



DIVISION OF
CORPORATION FINANCE

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

December 4, 2013

Mr. Frederick Wertheim
Sullivan & Cromwell LLP
125 Broad Street
New York, NY 10004

Re: In the Matter of In the Matter of Fifth Third Bancorp (HO-11489)
Fifth Third Bancorp – Waiver Request of Ineligible Issuer Status under Rule 405 of the Securities Act

Dear Mr. Wertheim:

This is in response to your letter dated December 3, 2013, written on behalf of Fifth Third Bancorp (Company) and constituting an application for relief from the Company being considered an “ineligible issuer” under Rule 405(1)(vi) of the Securities Act of 1933 (Securities Act). The Company requests relief from being considered an “ineligible issuer” under Rule 405, due to the entry on December 4, 2013, of a Commission Order (Order) pursuant to Section 8A of the Securities Act and Section 21C of the Securities Exchange Act of 1934 naming the Company as respondent. The Order requires that, among other things, the Company cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) and 17(a)(3) of the Securities Act.

Based on the facts and representations in your letter, and assuming the Company complies with the Order, the Commission, pursuant to delegated authority has determined that the Company has made a showing of good cause under Rule 405(2) of the Securities Act and that the Company will not be considered an ineligible issuer by reason of the entry of the Order. Accordingly, the relief described above from the Company being an ineligible issuer under Rule 405 of the Securities Act is hereby granted. Any different facts from those represented or non-compliance with the Order might require us to reach a different conclusion.

Sincerely,

/s/

Mary Kosterlitz
Chief, Office of Enforcement Liaison
Division of Corporation Finance

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December 3, 2013

Mary Kosterlitz, Esq.,
Chief of the Office of Enforcement Liaison,
Division of Corporation Finance,
U.S. Securities and Exchange Commission,
100 F. Street, N.E.,
Washington, D.C. 20549.

Re: Fifth Third Bancorp – HO-11489

Dear Ms. Kosterlitz:

We are writing on behalf of our client, Fifth Third Bancorp (“Bancorp” or the “Company”), in connection with the anticipated settlement relating to the above-referenced investigation by the Commission. The settlement would result in entry of an Order Instituting Public Administrative and Cease-and-Desist Proceedings pursuant to Section 8A of the Securities Act of 1933 and Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission’s Rules of Practice, Making Findings, and Imposing Remedial Sanctions and Cease-and-Desist Orders and Penalties (the “Order”).

Bancorp hereby requests, pursuant to Rule 405 under the Securities Act of 1933 (the “Securities Act”), that the Division, acting on behalf of the Commission pursuant to delegated authority, determine that Bancorp shall not be considered an “ineligible issuer” as defined in Rule 405 as a result of the contemplated Order. Bancorp requests that this determination be made effective upon entry of the Order. It is our understanding that the Division of Enforcement supports our request for such a determination.

BACKGROUND

The Division of Enforcement staff engaged in settlement discussions with Bancorp in connection with the above-referenced investigation. As a result of these

discussions, Bancorp and the Division of Enforcement have reached an agreement in principle to settle the matter as described below. In doing so, Bancorp has submitted to the Commission an offer of settlement in which, solely for the purpose of proceedings brought by or on behalf of the Commission or to which the Commission is a party, Bancorp consents to the entry of a Cease and Desist Order without admitting or denying the matters set forth in the Cease and Desist Order (except as to the jurisdiction of the Commission and the subject matter of the proceedings).

The Order will provide that, as a result of failing to reclassify certain non-performing assets after the Company had formed the intent to sell the assets, which reclassification would have affected the Company's Form 10-Q for the third quarter of 2008, Bancorp violated Sections 17(a)(2) and 17(a)(3) of the Securities Act and Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Securities Exchange Act of 1934 (the "Exchange Act"), as well as Exchange Act Rule 13a-13. First, the Order will state that Bancorp engaged in certain actions that evidenced an intent to sell a large portfolio of non-performing commercial loans in the third quarter of 2008, but did not then reclassify the loans from "held for investment" to "held for sale" as was required by Generally Accepted Accounting Principles. The Order also will state that, after engaging in these actions, Bancorp issued its Form 10-Q for the third quarter of 2008, reporting a pretax loss of \$128 million; whereas, had the Company reclassified the loans as required by GAAP, it would have reported a pretax loss of approximately \$297 million. The Order will state that Bancorp did not reclassify the loans from held for investment to held for sale and announce the resulting loss until its fourth quarter of 2008 earnings release on January 22, 2009.

The Order will require that Bancorp cease and desist from committing or causing any violations or future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act and Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act, and Exchange Act Rule 13a-13, and will require Bancorp to pay a civil money penalty in the amount of \$6,500,000.¹

¹ Daniel Poston, Bancorp's interim Chief Financial Officer during the period relevant to the Commission's investigation and Chief Financial Officer since 2009, also will be named as a Respondent in the Order and will be subject to a one-year ban under Rule 102(e) from practicing before the Commission. In connection with the Order, on October 31, 2013, Bancorp replaced Mr. Poston as the Chief Financial Officer and appointed him to the position of Bancorp's Chief Strategy and Administrative Officer. In that position, Mr. Poston has no specific accounting or financial attestation responsibilities, other than those that are required in the ordinary course of business of all officers with business unit responsibility, and no role in the disclosure process.

DISCUSSION

Under a number of Securities Act rules, a company that qualifies as a “well-known seasoned issuer” as defined in Rule 405 is eligible, among other things, to register securities for offer and sale under an “automatic shelf registration statement,” as defined in the rules, and to have the benefits of a streamlined registration process under the Securities Act. Companies that qualify as well-known seasoned issuers are entitled to conduct registered offerings more easily and with substantially fewer restrictions. Pursuant to Rule 405, however, a company cannot qualify as a well-known seasoned issuer if it is an “ineligible issuer.” Similarly, the Securities Act rules permit an issuer and other offering participants to communicate more freely during registered offerings by using free-writing prospectuses, but only if the issuer is not an “ineligible issuer.”²

Rule 405 of the Securities Act provides that an issuer is an “ineligible issuer” if, during the past three years, the issuer or any entity that at the time was a subsidiary of the issuer “was made the subject of any judicial or administrative decree or order arising out of a governmental action” that, among other things, “(B) requires that the person cease and desist from violating the anti-fraud provisions of the federal securities laws or (C) determines that the person violated the anti-fraud provisions of the federal securities laws.”³ Rule 405 also authorizes the Commission to determine, “upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.”⁴ The Commission has delegated authority to the Division of Corporation Finance to grant waivers from any of the ineligibility provisions of this definition.⁵

² Being an ineligible issuer will disqualify an issuer under the definition of “well-known seasoned issuer,” thereby preventing the issuer from using an automatic shelf registration statement (*see* Rule 405) and limiting its ability to communicate with the market prior to filing a registration statement (*see* Rule 163). In addition, being an ineligible issuer will disqualify an issuer, whether or not it is a well-known seasoned issuer, under Rules 164 and 433, thereby preventing the issuer and other offering participants from using free-writing prospectuses during registered offerings of its securities.

³ *See* 17 C.F.R. § 230.405.

⁴ *Id.*

⁵ *See* 17 C.F.R. § 200.30-1. *See also* note 215 in Release No. 33-8591 (July 19, 2005).

The Order may be deemed to be an order arising out of government action of the kind that would result in Bancorp becoming an ineligible issuer for a period of three years after the Order is entered because it asserts violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act, which, although they do not require a showing of scienter, are antifraud provisions. This result would preclude Bancorp from qualifying as a well-known seasoned issuer and deny Bancorp the benefit of automatic shelf registration and other provisions of the rules for three years. As described above, Rule 405 authorizes the Commission to determine that a company shall not be an ineligible issuer, notwithstanding that the company becomes subject to an otherwise disqualifying order arising out of government action.

Bancorp respectfully requests that the Commission determine that it is not necessary for Bancorp to be considered an ineligible issuer. Under the Division's July 8, 2011 guidance on WKSI Waivers, in situations such as this, in which the violation does not involve allegations of scienter-based conduct and where the violation relates to issuer disclosures, the Division will consider three factors: (1) remedial steps taken by the issuer; (2) pervasiveness and timing of the misconduct; and (3) impact on the issuer if the waiver request is denied. Here, the Order does not allege any scienter-based antifraud violations of the securities laws; rather it alleges violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act, neither of which requires scienter. Each of these factors weighs in favor of a determination that it is not necessary under the circumstances that Bancorp be considered an ineligible issuer:

1. Bancorp has taken steps to prevent accounting errors of the type alleged in the Order. The alleged violative conduct related to Bancorp's failure in 2008 to reclassify for accounting purposes certain non-performing commercial loans after it had engaged in activities that evidenced an intent to sell the loans. At the time, Bancorp had no prior experience selling pools of loans of this size, and it had no formal procedures concerning the authorization of such sales. Bancorp subsequently recognized the need for greater controls around such sales. Specifically, in 2009, Bancorp formalized new policies concerning authorizations for large loans sales by Bancorp's Special Assets Group ("SAG"). In 2008, SAG managed Bancorp's non-performing loans and pursued the loan sale strategy at issue in the SEC's investigation, and SAG continues to be responsible for Bancorp's non-performing loans today. SAG Authority Guidelines were originally created in March 2009 and since 2012 have set forth the specific executives needed to approve loan sales depending on the size of the sale. Under those Guidelines, if sales will cause a loss greater than \$500,000, the Managing Director of SAG and Chief Credit Officer

or SAG Credit Officer, must approve; and for losses greater than \$10 million, the Bancorp CEO must approve.

2. The alleged Bancorp misconduct is confined to a single accounting classification and the financial disclosures affected by that classification over a three-month period during October 2008 through January 2009, nearly five years ago, and at a time of tremendous economic upheaval, triggering the need to make unprecedented decisions under unprecedented conditions. While the amount involved would have resulted in a more substantial pretax loss in the third quarter of 2008, the fact that there was a single incident, that it was the first time that Bancorp faced this accounting issue with respect to loan pools of this size, and that the conduct is not alleged to have involved scienter warrants a determination that Bancorp should not be considered an ineligible issuer under these circumstances.
3. Treatment as an ineligible issuer would impose a significant burden on Bancorp. Bancorp relies on the issuance of securities under an automatic shelf registration on a regular basis and indeed is contemplating several new securities issuances in the near to medium term. For Bancorp, the automatic shelf registration process provides an important means of access to the capital markets, which are an essential source of funding for Bancorp's operations. If Bancorp is precluded from taking advantage of the many benefits set forth in Rules 405 and 163, it would hinder necessary access to the capital markets through significantly increased time, labor and cost of such access. Bancorp shareholders would bear the additional costs associated with the loss of its WKSII status. The disqualification of Bancorp as a well-known seasoned issuer thus would be unduly and disproportionately severe.

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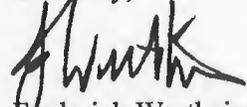
In light of the foregoing, we believe that disqualification of Bancorp as an ineligible issuer is not necessary under the circumstances, either in the public interest or for the protection of investors, and that Bancorp has shown good cause for the requested relief to be granted. Accordingly, we respectfully request that the Division, on behalf of the Commission, pursuant to Rule 405, determine that it is not necessary under the circumstances that Bancorp be an "ineligible issuer" within the meaning of Rule 405 as a result of the Order.

Mary Kosterlitz, Esq.

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If you have any questions regarding this request, please contact the undersigned at (212) 558-4974.

Sincerely,

A handwritten signature in black ink, appearing to read 'F. Wertheim', written in a cursive style.

Frederick Wertheim

cc: Rami Sibay, Division of Enforcement
John Madison, Division of Corporation Finance