

I. **The agencies should clarify the scope of third-party relationships and encourage maximum flexibility.**

II. **The agencies should clarify that regulators will promote as much uniformity as possible in implementing the Guidance.**

III. **The agencies should allow maximum flexibility in determining "critical activities."**

IV. **Incorporation of OCC's 2020 FAQs into the Guidance**

I. The agencies should clarify the scope of third-party relationships and encourage maximum flexibility.

The Guidance defines a third-party relationship as "any business arrangement between a banking organization and another entity, by contract or otherwise." This very broad definition encompasses a seemingly unlimited number of relationships. Question 15 in the Guidance addresses subcontractor relationships and asks how the Guidance can provide more clarity in conducting due diligence in these relationships. As Question 15 notes, these relationships extend beyond third-party relationships (4th, 5th, etc.), and reach to areas that become increasingly outside of a bank's control the more removed they are from an actual third-party relationship. These relationships should not be subject to the third-party risk management principles because they do not involve any business relationship. These relationships also are extremely difficult, if not impossible, for a bank to monitor and control.

The Chamber recommends that a "business arrangement" be defined as one that is covered by a written contract and in which a third party provides services on a continuous basis (e.g., an arrangement in which a fintech company provides services). The Board's 2013 guidance defines the scope of these arrangements as any "contractual relationships with a financial institution to provide business functions or activities[1]." We support this approach and feel that a written contract provides the necessary binding commitment for compliance with the Guidance.

The Chamber also encourages the Agencies to further emphasize the risk-based nature of third-party management by allowing banks to consider all relevant factors. This could include the legal and economic realities of the relationship, jurisdiction where the relationship is formed, actual risk posed by the relationship, and continuing nature of the relationship. In addition, the Agencies should make clear that the considerations included in the Guidance are not always "typical" for every third-party relationship. This is particularly important to consider in light of the expanded scope of the third-party guidance for non-OCC regulated entities. For example, the Board takes a broad view of its oversight of Bank Holding Companies that may place BHC

[1] Federal Reserve, SR Letter 13-19 / CA 13-21: Guidance on Managing Outsourcing Risk (Dec. 5, 2013, rev. Feb. 26, 2021).

subsidiaries at a competitive disadvantage when trying to implement such robust measures on non-service provider relationships. This would be particularly the case where such standards are not customary in the market.

Additionally, we feel that the breadth of the definition of third party is different to other jurisdictions which take a traditional vendor/outsourcing arrangement approach. Given the more expansive 'third party' approach, we stress the importance of acknowledging in the final Guidance that certain relationships may pose different or lesser risks than other third-party relationships. Thus, some or all of the risk management practices described in the final Guidance may not be typical or necessary with respect to these relationships, consistent with the risk-based nature of Guidance.

II. The agencies should clarify that regulators will promote as much uniformity as possible in implementing the Guidance.

We encourage the Agencies to implement the Guidance in a way that will provide as much uniformity as possible for banks. Since banks have different regulators, there is concern that, while the Agencies are issuing the Guidance jointly, each regulator will interpret the Guidance differently. It is critical for each agency to treat banks as uniformly as possible to ensure that banks make consistent decisions that are in the best interests of their customers.

III. The agencies should allow maximum flexibility in determining "critical activities."

The Guidance's definition of "critical activities" focuses on significant risks and customer impacts, as well as a bank's investment in resources and impacts on bank operations if an activity has to be brought in-house. These are relevant concerns, but banks will have varying views of significance depending on their individual operations.

We request that the Agencies confirm how "critical activity" maps to existing definitions. For example, separately, the Agencies have established varying definitions for concepts similar to what the "critical activities" definition is intended to capture. The Agencies have established consistent definitions for "critical operations" and "core business lines" for purposes of the Agencies' "Sound Practices to Strengthen Operational Resilience" guidance and the Board's and FDIC's resolution planning rule. We also note that whether something 'requires significant investment in resources to implement the third-party relationship and manage the risk' should not be considered something that constitutes criticality in and of itself (as the Guidance suggests at page 20).

The Guidance should allow maximum flexibility in determining what constitutes "critical activities" because it will mean different things for each bank. Defining these activities in rigid terms could restrict banks and the services they provide.

IV. Incorporation of 2020 OCC FAQs into the Guidance

Banks will have differing views on whether the FAQs should be wrapped into the Guidance, and the Chamber does not take a stance on incorporation of the FAQs. We do,

however, encourage the Agencies to address the FAQs in a uniform manner. The FAQs were not incorporated into the Guidance but were included as an exhibit separate from the Guidance, and they were only issued by one of the Agencies (the OCC). We have concerns that, if incorporated, they will not be applied uniformly and that banks will have to interpret the regulations differently depending on their primary regulator. FDIC and Board-regulated banks may have concerns about how the concepts mentioned in the FAQs will be applied to them since their primary regulator did not issue the FAQs.

While banks are not uniform on incorporation, the industry does want uniform treatment. Confusion over regulatory interpretation would not promote stability and could lead to decisions by banks that are ultimately not in the best interest of consumers and businesses. We request that any incorporated FAQs continue to use the less prescriptive language adopted by the proposed Guidance.

Question 4: If a data aggregator collects customer-permissioned data from a bank, does the data aggregator have a third-party relationship with the bank? If so, what are the third-party risk management expectations?

The answer to this FAQ notes that a data aggregator "typically acts at the request of and on behalf of a bank's customer without the bank's involvement in the arrangement" and that a business arrangement between a bank and data aggregator "depends on the level of formality of any arrangements that the bank has with the data aggregator for sharing customer-permissioned data." The answer also notes that even if a bank does not have a business arrangement with a data aggregator, it should perform significant diligence to ensure the data aggregator safeguards customer data.

If incorporated into the Guidance, this could present significant confusion for banks trying to determine whether these relationships are actual third-party relationships that are subject to the Guidance. Question 4 specifically mentions the practice of screen scraping, noting that this type of information sharing is usually between the customer and the data aggregator and does not generally meet the definition of a business arrangement. Yet, the answer to the FAQ still directs banks to monitor and identify large-scale screen scraping activities and to conduct appropriate diligence in managing these relationships. The answer notes that in these instances where a business arrangement exists, that due diligence and monitoring should be commensurate with the risk.

Banks need clarity and consistency from the Agencies regarding relationships with data aggregators—including screen scraping activities—and whether they constitute third-party relationships that are subject to the Guidance.

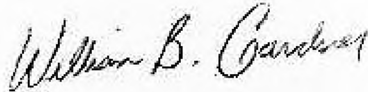
Question 10: Is a fintech company arrangement considered a critical activity?

As mentioned above, the Chamber asks that the Agencies provide maximum flexibility for the definition of "critical activity," including in the rapidly evolving world of fintech company arrangements. Some examples of fintech company arrangements are outlined in FAQ 18. The Chamber asks the Agencies for flexibility in determining these relationships and again emphasizes the Agencies' endorsement of banking institutions using a risk-based approach. This

allows firms to take into account the level of risk, complexity, and the nature of the third-party relationship.

We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,



Will Gardner
Director
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce