

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

_____ )	
In the Matter of )	
HIGHER ONE, INC. )	CONSENT ORDER,
NEW HAVEN, CONNECTICUT )	ORDER FOR RESTITUTION,
)	AND ORDER TO PAY
As an Institution-Affiliated Party of )	CIVIL MONEY PENALTY
)	
THE BANCORP BANK )	FDIC-11-700b
WILMINGTON, DELAWARE )	FDIC-11-704k
)	
(INSURED STATE NONMEMBER BANK) )	
_____ )	

The Federal Deposit Insurance Corporation (“FDIC”) is the appropriate Federal banking agency for Higher One, Inc. (“Higher One”) as an institution-affiliated party of The Bancorp Bank, Wilmington, Delaware (“Bank”), under section 3(q) of the Federal Deposit Insurance Act (“FDI Act”), 12 U.S.C. § 1813(q).

The FDIC has reason to believe that Higher One has engaged in unsafe or unsound banking practices and violations of law and regulation, including engaging in deceptive and unfair acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act (“Section 5”), 15 U.S.C. § 45(a)(1), in connection with the Bank’s deposit account product that is offered in conjunction with Higher One (the “OneAccount”).

Higher One, by and through its duly elected and acting Board of Directors (“Board”), has executed a STIPULATION AND CONSENT TO THE ISSUANCE OF A CONSENT ORDER, ORDER FOR RESTITUTION, AND ORDER TO PAY CIVIL MONEY PENALTY (“Consent Agreement”), dated July 2, 2012, that is accepted by the FDIC. With the Consent Agreement, Higher One has consented, without admitting or denying any charges of unsafe or unsound banking

practices or violations of law or regulation to the issuance of this CONSENT ORDER, ORDER FOR RESTITUTION, AND ORDER TO PAY CIVIL MONEY PENALTY (collectively “ORDER”) by the FDIC.

Having determined that the requirements for issuance of an order under sections 8(b) and 8(i)(2) of the FDI Act, 12 U.S.C. §§ 1818(b) and 1818(i)(2), have been satisfied, the FDIC hereby issues the following:

**CONSENT ORDER**

**NO MISREPRESENTATIONS/OMISSIONS**

1. (a) Higher One shall not make, or allow to be made, any misleading or deceptive representation, statement, or omission, expressly or by implication, in the marketing materials used to solicit any customer or prospective customer, or in any similar communication, in connection with the OneAccount or any consumer or commercial deposit, lending, or other product or service that is or may be offered in conjunction with the Bank or any “insured depository institution,” as that term is defined in 12 U.S.C. § 1813(c)(2) (collectively, “Products and Services”).

(b) Within sixty (60) days from the effective date of this ORDER, Higher One shall take all action necessary to comply with the guidance set forth in *Unfair or Deceptive Acts or Practices by State-Chartered Banks* (FIL-26-2004, issued March 11, 2004) and shall not engage in any violations of Section 5 with respect to any Product or Service that is or may be offered in conjunction with the Bank or any insured depository institution. Without limiting the generality of the foregoing, Higher One shall not make, and shall cause its service providers not to make, directly or indirectly, any misrepresentation, expressly or by implication, about any material term of an offer related to any Product or Service that is to be offered in conjunction with the Bank or any insured depository institution in connection with the advertising, marketing, offering,

soliciting, extending, billing, or servicing of same, including but not limited to misrepresentations and/or omissions as to:

(i) any and all fees, including non-sufficient funds (“NSF”) fees and overdraft fees, and the circumstances under which more than one NSF fee may be charged with respect to a single transaction or item presented multiple times against a OneAccount; or

(ii) OneAccount collections, balances, or other OneAccount terms or requirements.

### **COMPLIANCE MANAGEMENT SYSTEM**

2. (a) Within sixty (60) days from the effective date of this ORDER, Higher One shall review, revise, develop, and/or implement, as necessary, a sound risk-based compliance management system, including a comprehensive written compliance program (“Compliance Program”) to ensure that Products and Services comply with consumer protection and fair lending laws, including Section 5, implementing rules and regulations, and regulatory guidance and statements of policy (collectively “Consumer Protection Laws”). Without limiting the generality of the foregoing, Higher One shall ensure that the Compliance Program includes effective monitoring systems for any such Product or Service with provisions requiring:

(i) review and approval by Higher One and, as applicable, by the Bank or other insured depository institutions of (1) all marketing, advertising, and solicitation materials, including direct mail or internet solicitations, promotional materials, and telemarketing scripts; (2) other materials provided to customers or potential customers generated in connection with the marketing, administration, and servicing of such Product or Service, including agreements, privacy policies, and statements; and (3) any material changes or amendments thereto; and maintenance of copies of the above-described materials by Higher One;

(ii) timely and regular notification by Higher One to, as applicable, the Bank or other insured depository institutions of any regulatory agency inquiries or legal actions and any legal actions commenced by any customer or potential customer;

(iii) review and approval by Higher One and, as applicable, the Bank or other insured depository institutions of all materials related to policies and procedures concerning customer service, monitoring of customer service calls on a regular basis, and the review of service-level reports;

(iv) review and approval by Higher One and, as applicable, the Bank or other insured depository institutions of all materials relating to policies and procedures concerning collection activities and monitoring of collection calls on a regular basis;

(v) monitoring by Higher One of the performance of marketing and solicitation programs;

(vi) periodic compliance reviews, including on-site visits as appropriate, by Higher One of partners, vendors, and servicers whose role is material to the Products or Services;<sup>1</sup>

(vii) maintenance of records by Higher One of all approved Product or Service materials, complaints and responses, customer solicitation materials, administrative materials, and service provider agreements;

(viii) maintenance of records by Higher One documenting its service-level standards and those for such services as are provided by partners, vendors, and servicers whose role is material to the Products and Services, including due diligence reports, monitoring and audit results, and financial materials;

---

<sup>1</sup> As used in this Order, the terms “partners, vendors and servicers” shall include any service providers of any such persons whose role is material to the provision of any Product or Service by Higher One.

(ix) regular, quarterly meetings between Higher One and, as applicable, the Bank or other insured depository institutions and Higher One's partners, vendors, and servicers whose role is material to the Products and Services provided by Higher One, for which written minutes will be taken and maintained;

(x) periodic monitoring of the use of confidential and nonpublic personal information of consumers by partners, vendors, and servicers whose role is material to the Products and Services, and the information security programs of such partners, vendors, and servicers; and

(xi) Higher One shall maintain and make available upon request by the Bank or, as applicable, other insured depository institutions, any and all records, reports or other materials required by this Paragraph (2).

(b) Higher One shall ensure that its Compliance Program provides for the establishment and implementation of an effective training program for appropriate personnel that includes regular, specific, comprehensive training on applicable Consumer Protection Laws for employees having responsibilities that relate to Consumer Protection Laws, including senior management and the Board, commensurate with their individual job functions and duties.

(c) Higher One shall ensure that its Compliance Program includes procedures for:

(i) prompt notification to the Bank or other insured depository institutions, as applicable, of regulatory agencies' inquiries, customer complaint correspondence, or legal action received from any third-party, in each case relating to a Product or Service, and

(ii) promptly addressing and resolving consumer inquiries and complaints relating to a Product or Service regardless of the source of the inquiries or complaints.

(d) Higher One shall ensure that its Compliance Program includes a compliance audit component as necessary to ensure an effective and independent review of its internal policies and procedures and compliance with Consumer Protection Laws and includes policies, procedures, and processes that ensure:

(i) audit practices and procedures that are consistent with Generally Accepted Auditing Standards, are independent and adequate in scope;

(ii) completion of a compliance audit plan each calendar year that is reviewed and approved by the Board;

(iii) annual risk assessments to ensure that compliance audits are performed with reasonable frequency;

(iv) assignment of ratings or expressions of opinion as to the adequacy, effectiveness, and efficiency of the internal control environment and compliance audit findings, deficiencies, and recommendations relating to a Product or Service, as documented in a written report and provided to the Audit Committee of the Board, with that Committee's review of the written report documented in its minutes, together with a report of the Committee's actions in response to the audit, including where applicable an explanation why a recommendation has not been implemented; and

(v) provisions for an adequate formal tracking and monitoring system for exceptions identified by compliance audits and regulatory examinations.

(e) The Compliance Program shall be administered by compliance personnel with sufficient experience in, and knowledge of, Consumer Protection Laws and shall provide for sufficient personnel with appropriate authority in order to fully comply with all requirements of this ORDER.

(f) Within sixty (60) days from the effective date of this ORDER, Higher One shall submit the revised Compliance Program, including identification of proposed personnel, to the Regional Director of the FDIC's New York Regional Office ("Regional Director") for review and comment. The Regional Director shall provide comments to Higher One within thirty (30) days of receipt of the revised Compliance Program. Within fifteen (15) days of the receipt of comments from the Regional Director, the Board shall revise the Compliance Program if necessary to incorporate the Regional Director's comments and thereafter adopt, implement, and fully comply with the revised Compliance Program. The Board's review and approval of the revised Compliance Program shall be recorded in its minutes.

(g) Higher One shall ensure that all Products and Services offered pursuant to any arrangement with any insured depository institution are not in conflict with the insured depository institution's compliance management plan and compliance management systems. Any such arrangement shall require that the insured depository institution has ultimate authority to determine the terms, manner, and conditions under which any Product or Service will be offered to consumers, and that Higher One will make any necessary changes, on a prospective basis, in such terms, manner, and conditions as the insured depository institution deems necessary as a result of regulatory guidance, criticism, or formal or informal enforcement action.

(h) Higher One shall make no representations to any insured depository institution, any consumer, or any other person or entity that the FDIC or any employee, agent or representative of the FDIC has endorsed or approved any aspect of any Product or Service offered by Higher One.

### CONDUCT RELIEF

3. (a) With respect to Automated Clearing House ("ACH") transaction items, to the extent any Product or Service is being or is to be offered in conjunction with the Bank or any insured depository institution, Higher One and, as applicable, the Bank or any insured depository institution shall not charge directly or indirectly to any account any NSF fee:

(i) on any returned item where the respective account has a negative balance for more than sixty (60) consecutive days ("60-Day NSF Fee");

(ii) in excess of three (3) NSF fees on any single day to the respective account;

and

(iii) in excess of one (1) NSF fee within any twenty-one (21)-day period with respect to an authorized ACH transaction presented against the respective account that is returned unpaid ("Repeat ACH-NSF Fees"), where any subsequent, authorized ACH transaction in the same amount is presented by the same originator against the respective account within such twenty-one (21) day period and is returned unpaid.

(b) With respect to ChexSystems reporting, Higher One may transmit a report as to a OneAccount only if the account meets the following criteria:

(i) the account has a negative balance in the amount of \$100 or more; and

(ii) the account remains in this negative balance status for sixty (60) or more consecutive days.

(c) With respect to ACH activity, Higher One shall implement a manual process to monitor excessive ACH transactions and ACH activity on OneAccounts, including accounts with "fraud alerts" or "active duty alerts" as required by Consumer Protection Laws. Higher One shall abide by ACH restrictions or holds on OneAccounts imposed by the Bank or any insured depository institution.

(d) Higher One shall promptly notify OneAccount customers when any ACH, checking, POS and other transaction item is returned and the amount of any NSF fee charged for such item by sending a notice to the customer no later than the day after the day the item is returned. The notification should identify the date of the transaction, the type of transaction, the overdraft amount, the fee associated with the item, the amount necessary to return the OneAccount to a positive balance, the amount of time to return the OneAccount to a positive balance, and should include any other information required by Consumer Protection Laws. The notification shall be sent by electronic mail to customers who have agreed to receive notices electronically. For customers for whom the electronic mail box address is no longer active, or for whom electronic mail sent by Higher One is returned as being undeliverable, a notification that a transaction item was returned and that an NSF fee was charged for such item shall be made telephonically to each customer's last known telephone number reflected in Higher One's and, as applicable, the Bank's or any insured depository institution's records for the OneAccount or shall be sent by United States Postal Service first-class mail, forwarding permitted, to each customer's last known address reflected in Higher One's and, as applicable, the Bank's or any insured depository institution's records for the OneAccount or, in the event there is no such record or mail sent to such address is returned, the notification shall be mailed to the then most recent address that may be provided by the National Change of Address System.

(e) With respect to Higher One's collection activities, including those related to collection of NSF fees, Higher One shall not take action to initiate filing of criminal charges or other legal actions without probable cause, nor shall Higher One indicate to customers, whether in writing or otherwise, that it will take any legal action or unintended action unless there is a reasonable likelihood that it will and can take such action.

(f) With respect to Higher One's investigation, handling, and resolution of electronic funds transfer errors and disputes reported by accountholders on OneAccounts directly or indirectly to Higher One, Higher One shall comply in all respects with all applicable requirements of Regulation E of the Consumer Financial Protection Bureau, 12 C.F.R. Part 1005.

### **ORDER FOR RESTITUTION AND OTHER RELIEF**

#### **IT IS FURTHER ORDERED** that

4. (a) Higher One shall make restitution and provide other relief described below and shall complete such restitution within 180 days from the effective date of this ORDER; provided, however, Higher One shall not be obligated to provide such restitution and other relief to OneAccount customers with respect to amounts already paid or credited to their OneAccounts pursuant to the remediation plan already implemented by Higher One to the extent such amounts were paid or credited by Higher One as reimbursement of the specific fees for which financial remediation is required herein. Within seven (7) days from the effective date of this ORDER, Higher One shall deposit \$5,000,000 into a segregated deposit account ("Restitution Account") at an insured depository institution acceptable to the FDIC from which Higher One shall make the restitution described below, less any amounts already paid or credited, as described above. Until Higher One's restitution obligations under this ORDER are fully satisfied, Higher One shall deposit additional funds into the Restitution Account, as necessary, to ensure that it contains sufficient funds to satisfy Higher One's restitution obligations under this ORDER. Once the FDIC determines that all such restitution obligations under this ORDER have been satisfied, including any obligations under Paragraph 4(k) of this ORDER concerning any unclaimed restitution payments, Higher One may close the Restitution Account and remit to itself any funds remaining therein.

(b) Higher One shall make restitution to each individual who had, has, or will have a OneAccount (“Eligible Consumer”) that was or will be charged any 60-Day NSF Fees and/or any Repeat-NSF Fees (collectively “Reimbursable NSF Fees”). The Reimbursable NSF Fees shall be calculated for the period commencing July 16, 2008 through the respective dates Higher One shall have ceased charging 60-Day NSF Fees and Repeat-ACH-NSF Fees in accordance with this ORDER (“Restitution Periods”).

(c) Restitution to Eligible Consumers of the Reimbursable NSF Fees for the Restitution Periods in accordance with this ORDER shall apply to all Eligible Consumers regardless of whether their OneAccounts are closed, charged-off, sold, or otherwise transferred. Higher One’s restitution obligation for the Reimbursable NSF Fees on each Eligible Consumer’s OneAccount for the Restitution Periods may be reduced to the extent any such Reimbursable NSF Fees were previously credited in compromise of a claim to the respective OneAccount at Higher One’s expense or paid to the respective Eligible Consumer by Higher One during the Restitution Periods in compromise of a claim for such Reimbursable NSF Fees by Higher One in favor of such Eligible Consumer.

(d) Except as provided below, payments of the Reimbursable NSF Fees for the Restitution Periods shall be made by credits to the OneAccounts of Eligible Consumers entitled to such credits. If, as of the date that restitution has been made pursuant to this ORDER, an Eligible Consumer’s OneAccount has been closed, charged off, sold, or otherwise transferred, the amount of restitution to which the Eligible Consumer is entitled will be made by restitution check to the holder of the respective OneAccount to the extent it exceeds any balance owed on the OneAccount. Within sixty (60) days of making restitution to the respective Eligible Consumers, Higher One shall report the reduced negative balances of OneAccounts to Check

Systems and to any other credit reporting agencies to which such account balances had been previously reported.

(e) The restitution calculations submitted by Higher One and agreed to by the Regional Director in writing shall be deemed in compliance with the restitution calculations prescribed in this paragraph.

(f) Within thirty (30) days from the effective date of this ORDER, Higher One shall have submitted to the Regional Director for review and non-objection the proposed text of the letters that will accompany the restitution checks to Eligible Consumers, a proposed sample restitution check, and the proposed text of electronic mail and letters that will be sent to Eligible Consumers entitled to credits to their accounts. The text of electronic mail and letters shall include satisfactory language explaining the reason Higher One is sending a restitution check or crediting the account together with an explanation of the manner in which the amount of restitution was calculated. The face of each restitution check shall clearly and conspicuously state "Please cash or deposit this check within 180 days or it will no longer be valid." The Regional Director shall notify Higher One in writing of any comments or non-objection to the proposed letters, checks, and/or electronic mail. Higher One shall address any comments of the Regional Director, making such changes as may be required to the proposed letters, checks, and/or electronic mail. The letters, checks, and/or electronic mail incorporating any changes that may be required in response to comments by the Regional Director shall be sent without further changes to all to Eligible Consumers entitled to receive checks for restitution and to Eligible Consumers entitled to credits to their accounts in accordance with this ORDER.

(g) Within thirty (30) days of a request from the Regional Director, Higher One shall submit to the Regional Director, for review and approval, a proposed announcement to be posted on Higher One's website that describes this ORDER and the restitution to be made by Higher

One to Eligible Consumers. The announcement shall set forth procedures whereby individuals can check their eligibility for restitution to be made by Higher One and can provide updated electronic mail and/or United States Postal Service mailing address information, via a toll-free number and via the Higher One website, if they have not received electronic mail and/or a letter from Higher One addressing this ORDER within 187 days from the effective date of this ORDER. The Regional Director shall notify Higher One in writing of any comments or non-objection to the proposed announcement. Higher One shall address any comments of the Regional Director, making such changes as may be required to the proposed announcement. Upon receipt of the Regional Director's written non-objection, the announcement, incorporating any changes that may be required in response to comments by the Regional Director, shall be posted by Higher One to its website without further changes, but in no event later than sixty (60) days from the effective date of this ORDER.

(h) Within ninety (90) days from the effective date of this ORDER, and then every ninety (90) days thereafter until completion of the restitution required by this ORDER, Higher One shall prepare and send to the Regional Director a detailed written report ("Restitution Report") that explains the processes and procedures by which Higher One identified the Eligible Consumers and determined the applicable restitution amounts described above. The Restitution Report shall also include the following: (i) total number of Eligible Consumers; (ii) names, contact, and account information of the Eligible Consumers; (iii) amount of restitution to which each Eligible Consumer is entitled; (iv) the number of Eligible Consumers who are to receive restitution; (v) total amount of restitution to be paid; (vi) Higher One's procedures to contact Eligible Consumers who do not receive restitution; and (vii) number and names of Eligible Consumers for whom the amount of restitution has yet to be determined.

(i) Within sixty (60) days from the effective date of this ORDER, Higher One shall hire an independent auditor who is acceptable to the Regional Director, who shall verify that Higher One accurately identified Eligible Consumers with respect to whom restitution checks are to be issued or Eligible Consumers' OneAccounts are to be credited as required by this ORDER. The independent auditor shall prepare a detailed written report of the accuracy and completeness of the processes and procedures by which Higher One determined and made the restitution, including the amounts of all restitution credits and refunds required to be made pursuant to this ORDER. The report described shall be submitted to the Regional Director for review, comment, and/or non-objection within one-hundred eighty (180) days from the effective date of this ORDER, and then every sixty (60) days thereafter until completion of the restitution required by this ORDER. The auditor's final report shall include a confirmation that all restitution credits and refunds required to be made pursuant to this ORDER have been accurately calculated, and that all credits to the OneAccounts of Eligible Consumers and all restitution check refunds pursuant to this ORDER have been made.

(j) Upon receipt of the Regional Director's written non-objection, the letters, restitution checks, and electronic mail described above shall be sent in accordance with the Regional Director's comments, if any, but in no event later than thirty (30) days from the effective date of this ORDER. Electronic mail contemplated above for Eligible Consumers who are to receive restitution by credits to their OneAccounts may be sent to Eligible Consumers and, for Eligible Consumers for whom the electronic mail box address is no longer active, letters are to be sent by Higher One. In the case of letters, letters and any checks are to be sent by United States Postal Service first-class mail, address correction service requested, to each Eligible Consumer's last known address reflected in Higher One's records or the then-most-recent address that may be provided by the National Change of Address System. The envelopes shall

contain no materials other than the approved letters, checks, and any other materials reviewed and not objected to by the Regional Director. Higher One shall make reasonable attempts to locate Eligible Consumers or their estates, including a standard address search using the National Change of Address System, whose notification letter and/or restitution check is returned for any reason. Higher One shall promptly re-mail all returned letters and any restitution checks to corrected addresses, if any.

(k) After one hundred eighty-seven (187) days from the date the restitution checks were originally mailed (“Mail Date”), Higher One may void all checks that were returned or have not been negotiated. The total amount of any restitution payments required by the ORDER and not credited to the OneAccounts or claimed by Eligible Consumers within two hundred fifty (250) days from the Mail Date, shall be donated as soon as practicable thereafter by the Bank to a charitable corporation that is tax-exempt under section 501(c)(3) of the Internal Revenue Code (including colleges and/or universities), for financial or credit education or counseling programs or services. Before making any such donation, Higher One shall submit the name of each such entity and a description of the financial and/or credit education or counseling programs or services provided by such entity for non-objection by the Regional Director.

(l) For three (3) years from the effective date of this ORDER, Higher One shall retain all records pertaining to the restitution including, but not limited to, documentation of the processes and procedures used to determine the Eligible Consumers, the names, contact and account information of the Eligible Consumers, any mailing records, and documentation that the appropriate restitution was made.

(m) The provisions pertaining to restitution set forth herein provide for equitable relief pursuant to section 8(b)(6) of the FDI Act, 12 U.S.C. § 1818(b)(6), and are remedial in nature.

## **ORDER TO PAY**

### **IT IS FURTHER ORDERED** that

5. By reason of the alleged violations of law and/or regulations, and after taking into account the Consent Agreement, the appropriateness of the penalty with respect to the financial resources and good faith of Higher One, the gravity of the conduct by Higher One, the history of previous conduct by Higher One, and such other matters as justice may require, pursuant to section 8(i)(2) of the Act, 12 U.S.C. § 1818(i)(2), Higher One shall pay a civil money penalty of ONE HUNDRED TEN THOUSAND (\$110,000) DOLLARS. Higher One shall pay the civil money penalty to the Treasury of the United States. Higher One shall pay such civil money penalty itself, and is prohibited from seeking or accepting indemnification for such payment from any third party.

### **PROGRESS REPORTS**

6. Higher One shall furnish a written progress report to the Regional Director sixty (60) days after the effective date of this ORDER and every ninety (90) days thereafter, detailing the form and manner of all actions taken to secure compliance with this ORDER and the results of such actions. Nothing in this paragraph shall relieve Higher One from compliance with any other reporting requirement or provision of this ORDER.

### **MISCELLANEOUS**

7. The provisions of this ORDER shall not bar, estop, or otherwise prevent the FDIC, any insured depository institution, or any federal or state agency or department from taking any other action against Higher One, the Bank, any of Higher One's or the Bank's affiliates, successors or assigns, or any of their respective directors, officers, employees, and agents, or any of the Bank's current or former institution-affiliated parties, or any of their respective directors, officers, employees, and agents.

This ORDER shall be effective on the date of issuance.

The provisions of this ORDER shall be binding upon Higher One, its successors and assigns, and any of their respective directors, officers, employees, and agents.

The provisions of this ORDER shall remain effective and enforceable except to the extent that and until such time as any provision has been modified, terminated, suspended, or set aside by the FDIC.

Issued pursuant to delegated authority.

Dated at Washington, D.C. this 7<sup>th</sup> day of August, 2012.

/s/  
Sylvia H. Plunkett  
Senior Deputy Director  
Division of Depositor and Consumer Protection