

UNITED STATES OF AMERICA  
DEPARTMENT OF THE TREASURY  
COMPTROLLER OF THE CURRENCY

	)	
<b>In the Matter of:</b>	)	
	)	
TCF National Bank	)	AA-EC-2018-38
Sioux Falls, South Dakota	)	
	)	

**CONSENT ORDER**

The Comptroller of the Currency of the United States of America (“Comptroller”), through his national bank examiners and other staff of the Office of the Comptroller of the Currency (“OCC”), has conducted examinations of TCF National Bank, Sioux Falls, South Dakota (“TCF” or the “Bank”). The OCC identified deficiencies in the Bank’s practices during the period 2010 to 2013 that resulted in violations of Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(a)(1), related to the Bank’s presentation of its ATM and one-time debit card transaction overdraft service (“Opt-In Practices”).

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, dated July 20, 2018, that is accepted by the Comptroller (“Stipulation”). By this Stipulation, which is incorporated herein by reference, the Bank has consented to the issuance of this Consent Cease and Desist Order (“Order”) by the Comptroller pursuant to 12 U.S.C. § 1818(b). The Order requires, among other things, that the Bank provide restitution to consumers affected by the Bank’s FTC Act violations in a total amount of \$25,000,000, as also reflected in a Stipulated Final Judgment and Order between the Bank and the Bureau of Consumer Financial Protection (“BCFP”), filed July 20,

2018. Simultaneously, the OCC also has issued a Consent Order for a Civil Money Penalty against the Bank for its FTC Act violations. The total amount TCF will pay pursuant to this Order with the OCC and the Stipulated Final Judgment and Order with the BCFP is \$25,000,000 in restitution and \$5,000,000 in civil money penalties.

On January 19, 2017, the BCFP commenced an action against TCF by filing a Complaint in the United States District Court for the District of Minnesota (Case No. 17-cv-00166) challenging TCF's Opt-In Practices. On July 20, 2018, the BCFP and the Bank filed a Stipulated Final Judgment and Order with the Minnesota District Court that requires the Bank to provide restitution to consumers and to pay a civil money penalty to the BCFP as described above.

## **ARTICLE I**

### **COMPTROLLER'S FINDINGS**

The Comptroller finds, and the Bank neither admits nor denies, the following:

(1) Effective January 19, 2010, the Federal Reserve Board issued amendments to Regulation E requiring, among other things, that financial institutions provide a disclosure and obtain a consumer's affirmative consent to the payment of overdrafts for ATM and one-time debit card transactions prior to charging an overdraft fee (the "Opt-In Rule"). Compliance with these provisions became mandatory on August 15, 2010, for accounts opened before July 1, 2010. Accounts opened on or after July 1, 2010, were required to immediately comply with the Opt-In Rule.

(2) In light of the Opt-In Rule, the Bank developed and executed overdraft presentation procedures to obtain customer opt-ins to the Bank's overdraft service for the payment of overdrafts for ATM and one-time debit card transactions ("Overdraft Service").

(3) The Bank's Opt-In Practices left a deceptive "net impression" for some customers who already held accounts at the Bank as of June 30, 2010 (existing customers), and some customers who opened accounts on or after July 1, 2010 (new customers). Some customer scripts lacked key information to allow customers to make an informed opt-in choice. Additionally, with respect to new customers, the Bank's account opening process obscured the optional nature of opting in to the Bank's Overdraft Service. Although the Bank provided its customers with written disclosures concerning its Overdraft Service that were technically compliant with Regulation E, Bank employees provided customers with information that left a subset of new and existing customers with a deceptive "net impression" of the Bank's Overdraft Service between January 2010 and December 2013.

(4) By reason of the foregoing, the Bank engaged in deceptive practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1). The Bank's violations of Section 5 of the FTC Act caused substantial consumer injury.

(5) The Bank's violations of Section 5 of the FTC Act are part of a pattern of misconduct that resulted in financial gain to the Bank. The Bank's violations of Section 5 of the FTC Act caused the Bank to be unjustly enriched.

(6) Pursuant to the authority vested in him by the Federal Deposit Insurance Act, as amended, 12 U.S.C. § 1818, the Comptroller hereby ORDERS that:

## **ARTICLE II**

### **COMPLIANCE COMMITTEE**

(1) The Board shall appoint and maintain an active Compliance Committee of at least three (3) directors that shall be responsible for monitoring and overseeing the Bank's compliance

with the provisions of this Order. The Compliance Committee shall maintain minutes of its meetings at which compliance with this Order is discussed.

(2) Within one hundred twenty (120) days of the effective date of this Order, and thereafter within thirty (30) days after the end of each calendar quarter, the Compliance Committee shall submit a written progress report to the Board setting forth in detail the actions taken to comply with each Article of this Order, the results and status of those actions, and sufficient information to validate compliance with this Order.

(3) The Board shall forward a copy of the report, with any additional comments by the Board, to the Assistant Deputy Comptroller within ten (10) days of the first Board meeting following receipt of such report, unless additional time is granted by the Assistant Deputy Comptroller through a written determination of no supervisory objection. The Assistant Deputy Comptroller may, in writing, discontinue the requirement for progress reports or modify the reporting schedule.

### **ARTICLE III**

#### **RESTITUTION PLAN**

(1) Within sixty (60) days of the effective date of this Order, the Bank shall develop and submit a Board-approved Restitution plan (“Restitution Plan”) to provide restitution to Affected Consumers for a total amount of \$25,000,000 to the Assistant Deputy Comptroller for prior determination of no supervisory objection. The Restitution Plan shall include the following:

- (a) A description of the methodology used to identify the specific Affected Consumers who will receive restitution under the Restitution Plan.

“Affected Consumers” include current and former TCF customers who meet either of the following criteria:

- (1) New customers who meet the following:
    - (i) Account opened at a TCF branch (not online);
    - (ii) Account opened between July 1, 2010 and December 31, 2013;
    - (iii) Opted in to TCF’s Overdraft Service at account opening;  
and
    - (iv) Account is not otherwise excluded from receiving restitution by the terms of the approved Restitution Plan; or
  - (2) Existing customers who held an account as of June 30, 2010, opted in to TCF’s Overdraft Service on or before December 31, 2013, and are not otherwise excluded from receiving restitution by the terms of the approved Restitution Plan.
- (b) A description of the methodology used to calculate the amount of restitution to be paid to each Affected Consumer covered by the Restitution Plan.
  - (c) A description of the methodology used to locate, contact, and inform Affected Consumers, covered by the Restitution Plan, of their restitution.
  - (d) A description of the procedures used for issuance and tracking of restitution payments to Affected Consumers covered by the Restitution Plan.

- (e) A description of the procedures to be followed for escheating any uncashed restitution payments to the state of the last known domestic address of Affected Consumers covered by the Restitution Plan.
- (f) A description of the procedures used to:
  - (1) Provide all current customers who first opted-in prior to May 1, 2015, and remain opted-in as of the effective date of this Order, with an opt-in status letter that contains disclosures regarding the Opt In Rule and affords opted-in customers an opportunity to opt out;
  - (2) Contact consumer reporting agencies to which the Bank furnished information, within the past seven years, regarding unpaid covered overdraft fees for Affected Consumers in connection with Bank's Overdraft Service and request that the information be corrected to update or remove such information; and
  - (3) Request that the appropriate consumer reporting agencies (*e.g.*, ChexSystems) correct negative reporting for Affected Consumers associated with accounts closed due to unpaid covered overdraft fees charged by the Bank in connection with the Bank's Overdraft Service.
- (g) A description of the procedures for monitoring compliance with the Restitution Plan.

(2) Upon receipt of a determination of no supervisory objection to the Restitution Plan, the Board shall oversee the implementation and adherence to the Restitution Plan. Any

proposed changes to or deviations from the approved Restitution Plan shall be submitted in writing to the Assistant Deputy Comptroller for prior supervisory review and non-objection.

#### **ARTICLE IV**

##### **ASSESSMENT OF RESTITUTION**

(1) Within sixty (60) days from the completion of restitution under the Restitution Plan, as detailed in Article III, an independent review and assessment of compliance with the terms of the Restitution Plan shall be performed (“Restitution Review”). The Restitution Review shall be completed and summarized in a written report (the “Restitution Review Report”), which shall be completed within thirty (30) days of completion of the Restitution Review. Within ten (10) days of its completion, the Restitution Review Report shall be submitted to the Assistant Deputy Comptroller and the Board.

- (2) The Restitution Review Report shall include, at a minimum, an assessment of:
- (a) The effectiveness of the methodology used to identify and determine the population of Affected Consumers covered by the Restitution Plan and amount of restitution for each Affected Consumer;
  - (b) The rationale for any changes or adjustments to the population of Affected Consumers covered by the Restitution Plan or the amount of restitution;
  - (c) The effectiveness of procedures used to locate and contact Affected Consumers covered by the Restitution Plan;
  - (d) The Bank’s success in contacting Affected Consumers covered by the Restitution Plan;
  - (e) The effectiveness of procedures to issue and track restitution payments;

- (f) Complaints received from Affected Consumers receiving restitution or customers that believe they were affected but were not eligible for restitution under the Restitution Plan; and
- (g) The work of any independent consultants that the Bank engages to assist with the implementation or execution of the Restitution Plan.

(3) Any (including all draft and finalized) communications, workpapers, or work product related to the Restitution Review and Restitution Review Report shall be made available to the OCC promptly upon request of the Examiner-in-Charge.

## **ARTICLE V**

### **APPROVAL, IMPLEMENTATION, AND REPORTS**

(1) The Bank shall submit the written plans and reports required by this Order to the Assistant Deputy Comptroller for review and determination of no supervisory objection within the applicable time periods set forth in Articles II through IV. In the event the OCC asks the Bank to revise the written plans and reports, the Bank shall promptly make necessary and appropriate revisions and resubmit the materials to the Assistant Deputy Comptroller for review and determination of no supervisory objection. Unless otherwise specified, following implementation of the written plans and reports, the Bank shall not take any action that will cause a significant deviation from, or material change to the written plans and reports, unless and until the Bank has received prior written notice of no supervisory objection.

(2) During the term of this Order, the Bank shall revise the required written plans and reports as necessary to incorporate new, or changes to, applicable legal requirements and supervisory guidelines.



(3) The Board shall oversee the Bank's processes, personnel, and control systems to implement and adhere to the written plans and reports required by this Order.

(4) All communication regarding this Order shall be sent to:

Matthew R. White  
Assistant Deputy Comptroller  
Midsize Bank Supervision  
1 South Wacker Drive, Suite 2000  
Chicago, IL 60606

or such other individuals or addresses as directed by the OCC.

## **ARTICLE VI**

### **OTHER PROVISIONS**

(1) Although this Order requires the Bank to submit certain written plans and reports for the review or prior written determination of no supervisory objection, the Board has the ultimate responsibility for proper and sound management of the Bank.

(2) If, at any time, the Comptroller deems it appropriate in fulfilling the responsibilities placed upon him by the several laws of the United States to undertake any action affecting the Bank, nothing in this Order shall in any way inhibit, estop, bar, or otherwise prevent the Comptroller from so doing.

(3) This Order constitutes a settlement of the cease and desist proceeding against the Bank contemplated by the Comptroller, based on the practices and violations of law described in the Comptroller's Findings set forth in Article I of this Order. The Comptroller releases and discharges the Bank from all potential liability for a cease and desist order that has been or might have been asserted by the Comptroller based on the practices and violations described in Article I of this Order, to the extent known to the Comptroller as of the effective date of this Order. Nothing in the Stipulation or this Order, however, shall prevent the Comptroller from:

- (a) instituting enforcement actions other than a cease and desist order against the Bank based on the findings set forth in Article I of this Order;
- (b) instituting enforcement actions against the Bank based on any other findings;
- (c) instituting enforcement actions against the Bank's institution-affiliated parties based on the findings set forth in Article I of this Order, or any other findings; or
- (d) utilizing the findings set forth in Article I of this Order in future enforcement actions against the Bank or its institution-affiliated parties to establish a pattern or the continuation of a pattern.

Further, nothing in the Stipulation or this Order shall affect any right of the Comptroller to determine and ensure compliance with the terms and provisions of the Stipulation or this Order.

(4) This Order is and shall become effective upon its execution by the Comptroller, through his authorized representative whose hand appears below. The Order shall remain effective and enforceable, except to the extent that, and until such time as, any provision of this Order shall be amended, suspended, waived, or terminated in writing by the Comptroller or his authorized representative.

(5) Any time limitations imposed by this Order shall begin to run from the effective date of this Order, as shown below, unless the Order specifies otherwise. The time limitations may be extended in writing by the OCC for good cause upon written application by the Board. Any request to extend any time limitation shall include a statement setting forth in detail the special circumstances that prevent the Bank from complying with the time limitation, and shall

be accompanied by relevant supporting documentation. The OCC's decision regarding the request is final and not subject to further review.

(6) The terms and provisions of this Order apply to the Bank and its subsidiaries, even though those subsidiaries are not named as parties to this Order. The Bank shall integrate any activities done by a subsidiary into its plans, policies, programs, and processes required by this Order. The Bank shall ensure that its subsidiaries comply with all terms and provisions of this Order.

(7) This Order is intended to be, and shall be construed to be, a final order issued pursuant to 12 U.S.C. § 1818(b), and expressly does not form, and may not be construed to form, a contract binding the Comptroller or the United States. Without limiting the foregoing, nothing in this Order shall affect any action against the Bank or its institution-affiliated parties by a bank regulatory agency, the United States Department of Justice, or any other law enforcement agency.

(8) The terms of this Order, including this paragraph, are not subject to amendment or modification by any extraneous expression, prior agreements, or prior arrangements between the parties, whether oral or written.

**IT IS SO ORDERED**, this 20th day of July, 2018.

/s/William D. Haas

William D. Haas

Deputy Comptroller

Midsized Bank Supervision

**UNITED STATES OF AMERICA  
DEPARTMENT OF THE TREASURY  
COMPTROLLER OF THE CURRENCY**

_____	)	
<b>In the Matter of:</b>	)	
	)	
TCF National Bank	)	AA-EC-2018-38
Sioux Falls, South Dakota	)	
_____	)	

**STIPULATION AND CONSENT TO THE ISSUANCE  
OF A CONSENT ORDER**

**WHEREAS**, the Comptroller of the Currency of the United States of America (“Comptroller”), based upon information derived from the exercise of his regulatory and supervisory responsibilities, intends to issue a cease and desist order to TCF National Bank, Sioux Falls, South Dakota (“Bank”), pursuant to 12 U.S.C. § 1818(b), for deficiencies in the Bank’s practices during the period 2010 to 2013 related to the Bank’s presentation of its ATM and one-time debit transaction overdraft service that resulted in violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1);

**WHEREAS**, in the interest of cooperation and to avoid additional costs associated with administrative and judicial proceedings with respect to the above matter, the Bank, through its duly elected and acting Board of Directors (“Board”), has agreed to execute this Stipulation and Consent to the Issuance of a Consent Order (“Stipulation”), that is accepted by the Comptroller, through his duly authorized representative;

**NOW, THEREFORE**, in consideration of the above premises, it is stipulated by the Bank that:

## **ARTICLE I**

### **JURISDICTION**

(1) The Bank is a national banking association chartered and examined by the Comptroller pursuant to the National Bank Act of 1864, as amended, 12 U.S.C. § 1 *et seq.*

(2) The Comptroller is “the appropriate Federal banking agency” regarding the Bank pursuant to 12 U.S.C. §§ 1813(q) and 1818(b).

(3) The Bank is an “insured depository institution” within the meaning of 12 U.S.C. § 1818(b)(1).

## **ARTICLE II**

### **CONSENT**

(1) The Bank, without admitting or denying any wrongdoing, consents and agrees to issuance of the accompanying Consent Order by the Comptroller.

(2) The terms and provisions of the Consent Order apply to the Bank and all of its subsidiaries, even though those subsidiaries are not named as parties to the Consent Order.

(3) The Bank consents and agrees that the Consent Order shall be deemed an “order issued with the consent of the depository institution” pursuant to 12 U.S.C. § 1818(h)(2), and consents and agrees that the Consent Order shall become effective upon its execution by the Comptroller through his authorized representative, and shall be fully enforceable by the Comptroller pursuant to 12 U.S.C. § 1818.

(4) Notwithstanding the absence of mutuality of obligation, or of consideration, or of a contract, the Comptroller may enforce any of the commitments or obligations herein undertaken by the Bank under his supervisory powers, including 12 U.S.C. § 1818(b), and not as

a matter of contract law. The Bank expressly acknowledges that neither the Bank nor the Comptroller has any intention to enter into a contract.

(5) The Bank declares that no separate promise or inducement of any kind has been made by the Comptroller, or by his agents or employees, to cause or induce the Bank to consent to the issuance of the Consent Order and/or execute this Stipulation.

(6) The Bank expressly acknowledges that no officer or employee of the Comptroller has statutory or other authority to bind the United States, the United States Treasury Department, the Comptroller, or any other federal bank regulatory agency or entity, or any officer or employee of any of those entities to a contract affecting the Comptroller's exercise of his supervisory responsibilities.

(7) The Consent Order constitutes a settlement of the cease and desist proceeding against the Bank contemplated by the Comptroller, based on the practices and violations of law described in the Comptroller's Findings set forth in Article I of the Consent Order. The Comptroller releases and discharges the Bank from all potential liability for a cease and desist order that has been or might have been asserted by the Comptroller based on the practices and violations described in Article I of the Consent Order, to the extent known to the Comptroller as of the effective date of the Consent Order. Nothing in this Stipulation or the Consent Order shall prevent the Comptroller from:

- (a) Instituting enforcement actions other than those pursuant to a 12 U.S.C. § 1818(b) cease and desist order against the Bank based on the findings set forth in Article I of the Consent Order;
- (b) Instituting enforcement actions against the Bank based on any other findings;

- (c) Instituting enforcement actions against the Bank's institution-affiliated parties based on the findings set forth in Article I of the Consent Order, or any other findings; or
- (d) Utilizing the findings set forth in Article I of the Consent Order in future enforcement actions against the Bank or its institution-affiliated parties to establish a pattern or the continuation of a pattern.

Further, nothing in this Stipulation or the Consent Order shall affect any right of the Comptroller to determine and ensure compliance with the terms and provisions of this Stipulation or the Consent Order.

### **ARTICLE III**

#### **WAIVERS**

- (1) The Bank, by executing this Stipulation and consenting to the Consent Order, waives:
  - (a) Any and all rights to the issuance of a Notice of Charges pursuant to 12 U.S.C. § 1818(b);
  - (b) Any and all procedural rights available in connection with the issuance of the Consent Order;
  - (c) Any and all rights to a hearing and a final agency decision pursuant to 12 U.S.C. § 1818(b) and (h), 12 C.F.R. Part 19;
  - (d) Any and all rights to seek any type of administrative or judicial review of the Consent Order;
  - (e) Any and all claims for fees, costs, or expenses against the Comptroller, or any of his agents or employees, related in any way to this enforcement



matter or the Consent Order, whether arising under common law or under the terms of any statute, including, but not limited to, the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412;

- (f) Any and all rights to assert this proceeding, this Stipulation, consent to the issuance of the Consent Order, and/or the issuance of the Consent Order, as the basis for a claim of double jeopardy in any pending or future proceeding brought by the United States Department of Justice or any other governmental entity; and
- (g) Any and all rights to challenge or contest the validity of the Consent Order.

#### **ARTICLE IV**

##### **OTHER PROVISIONS**

(1) Regarding the effect of the Consent Order, and unless the OCC informs the Bank otherwise in writing, or the effect is required by law or regulation, with respect to any or all of the subparts below:

- (a) The Bank is an “eligible bank” pursuant to 12 C.F.R. § 5.3(g)(5) for the purposes of 12 C.F.R. Part 5 regarding rules, policies, and procedures for corporate activities;
- (b) The Bank is not subject to the limitation of 12 C.F.R. § 5.51(c)(7)(ii) for the purposes of 12 C.F.R. § 5.51 requiring OCC approval of a change in directors and senior executive officers;
- (c) The Bank is not subject to the limitation on golden parachute payments provided by 12 C.F.R. § 5.51(c)(7)(ii);

(d) The Bank’s status as an “eligible bank” remains unchanged pursuant to 12 C.F.R. § 24.2(e)(4) for the purposes of 12 C.F.R. Part 24 regarding community and economic development; and

(e) The Order shall not be construed to be a “written agreement, order, or capital directive” within the meaning of 12 C.F.R. § 6.4.

(2) The Stipulation supersedes all prior OCC communications issued pursuant to 12 C.F.R. §§ 5.3(g)(5), 5.51(c)(7)(ii), and 24.2(e)(4).

## **ARTICLE V**

### **CLOSING**

(1) The provisions of this Stipulation and the Consent Order shall not inhibit, estop, bar, or otherwise prevent the Comptroller from taking any other action affecting the Bank if, at any time, he deems it appropriate to do so to fulfill the responsibilities placed upon him by the several laws of the United States of America.

(2) Nothing in this Stipulation or the Consent Order shall preclude any proceedings brought by the Comptroller to enforce the terms of the Consent Order, and nothing in this Stipulation or the Consent Order constitutes, nor shall the Bank contend that it constitutes, a release, discharge, compromise, settlement, dismissal, or resolution of any actions, or in any way affects any actions that may be or have been brought by any other representative of the United States or an agency thereof, including, without limitation, the United States Department of Justice.

(3) The terms of this Stipulation, including this paragraph, and of the Consent Order are not subject to amendment or modification by any extraneous expression, prior agreements or prior arrangements between the parties, whether oral or written.

**IN TESTIMONY WHEREOF**, the undersigned, as the duly elected and acting Board of Directors of TCF National Bank, Sioux Falls, South Dakota, have hereunto set their hands on behalf of the Bank.

/s/Thomas Butterfield	7/19/18
_____ Thomas Butterfield	_____ Date
/s/James Costa	7/19/18
_____ James Costa	_____ Date
/s/Craig Dahl	7/19/18
_____ Craig Dahl	_____ Date
/s/William Henak	7/19/18
_____ William Henak	_____ Date
/s/Thomas Jasper	7/19/18
_____ Thomas Jasper	_____ Date
/s/Michael Jones	7/19/18
_____ Michael Jones	_____ Date
/s/Brian Maass	7/19/18
_____ Brian Maass	_____ Date

Accepted by:

THE COMPTROLLER OF THE CURRENCY

/s/William D. Haas  
By: \_\_\_\_\_  
William D. Haas  
Deputy Comptroller  
Midsize Bank Supervision

7/20/18  
\_\_\_\_\_  
Date