

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

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In the Matter of	)	
	)	
THE BANCORP BANK	)	ORDER FOR RESTITUTION AND
WILMINGTON, DELAWARE	)	ORDER TO PAY CIVIL MONEY
	)	PENALTY
	)	
	)	
(Insured State Nonmember Bank)	)	FDIC-18-0008b
_____	)	FDIC-18-0009k

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 engaged in violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (“Section 5”) as a result of practices regarding the disclosure and assessment of transaction fees for point-of-sale signature-based transactions without a personal identification number (“PINless transactions”) for the Bank's Excella Visa Prepaid Debit Cards (“Excella Cards”) and certain other general purpose reloadable (“GPR”) debit cards offered by the Bank (“Non-Excella Cards”). The transaction fees assessed on behalf of the Bank by the Bank’s third party payment processor for PINless transactions were greater than the Bank disclosed to consumers for such transactions.

The FDIC also has reason to believe that the Bank violated the Electronic Funds Transfer Act, 15 U.S.C. § 1693 *et seq.* and Regulation E, 12 C.F.R. Part 1005; the Truth in Savings Act,

12 U.S.C. § 3201 *et seq.* and Regulation DD, 12 C.F.R. Part 1030; and the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §7001.

The Bank, by and through its duly elected board of directors, has executed a STIPULATION AND CONSENT TO THE ISSUANCE OF AN ORDER FOR RESTITUTION AND AN ORDER TO PAY CIVIL MONEY PENALTY (“CONSENT AGREEMENT”) dated March 1, 2018. Through the CONSENT AGREEMENT, the Bank has consented, solely for the purpose of this proceeding and without admitting or denying any violations of law or regulation, to the issuance of this ORDER FOR RESTITUTION AND ORDER TO PAY CIVIL MONEY PENALTY (“ORDER”) by the FDIC.

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

**IT IS HEREBY ORDERED**, that the Bank, its institution-affiliated parties, as that term is defined in section 3(u) of the FDI Act, 12 U.S.C. § 1813(u), and its successors and assigns, fully comply with Section 5.

### **ORDER FOR RESTITUTION**

#### Restitution Plan

1. Within thirty (30) days from the effective date of this ORDER, the Bank shall prepare a comprehensive restitution plan (“Restitution Plan”) for all past and present holders of Excella Cards (“Excella Consumers”) and Non-Excella Cards (“Non-Excella Consumers”) who from December 3, 2010 through November 8, 2014 were assessed transaction fees for PINless transactions that exceeded the amount of the fee the Bank disclosed to Excella Consumers and Non-Excella Consumers for such transaction (“Excess Transaction Fees”) and

who are therefore entitled to reimbursement (“Eligible Consumers”). The Bank shall submit the Restitution Plan to the Regional Director of the FDIC’s New York Regional Office (“FDIC Regional Director”) for his review, comment, and non-objection prior to implementation of any actions still to be performed under the Restitution Plan.

2. The Restitution Plan shall distinguish between Eligible Consumers to whom reimbursement has already been made (“Previously Reimbursed Eligible Consumers”) and those who are entitled to reimbursement, including consumers who were mailed reimbursement checks that have not been cashed, (“Unreimbursed Eligible Consumers”) and shall: (a) identify all Eligible Consumers; (b) specify the methodology for calculating the amount of restitution for each Eligible Consumer; (c) describe the process for providing restitution to all of the Eligible Consumers for Excess Transaction Fees assessed by the Bank, including the manner in which restitution was or will be paid and the time frames for such payments; (d) describe, for cash restitution made by United States Postal Service first class mail to Previously Reimbursed Eligible Consumers, (i) the Bank’s processes for prior and future attempts to locate those Eligible Consumers whose payments were or may be returned to the Bank as undeliverable, which shall be consistent with the standards set forth in Paragraph 7 of this ORDER; and (ii) the Bank’s processes for prior and future attempts to contact Eligible Consumers whose reimbursement checks remain uncashed thirty (30) days after the reimbursement checks were mailed shall be consistent with the standards set forth in Paragraph 7 of this ORDER; and (e) provide for payment of restitution to all Unreimbursed Eligible Consumers within ninety (90) days of receipt of non-objection to the plan from the FDIC Regional Director as required in Paragraph 3 of this ORDER.

3. The Restitution Plan shall include samples of any letters, envelopes, and/or electronic mail to be sent to any Unreimbursed Eligible Consumers, including satisfactory language explaining the reason the Bank is sending a restitution payment or providing a credit to the Excella Card Accounts and Non-Excella Card Accounts of Eligible Consumers. The letters and/or electronic mail shall also include reference to and the web addresses for any FDIC press releases related to the ORDER, and shall include a reference that the restitution payment does not, in any manner, limit an Eligible Consumer's rights. Upon the FDIC Regional Director's non-objection to the Restitution Plan, the letters and/or electronic mail, incorporating any changes that may be required in response to comments by the Regional Director, shall be sent by United States Postal Service first-class mail and/or electronic mail to all Unreimbursed Eligible Consumers entitled to receive restitution payments or credits in accordance with this ORDER.

4. The Bank shall fully implement the Restitution Plan, including making payments or providing credits to all of the Eligible Consumers, within ninety (90) days of receipt of non-objection from the FDIC Regional Director. Any required restitution shall be made by credits to the Excella Card Accounts and Non-Excella Card Accounts of Eligible Consumers. If, as of the date that restitution is made, an Eligible Consumer's Excella Card Account and/or Non-Excella Card Account has been closed, charged off, sold, or otherwise transferred, the amount of restitution to which the Eligible Consumer is entitled shall be made by bank or certified check ("Restitution Check") mailed to the holder of the Account as provided below. Restitution provided by the Bank under this ORDER shall not limit consumers' rights in any way.

Independent Auditor

5. Within thirty (30) days from the effective date of this ORDER, the Bank shall provide the Regional Director for his review and non-objection the name of an independent

third-party consultant (“Auditor”) with appropriate expertise and qualifications to review and verify that the Bank:

(i) Accurately identified the Eligible Consumers pursuant to the Restitution Plan required by this ORDER;

(ii) Accurately calculated the restitution amount for each Eligible Consumer pursuant to the Restitution Plan required by this ORDER; and

(iii) Made the appropriate restitution payments or provided credits to each Eligible Consumer as required by this ORDER.

6. The Auditor shall prepare a detailed written report describing the status of the Bank’s Restitution Plan and payment distribution and submit it to the FDIC Regional Director for review, comment and non-objection sixty (60) days from the date the Auditor is engaged, and every thirty (30) days thereafter until completion of the restitution required by this ORDER. The FDIC Regional Director shall have unrestricted access to any Auditor work papers or records used to prepare the Auditor’s written report or used by the Auditor to verify or monitor the implementation of the Restitution Plan.

#### Mailing Restitution Checks

7. When the Bank makes cash restitution by Restitution Check made payable to an Unreimbursed Eligible Consumer, it shall send the Restitution Check by United States Postal Service first-class mail, address correction service requested, to the Eligible Consumer’s last address as maintained by the Bank’s records. The Bank shall make reasonable attempts to obtain a current address for any Eligible Consumer whose notification letter and/or Restitution Check is returned for any reason, using standard address search methodologies, and shall promptly re-mail all returned letters and/or Restitution Checks to current addresses, if any. If the Restitution

Check for an Eligible Consumer is returned to the Bank after two mailing attempts, or if a current mailing address cannot be identified using standard address search methodologies, the Bank shall retain the restitution amount of such Eligible Consumer for a period of three-hundred sixty (360) days from the date the Restitution Check was originally mailed, during which period such amount may be claimed by such Eligible Consumer upon appropriate proof of identity. After such time, these monies will be disposed of in accordance with applicable State law as specified in the Restitution Plan.

#### Recordkeeping

8. For seven (7) years from the effective date of this ORDER, the Bank shall retain all records pertaining to the restitution required by this ORDER, including, but not limited to: documentation of the processes and procedures used to identify the Eligible Consumers, the names, contact, and account information of the Eligible Consumers, mailing records, and any other documentation related to the payment of restitution required by this ORDER.

#### Progress Reports and Shareholder Notification

9. On or before the 30<sup>th</sup> day after the end of the first calendar quarter following the effective date of this ORDER, and on or before the 30<sup>th</sup> day after the end of every calendar quarter thereafter, the Bank shall furnish written progress reports to the FDIC Regional Director, detailing the form and manner of any actions taken to secure compliance with this ORDER and the results thereof.

10. Following the effective date of this ORDER, the Bank shall send to its sole shareholder, The Bancorp, Inc., a copy of this ORDER or a description of this ORDER in conjunction both with the Bank's next shareholder communication and with its notice and/or proxy statement preceding the Bank's next shareholder meeting. If the Bank sends the

shareholder a description of this ORDER rather than a copy of it, the description shall fully describe this ORDER in all respects. The description and any accompanying communication, statement, or notice shall be sent to the FDIC, Accounting and Securities Section, Washington, D.C. 20429, at least fifteen (15) days prior to dissemination to the shareholder. Any changes requested to be made by the FDIC shall be made prior to dissemination of the description, communication, notice, or statement.

Effect of Prior Determinations or Other Monetary Relief

11. If restitution has been provided to a Previously Reimbursed Consumer in accordance with the Restitution Plan, then this ORDER shall not be construed as requiring the Bank to make duplicate restitution to that Eligible Consumer.

**ORDER TO PAY CIVIL MONEY PENALTY**

**IT IS FURTHER ORDERED** that, by reason of the violations set forth herein and after taking into account the appropriateness of the penalty with respect to the financial resources and good faith of the Bank, the gravity of such violations by the Bank, the history of previous violations by the Bank, and such other matters as justice may require, a civil money penalty of TWO MILLION DOLLARS (\$2,000,000) is assessed against the Bank. The Bank shall pay such civil money penalty to the Treasury of the United States. The Bank itself shall pay such amount to the Treasury of the United States, and is prohibited from seeking or accepting indemnification for such payment from any third party.

Miscellaneous

The provisions of this ORDER shall not bar, estop or otherwise prevent the FDIC or any other federal or state agency or department from taking any other action against the Bank, or any

of the Bank's current or former institution-affiliated parties, and their respective successors and assigns.

This ORDER shall become effective upon its issuance by the FDIC.

The provisions of this ORDER shall be binding upon the Bank, its institution-affiliated parties, and their successors and assigns.

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 in writing by the FDIC.

Issued pursuant to delegated authority.

Dated at Washington, D.C. this \_\_7th\_\_ day of March, 2018.

\_\_\_\_\_/s/\_\_\_\_\_  
Sylvia H. Plunkett  
Senior Deputy Director  
Division of Depositor and Consumer Protection  
Federal Deposit Insurance Corporation