

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

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	)	
In the Matter of	)	
	)	
MERRICK BANK	)	CONSENT ORDER, ORDER
SOUTH JORDAN, UTAH	)	FOR RESTITUTION, AND
	)	ORDER TO PAY
	)	CIVIL MONEY PENALTY
	)	
	)	
(INSURED STATE NONMEMBER BANK)	)	FDIC-13-0446b
	)	FDIC-13-0447k
	)	
_____	)	

The Federal Deposit Insurance Corporation (“FDIC”) is the appropriate Federal banking agency under section 3(q) of the Federal Deposit Insurance Act (“FDI Act”), 12 U.S.C. § 1813(q), for Merrick Bank, South Jordan, Utah (“the Bank”).

The FDIC determined that the Bank has engaged in unfair and deceptive 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), stemming from the marketing, promotion, and sale of certain add-on products associated with its credit cards.

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, ORDER FOR RESTITUTION, AND ORDER TO PAY CIVIL MONEY PENALTY (“CONSENT AGREEMENT”), dated September 18, 2014, that is accepted by the FDIC. With the CONSENT AGREEMENT, the Bank has consented, without admitting or denying any charges of 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 ORDER:

### **DEFINITIONS**

For purposes of this ORDER, the following definitions shall apply:

1. “Board” shall mean the Bank’s duly elected and acting Board of Directors.
2. “Clear and conspicuous” shall mean:
  - (a) As to written information, written in a type size and location sufficient for an ordinary consumer to read and comprehend it, and disclosed with language and syntax that would be easily recognizable and understandable to an ordinary consumer; and
  - (b) As to information presented orally, spoken and disclosed in a volume, cadence, and syntax sufficient for an ordinary consumer to hear and comprehend.
3. “Card” shall mean any consumer credit card issued by the Bank.
4. “Card Member” shall mean any consumer who has applied or applies for, and received or receives a Bank consumer credit card.
5. “Compliance ROE” shall mean the FDIC Compliance Report of Examination dated April 17, 2013.
6. “Effective Date” shall mean the date on which this ORDER is issued.
7. “PAYS” shall mean the PAYS Plan and the PAYS Plan RD collectively.
8. “PAYS Plan” shall mean a payment protection credit card add-on product that the Bank marketed and sold to Card Members from 2008 to 2013 that allowed Card Members to

request benefit payments for a monthly payment following certain life events, including, but not limited to involuntary unemployment and disability.

9. "PAYS Plan Eligible Consumers" shall mean all Card Members who enrolled in PAYS Plan or PAYS Plan RD, or both, between February 1, 2008 and December 31, 2013.

10. "PAYS Plan RD" shall mean a payment protection credit card add-on product that was designed specifically for retired or disabled Card Members, or both, and marketed and sold by the Bank to Card Members during 2013, and that allowed Card Members to request benefit payments for their minimum payment due following certain life events.

11. "Regional Director" shall mean the FDIC Regional Director for the San Francisco Region.

#### **I. CONSENT ORDER**

IT IS HEREBY ORDERED that the Bank cease and desist from engaging in unsafe or unsound banking practices and violations of law and/or regulations as described in this ORDER, and as more fully set forth in the Compliance ROE.

IT IS FURTHER ORDERED that the Bank shall take the following affirmative actions:

#### **Correct Violations of Law**

1. Within 60 days of the Effective Date, the Bank shall correct all violations of law, as more fully set forth in the Compliance ROE and as described in this ORDER, and implement procedures to prevent their recurrence. The Bank's actions as required by this paragraph shall be satisfactory to the Regional Director as determined at subsequent examinations and/or visitations.

### Unfair and Deceptive Acts and Practices

2. The Bank shall take all action necessary to eliminate all violations of Section 5 and maintain future compliance with Section 5. The Bank, whether acting directly or through third parties, shall not make, or allow to be made, any deceptive representations, statements, or omissions, expressly or by implication, in the marketing materials, telemarketing scripts and/or sales presentations used to solicit any Card Member or prospective Card Member to enroll in PAYS or unfair practices or procedures, including but not limited to the following misrepresentations, failures to adequately disclose, or practices:

- (a) That the PAYS Plan “Monthly Benefit” would equal the Card Member’s “Minimum Payment Due”;
- (b) That PAYS Plan would protect the consumer’s credit rating;
- (c) That PAYS Plan or PAYS Plan RD payments would be made automatically;
- (d) That there was a free review period for PAYS Plan;
- (e) The terms and conditions for accessing the PAYS Plan hospitalization benefit;
- (f) The material conditions, benefits, and restrictions related to PAYS Plan;
- (g) Use of incomplete terms and conditions disclosure on the PAYS website; and
- (h) Requiring permanently disabled consumers to recertify the consumer’s disabled

status each month.

### Board and Senior Management Oversight

3. The Board shall participate fully in the oversight of the Bank’s Compliance Management System (“CMS”), and shall be responsible for the approval of sound policies and objectives, implementation of an adequate compliance program that addresses all consumer compliance risks associated with the bank’s operations, and effectively supervise all the Bank’s

compliance-related activities, consistent with the role and expertise commonly expected for directors of banks of comparable size and complexity and offering comparable banking products and services.

4. The Board shall ensure that, within 60 days, senior management completes an evaluation of the effectiveness of the PAYS servicing systems and thereafter take action as necessary to ensure that the PAYS servicing and all processing systems (including those provided by third parties) comply with all applicable consumer protection laws, implementing rules and regulations, regulatory guidance, and statements of policy (“Consumer Protection Laws”).

#### Compliance Program

5. Within 90 days from the Effective Date, the Board shall ensure that senior management reviews, revises, develops, and implements a sound risk-based CMS, including making revisions as necessary to its comprehensive written compliance program (“Compliance Program”) to ensure that all activities related to third-party service providers comply with Section 5 and all Consumer Protection Laws. At a minimum, the written Compliance Program shall provide for and include the following:

(a) Comprehensive written policies and procedures, including detailed operating procedures and controls designed to prevent violations of Consumer Protection Laws and prevent associated risks of harm to consumers, particularly with regard to third-party oversight and Section 5;

(b) An effective training program that addresses compliance with Consumer Protection Laws and includes regular, specific, comprehensive training of the Board, senior management, Bank staff, and all individuals having responsibilities that relate to Consumer

Protection Laws. The training shall be commensurate with individual job functions and duties for appropriate staff, and shall incorporate training for high-risk compliance areas, including third-party oversight and Section 5;

(c) An enhanced, well-documented and proactive internal CMS monitoring process, incorporated into the daily work of Bank personnel, that is designed to detect and promptly correct compliance weaknesses within the Bank and third parties, particularly weaknesses that have an impact on consumer accounts;

(d) An effective consumer complaint monitoring process, including the maintenance of adequate records of all written, oral, or electronic complaints or inquiries, formal or informal, received by the Bank and all third parties, and the resolution of the complaints and inquiries; and

(e) An effective, independent audit of the Compliance Program and the Bank's compliance operations, including products or services offered through third parties, to ensure compliance with all Consumer Protection Laws and internal policies and procedures.

6. Prior to implementation, the Board shall review the revised written Compliance Program and/or any subsequent modification thereto. Once the Board determines that the Compliance Program and any subsequent modification thereto is acceptable, the Board shall approve it and record the approval in the Board minutes. The initial review and approval required by this paragraph shall be completed within 90 days of the Effective Date.

7. The Bank shall implement and comply with the written Compliance Program and/or any subsequent modification thereto upon approval of the Compliance Program by the Board. Thereafter, the Board will ensure that the Compliance Program is fully implemented.

8. Within 90 days from the Effective Date, the Bank shall perform a full review of all compliance policies and procedures and ensure compliance with all Consumer Protection Laws, particularly with regard to third-party oversight and Section 5.

9. Within 90 days from the Effective Date, the Bank shall perform a full review of the Bank's training program to ensure compliance with all Consumer Protection Laws.

10. Within 90 days from the Effective Date, the Bank shall perform a full review of all compliance monitoring procedures, including those areas identified as weak in the Compliance ROE, to ensure compliance with all Consumer Protection Laws. Monitoring procedures should include reviews of activities provided by third parties to ensure regulatory compliance, and reviews of both the Bank's and third parties' complaint processing procedures.

#### Compliance Officer

11. Within 30 days from the Effective Date, the Bank shall have its Compliance Officer report directly to the Board and provide the Compliance Officer with sufficient authority and resources to effectively manage the Bank's CMS, including oversight of third-party service providers. The Compliance Officer will provide a monthly presentation to the Board regarding the enhancements made to the Bank's Compliance Program and compliance with each provision of this ORDER. The Board shall provide the Compliance Officer with sufficient authority to correct identified deficiencies and violations of Consumer Protection Laws.

#### Compliance Committee

12. Within 30 days from the Effective Date, the Board shall maintain a compliance committee comprised of at least two of its outside directors, who are not officers of the Bank or any affiliate of the Bank, at least one member of senior management, and the Compliance Officer ("Compliance Committee").

13. The Compliance Committee shall meet at least monthly and, at a minimum, the following areas shall be reviewed and approved: minutes of the Compliance Committee, Compliance Officer reports, Compliance Program audit reports, Compliance Program policies, and progress reports concerning compliance with this ORDER that include, at a minimum, corrective action due dates, names of individuals assigned responsibility for the corrective action, and any follow-through testing and reporting to ensure corrective action is completed and effective.

14. The Compliance Committee shall report its discussions to the Board at each regularly scheduled Board meeting, and the Board minutes shall document the review and approval of all items before the Board, including the names of any dissenting directors. Nothing in this ORDER shall diminish the responsibility of the entire Board to ensure compliance with the provisions of this ORDER.

15. The Board, in conjunction with the Compliance Committee, shall allocate resources that are commensurate with the level of complexity of the Bank's operations to ensure the establishment and implementation of an adequate CMS, as described in the FDIC's Compliance Examination Manual, Section II-3.1 to 3.4, and shall include specific procedures to ensure the Bank's compliance with all Consumer Protection Laws. The allocated resources shall be sufficient to ensure the Bank's timely compliance with this ORDER.

16. The Board, in conjunction with the Compliance Committee, shall oversee the following actions:

(a) Ensure that the Bank has appropriate oversight of all processing systems, including systems provided by any third parties, to maintain compliance with all Consumer

Protection Laws and to ensure compliance with all Consumer Protection Laws prior to offering any product serviced through the Bank's or any third parties' processing systems.

(b) Ensure that the Bank's Compliance Officer possesses the requisite knowledge and experience to administer an effective CMS.

(c) Ensure that all required disclosures provided over the telephone, online, or through direct mail, including materials prepared by third parties, are reviewed and approved by the Bank prior to their use, and comply with all Consumer Protection Laws.

(d) Ensure that the duties and responsibilities of the Compliance Officer are clearly defined and provide the Compliance Officer access to both Board and Compliance Committee members.

(e) Ensure that the Compliance Officer has and retains sufficient authority and independence to implement policies related to Consumer Protection Laws and to institute corrective action as needed. This authority shall include the ability to oversee activities of all third parties and across all departmental lines within the Bank, to have access to all areas of the Bank's operations, and to effectuate corrective action upon discovering deficiencies.

(f) Ensure that the Compliance Officer and all individuals with compliance oversight responsibilities receive ongoing training, sufficient time, and adequate resources to effectively oversee, coordinate, and implement the Bank's CMS.

(g) Require the Compliance Officer to provide monthly written reports through the Compliance Committee to the Board, including, but not limited to, reports related to the enactment and/or promulgation of new Consumer Protection Laws and changes to existing Consumer Protection Laws, training performed, compliance monitoring completed, independent, compliance audits performed, corrective action taken, and compliance with this ORDER.

(h) Ensure proper and timely follow-up and resolution to audit and examination findings indicating the need for corrective action(s). The compliance audit must be independent to ensure appropriate oversight of the Bank's operations.

(i) Develop and implement an internal monitoring system of employees' performance designed to ensure that compliance policies, procedures, and regulatory requirements are adequately followed and employees are held accountable for following adopted policies, procedures, and regulatory requirements. With respect to products or services offered by third parties on behalf of or for the Bank, the Bank shall develop and implement oversight of the third-party's internal monitoring system of employee performance.

#### Audit

17. Within 30 days from the Effective Date, the Bank shall schedule independent audits to be conducted at least annually to ensure compliance with all Consumer Protection Laws. The audits shall be conducted by qualified personnel with experience in conducting independent audits of compliance programs of banks of comparable complexity. The audits identified on the schedule will assess the Bank's CMS and Compliance Program, and at a minimum, shall include the following:

- (a) Define a comprehensive scope to include appropriate aspects of each law or regulation based on a risk analysis;
- (b) Identify the number of transactions sampled by category or product type;
- (c) Identify deficiencies;
- (d) Provide descriptions of, or suggestions for, corrective actions and timeframes for correction; and

(e) Establish follow-up procedures to verify that corrective actions are implemented and effective. Audit findings, deficiencies, and recommendations must be documented in a written report and provided to the Bank's Audit Committee within 15 days after completion of the independent audit. In addition, the audit report should be thoroughly reviewed by the Bank's Board and fully documented in the Board's minutes.

18. Within 45 days from receipt of the independent auditor's written report, the Board shall take action to address the audit's findings and develop and implement a plan to complete the following:

- (a) Correct any deficiencies noted; and
- (b) Implement any recommendations or explain in a written document acceptable to the Regional Director and signed by all Board members why a particular recommendation is not being implemented.

#### Oversight of Third-Party Agreements and Services

19. Within 60 days from the Effective Date, the Bank shall develop and implement an effective third-party oversight program based on the principles set forth in *Guidance for Managing Third-Party Risk* (Financial Institutions Letter 44-2008, issued June 6, 2008). The program shall, at a minimum, include the following:

- (a) A risk-based review related to compliance with Consumer Protection Laws of all aspects of the Bank's agreements with third parties and the services performed for the Bank pursuant to these agreements ("Third-Party Agreements");
- (b) Procedures for effective monitoring, training, record-keeping, and audit over the Bank's third parties;

(c) Access by Bank employees to all systems necessary to ensure compliance with all Consumer Protection Laws and to perform their duties, including monitoring, training, and fulfilling regulatory requests;

(d) Monitoring of Third-Party Agreements to ensure that they are formalized, enforceable, and contain the specific expectations, obligations, and consequences, for both the Bank and the third party;

(e) Maintenance of records of all service provider agreements and approved marketing and solicitation materials, including any changes or amendments with respect to such materials;

(f) Prompt notification to the Bank by any third-party provider of all regulatory agencies' inquiries, customer complaint correspondence, and/or legal action received (other than routine requests such as requests to cease and desist collection contact); and

(g) Procedures for promptly addressing and resolving consumer complaints and inquiries, regardless of the source.

20. The Bank's Compliance Committee shall, on at least a quarterly basis, submit a written report to the Board and senior management addressing whether third parties are in compliance with Third-Party Agreements with respect to Consumer Protection Laws. The written report shall include potential violations, deficiencies, trends and analyses related to consumer complaints and inquiries, or other concerns. The Board shall be responsible for ensuring that corrective actions are taken to address the findings of the written report and for assuring that a sound annual review of compliance-related Third-Party Agreements is performed.

## **II. ORDER FOR RESTITUTION**

IT IS ORDERED that the Bank provide restitution to consumers as follows:

### **Reserve Account**

21. Within 10 days from the Effective Date, the Bank shall reserve or deposit into a segregated deposit account an amount not less than \$15,000,000 ("Reserve Account") for the purpose of providing restitution as required by the ORDER.

22. The Bank shall make all restitution payments required by the ORDER, regardless of whether the total of such payments exceeds the Reserve Account. If the total of payments is less than the Reserve Account, the excess shall be returned to the Bank's general funds.

### **Restitution Plan**

23. Within 30 days from the Effective Date, the Bank shall prepare a comprehensive Restitution and Other Relief Plan for all PAYS Plan Eligible Consumers ("PAYS Plan Restitution Plan").

24. The Bank shall submit the PAYS Plan Restitution Plan, including samples of letters to consumers, to the Regional Director for review, comment, and non-objection prior to implementation. The text of letters and/or electronic mail to be sent to PAYS Plan Eligible Consumers shall include satisfactory language explaining the reason the Bank is sending a restitution payment, including that the Bank is sending the payment, providing a statement credit or a combination of the two, as the result of an enforcement action by the FDIC. 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 not, in any manner, limit a consumer's rights. 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 PAYS Plan Eligible Consumers entitled to receive restitution payments in accordance with the ORDER.

25. The PAYS Plan Restitution Plan shall, at a minimum, require the Bank to:

(a) Provide restitution to PAYS Plan Eligible Consumers whose benefit payments were not sufficient to meet the minimum monthly payment due. The restitution shall be the difference between the benefit payment the card member received and the minimum monthly payment due, any finance charges, late fees, and overlimit fees. Restitution shall include removing any penalty APR triggered as the result of the benefit payment being insufficient to meet the minimum monthly payment due;

(b) Provide restitution to PAYS Plan Eligible Consumers who enrolled in PAYS through the online and post card enrollment channels between February 1, 2008 and December 31, 2012, and through the direct mail offer enrollment channel between February 1, 2008 and July 1, 2013, who filed a valid claim, and incurred late fees during the benefit activation period for any reason. The restitution shall be equal to all late fees and related finance charges, including any penalty rates applied. Penalty rate adjustments shall be calculated using the average daily balance on the statement for each statement period from the time the penalty rate was assessed until either payoff, chargeoff, or the date of this ORDER;

(c) Provide restitution to PAYS Plan Eligible Consumers who enrolled in PAYS Plan through the online enrollment channel during the period when the Bank advertised a free 30-day review period and were denied claims because the card member's qualifying life event occurred during the advertised 30-day free review. The restitution shall be equal to the minimum monthly payment due for the full term of the benefit coverage including any finance charges, late fees, and overlimit fees;

(d) Provide restitution to PAYS Plan Eligible Consumers who enrolled in PAYS Plan from February 1, 2008 to December 31, 2012, and who filed a claim for a hospitalization benefit that was denied because of limitations and exclusions as described more fully in the Compliance Report of Examination. The restitution shall be equal to three months of benefit payments at the minimum monthly payment due, including any finance charges, late fees, and overlimit fees;

(e) Provide restitution to PAYS Plan Eligible Consumers who enrolled in PAYS Plan from February 1, 2008 to December 31, 2012, and filed a claim for unemployment or disability benefits that was denied because the card member was retired, or who filed a claim for disability benefits that was denied because of an intentionally self-inflicted injury or a pre-existing medical condition, or who filed a claim for unemployment benefits that was denied because the card member was self-employed or employed part-time. The restitution shall be equal to 12 months of benefit payments at the minimum monthly payment due, including any finance charges, late fees, and overlimit fees;

(f) Provide restitution to PAYS Plan Eligible Consumers who enrolled in PAYS Plan between February 1, 2008 and December 31, 2012, who became permanently disabled, thereafter filed a claim, and, because of the Bank's re-certification process, incurred late fees and interest because benefit payments were shortened or delayed. The restitution shall ensure that each of these Card Members receives 12 months of benefit payments at the minimum monthly payment due, including any finance charges, late fees, and overlimit fees; and

(g) Provide restitution to PAYS Plan Eligible Consumers as follows:

- i. Twenty-eight percent of the total PAYS Plan fees paid by the card member between February 1, 2008 and December 31, 2012. For Card Members entitled to restitution under Paragraph 25 (a)

through (f) above, the Card Member shall be entitled to the greater of the restitution provided under Paragraph 25 (a) through (f) or this provision; and

- ii. All PAYS Plan fees paid by the Card Member for fees billed for the period between January 1, 2013 and December 31, 2013, less any benefit payments the Card Member received during this time period.

26. Within 60 days of receipt of non-objection from the Regional Director, the Bank shall implement the PAYS Plan Restitution Plan. Cash restitution and statement credits shall be provided to each of the PAYS Plan Eligible Consumers for open accounts, closed accounts with and without a balance, and charged-off accounts as follows:

(a) for any open credit card account (including inactive accounts), the Bank shall deliver a statement credit to the account, and a refund check for any resulting credit balance as required by 12 C.F.R. § 1026.11(a)(3) and in accordance with the requirements of Paragraph 29, below;

(b) for any closed credit card account which is not charged off, the Bank shall decrease the account balance (if any) by the amount of the restitution, and where the restitution amount is greater than the existing account balance, the Bank shall mail to the Eligible Consumer a refund check for the resulting credit balance;

(c) for any charged-off account, the Bank shall decrease the charged-off balance by the amount of restitution, and where the refund is greater than the existing charged-off balance, the Bank shall mail to the Eligible Consumer a refund check in the amount of the credit balance;

(d) if the account holder is deceased, the Bank shall provide a statement credit to the account, and a refund check for any resulting credit balance shall be sent in accordance with applicable law; and

(e) with respect to any bankruptcy, estate, and accounts in litigation, the Bank shall provide a statement credit or a refund check in accordance with applicable law.

27. Restitution provided by the Bank shall not limit consumers' rights in any way.

28. Within 30 days from the Effective Date, the Bank shall submit to the Regional Director, for review and non-objection, a proposed announcement to be prominently posted on the Bank's website that describes the ORDER and the restitution to be made by the Bank to PAYS Plan Eligible Consumers. The announcement shall set forth procedures whereby individuals can check the eligibility criteria for restitution from the Bank and can provide updated electronic mail and/or United States Postal Service mailing address information, via a toll-free number and, either via the Bank's website or via a dedicated e-mail address. The Regional Director shall notify the Bank in writing of any comments or non-objection to the proposed announcement. The Bank 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 prominently and promptly posted by the Bank to its website without further changes, but in no event later than 60 days from the Effective Date.

#### **Mailing Refunds**

29. When the Bank makes cash restitution by certified or bank check made payable to a PAYS Plan Eligible Consumer, the Bank shall send the certified or bank check by United States Postal Service first-class mail, address correction service requested, to the PAYS Plan

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 PAYS Plan 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 certified or bank check for any PAYS Plan Eligible Consumer is returned to the Bank after such second mailing by the Bank, or if a current mailing address cannot be identified using standard address search methodologies, the Bank shall retain the restitution amount of such PAYS Plan Eligible Consumer for a period of 360 days from the date the restitution check was originally mailed, during which period such amount may be claimed by such PAYS Plan Eligible Consumer upon appropriate proof of identity. After such time, these monies will be disposed of in accordance with the PAYS Plan Restitution Plan.

30. The Bank shall not undertake collection efforts in the same mailing as that containing any of the restitution checks and/or notification letters. Further, the Bank shall not condition, expressly or by implication, the provision of a credit or cash payment pursuant to this ORDER on the payment of any outstanding debt.

#### **Credit Reporting**

31. For all consumer reporting agencies to which it regularly reports, within 90 days of a restitution disbursement or adjustment required by this ORDER, the Bank shall take all appropriate steps, consistent with the provisions of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*, and its implementing Regulation V, 12 C.F.R. §1022, to amend and correct all negative incident reports previously made with respect to all PAYS Plan Eligible Consumers whose accounts would not have generated a negative incident report but for the imposition of

late charges, interest or penalty interest charges to be credited or refunded pursuant to the preceding paragraphs.

### **Recordkeeping**

32. The Bank shall retain for seven years all records pertaining to the PAYS Plan Restitution Plan, including but not limited to: documentation of the processes and procedures used to determine the PAYS Plan Eligible Consumers; the names, contact, and account information of the PAYS Plan Eligible Consumers; any mailing records; and documentation that the appropriate restitution and equitable relief were made.

### **Independent Certified Accounting Firm**

33. The Bank shall retain, at its expense, an independent certified accounting firm (“Firm”) to determine compliance with the PAYS Plan Restitution Plan. Prior to the engagement of the Firm, and no later than 30 days after the effective date of the PAYS Plan Restitution Plan, 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. The Firm shall determine compliance in accordance with the attestation standards established by the American Institute of Certified Public Accountants for agreed-upon procedures for engagements.

34. 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 the ORDER. To be acceptable to the Regional Director, the Firm must be an objective and unaffiliated third party and, at a minimum, comply with the Code of Conduct of the appropriate State Board of Accountancy and meet auditor independence requirements of the Securities and Exchange Commission.

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

**IT IS FURTHER ORDERED** that by reason of the violations of law and/or regulations set forth herein, and after taking into account the appropriateness of the penalty with respect to the size of the financial resources and good faith of the Bank, the gravity of the violations, the history of previous violations by the Bank, and such other matters as justice may require, including the severity of the risks to and losses of consumers, pursuant to 12 U.S.C. § 1818(i)(2), a civil money penalty of \$1,100,000 is assessed against the Bank. The Bank shall pay such amount to the Treasury of the United States, as directed by the FDIC. The Bank is prohibited from seeking or accepting indemnification from any third party for the civil money penalty assessed and paid in this matter.

### **IV. NOTIFICATION AND REPORTING REQUIREMENTS**

#### **Progress Reports and Shareholder Notification**

35. On or before the 30<sup>th</sup> day after the end of the first calendar quarter following the Effective Date, 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 Regional Director detailing the form and manner of any actions taken to secure compliance with this ORDER and the results thereof.

36. Within 30 days of the Effective Date, the Bank shall send to its sole shareholder, CardWorks, Inc., a copy of this ORDER or a description of this ORDER. If the Bank sends its 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 15 days prior to dissemination to the shareholder. Any changes requested to

