

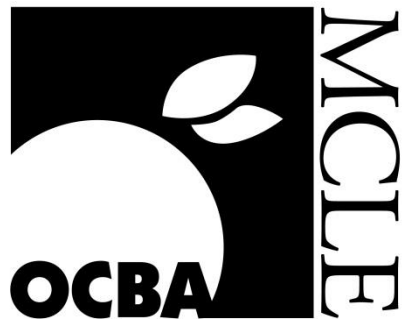
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**ORANGE COUNTY BAR ASSOCIATION**

**BANKING & LENDING  
SECTION WEBINAR**

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Fintech Guide to Bank Partnerships: A Practical and Legal  
Roadmap



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# Fintech Guide to Bank Partnerships: A Practical and Legal Roadmap

Presented for the Orange County Bar Association Banking & Lending Section



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# Agenda

Business Considerations for Bank Partnerships

Legal and Regulatory Challenges

Managing Compliance



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# Business Considerations for Bank Partnerships

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# Reasons Why Bank Partnerships Are Used for Many Fintech Products and Services

- All Fintechs need a bank partner in some way
- Leveraging of existing bank platforms and services
- Establishing products and services in a way that minimizes licensing requirements for Fintechs
  - 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
  - Sponsor bank for card-related services
  - Banking as a Service (BaaS)

# Understanding the Ins and Out of State Licensing

- Non-bank financial institutions generally may not provide financial products and services that the state licenses.
  - 51 licenses for residential mortgage lending and brokering
  - 50 licenses for money transmission
  - 49 licenses for personal lending
- Come states license lead generators and SMB lenders too.
- Common licensing requirements include:
  - Application and company-level disclosures
  - Individual personal and financial disclosures for officers, directors, and major shareholders
  - Fingerprints for criminal background check
  - Business plan / Compliance policies and procedures
  - Secretary of state “doing business” filings

# Working with Bank Partners and Vendors

- 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 and Vendors

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.





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# Legal and Regulatory Challenges

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# Understanding the Legal Framework for Fintech

- Although fintech has received considerable attention as “new” and “disruptive,” it is important to recognize that the term covers a wide field of different financial services, and each of these is subject to a host of federal and state laws and regulations.
- Depending on the types of financial services at issue, relevant federal and state laws include those that address:
  - AML and Economic Sanctions
  - Money Transmission
  - 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
  - And More!

# Understanding the Legal Framework

Federal Laws and Regulations	State Laws and Regulations
Bank Secrecy Act (BSA)	Brokering Laws
Bank Service Company Act	California Financial Information Privacy Act (CCPA)
Children's Online Privacy Act (COPPA)	Consumer Reporting Laws
Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM)	Data Breach Notification Laws
Economic Sanctions	Substantive data security laws
Electronic Fund Transfer Act (Regulation E)	Debt Collection Laws
Equal Credit Opportunity Act (Regulation B)	Escheatment
Fair Credit Reporting Act (FCRA)	Financial Privacy Laws
Gramm Leach Bliley Act (GLBA)	Lending Licensing
Health Insurance Portability and Accountability Act of 1996 (HIPAA)	Money Transmitter Laws
Investment Advisers Act of 1940	Online Privacy Policy Laws
Securities Acts of 1933 and 1934	Regulation of Payment Processor and Merchant Contracts
Telemarketing Consumer Fraud and Abuse Prevention Act	Sales and Use Tax Compliance
Telephone Consumer Protection Act (TCPA)	Uniform Commercial Code (UCC)
Truth in Lending Act (Regulation Z)	Usury Laws
Unfair and Deceptive Acts and Practices	

# Spotlight on AML, Money Transmission, and OFAC

- BSA/AML

- The Bank Secrecy Act (BSA) requires “financial institutions” to implement anti-money laundering (AML) programs.
- Even if not a regulated financial institution, Fintechs often have BSA / AML obligations that are flowed down by a sponsor bank, network, or other partner.
- Relevant requirements include, for example:
  - Diligence of merchants / customers
  - Monitoring of suspicious activity
  - Reporting to government

- OFAC

- U.S. government maintains economic sanctions’ programs that prohibit U.S. persons from doing business with certain countries, entities, and individuals.

# Spotlight on AML, Money Transmission, and OFAC

- Money transmission considerations are relevant for payment processors, payment facilitators, digital wallet providers, and ACH processors, among other payments companies.
  - Federal Law
    - Money transmitters must register with FinCEN, implement a BSA / AML program, and comply with certain reporting requirements.
    - There is a “payment processor” exemption.
  - State Law
    - Forty-eight states and the District of Columbia require a money transmitter to obtain a license and impose various compliance requirements on money transmitters.
    - Some states have an agent of the payee exemption that is similar to the federal payment processor exemption.

# Spotlight on Lending

- Structure
  - Consumer vs. small business
  - Balance sheet vs. bank partner vs. marketplace
  - Lead generation / broker
- Valid When Made (*Madden*)
  - The ability of an assignee to continue charging the interest rate that was legal when the bank originated the loan is called "valid when made." In *Madden v. Midland*, 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 doctrine, and the OCC and FDIC have published rules seeking to resolve the issue.

# Spotlight on Lending

- True Lender
  - Bank partner lending models in the U.S. have faced legal challenges in recent years based on "true lender" theories, which argue that the fintech (and not the bank) is the true lender in the transactions, and, therefore, bank preemption of state lending laws should not be available.
  - The OCC has issued a rule clarifying that if a federally chartered bank is named as the lender in the loan agreement or funds the loan, it is the "true lender." However, for state-chartered banks, the FDIC has indicated that it does not have the authority to determine which party in a bank partnership is the "true lender," as that is a matter of state law.
- Licensing / Brokering

# Spotlight on Consumer Financial Services

- Data Privacy
  - GLBA
  - HIPAA
  - CCPA
  - Other state laws
- Credit Reporting
  - Using credit report information
  - Furnishing information to credit reporting agencies



# Spotlight on California Department of Financial Protection and Innovation (DFPI)

- New California state consumer financial protection agency (the Department of Financial Protection and Innovation (DFPI)) that replaces the old Department of Business Oversight.
- Essentially a “mini-CFPB” with similar authorities, resources, and consumer protection mandates as the federal Consumer Financial Protection Bureau (CFPB).
- Authorizes the DFPI to impose penalties of \$2,500 for “each act or omission” in violation of the law without a showing that the violation was willful, which, arguably, represents an enhancement of DBO’s existing enforcement powers in contrast to Dodd-Frank and existing California law. The new law also includes enhanced penalties for “reckless” violations of up to \$25,000 per day or \$10,000 per violation. For “knowing” violations, the penalty may be up to \$1,000,000 per day or 1% of the violator’s net worth (whichever is less) or \$25,000 per violation.
- Broad authority over providers of financial services, but some limits to jurisdiction, including UDAAP authority over banks, credit unions, federal savings and loan associations, and certain California licensed entities “to the extent that licensee or employee is acting under the authority of” the license.
- Beginning immediately, the DFPI plans to investigate consumer complaints against previously unregulated financial products and services, including debt collectors, credit repair and consumer credit reporting agencies, debt relief companies, rent to own contractors, private school financing, and more.

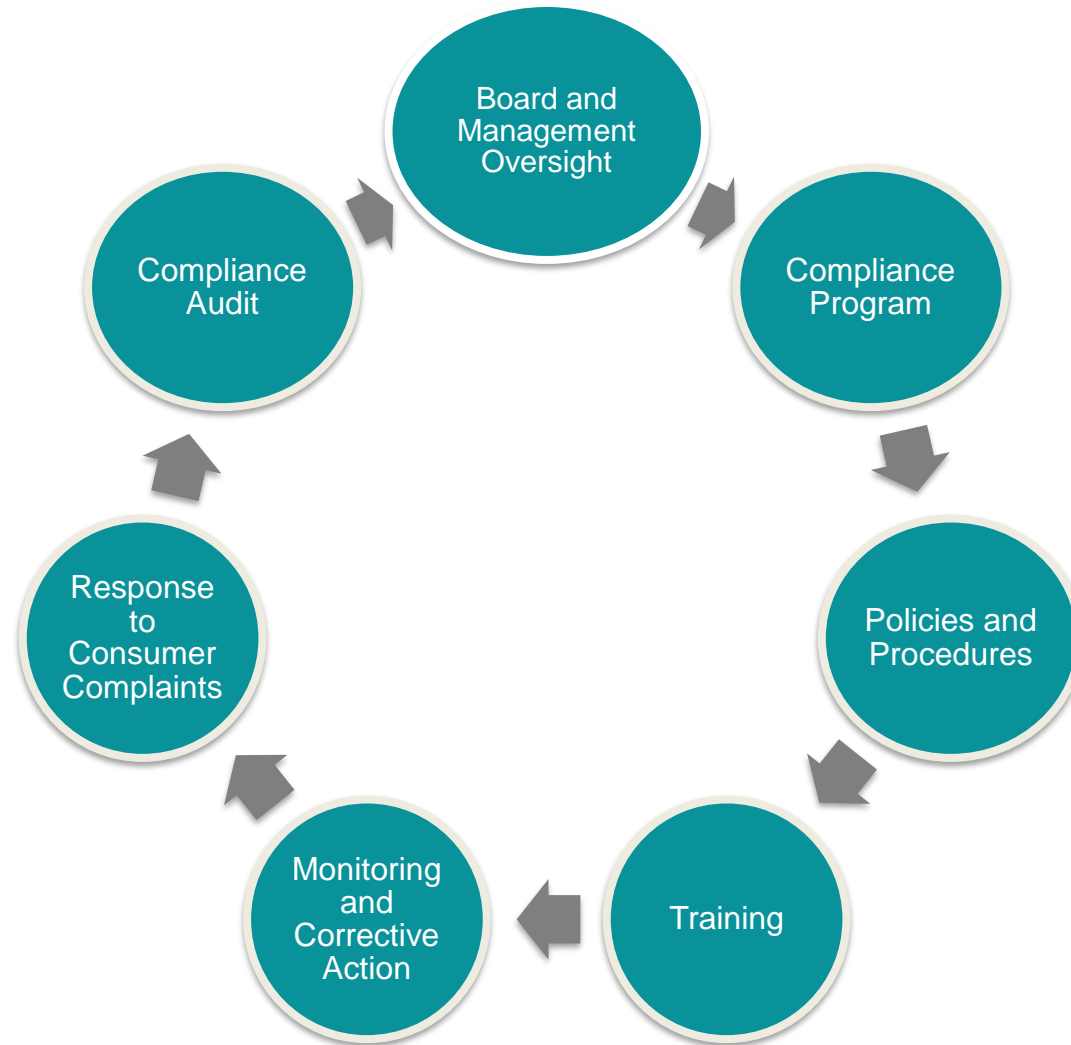


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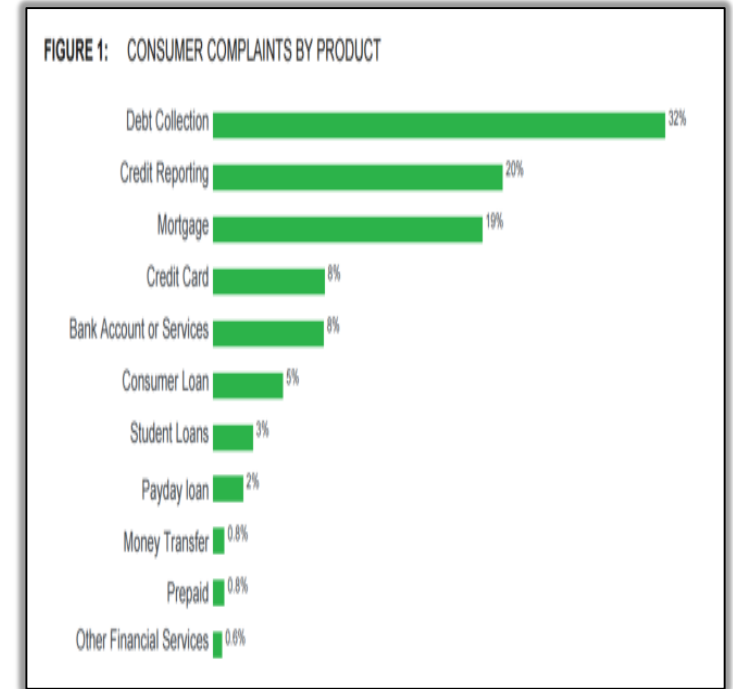
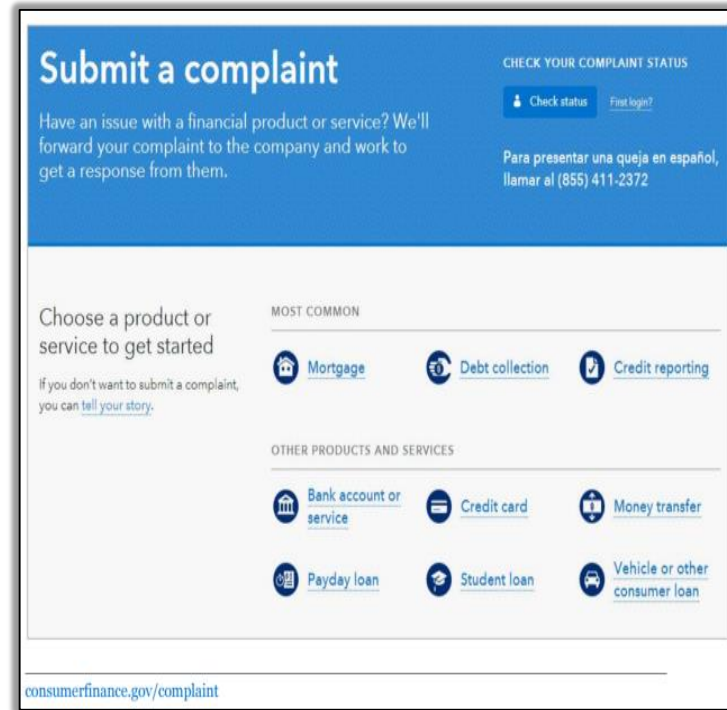
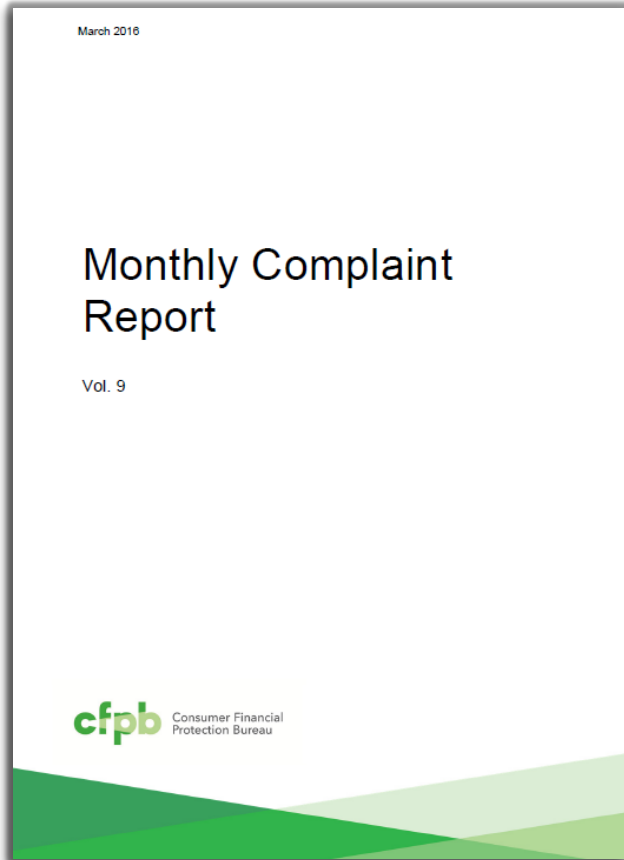
# Managing Compliance

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# Compliance Management



# Understanding the Role of Consumer Complaints



# Compliance Checklist

- ❑ Update / enhance CMS on an ongoing basis
- ❑ Develop a gov't investigation response plan
  - ❑ Investigatory demands
  - ❑ Examination requests
  - ❑ Enforcement actions
  - ❑ Due diligence requests from vendors / customers
- ❑ Identify all applicable laws and rules (federal, state, local)
- ❑ Develop written policies, procedures, and practices
- ❑ Review all consumer-facing materials for compliance
  - ❑ Claim substantiation
  - ❑ Avoid deceptive disclosures
  - ❑ Use of testimonials
  - ❑ Digital advertising
- ❑ Social media
- ❑ Telemarketing (e.g., scripts, dialing)
- ❑ Market-specific laws and guidance
- ❑ Privacy and data security
- ❑ Consumer-facing terms and conditions
- ❑ Payment policies and portals
- ❑ Review and revise contracts to take into account regulatory environment
  - ❑ Reporting and monitoring (activities, compliance, and complaints)
  - ❑ Regulatory examinations
  - ❑ Notice of third-party subpoenas, examinations, and investigations
  - ❑ Indemnity
  - ❑ Representations and warranties
- ❑ Due diligence, reporting, and monitoring of internal practices and third-party relationships
- ❑ Implement a complaint-handling process

# Don't Forget About Advertising!

- ❑ What is the product or service being advertised? Is it lead generation?
- ❑ What laws, regs, and guidance are relevant?
- ❑ Does the advertisement contain any material misrepresentations, expressly or by implication, including the following:
  - ❑ The existence, nature, or amount of fees or other costs;
  - ❑ The nature and benefits of the product or service advertised;
  - ❑ The means by which to close or cancel the product or service; or
  - ❑ Terms and conditions.
- ❑ How do the representations compare to actual practices?
- ❑ Do advertisements and promotional materials directed to consumers clearly disclose all material limitations or conditions on the terms or availability of products or services marketed to consumers, such as:
  - ❑ Expiration date
  - ❑ Material prerequisites for obtaining particular products, services, or benefits (e.g., discounts, refunds, or rebates)
- ❑ Is there fine print or other disclosures?
- ❑ Are there disclosures required by applicable law or regulation?
- ❑ If additional products or services are sold or offered in connection with products or services sold to consumers, determine the following:
  - ❑ Do marketing materials reflect the actual terms and conditions of the product, or are they not deceptive or misleading to consumers?
  - ❑ Have you reviewed scripts and manuals used by the entity's telemarketing and customer service centers?
  - ❑ What is the cancellation/return policy?
  - ❑ Are there any guarantees?
  - ❑ Are testimonials or endorsements used?
  - ❑ Is the advertisement comprehensible by the target audience?
- ❑ If there are service providers involved, are there contracts with terms, conditions, and representations?
- ❑ Is there a compliance management system and vendor oversight?

# Fintech Law 101



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