

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

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In the Matter of	)	
FIRST BANK & TRUST	)	ORDER TO CEASE AND DESIST,
BROOKINGS, SOUTH DAKOTA	)	ORDER FOR RESTITUTION,
(Insured State Nonmember Bank)	)	AND ORDER TO PAY
	)	FDIC-07-228b
	)	FDIC-07-260k

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First Bank & Trust, Brookings, South Dakota (Bank), having received a NOTICE OF CHARGES FOR AN ORDER TO CEASE AND DESIST AND FOR RESTITUTION; NOTICE OF ASSESSMENT OF CIVIL MONEY PENALTIES; FINDINGS OF FACT AND CONCLUSIONS OF LAW; ORDER TO PAY; AND NOTICE OF HEARING issued by the Federal Deposit Insurance Corporation (FDIC) on June 10, 2008 (NOTICE), detailing the violations of law and/or regulations and unsafe or unsound banking practices alleged to have been committed by the Bank, and having been advised of its right to a hearing with respect to the foregoing under sections 8(b) and 8(i)(2) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. §§ 1818(b) and (i)(2), and the FDIC Rules of Practice and Procedure, 12 C.F.R. Part 308, and having waived those rights, entered into a STIPULATION AND CONSENT TO THE ISSUANCE OF AN ORDER TO CEASE AND DESIST, ORDER FOR RESTITUTION, AND ORDER TO PAY (CONSENT

AGREEMENT) with a representative of the Legal Division of the FDIC, dated March 4, 2009, whereby, solely for the purpose of this proceeding and without admitting or denying the alleged violations of law and/or regulations and unsafe or unsound banking practices, the Bank consented to the issuance of an ORDER TO CEASE AND DESIST, ORDER FOR RESTITUTION, AND ORDER TO PAY (ORDER) by the FDIC.

The FDIC considered the matter and determined that it has reason to believe that the Bank committed violations of law and/or regulations and engaged in unsafe or unsound banking practices, including, but not limited to, violations of section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (Section 5), and operating the Bank without effective oversight and supervision of the Bank's consumer lending programs.

The FDIC, therefore, accepts the CONSENT AGREEMENT and issues the following ORDER:

**ORDER TO CEASE AND DESIST**

IT IS HEREBY ORDERED, that the Bank, its institution-affiliated parties, as that term is defined in section 3(u) of the Act, 12 U.S.C. § 1813(u), and its successors and assigns, cease and desist from the following unsafe or unsound banking practices and violations of law and/or regulations:

(a) operating the Bank without effective oversight by the Board of Directors (Board) and supervision by executive management of its Visa and MasterCard branded credit card programs marketed and serviced by a third party pursuant to a contractual agreement with the Bank (third party credit card programs);

(b) operating in violation of Section 5; operating in violation of Part 332 of the FDIC's Rules and Regulations, 12 C.F.R. Part 332, implementing the consumer privacy safeguards of the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 *et seq.*; and

(c) operating with an inadequate compliance management system to ensure compliance with Section 5 and other federal consumer protection laws and regulations.

IT IS FURTHER ORDERED that the Bank, its institution-affiliated parties, and its successors and assigns, take affirmative action as follows:

**AFFIRMATIVE RELIEF**

1. Within ninety (90) days of the effective date of this ORDER, the Bank shall eliminate and/or correct all unsafe or unsound banking practices and violations of law and/or regulations, including Section 5 violations, as referenced in the NOTICE. In addition, the Bank shall take all necessary steps to ensure future compliance with Section 5 and all other

applicable federal consumer protection laws and all implementing rules and regulations, regulatory guidance, and statements of policy.

2. The Bank shall, directly or indirectly, disclose as clearly and prominently as, and on the same page as, any representation about credit limits or available credit, in any credit card solicitation:

(a) a description of:

(i) all initial fees (Initial Fees), as defined below;

(ii) all other fees imposed for issuance or availability of a credit card, or imposed based on account activity or inactivity, other than: (A) any fee imposed for an extension of credit in the form of cash; (B) any fee imposed for a late payment; or (C) any fee imposed in connection with an extension of credit in excess of the amount of credit authorized to be extended with respect to such account; or (D) any fee imposed in connection with foreign country transactions or foreign currency exchange;

(iii) the amount and timing of all such fees; and

(iv) all other restrictions imposed for the issuance or availability of credit;

(b) if the aggregate amount of the Initial Fees or other restrictions that affect initial available credit is

material, the amount of credit available upon activation after application of the Initial Fees and other restrictions, *provided* that if the solicitation offers a credit limit of "up to" a certain amount, the amount of available credit after application of Initial Fees and restrictions shall be expressed as an example of a typical offer of credit; and

(c) if the effect of the fees described in subparagraph 2(a)(ii) or the restrictions described in subparagraph 2(a)(iv) on available credit is material, a description of the effect of such fees or restrictions on available credit.

(d) "Initial Fees" shall mean any annual, activation, account opening, membership, periodic, or other fee imposed for the issuance of availability of a credit card, at the time the account is opened; *provided*, that "Initial Fees" shall not include: (i) any fee imposed for an extension of credit in the form of cash; (ii) any fee imposed for a late payment; or (iii) any fee imposed in connection with an extension of credit in excess of the amount of credit authorized to be extended with respect to such account.

3. The Bank shall not make, directly or indirectly, any misrepresentation, expressly or by implication, about any material term of an offer or extension of credit including, but not limited to, the amount of available credit or the

relationship between an offer or extension of credit and a debt repayment plan or the repayment of existing debt, in connection with the advertising, marketing, offering, soliciting, extending, billing or servicing of open-end credit.

#### **COMPLIANCE MANAGEMENT SYSTEM**

4. The Board shall participate fully in the administration of the Bank's compliance management system (CMS) and demonstrate clear and unequivocal expectation regarding compliance. As part of its CMS, the Bank shall implement a revised Corporate Compliance Plan (Compliance Plan) and modify or update the Compliance Plan, as necessary, to maintain a sound risk-based CMS designed to ensure that the Bank's third party credit card programs comply with Section 5 and all applicable federal consumer protection laws and all implementing rules and regulations, regulatory guidance, and statements of policy.

(a) At a minimum, the Compliance Plan shall include an effective monitoring system with provisions addressing:

(i) Bank review, approval, and maintenance of copies of (A) all marketing and solicitation materials, including direct mail or internet solicitations, promotional materials, advertising and telemarketing scripts, (B) other materials provided to consumers and cardholders generated in connection with the administration and servicing of the third

party credit card programs, including cardholder agreements, privacy policy, and forms of cardholder statement, and (C) changes or amendments with respect to the materials described in (A) and (B);

(ii) timely and regular notification to the Bank by any third party credit card program partner and any vendor or servicer providing services material to the Bank's third party credit card programs (Vendor), of all regulatory agencies' inquiries, customer complaint correspondence, and/or legal action received from any third party with respect to the third party credit card programs (other than routine requests to cease and desist collection contact);

(iii) (A) Bank review and approval of all materials related to customer service, including compliance with the guidance set forth in FIL-52-2006 (June 21, 2006), (B) monitoring of customer service calls on a regular basis, (C) Bank review of service level reports, and (D) procedures for working with third party credit card program partners and Vendors to timely resolve any customer complaints and issues;

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

(v) Bank review of periodic quality assurance reports, reports on collection results, collector evaluation results, and disciplinary action reports for each call center;

(vi) Bank review of all third party credit card program partners', Vendors' credit, fraud, and risk management materials, including policy manuals and practices relating to the Bank's credit card programs, to determine compliance with all applicable consumer protection laws;

(vii) Bank review and approval of arrangements between third party credit card program partners and Vendors, and monitoring and periodic reviews, including the review of quality assurance reports and on-site audits of Vendors;

(viii) periodic review by the Bank of account services materials, including materials related to customer chargeback and dispute processing, mail forwarding, returned mail and copy requests;

(ix) Bank review and regular monitoring of third party credit card program partners' and Vendors' materials relating to suspense item research, general ledger reconciliation and settlement, including daily settlement reports and preparation of monthly settlement reports;

(x) Bank review of all materials related to the financial performance of the third party credit card programs and performance monitoring, on a monthly basis, of assets in the

third party credit card programs as a whole and by vintage and campaign, including, as applicable, new accounts established, receivables growth or decline, charge-offs, credit risk scores (such as FICO scores), sources of revenue (APRs and fees), number of accounts receiving credit line increases and decreases, and APR increases or reductions;

(xi) Bank monitoring of the performance of marketing and solicitation programs for credit card accounts and enhancement products, including numbers of accounts offered, the products in each campaign and response rate, and production and review of trend analysis;

(xii) mandatory regular compliance reviews by the Bank, including all policies and procedures related to the Bank's credit card programs, and internal compliance audits and on-site visits to service facilities of all third party credit card program partners and Vendors;

(xiii) Bank review of business and strategic plans relating to credit card programs conducted by the Bank with third party credit card program partners;

(xiv) Bank maintenance of records of all approved consumer materials, complaints and responses, solicitation materials, administration materials and service provider agreements, relating to the Bank's agreements with third party credit card programs;

(xv) Bank maintenance of files documenting the service level standards for those services provided in connection with third party credit card programs, including due diligence reports, monitoring and audit results, and financial materials;

(xvi) Bank scheduling and conducting regular meetings with its third party credit card program partners and Vendors, for which written minutes will be taken and maintained;

(xvii) Bank monitoring of third party membership programs, if any; and

(xviii) periodic Bank monitoring of the use and security of confidential and nonpublic personal information.

(b) The Bank's CMS shall also provide for the establishment and implementation of an effective training program that includes regular, specific, comprehensive training in applicable federal consumer protection laws, including Section 5, and all implementing rules and regulations, and regulatory guidance, and statements of policy, for appropriate Bank personnel.

(c) The Bank's CMS shall include procedures for promptly addressing and resolving consumer complaints regarding the third party credit card programs, regardless of the source.

(d) The Bank's CMS shall be administered by compliance personnel with sufficient experience in, and

knowledge of, Visa and MasterCard branded programs and consumer compliance laws and regulations, and whose names and qualifications shall be submitted to the Regional Director. The CMS shall provide for sufficient staff personnel to assist the Bank's compliance officer.

(e) The Bank's CMS shall provide for an independent audit program of the Bank's third party credit card programs including, but not limited to, the Bank's management, supervision and oversight of Vendors.

(f) The Compliance Plan shall provide for compliance with the *Account Management and Loss Allowance Guidance for Credit Card Lending*, FIL-2-2003 (January 8, 2003).

(g) Within forty-five (45) days of the effective date of this ORDER, the Bank shall submit the revised Compliance Plan, including the enhanced independent audit program, training program, and identification of proposed personnel, to the Regional Director of the FDIC's Kansas City Regional Office (Regional Director) for review and approval. The Board's review and approval of the revised Compliance Plan shall be recorded in the minutes.

(h) Prior to entering into any arrangement with a third party to market credit cards or other credit products, the Bank shall ensure that any products or services offered pursuant

to such arrangements will be consistent with its Compliance Plan.

(i) The Bank shall make no representations to 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 the Bank directly or through a third party.

(j) The Bank shall comply with the guidance set forth in the Financial Institution Letter titled *Unfair or Deceptive Acts or Practices by State-Chartered Banks*, FIL-26-2004 (March 11, 2004).

#### **ACCOUNT MANAGEMENT GUIDANCE**

5. (a) Within sixty (60) days of the effective date of this ORDER, the Bank shall implement policies, practices and systems to comply with the *Account Management and Loss Allowance Guidance for Credit Card Lending*, FIL-2-2003 (January 8, 2003)(Account Management Guidance). Such policies, practices, and systems shall include:

(i) requiring minimum payments that will preclude negative amortization and will amortize the current balance over a reasonable period of time consistent with the unsecured nature of the underlying debt and the consumer's documented creditworthiness; and

(ii) providing for reasonable control over and timely repayment of amounts that exceed established credit limits.

(b) To the extent that the Bank causes to be performed by contract or otherwise any services for account management and/or account servicing, the Bank shall ensure that all such third-party service providers comply with the requirements of subparagraph 5(a) above.

#### **ORDER FOR RESTITUTION**

6. **IT IS FURTHER ORDERED** that the Bank shall establish and maintain an account in the amount of \$195,000 to ensure the availability of restitution with respect to categories of consumers, specified by the FDIC, who activated Aspen S credit card accounts.

7. Any application of the account shall be made through a cash payment to or at the direction of the FDIC for the purpose of making restitution to consumers.

8. The FDIC may only require the account to be applied if CompuCredit defaults, in whole or in part, on its obligation to make the restitution required under the terms of the ORDER issued by the FDIC in this case against CompuCredit on December 19, 2008. Full performance by CompuCredit of its obligations to make restitution under the December 19, 2008 ORDER shall release the

Bank from all obligations to maintain the restitution account, or to make restitution as sought in the Notice. The Regional Director shall provide prompt written notice to the Bank that CompuCredit has completed its restitution obligations. The Bank may then release the account funds to itself.

#### **PROGRESS REPORTS**

9. The Bank 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. Such reports may be discontinued when the corrections required by this ORDER have been accomplished and the Regional Director has released the Bank in writing from making further reports. Nothing in this paragraph 9 shall relieve the Bank from compliance with any other reporting requirements or provisions of this ORDER. All progress reports and other written responses to this ORDER shall be reviewed by the Board and made a part of the minutes of the corresponding Board meeting.

#### **ORDER TO PAY**

10. IT IS FURTHER ORDERED THAT, within fifteen (15) days of the effective of this ORDER, by reason of the alleged

violations of law and/or regulations including deceptive practices in violation of Section 5, 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 Act, 12 U.S.C. § 1818(i)(2), a civil money penalty of \$90,000 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.

#### **MISCELLANEOUS**

11. Except for an action to enforce compliance with this ORDER, the FDIC shall not commence any action under section 8 of the Act, 12 U.S.C. § 1818, Section 5, or any other statute or regulation, against the Bank, or any of its directors, officers, employees, and agents, or any of the Bank's affiliates, their successors or assigns, and any of the Bank's current or former institution-affiliated parties, or any of their respective directors, officers, employees, and agents arising out of or

related to the Aspen credit card programs from March 2005 to the effective date of this ORDER.

12. Except as limited by the CONSENT AGREEMENT and paragraph 11 above, 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 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.

13. 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.

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

15. The provisions of this ORDER shall be binding on the Bank, its affiliates, their successors and assigns, and any of their respective directors, officers, employees, and agents, and any of the Bank's current or former institution-affiliated parties, and any of their respective directors, officers, employees, and agents.

