

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 95589 / August 24, 2022

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 4323 / August 24, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-20997

In the Matter of

THE BANCORP, INC.,

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 The Bancorp, Inc. (“Bancorp,” “company,” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement of The Bancorp, Inc. (“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 it and the subject matter of these proceedings, which are admitted, 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 finds¹ the following:

SUMMARY

1. This matter concerns violations of reporting, record-keeping, and internal accounting controls provisions of the Exchange Act by Bancorp. Beginning in the first quarter of 2017 and continuing through the first quarter of 2019 ("Relevant Period"), Bancorp made filings with the Commission in which it reported gains that it received from the sales of loans included in five commercial real estate securitizations ("CRE Transactions"). The CRE Transactions involved the securitization by Bancorp of floating-rate, short-term, transitional commercial real estate ("CRE") loans. In connection with each of the CRE Transactions, Bancorp obtained a tranche of certificates classified as debt securities ("CRE certificates") that included two components: principal-and-interest and interest-only ("IO") components. Bancorp's reported gain was based on the value that Bancorp assigned to the certificates that it received and, in particular, the IO component of the certificates.

2. During the Relevant Period, generally accepted accounting principles ("GAAP") governed the valuation of the CRE certificates and required that they be measured at fair value. Because the initial valuation of each CRE certificate and, specifically, the IO components required the use of what GAAP characterized as "unobservable inputs," the certificates were categorized as assets measured using level 3 inputs that are significant to the overall measurement ("Level 3" assets). One significant unobservable input was the prepayment rate assumption for the loans that provided the collateral for the CRE Transactions. Bancorp failed to maintain adequate books and records and did not sufficiently incorporate all reasonably available market data in support of these valuations. Bancorp also lacked policies and procedures applicable to its initial valuations of the CRE certificates that were reasonably designed to ensure that those valuations conformed with certain GAAP requirements. Bancorp further omitted and misstated material information related to the certificates and the assumptions that it had used in valuing those certificates in certain of its quarterly and annual financial statements filed with the Commission from the first quarter of 2017 through the first quarter of 2019.²

RESPONDENT

3. The Bancorp, Inc. 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 holding company for Bancorp Bank. In September 2019, the Commission

¹ The findings herein are made pursuant to Bancorp's Offer and are not binding on any other person or entity in this or any other proceeding.

² The filings at issue are Bancorp's quarterly filings for the first and third quarters of 2017 and 2018, the quarterly filing for the first quarter of 2019, and the annual filings for fiscal years 2017 and 2018.

entered a settled cease-and-desist order against Bancorp for violations of reporting, record-keeping, and internal accounting controls provisions for conduct that took place between 2012 and 2014. Bancorp implemented certain remedial measures in response to that order, which was entered after the occurrence of the majority of the conduct described in this Order.

FACTS

4. In the Relevant Period, Bancorp securitized floating-rate, short-term commercial real estate loans that Bancorp had originated to improve or rehabilitate existing properties. In each of the CRE Transactions, Bancorp sold the loans to a trust established for the transaction. The trust then offered tranches of certificates with variable rate coupons that were collateralized by loans that Bancorp had originated. In consideration for the loans that it sold to the trust, Bancorp received cash in an amount less than the carrying value of the loans, and a tranche of non-offered certificates also collateralized by the loans.

6. The CRE certificates that Bancorp obtained in each of the CRE Transactions (referred to as “CRE1,” “CRE2,” “CRE3,” “CRE4,” and “CRE5”) were comprised of two components that had different risk profiles: (a) a principal balance certificate, referred to as the Class E or Class C Regular Interest, which was like a regular coupon bond and received distributions of principal and interest; and (b) an IO component, referred to as the Class X Regular Interest, which received only distributions of interest that were in excess of interest required to be distributed to other certificates.

7. In a subsequent sixth CRE transaction that is not the subject of this action, the Class C certificates that Bancorp obtained consisted only of the Class C Regular Interest. A separate IO tranche of certificates was created and sold to a third party unrelated to Bancorp.

A. **Bancorp Failed to Document Adequately and Incorporate All Reasonably Available Market Data into Its Valuation Assumptions for the CRE Certificates**

8. When valuing the CRE certificates, Bancorp determined that there were no observable inputs or standard market assumptions that could be used for pricing. Bancorp derived its initial valuation of the CRE certificates from Level 3 unobservable inputs and worked with third parties as part of its valuation process. Certain of those third parties generated reports and provided Bancorp with information that it used in its valuations.

9. Throughout the Relevant Period, GAAP governed the fair value measurement of Level 3 and other assets. Many of those standards were set forth in Fair Value Measurement, Financial Accounting Standards Board Accounting Standards Codification Topic 820 (“ASC 820”). In relevant part, ASC 820 provided as follows:

- “Fair value is a market-based measurement, not an entity-specific measurement. . . . [T]he objective of a fair value measurement in both cases [observable and unobservable market transactions and market information] is the same—to estimate

the price at which an orderly transaction to sell the asset or transfer the liability would take place between market participants at the measurement date under current market condition (that is, an **exit price** at the measurement date from the perspective of a market participant that holds the asset or owes the liability).” ASC 820-10-05-1B (bold in original);

- “A reporting entity shall measure the fair value of an asset or liability using the assumptions that market participants would use in pricing the asset or liability, assuming that market participants act in their economic best interest.” ASC 820-10-35-9;
- “Unobservable inputs shall be used to measure fair value to the extent that relevant observable inputs are not available, thereby allowing for situations in which there are little, if any, market activity for the asset or liability at the measurement date. However, the fair value measurement objective remains the same, that is, an exit price at the measurement date from the perspective of a market participant that holds the asset or owes the liability. Therefore, unobservable inputs shall reflect the assumptions that market participants would use when pricing the asset or liability, including assumptions about risk.” ASC 820-10-35-53;
- “A reporting entity shall develop unobservable inputs using the best information available in the circumstances, which might include the reporting entity’s own data. In developing unobservable inputs, a reporting entity may begin with its own data, but it shall adjust those data if reasonably available information indicates that other market participants would use different data or there is something particular to the reporting entity that is not available to other market participants (for example, an entity-specific synergy). A reporting entity need not undertake exhaustive efforts to obtain information about market participant assumptions. However, a reporting entity shall take into account all information about market participant assumptions that is reasonably available.” ASC 820-10-35-54A; and
- “A reporting entity shall use valuation techniques that are appropriate in the circumstances and for which sufficient data are available to measure fair value, maximizing the use of relevant observable inputs and minimizing the use of unobservable inputs.” ASC 820-10-35-24; *see also* ASC-820-10-35-36.

10. In assigning prices to the CRE certificates, including the IO components of those certificates, Bancorp projected future cash flows using a baseline prepayment assumption of 0% CPY (constant prepayment yield) or 5% CPY. Bancorp then discounted those cash flows at the London Interbank Offered Rate (“LIBOR”), plus an additional discount margin.

11. Bancorp ostensibly sought to account for the prepayment risk to the IO components through its use of the discount margins that it applied in its valuation. For the CRE1 through CRE3 certificates, Bancorp used an 800 basis point discount margin, i.e., the spread above the

LIBOR, in connection with its prepayment assumption.³ For the IO components of the certificates that it obtained in the CRE4 and CRE5 transactions, Bancorp used a 1,000-basis point discount margin in connection with its prepayment assumption.

12. Bancorp, however, failed to sufficiently document adequate support for this approach, which was inconsistent with certain market information that was reasonably available to Bancorp and other market participants at the time.

13. For example, at the times Bancorp sponsored the CRE Transactions, there was a convention used in pricing IO strips of commercial mortgage-backed securities (“CMBS”)⁴ based on an assumption known as 100% CPY. This convention assumed that at the end of any prepayment penalty periods, all of the underlying loans in the transaction would be prepaid. In assigning values to the CRE certificates, Bancorp did not reasonably consider the 100% CPY assumption.

14. There also was, for example, historical market data showing actual prepayments on comparable loans included in other securitizations. Throughout the Relevant Period, Bancorp received and, through market research, had available historical information on prepayments. That information showed that prepayments on comparable loans generally exceeded 30% CPY.

15. As Bancorp continued to sponsor the CRE Transactions and obtain CRE certificates, the underlying collateral for the CRE Transactions experienced prepayments at a rate significantly higher than the 0% CPY and 5% CPY assumptions that Bancorp used, which Bancorp failed to appropriately consider in its valuations.

16. Bancorp failed to document adequate support for or analysis behind its use of the CPY assumptions and discount margins that the company used in its valuations. Although Bancorp did prepare Exception Reports that provided some analysis for its valuations of the CRE certificates, the Exception Reports did not address the available market information that was inconsistent with Bancorp’s valuation, explain why a 0% CPY or 5% CPY assumption was a reasonable assumption for the IO components of the CRE certificates, or include analysis showing how Bancorp arrived at the discount margins it used. In addition, while Bancorp’s Investment Policy in effect at the time included policies and procedures applicable to subsequent valuations, Bancorp lacked written policies and procedures specific to initial valuations of the CRE certificates.

17. Because Bancorp failed to sufficiently document adequate support for the prepayment rate assumptions and discount margins that it used to assign values to the CRE

³ Notwithstanding the different risk profiles, the 800 basis point discount margin that Bancorp used in pricing the IO components of the certificates it obtained in the CRE1 and CRE2 transactions is the same discount margin that it used in pricing the regular coupon portions of the certificates.

⁴ In its periodic reports filed with the Commission, Bancorp classified the certificates that it obtained in the CRE Transactions as CMBS.

certificates and did not incorporate sufficiently its own data and reasonably available information that market participants would use, Bancorp failed to comply with ASC 820.

B. Bancorp Omitted and Misstated Material Information About the CRE Transactions

18. Bancorp first made specific disclosures about the CRE Transactions in its quarterly report for the third quarter of 2018. After Bancorp began making specific disclosures about the CRE Transactions, Bancorp never disclosed, in its Commission filings, that the certificates that it obtained included an IO component or that the gains it reported were based on the values that Bancorp had assigned to those IO components.

19. With respect to the CRE1 through CRE4 transactions, the company, in the notes to its financial statements, disclosed that the loans that provided the collateral for the transactions had prepayment protections and loan extension options and that it was expected that those features “would generally offset the impact of prepayments which are accordingly not assumed.” Bancorp, however, based its prepayment assumptions on the CPY method, which assumes that prepayment protections already have expired. Bancorp did not adequately document or have sufficient support for its representation that prepayment protections and loan extension options would offset the impact of prepayments.

20. In addition, at the times of the CRE transactions, ASC 820-10-50-2(bbb) and ASC 820-10-55-103 provided that for fair value measurements of assets categorized as Level 3 within the fair value hierarchy, reporting entities were to provide quantitative information about the “significant unobservable inputs” used in the fair value measurements. ASC 820-10-55-103 additionally set forth examples of the types of unobservable inputs that a reporting entity might disclose. For CMBS, the specified examples included the prepayment rate.

21. In the notes to its financial statements included in its periodic reports, Bancorp failed to provide quantitative information about certain “significant unobservable inputs” used in its fair value measurements of the CRE certificates. For example, while Bancorp provided discount rate information about the CRE certificates, it did not include information about the prepayment rates, which were a significant unobservable input for valuing those certificates.

22. For these reasons, there were material omissions from, and misstatements in, the annual and quarterly reports for 2017 through 2019 and the interim periods therein that Bancorp filed with the Commission. Additionally, the filings failed to include further information necessary to make certain required statements, in the light of the circumstances under which they are made, not misleading.

REMEDIAL MEASURES

23. In determining to accept Bancorp’s Offer of Settlement, the Commission considered remedial measures undertaken by Bancorp. Prior to the entry of this Order, Bancorp instituted additional company-wide controls and related infrastructure. This included the creation

of a new committee structure, the New Product and Services Committee, with the purpose of identifying new controls, compliance and risk issues relating to potential and actual new lines of business and products, and assuring that new products are appropriately challenged and vetted. An expanded risk committee was also established at the Board level.

VIOLATIONS

24. As a result of the conduct described above, Bancorp violated Section 13(a) of the Exchange Act and Exchange Act Rules 12b-20, 13a-1, and 13a-13. Section 13(a) and Rules 13a-1 and 13a-13 require issuers of securities registered pursuant to Section 12 of the Exchange Act to file with the Commission, among other things, annual and quarterly reports as the Commission may require. The information reported must be true, correct, and complete. Rule 12b-20 requires that, in addition to the information expressly required to be included in a statement or report filed with the Commission, there shall be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

25. As a result of the conduct described above, Bancorp also violated Section 13(b)(2)(A) of the Exchange Act. This provision requires issuers 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 dispositions of assets.

26. As a result of the conduct described above, Bancorp additionally violated Section 13(b)(2)(B) of the Exchange Act. This provision requires issuers of securities registered pursuant to Section 12 of the Exchange Act to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are executed in accordance with management's general or specific authorization; transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP or any other criteria applicable to such statements, and to maintain accountability for assets; access to assets is permitted only in accordance with management's general or specific authorization; and the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

IV.

In view of the foregoing, 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), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Exchange Act Rules 12b-20, 13a-1, and 13a-13.

B. Respondent shall, within 10 days of the entry of this Order, pay a civil money penalty in the amount of \$1,750,000.00 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Section 21F(g)(3) of the Exchange Act. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

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 Commission 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 The Bancorp, Inc. as the 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 Armita S. Cohen, Assistant 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, it shall not argue that it is entitled to, nor shall it 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 it 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.

By the Commission.

Vanessa A. Countryman
Secretary