

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, DC

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In the Matter of	)	
	)	
1ST FINANCIAL BANK USA	)	CONSENT ORDER and
DAKOTA DUNES, SOUTH DAKOTA	)	ORDER TO PAY
	)	
	)	
(Insured State Nonmember Bank)	)	FDIC-09-307b
	)	FDIC-09-309k
_____	)	

The Federal Deposit Insurance Corporation (FDIC) is the appropriate Federal banking agency for 1st Financial Bank USA, Dakota Dunes, South Dakota, (Bank) under Section 3(q) of the Federal Deposit Insurance Act (FDI Act), 12 U.S.C. § 1813(q)(3). 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” (Stipulation) dated December 24, 2009 that is accepted by the FDIC. Through its stipulation, the Bank has consented, without admitting or denying any and all charges of unsafe or unsound banking practices or violations of any law, rule or regulation, to the issuance of this Consent Order and Order to Pay (collectively 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) & (i) have been satisfied, the FDIC hereby orders the Bank and its institution-affiliated parties to:

- (a) Refrain from the Bank's prior practice of assessing a second over-the-credit-limit fee (overlimit fee) on the first day of a billing cycle when a cardholder

exceeded his or her credit limit during the prior billing cycle, was assessed an overlimit fee during the prior billing cycle and was overlimit at the end of that billing cycle and through the beginning of the next billing cycle.

(b) Strengthen Management and Board oversight of the Bank's credit card operations, with particular focus on possible unfair and/or deceptive acts or practices by:

(1) maintaining a Compliance Management System designed to ensure compliance with all federal consumer protection laws, including Section 5 of the Federal Trade Commission (FTC) Act, 15 U.S.C. § 45(a)(1) (Section 5), and all implementing rules and regulations, regulatory guidelines and statements of policy applicable to the Bank's products and practices;

(2) ensuring Management and Board review of new credit card products, product features, and amendments to credit card agreements to assure that all new products, product features and contractual agreements are not unfair and/or deceptive; and

(3) creating a Compliance Committee with representatives from all operating units of the Bank as well as an independent member of the Board. The Compliance Committee shall provide additional and continued training to, at a minimum, address the violations cited in the Report of Examination as of June 4, 2007. The Compliance Committee shall review the implementation and adequacy of the aforementioned training programs on a quarterly basis, and report the results of its review to the Board for its review and approval of the nature and extent of the training provided by the Bank and to ensure that all training programs address any new consumer laws, regulations or rules applicable to the Bank that may have become effective since the

previous quarterly review. The report shall be maintained with the records of Board meetings.

ORDER FOR RESTITUTION

IT IS FURTHER ORDERED, that:

(a) Within thirty (30) days from the issuance of this ORDER, the Bank shall implement the plan for restitution that has been submitted by the Bank and agreed to by the FDIC (Restitution Plan) pursuant to which restitution shall be made to cardholders who were assessed an overlimit fee on the first day of a billing cycle (Billing Cycle 2) immediately following a billing cycle during which those cardholders went over their credit limit and were charged an overlimit fee at that time (Billing Cycle 1), and were overlimit on the last day of Billing Cycle 1 and the first day of Billing Cycle 2 (Eligible Cardholders). The Restitution Plan shall require the Bank to perform a full review of the account history of all credit card accounts that were charged such overlimit fees (Cycle 2 Overlimit Fees), determine all Cycle 2 Overlimit Fees and interest accrued on them, apply appropriate credits as payments to each Eligible Cardholder's account, and provide cash refunds where the adjustments result in a credit balance for the account. This paragraph shall apply even if an Eligible Cardholder's account was closed, charged off or sold to a third party. An Eligible Cardholder who previously received a credit for a Cycle 2 Overlimit Fee is not eligible for restitution with respect to that particular Cycle 2 Overlimit Fee.

(b) If applying payment of the restitution amount to the account of an Eligible Cardholder results in a credit balance, the Bank shall refund the balance to such individual in cash by check made payable to that Eligible Cardholder and sent by United

States Postal Service first-class mail, address correction service requested, to the consumer's last address as maintained in the Bank's records. The Bank shall make reasonable attempts to obtain a current address for any Eligible Cardholder 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 any Eligible Cardholder is returned to the Bank after such second mailing by the Bank, the Bank shall retain the restitution amount of such Eligible Cardholder for a period of three-hundred sixty-two (362) days from the date the restitution check was originally mailed, during which period such amount may be claimed by such Eligible Cardholder upon appropriate proof of identity. After such time these monies will be disposed of in accordance with the Restitution Plan.

(c) The restitution set forth herein and in the Restitution Plan is equitable relief pursuant to Section 8(b)(6) of the FDI Act, 12 U.S.C. § 1818(b)(6), and is remedial in nature.

(d) Within thirty (30) days of the effective date of this ORDER, the Bank shall submit to the Regional Director, for review and non-objection, the final text of any and all communications to be made by the Bank to Eligible Cardholders in furtherance of compliance with this ORDER.

(e) Within sixty (60) days from the issuance of this ORDER, the Bank shall prepare a detailed written report of the processes and procedures by which the Bank determined the amount of restitution. The report shall also include the total number of Eligible Cardholders and the total amount of restitution being made.

(f) The Bank shall retain all records pertaining to the Restitution Plan, including, but not limited to, documentation of the processes and procedures used to determine the Eligible Cardholders; the names, contact, and account information of the Eligible Cardholders; any mailing records; and documentation supporting that appropriate restitution was made or sought to be made in the manner set forth in subparagraph (b) above.

IT IS FURTHER ORDERED, that:

(a) Within thirty (30) days from the issuance of this ORDER, the Bank shall retain, at its expense, an independent certified accounting firm (Firm) acceptable to the Regional Director to determine compliance with the Restitution Plan in accordance with the attestation standards established by the American Institute of Certified Public Accountants for agreed-upon procedures for engagements and provide the reports called for in paragraphs (f), (g) and (h) below.

(b) Prior to the engagement of the Firm, and no later than fifteen (15) days from the issuance of this ORDER, the Bank shall submit the name and qualifications of the Firm, together with the proposed engagement letter with the Firm and the proposed agreed-upon procedures, to the Regional Director for non-objection.

(c) The engagement letter between the Bank and the Firm shall grant the FDIC access to the Firm's staff, work-papers, and materials prepared in the course of the Firm's engagement and preparation of the reports required by this ORDER.

(d) To be acceptable to the Regional Director, the Firm must be independent and, at a minimum, comply with the Code of Conduct of the appropriate State Board of

Accountancy and meet the auditor independence requirements of the Securities and Exchange Commission.

(e) Within fifteen (15) days after submission of the Firm's name, the Regional Director shall notify the Bank in writing of the FDIC's objection or non-objection thereto.

(f) The Firm shall issue reports of findings based on the agreed-upon procedures that will include:

- i. the completeness and accuracy of the criteria, data sources, formulas, and calculations established, used and generated to determine the amounts of fees and interest credited as payments to the accounts of Eligible Cardholders and any resulting credit balances to be refunded in cash; and
- ii. whether the Bank's efforts to obtain the current addresses of Eligible Cardholders whose letters and/or restitution checks were initially returned complied with subparagraph (b) above.

(g) Within one-hundred and twenty (120) days from the issuance of this ORDER, the Firm shall simultaneously submit to the Bank and the Regional Director, an initial report evaluating compliance with the Restitution Plan pursuant to the agreed-upon procedures.

(h) Within one-hundred and eighty (180) days from the issuance of this ORDER, the Firm shall submit a copy of its final report evaluating compliance with the Restitution Plan pursuant to the agreed-upon procedures to the Bank and the Regional Director. Such report shall include a confirmation that all credits as payments to the accounts of Eligible Cardholders required to be made pursuant to this ORDER have been

accurately calculated and made, and that all cash refunds required to be paid to Eligible Cardholders have either been paid or returned to the Bank after a second mailing has been made.

#### ORDER TO PAY

IT IS FURTHER ORDERED, that by reason of the alleged violations of law and/or regulations, and after taking into account the ORDER, 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 \$140,000 is assessed against the Bank. The Bank itself shall pay such amount to the Treasury of the United States, and is prohibited from seeking or accepting indemnification from such payment from any third party.

#### MISCELLANEOUS

(a) Within thirty (30) days from the issuance of the ORDER and permanently thereafter, the Bank shall ensure that all Bank products and practices comply with all consumer laws and regulations, including Section 5 pursuant to the guidance set forth in *Unfair or Deceptive Acts or Practices by State-Chartered Banks*, FIL-26-2004 (March 11, 2004).

(b) Within ninety (90) days from the issuance of this ORDER, and every 90 days thereafter, the Bank shall provide a written progress report to the Regional Director detailing the form and manner of all actions taken to secure compliance with this ORDER and the results of such actions. The Regional Director will notify the Bank in writing when it is released from providing further progress reports.

(c) Except for an action under Section 8(i) of the FDI Act, 12 U.S.C. § 1818(i), to enforce compliance with this ORDER by the FDIC, the FDIC shall not commence any action under 12 U.S.C. § 1818, Section 5, or any other statute or regulation, against the Bank or any of its current or former directors, officers, employees, owners and/or agents, or, any of the Bank's affiliates their successors or assigns, or any of their respective directors, officers, employees, owners and/or agents (Bank Parties), arising out of or relating to the Bank's assessing a second overlimit fee at the beginning of a billing cycle when a cardholder exceeded his or her credit limit during the prior billing cycle, or relating in any manner to the subject matter of this ORDER.

(d) 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 action against any of the Bank Parties, for violations of any laws or regulations, including federal and state consumer protection laws, or engaging in unsafe or unsound banking practices except those practices identified in the ORDER.

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



This ORDER will become effective upon its issuance by the FDIC. The provisions of this ORDER shall remain effective and enforceable except to the extent that, and until such time as, any provisions of this ORDER shall have been modified, terminated, suspended, or set aside by the FDIC.

Pursuant to delegated authority.

Dated at Washington, D.C. this 30<sup>TH</sup> day of December, 2009.

/s/  
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Christopher J. Spoth  
Senior Deputy Director  
Division of Supervision and  
Consumer Protection