

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 87037 / September 20, 2019**

**ACCOUNTING AND AUDITING ENFORCEMENT**  
**Release No. 4082 / September 20, 2019**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-19478**

**In the Matter of**

**JAMES DAVID HILTY,**

**Respondent.**

**ORDER INSTITUTING CEASE-AND-  
DESIST PROCEEDINGS PURSUANT TO  
SECTION 21C OF THE SECURITIES  
EXCHANGE ACT OF 1934, MAKING  
FINDINGS, AND IMPOSING A CEASE-  
AND-DESIST ORDER**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against James David Hilty (“Hilty” or “Respondent”).

**II.**

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over him and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that

#### **SUMMARY**

1. This matter concerns failures between April 2012 and September 2014 of The Bancorp, Inc. ("Bancorp") to properly classify certain loans and to record appropriate charges for certain individually impaired loans, resulting in Bancorp materially understating its Allowance for Loan and Lease Losses ("ALLL") and its Provision for Loan and Lease Losses ("PLLL") in its requisite periodic reports filed with the Commission. Bancorp repeatedly overlooked indicators of borrowers' and guarantors' financial distress as it failed to assign appropriate risk ratings to certain loans and to identify certain large lending relationships as containing impaired or otherwise substandard loans.

2. As a result of these failures, on September 28, 2015, Bancorp restated its financial results and financial statements for certain prior fiscal years. Pursuant to the restatement, the aggregate adjustment to the PLLL for the fiscal years 2010 through 2013 was approximately \$138.6 million. Pursuant to the adjustments to the historical ALLL set forth in the restatement, Bancorp's ALLL for 2012 increased by 78.23% from the balance previously reported, and the ALLL for 2013 increased by 73.97%.

3. Hilty was Bancorp's Chief Risk Officer from February 2004 until September 2015. In that capacity, he led Bancorp's Loan Review function, which was tasked with assigning risk ratings to loans, including identifying impaired and otherwise substandard loans. He reviewed the risk ratings and impairment decisions made by his subordinates and used the ratings and decisions when he estimated Bancorp's ALLL and its PLLL. As a result of his oversight of and role in Loan Review, Hilty knew or should have known that risk ratings for certain loans had not been reevaluated, downgraded, or impaired in spite of indicators of financial distress. Accordingly, Hilty knew or should have known that, on multiple occasions, Bancorp's risk ratings and impairment decisions were not fair and accurate.

4. As a result of the conduct described in this Order, Hilty caused Bancorp's violations of Sections 13(a) and 13(b)(2)(A) and Rules 13a-1 and 13a-13 of the Exchange Act. Hilty also violated Exchange Act Rule 13b2-1.

#### **FACTS**

##### **A. Respondent**

5. James David Hilty was Bancorp's Chief Risk Officer from February 2004 to September 2015. As Chief Risk Officer, he was responsible for, among other things, the Loan

---

<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

Review function and estimating the ALLL and PLLL on a quarterly basis. He is currently Bancorp's Director of Consumer Lending, Senior Credit Allowance Officer. Hilty, age 56, is a resident of Wilmington, Delaware.

**B. Relevant Entity**

6. Bancorp is a Delaware corporation with its principal executive offices in Wilmington, Delaware. Its common stock is registered with the Commission pursuant to Section 12(b) of the Exchange Act and trades on the NASDAQ Stock Market under the ticker symbol TBBK. Bancorp is the bank holding company for The Bancorp Bank ("Bancorp Bank"), a regional bank headquartered in Wilmington, Delaware. Bancorp Bank is Bancorp's primary wholly-owned subsidiary.

**C. Accounting Guidance**

7. Banking institutions carry loans on their balance sheets as assets and record on their income statements any interest revenue on the loans. According to Generally Accepted Accounting Principles ("GAAP"), an individual loan is impaired when "based on current information and events, it is probable that a creditor will be unable to collect all amounts due according to the contractual terms of the loan agreement." Accounting Standards Codification ("ASC") 310-10-35. Furthermore, loan losses must be recognized for impairment of large groups of smaller balance loans and loans with similar risk characteristics when it is probable that the asset is impaired as of the date of the financial statements and the amount of loss can be reasonably estimated. *Id.*

8. The ALLL is the current estimate of the aggregate probable loss inherent in a loan portfolio and is reflected on the balance sheet as a reduction to the loan balance. The ALLL encompasses the effects of two types of loan losses: (1) loans identified and evaluated for impairment individually; and (2) loans grouped by common risk characteristics and analyzed for impairment on an aggregate basis. ASC 310-10-35. The PLLL reflects the income statement impact of impaired loans for the period being reported.

**D. Bancorp's Restatement**

9. On September 28, 2015, Bancorp filed its annual Report on Form 10-K for its fiscal year 2014, which included restated financial data for its fiscal years 2010 through 2013 and restated financial statements for its fiscal years 2012 and 2013, as well as for the first three quarters of 2013 and 2014. The restatement included an aggregate adjustment to the PLLL of approximately \$138.6 million in Bancorp's commercial loan portfolio from 2010 to 2013. That total adjustment included an adjustment adding \$90.5 million to the loan loss provision for 2012 and an adjustment adding \$28.9 million to the provision for 2013. The adjustment for 2012 exceeded the \$24.4 million in income before taxes previously reported by Bancorp, resulting in an overall loss for that fiscal year.

## **E. Bancorp's Business Model**

10. During the relevant time period, Bancorp engaged in a business model called "relationship banking." Bancorp sought to develop long-standing banking relationships with certain individuals and businesses within Bancorp Bank's geographic region and provide them with the attention of senior Bancorp Bank management. Bancorp's focus on long-standing relationships with borrowers and guarantors holding multiple Bancorp Bank loans was intended to encourage cross-selling, provide insight into borrowers' risk, and increase customer loyalty. Bancorp executives also believed that this model allowed Bancorp Bank to cross-collateralize loans and take a holistic approach to loan management.

11. However, Bancorp made risk rating and impairment decisions that relied too heavily on borrowers' and guarantors' reputations, their historic business and banking relationship with Bancorp Bank, and their expected future prospects for more business, while overlooking indicators of financial distress. This was particularly the case with respect to certain large or high-profile lending relationships and with respect to borrowers and guarantors with long relationships with Bancorp Bank. As a result, Bancorp failed to identify loan impairments and credit deterioration within individual loans and repeatedly failed to re-evaluate loans and downgrade risk ratings when confronted with negative information. This caused Bancorp to materially understate its PLLL from 2010 through 2013 and its ALLL from 2010 through the third quarter of 2014.

## **F. Hilty's Oversight of and Role in Bancorp's Loan Review Function**

12. The component of the ALLL that is comprised of the effects of losses from loans identified and evaluated for impairment individually is often referred to as the specific reserve. In turn, the component of the ALLL that is comprised of the effects of losses from loans grouped by common risk characteristics and analyzed for impairment on an aggregate basis is often called the general reserve.

13. Pursuant to Bancorp's Credit Policy, Bancorp Bank was to periodically review loan relationships by loan type and assign risk ratings ranging from I to VIII for purposes of computing the general reserve portion of the ALLL. Each individual loan risk rating signifies a level of credit quality. Loans rated I (Excellent – No Risk) to V (Special Mention) were considered to have passing ratings, and loans rated VI (Substandard) to VIII (Loss) were considered to have adverse ratings. Each loan-type pool was collectively evaluated for impairment by assigning a weighted loss risk factor by risk rating. The resulting aggregate estimated loss by loan type and risk rating category was then used to calculate the general reserve portion of the ALLL.

14. Hilty oversaw Bancorp's Loan Review function. Loan Review was responsible for periodically reviewing and assigning risk ratings to loans and identifying potentially impaired and otherwise substandard loans. Hilty reviewed the decisions made by the Loan Review staff. Bancorp's Credit Policy contemplated review of assigned risk ratings in the instance of a "deteriorating or negative situation." As a result of his position, Hilty knew or should have known about indicators of financial distress within certain large and high-profile loan relationships. Nevertheless, Hilty approved risk ratings for loans within those relationships that he knew or

should have known did not take such information into account. He also failed on multiple occasions to instruct the Loan Review staff to re-evaluate loans that he knew or should have known were of deteriorating credit quality.

15. As a result of his position, Hilty also knew or should have known that, on multiple occasions during the relevant time period, Bancorp Bank extended additional credit to borrowers who had fallen behind on their loan payments. This additional credit was used to bring existing loans current in the expectation that the borrower's or guarantor's financial situation would improve in the future and allow resumption of normal payments. Hilty knew or should have known that, on multiple occasions, Loan Review failed to acknowledge that certain borrowers or guarantors were in distress at the time they received extensions of credit from Bancorp Bank and that Loan Review failed to review or downgrade risk ratings assigned to the underlying loans.

16. For example, Bancorp Bank increased the available funds in a high-profile executive's \$9.8 million line of credit numerous times in order for the executive to be able to make quarter-end payments on his delinquent loans. The increases resulted from Bancorp's estimation of the borrower's potential future business opportunities based generally on his reputation and a business license, rather than on his financial condition at the time of the increases. At the time, Loan Review did not adjust the risk ratings for the loans and thus did not consider whether the loans were required to be impaired. During the restatement of its financial statements, Bancorp recognized an impairment loss on this line of credit of approximately \$8.7 million during the third quarter of 2012.

17. In another example, in 2012, Bancorp's Loan Review function did not evaluate a \$20 million loan relationship for potential impairment after the criminal conviction of the guarantor, a long-time Bancorp Bank customer. Loan Review also did not change the risk ratings for the loans in this relationship at that time. Instead, Bancorp focused on attempting to obtain an additional guarantee from the guarantor's brother. However, the guarantee was not obtained until May 2013. After the brother failed to make promised loan payments the following year, Bancorp Bank increased the relationship's line of credit and the increase was used to pay overdue balances on delinquent loans. Despite these developments, the loans in the relationship retained their passing risk ratings. During the restatement of its financial statements, Bancorp recognized a total of approximately \$16.1 million in impairment losses for loans in the relationship during the fourth quarter of 2012.

18. In sum, as a result of his supervision of and role in Loan Review, Hilty knew or should have known that specific Bancorp risk ratings and impairment decisions did not take into account important information, including indicators of financial distress, and were not fair and accurate. Nevertheless, Hilty subsequently used those risk ratings and impairment decisions to estimate Bancorp's specific and general reserves, and, ultimately, to estimate Bancorp's ALLL and PLLL on a quarterly and annual basis.

19. During this time, as described above, Bancorp failed to make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflected its transactions and the disposition of its assets. By his acts and omissions described above, including his supervision of

and role in Loan Review and his estimation of the ALLL and PLLL using risk ratings and impairment decisions that he knew or should have known were not fair and accurate, Hilty contributed to Bancorp's failure, and Hilty knew or should have known that his acts or omissions would so contribute.

20. By his acts and omissions described above, including his supervision of and role in Loan Review and his estimation of the ALLL and PLLL using risk ratings and impairment decisions that he knew or should have known were not fair and accurate, Hilty, directly or indirectly, falsified or caused to be falsified, Bancorp's books, records, and accounts.

21. The annual and quarterly ALLL and PLLL estimations performed by Hilty were used as specific line items in Bancorp's financial statements included in its quarterly and annual reports.

22. Accordingly, during this time, Bancorp made material misstatements regarding its ALLL and PLLL in its requisite quarterly and annual reports. Bancorp thereby failed to file with the Commission requisite quarterly and annual reports that were accurate in all material respects. By his acts and omissions described above, including his estimation of the ALLL and PLLL using risk ratings and impairment decisions that he knew or should have known were not fair and accurate, Hilty contributed to Bancorp's failure, and Hilty knew or should have known that his acts or omissions would so contribute.

#### **G. Violations**

23. As a result of the conduct described above, Respondent caused Bancorp's violation of Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder, which require issuers of securities registered pursuant to Section 12 of the Exchange Act to file with the Commission accurate periodic reports, including annual Reports on Form 10-K and quarterly Reports on Form 10-Q.

24. As a result of the conduct described above, Respondent caused Bancorp's violation of Section 13(b)(2)(A) of the Exchange Act, which requires an issuer of securities registered pursuant to Section 12 of the Exchange Act to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the issuer's transactions and disposition of assets.

25. As a result of the conduct described above, Respondent violated Exchange Act Rule 13b2-1 by, directly or indirectly, falsifying or causing to be falsified books, records, and accounts required to be maintained by Bancorp.

#### IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent James David Hilty's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent cease and desist from committing or causing any violations and any future violations of Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 13a-1, 13a-13, and 13b2-1 thereunder.

B. Respondent shall pay a civil money penalty in the amount of \$50,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). Payment shall be made in the following installments: \$20,000 to be paid within 10 days of the entry of this order, \$10,000 to be paid within 120 days of the entry of this order, \$10,000 to be paid within 240 days of the entry of this order, and \$10,000 to be paid within 350 days of the entry of this order. Payments shall be applied first to post-order interest, which accrues pursuant to 31 U.S.C. § 3717. Prior to making the final payment set forth herein, Respondent shall contact the staff of the Commission for the amount due. If Respondent fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.

Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center  
Accounts Receivable Branch  
HQ Bldg., Room 181, AMZ-341  
6500 South MacArthur Boulevard  
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying James David Hilty as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Carolyn M. Welshhans,

Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

C. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall he benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

#### V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. § 523(a)(19).

By the Commission.

Vanessa A. Countryman  
Secretary