

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

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In the Matter of	)	CONSENT ORDER
	)	AND ORDER TO PAY
THE BANCORP BANK	)	CIVIL MONEY PENALTY
WILMINGTON, DELAWARE	)	
	)	FDIC-11-698b
	)	FDIC-11-703k
(INSURED STATE NONMEMBER BANK)	)	
_____	)	

The Federal Deposit Insurance Corporation (“FDIC”) is the appropriate Federal banking agency for 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 the Bank has engaged in unsafe or unsound banking practices and engaged 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 (the “OneAccount”) that is offered in conjunction with Higher One, Inc. (“Higher One”), an institution-affiliated party of the Bank.

The Bank, 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 AND ORDER TO PAY CIVIL MONEY PENALTY (“Consent Agreement”), dated \_\_\_\_\_, 2012, that is accepted by the FDIC. With the Consent Agreement, the Bank 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 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**

#### **SUPERVISION BY BOARD**

1. The Board shall increase its oversight of the affairs of the Bank by assuming full responsibility for the approval of sound policies and objectives and for the supervision of all of the Bank's activities, relating to the Bank's consumer and commercial deposit, lending, and other products and services (collectively, "Products and Services") consistent with the role and expertise commonly expected for directors of banks of comparable size and complexity and offering comparable banking products and services. Without limiting the generality of the foregoing, the Board shall increase its oversight of the Bank's compliance management system, including assuming full responsibility for the approval of sound policies and objectives for the Bank's products and services offered to consumers ("Consumer Products"), including any of the Bank's Consumer Products offered in conjunction with a third party ("Third-Party Products"), and requiring that any such Consumer Products comply with applicable consumer protection and fair lending laws, including Section 5, implementing rules and regulations, and regulatory guidance and statements of policy (collectively "Consumer Protection Laws").

#### **COMPLIANCE MANAGEMENT SYSTEM**

2. (a) Within 60 days from the effective date of this ORDER, the Bank 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 the Bank's Consumer Products, including any Third-Party Products, comply with Consumer Protection Laws. Without limiting the generality of the foregoing, and to the extent

the Bank maintains any Third-Party Products, the Bank shall ensure that the Compliance Program includes effective monitoring systems for the Bank's Third-Party Products with provisions requiring:

(i) review, approval, and maintenance by the Bank of copies of (1) all marketing, advertising, and solicitation materials, including direct mail, electronic or telephonic marketing, or internet solicitations, promotional materials, and telemarketing scripts and rebuttals; (2) other materials provided or disseminated to customers or potential customers generated in connection with the marketing, administration and servicing of such Third-Party Products, including account agreements, privacy policies, and periodic statements; and (3) any material changes or amendments to any such materials;

(ii) timely and regular notification to the Bank by its Third-Party Product partners, vendors, or servicers of any regulatory agency inquiries or legal actions and any legal actions commenced by any customer or potential customer;

(iii) review and approval by the Bank of all materials related to customer service; monitoring by the Bank of customer service calls on a regular basis; and review by the Bank of service-level reports;

(iv) review and approval by the Bank of all materials relating to collection activities and monitoring of collection calls on a regular basis;

(v) monitoring by the Bank of the performance of marketing and solicitation programs, including numbers of accounts offered, the products in each campaign and the response rate for each Third-Party Product;

(vi) periodic compliance reviews, including on-site visits, by the Bank as appropriate of all Third-Party Product providers, partners, vendors, or servicers and any of their

material Third-Party Product-related service providers or sub-servicers (collectively “Third-Party Product Contributors”);

(vii) periodic review of all of the Bank’s business and strategic plans relating to agreements with Third-Party Product Contributors;

(viii) maintenance of records by the Bank of all approved materials, complaints and responses, solicitation materials, administration materials, and agreements related to its Third-Party Products;

(ix) maintenance of records by the Bank documenting the service-level standards for those services provided by Third-Party Product Contributors, including due diligence reports, monitoring and audit results, and financial materials;

(x) regular meetings between the Bank and its material Third-Party Product partners, vendors, and servicers, for which written notes will be taken and maintained; and

(xi) periodic monitoring of the use of confidential and nonpublic personal information about Bank customers and consumers by its Third-Party Product Contributors and of the information security programs of such Third-Party Product Contributors.

(b) The Bank shall ensure that its Compliance Program provides for the establishment and implementation of an effective training program for appropriate Bank 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) The Bank shall ensure that its Compliance Program includes procedures for promptly addressing and resolving consumer complaints arising from any Third-Party Product regardless of the source of the complaints, for monitoring such complaints and identifying any

trends concerning the nature of the complaints, and for promptly addressing any root causes of such complaints.

(d) 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 in order to fully comply with all requirements of this ORDER.

(e) Within sixty (60) days from the effective date of this ORDER, the Bank shall submit the revised Compliance Program, including any proposed staffing enhancements, 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 the Bank 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.

### **COMPLIANCE AUDIT PROGRAM**

3. (a) Within sixty (60) days from the effective date of this ORDER, the Bank shall review and revise its internal compliance audit program as necessary to ensure an effective and independent review of the Bank's internal policies and procedures and compliance with Consumer Protection Laws. The revised internal compliance audit program shall, at a minimum, include policies, procedures, and processes that ensure:

(i) audit practices and procedures that are consistent with Generally Accepted Auditing Standards, including provisions to ensure that the internal compliance audits of the Bank's Third-Party Products are independent and adequate in scope;

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

(iii) annual risk assessments of each Third-Party Product to ensure that internal 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 of each Third-Party Product; and

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

(b) Internal compliance audit findings, deficiencies, and recommendations shall be promptly documented in a written report and provided to the Audit Committee of the Board at its next meeting. The Bank shall promptly forward a copy of each internal compliance audit report and the minutes reflecting the Board's review of such report to the Regional Director. Within thirty (30) days of receipt of the written report, the Board shall take action to address the audit's findings, correct or take steps to correct any deficiencies noted in a timely manner, and implement any recommendations. The Board's review of the written report shall be fully documented in its minutes, together with a report of the Board's actions in response to the audit, including where applicable an explanation why a recommendation has not been implemented.

#### **MANAGING THIRD-PARTY RISK**

4. (a) Within sixty (60) days from the effective date of this ORDER, the Bank shall develop and implement a Board-approved Third-Party Risk Management Program ("Third-Party Program") which shall set forth the Bank's plan for managing the risks of its Third-Party Product Contributors, vendors and service providers. The Bank shall form a relationship risk committee ("Third-Party Relationship Risk Committee") comprised of senior management, including the

Compliance Officer, and whose minutes shall be regularly reviewed by the Audit Committee, to ensure proper management of third-party risk, consistent with the risk profile of any activity outsourced to Third-Party Product Contributors, vendors and service providers. At a minimum, the Bank's Third-Party Program shall include, consistent with the *Guidance for Managing Third-Party Risk* (FIL-44-2008, issued June 6, 2008):

(i) a risk assessment process to identify the risks associated with the use of Third-Party Product Contributors, vendors and service providers, including but not limited to, operational and transactional risks;

(ii) procedures adequate to conduct initial and ongoing due diligence with respect to activities of Third-Party Product Contributors, including but not limited to the marketing, processing, and servicing of Bank Products and Services;

(iii) procedures for terminating Third-Party Product Contributor relationships in the event that any such relationship fails to comply with the Bank's systems and controls;

(iv) procedures to review contract terms with respect to Third-Party Product Contributors; and

(v) effective oversight of Third-Party Product Contributors to maintain compliance with Bank systems and controls.

(b) On a quarterly basis, the Third-Party Relationship Risk Committee shall report to the Board: (i) any new or substantive changes in any Third-Party Product Contributor relationships, (ii) notable actions taken under subparagraph (a) above and recommendations made to Bank management regarding the same, and (iii) the status of any ongoing reviews and audits and any corrective actions taken pursuant to subparagraph (a) above. The Board minutes shall contain evidence of the Board's review and discussion of the foregoing and shall include an evaluation of the overall effectiveness of the Third-Party Program.

### **NEW THIRD PARTY RELATIONSHIPS**

5. (a) In the event that the Bank shall desire to enter into any new Third-Party Product relationships, or any agreements or arrangements with Third-Party Product Contributors, the Bank shall provide 20 days' advance notice thereof to the Regional Director prior to entry of the Bank into the Third-Party Product program, agreement, or arrangement.

(b) The Bank shall submit the following to the Regional Director with any notice of entry of the Bank into the Third-Party Product program, agreement, or arrangement:

(i) a full and complete description of the Third-Party Product, agreement, or arrangement in which the Bank is engaging and the initial due diligence that was performed in relation thereto;

(ii) a full and complete description of any Third-Party Product Contributors and of any functions or services any of them are to provide in connection with the proposed Third-Party Product; and

(iii) the projected volume and growth of the Third-Party Product.

### **TERMINATION OF RELATIONSHIP WITH THIRD-PARTY PRODUCT PROVIDER**

6. On or before the effective date of this ORDER, the Bank shall provide written notification to the Regional Director of the date of termination of the contractual arrangement with Higher One and the date on which new Higher One accounts ceased to be opened and the date on which existing Higher One accounts were transferred from the Bank.

### **CORRECTION OF VIOLATIONS OF LAW**

7. Within sixty (60) days from the effective date of this ORDER, the Bank shall, eliminate or correct violations of Consumer Protection Laws cited in the FDIC's most recent Compliance

Report of Examination. The Bank shall take all necessary steps to maintain ongoing compliance with such Consumer Protection Laws.

#### **NO MISREPRESENTATIONS/OMISSIONS**

8. Within sixty (60) days from the effective date of this ORDER, the Bank 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). Without limiting the foregoing, in any advertising, marketing, offering, soliciting, billing, or servicing of any Products and Services, including any Third-Party Product, the Bank shall not make, or allow to be made, any misleading or deceptive representation, statement, or omission, expressly or by implication.

#### **RESTITUTION AND OTHER RELIEF**

9. The FDIC may require the Bank, at the FDIC's direction and without any additional action or showing needed on the part of the FDIC, to establish and maintain a restitution account ("Restitution Account") with respect to categories of consumers specified by the FDIC ("Eligible Consumers") who activated their Higher One deposit accounts at the Bank ("One Accounts") on or after July 16, 2008. If so directed by the FDIC, the Bank shall establish and maintain a Restitution Account in the amount, as of the date of this ORDER, that remains unpaid by Higher One as restitution under an order or other agreement with the FDIC, including an order or agreement issued or made pursuant to a settlement arrangement with the FDIC, to any Eligible Consumers who activated their One Accounts after July 16, 2008 ("Required Restitution"). If Higher One defaults, in whole or in part, on its obligation to make the Required Restitution, the FDIC may require the Restitution Account to be applied to the extent of such default.

#### **ORDER TO PAY CIVIL MONEY PENALTY**

10. IT IS FURTHER ORDERED THAT, 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 the Bank, the gravity of the conduct by the Bank, the history of previous conduct by the Bank, and such other matters as justice may require, pursuant to section 8 (i) (2) of the FDI Act, 12 U.S.C. § 1818(i) (2), a civil money penalty of \$172,000 is assessed against the Bank. The Bank shall pay the civil money penalty to the Treasury of the United States. The Bank shall pay such civil money penalty itself, and is prohibited from seeking or accepting indemnification for such payment from any third-party.

### **PROGRESS REPORTS**

11. Within thirty (30) days from the end of each calendar quarter following the effective date of this ORDER, the Bank shall furnish to the Regional Director written progress reports detailing the form, manner, and results of any actions taken to secure compliance with this ORDER. All progress reports and other written responses to this ORDER shall be reviewed by the Board and made a part of the Board minutes.

### **SHAREHOLDERS**

12. Within thirty (30) days from the effective date of this ORDER, the Bank shall send a copy of this ORDER, or otherwise furnish a description of this ORDER, to its parent holding company. The description shall fully describe the ORDER in all material respects.

### **BOARD COMMITTEE TO MONITOR ORDER**

13. (a) Within thirty (30) days from the effective date of this ORDER, the Board shall establish an oversight committee (“Oversight Committee”) charged with the responsibility of ensuring compliance with the provisions of this ORDER. A majority of the Oversight Committee shall be comprised of members who are not now, and have never been, involved in the daily operations of the Bank and who shall be acceptable to the Regional Director.

(b) The Oversight Committee shall monitor compliance with this ORDER and submit a written report quarterly to the entire Board, and a copy of the report and any discussion related to the report or this ORDER shall be part of the minutes of the Board meeting. Copies of the quarterly report shall be submitted to the Regional Director as part of the progress reports required by this ORDER. Nothing contained herein shall diminish the responsibility of the entire Board to ensure compliance with the provisions of this ORDER.

### **MISCELLANEOUS**

14. The Bank shall use good faith reasonable efforts to cooperate with the FDIC in its pursuit of claims against Higher One related to OneAccounts activated after May 9, 2008, including, upon reasonable prior notice and at reasonable times and places, making its documents and records relating to the claims available to the FDIC without subpoena and, upon reasonable prior notice and at reasonable times and places, in making its personnel (including officers, directors and employees) available for interview and/or testimony by deposition or before any authorized tribunal without subpoena. The cooperation shall not require the Bank to waive any applicable privileges. The FDIC may use the documents and testimony in claims related to OneAccounts activated after May 9, 2008, including any action brought by the CFPB or FTC. Prior to their use in a proceeding, the documents and testimony will be kept confidential. Their use in a proceeding will be subject to confidentiality orders issued by the tribunal in which they will be used. The FDIC agrees to provide notice to Bank if any third party other than the CFPB or FTC attempts to obtain the documents or testimony.

15. (a) This ORDER shall not bar, estop or otherwise prevent the FDIC or any other federal or state agency or department from taking any action against the Bank, or any of its directors, officers, employees, and agents, or any of the Bank's affiliates, their 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.

(b) The FDIC expressly reserves all rights against Higher One. Nothing in the CONSENT AGREEMENT or this ORDER shall require the FDIC or any other party to reduce, compromise, or otherwise limit any claims against Higher One.

(c) Nothing in the CONSENT AGREEMENT or this ORDER shall require the FDIC or any other party to reduce, compromise, or otherwise limit any claims because of any contractual or other commitments of the Bank to indemnify, defend, or hold harmless Higher One.

16. Nothing herein shall prevent the FDIC from conducting on-site reviews and/or examinations of the Bank, its affiliates, agents, service providers, and any other institution-affiliated parties of the Bank at any time to monitor compliance with this ORDER.

17. This ORDER shall be effective on the date of issuance.

18. The provisions of this ORDER shall be binding on the Bank, its institution-affiliated parties, and any of successors or assigns thereof.

19. Each provision of the ORDER shall continue in full force and effect until such time as it shall have been modified, suspended or terminated in writing by the FDIC.

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