

FEDERAL RESERVE SYSTEM

Capital One Financial Corporation
McLean, Virginia

Order Approving the Acquisition of a Savings Association
and Nonbanking Subsidiaries

Capital One Financial Corporation (“Capital One”), a financial holding company within the meaning of the Bank Holding Company Act (“BHC Act”), has requested the Board’s approval under sections 4(c)(8) and 4(j) of the BHC Act and section 225.24 of the Board’s Regulation Y¹ to acquire ING Bank, fsb (“FSB”), Wilmington, Delaware, and thereby indirectly acquire ShareBuilder Advisors, LLC (“ShareBuilder”) and ING Direct Investing, Inc. (“IDII”), both of Seattle, Washington.²

Capital One, with total consolidated assets of approximately \$200 billion, is the 24th largest depository organization in the United States measured by asset size. Capital One is the eighth largest depository organization in the United States measured by deposits, controlling deposits of approximately \$127 billion, which represents approximately 1.4 percent of the total amount of deposits of insured depository institutions in the United States.³ Capital One controls two insured depository institutions, Capital One, National Association (“CONA”), McLean, Virginia, and

¹ 12 U.S.C. §§ 1843(c)(8) and (j); 12 CFR 225.24.

² FSB is owned by ING Groep N.V. (“ING Groep”), Amsterdam, The Netherlands. In 2008 and 2009, the government of The Netherlands provided ING Groep a guarantee of some of ING Groep’s assets, including certain U.S. assets of FSB. Under this proposal, Capital One would not acquire any FSB assets that are subject to the guarantee of the Dutch government.

³ Asset and nationwide deposit ranking data are as of September 30, 2011. In this context, insured depository institutions include commercial banks, savings banks, and savings associations.

Capital One Bank (USA), National Association (“COBNA”), Glen Allen, Virginia, that operate in eight states and the District of Columbia.⁴

FSB, with total consolidated assets of approximately \$92 billion, is the 17th largest depository organization in the United States measured by deposits, controlling deposits of approximately \$82 billion, which represents less than 1 percent of the total amount of deposits of insured depository institutions in the United States. FSB’s only banking office is in Delaware, but FSB solicits business and operates nationwide primarily through the Internet.⁵

On consummation of the proposal, Capital One would become the fifth largest depository organization in the United States by deposit size, with consolidated deposits of approximately \$210 billion, representing approximately 2.3 percent of the total amount of deposits of insured depository institutions in the United States. Capital One would become the 20th largest depository organization in the United States by asset size, with total consolidated assets of approximately \$292 billion.

Public Comment on the Proposal

Notice of the proposal, affording interested persons an opportunity to submit comments, has been published in the Federal Register (76 Federal Register 44,008 (July 22, 2011) and 76 Federal Register 54,770 (September 2, 2011)), and the time for filing comments has expired. The Board extended the initial period for public comment to accommodate the broad public interest in this proposal, providing interested persons more than 85 days to submit written comments.

Because of the extensive public interest in the proposal, the Board held public meetings in Washington, D.C., Chicago, Illinois, and San Francisco, California,

⁴ CONA is Capital One’s largest subsidiary depository institution as measured by both assets and deposits. COBNA primarily offers credit and debit card products in addition to deposit products.

⁵ FSB operates eight cafés in the United States that are marketing offices of FSB and do not meet the definition of “branch” under the regulations of the Office of Thrift Supervision (“OTS”) and Office of the Comptroller of the Currency (“OCC”). See 76 Federal Register 48,999 (August 9, 2011), to be codified at 12 CFR 145.92.

to provide interested persons an opportunity to present oral testimony on the factors that the Board must review under the BHC Act.⁶ Approximately 235 people testified at the public meetings, and many of the commenters who testified also submitted written comments.

In total, approximately 915 individuals and organizations submitted comments on the proposal through oral testimony, written comments, or both. Commenters included members of Congress, state legislators, community groups, nonprofit organizations, customers of Capital One or FSB, and other interested organizations and individuals.

A large number of commenters supported the proposal. Many of the commenters in support of the proposal commended Capital One for its commitment to local communities and described favorable experiences with the small business, community development, and affordable mortgage programs of the organization. Commenters also praised the willingness of Capital One to provide products and services under the Community Reinvestment Act (“CRA”),⁷ such as affordable mortgage products, educational seminars, and funds to support community development activities. In addition, commenters praised Capital One’s charitable contributions and noted that Capital One officers and employees frequently provide valuable services to community organizations as board members and volunteers.

A significant number of commenters opposed the proposal, requested that the Board only approve the proposal subject to certain conditions, or expressed concerns

⁶ The Board held the Washington public meeting on September 20, 2011, the Chicago public meeting on September 27, 2011, and the San Francisco public meeting on October 5, 2011. Several commenters requested that the Board further extend the comment period and hold additional public meetings in New York City, Los Angeles, Atlanta, New Orleans, and other communities. The Board believes that holding public meetings in Washington, Chicago, and San Francisco, as well as providing all commenters an extended period to submit written comments, provided sufficient opportunity for interested persons to provide relevant information to the Board. The three public meetings were distributed across the United States, and as noted above, the written comment period exceeded 85 days.

⁷ 12 U.S.C. § 2901 et seq.

about the proposal.⁸ Many commenters expressed concern about the impact of the proposal on the financial stability of the U.S. banking or financial system. Commenters also expressed their belief that, if approved by the Board, Capital One's acquisition of FSB would result in adverse effects that would outweigh the public benefits provided by the proposal.

A significant number of commenters criticized the performance of Capital One and FSB under the CRA. Some of the commenters criticized the compliance records of the mortgage lending operations of Capital One and FSB and expressed concern about their records of lending to minorities. Commenters also criticized Capital One's performance record of lending to small businesses and the record of its credit card lending operations. In addition, commenters expressed concern about the impact of the acquisition on Capital One's commitment to CRA-related initiatives and its future performance under the CRA. Commenters also noted concern about Capital One's proposed acquisition of credit card assets from subsidiaries of HSBC Holdings plc ("HSBC"), London, United Kingdom, and requested that the Board review the two proposals together or require an application from Capital One to acquire those assets, to ensure that the HSBC proposal is taken into consideration in connection with the review of the CRA, financial stability, and other factors related to the FSB proposal.⁹

In evaluating the statutory factors under the BHC Act, the Board considered the information and views presented by all commenters, including the testimony at the

⁸ Approximately 425 comments were submitted in the form of substantially identical letters.

⁹ Capital One has applied to the OCC for approval under the Bank Merger Act to acquire various assets from HSBC. The OCC is required to take into consideration the same factors that are reviewed by the Board under the BHC Act, including the effects of the acquisition on financial stability and on the convenience and needs of the community to be served. 12 U.S.C. § 1828(c)(5). Although Capital One is not required by law to apply for approval by the Federal Reserve to acquire the HSBC assets, Capital One has provided information to the Board regarding the proposed acquisition of HSBC's assets. The Board has taken this information into account for purposes of its review of the factors it must consider with respect to Capital One's notice to acquire FSB.

public meetings and in the written submissions.¹⁰ The Board also considered all the information presented in the notice and supplemental filings by Capital One; various reports filed by the relevant companies; publicly available information; and other information and reports. In addition, the Board reviewed confidential supervisory information, including examination reports on the depository institution holding companies and the depository institutions involved and information provided by other federal financial supervisory agencies, the Department of Housing and Urban Development (“HUD”), and the Department of Justice (“DOJ”). After a review of all the facts of record, and for the reasons discussed in this order, the Board has concluded that the statutory factors it is required to consider under the BHC Act are consistent with approval of the proposal.

Factors Governing Board Review of the Transaction

The Board previously has determined by regulation that the operation of a savings association by a bank holding company and the other nonbanking activities for which Capital One has requested approval are closely related to banking for purposes of section 4(c)(8) of the BHC Act.¹¹ The Board requires that savings associations acquired by bank holding companies or financial holding companies conform their direct and indirect activities to those permissible for bank holding companies under section 4(c)(8) of the act.¹² Capital One has committed that all the activities of FSB and the other

¹⁰ One commenter expressed concern about ex parte communications and the opportunity for the public to rebut all information that was provided by Capital One. On review, the Board found that the public had a full opportunity to provide the Board with any information related to the factors that the Board must consider in acting on the notice. The information submitted by Capital One, and the release of that information to the public, was in accordance with the Board’s regulations and policies. The Board confirmed that all contacts between Capital One and staff were in accordance with the Board’s rules on ex parte communications.

¹¹ 12 CFR 225.28(b)(4), (6), and (7).

¹² A savings association operated by a bank holding company may engage only in activities that are permissible for bank holding companies under section 4(c)(8) of the BHC Act. 12 CFR 225.28(b)(4).

nonbanking subsidiaries of FSB that it proposes to acquire will conform to those activities that are permissible under section 4 of the BHC Act and Regulation Y.

Section 4(j)(2)(A) of the BHC Act requires the Board to consider whether the proposed acquisition of FSB and its nonbanking subsidiaries “can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, unsound banking practices, or risk to the stability of the United States banking or financial system.”¹³ As part of its evaluation of these factors, the Board reviews the financial and managerial resources of the companies involved, the effect of the proposal on competition in the relevant markets, the risk to the stability of the United States banking or financial system, and the public benefits of the proposal.¹⁴ In acting on a notice to acquire a savings association, the Board reviews the records of performance of the relevant insured depository institutions under the CRA. In cases involving the interstate acquisition of an insured depository institution under section 4(c)(8) of the BHC Act, the Board must also consider the concentration of deposits on a nationwide basis.¹⁵

Interstate and Deposit Cap Analyses

The Dodd-Frank Act amended section 4 of the BHC Act to provide that, in general, the Board may not approve an application by a bank holding company to acquire an insured depository institution if the home state of the insured depository

¹³ 12 U.S.C. § 1843(j)(2)(A). Section 604(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1601 (2010), (“Dodd-Frank Act”) added the “risk to the stability of the United States banking or financial system” to the list of possible adverse effects.

¹⁴ See 12 CFR 225.26; see, e.g., Bank of America Corporation/Countrywide, 94 Federal Reserve Bulletin C81 (2008) (“Bank of America Order”); Wachovia Corporation, 92 Federal Reserve Bulletin C138 (2006); BancOne Corporation, 83 Federal Reserve Bulletin 602 (1997).

¹⁵ 12 U.S.C. § 1843(i)(8).

institution is a state other than the home state of the bank holding company, and the applicant controls or would control more than 10 percent of the total amount of deposits of insured depository institutions in the United States (“nationwide deposit cap”).¹⁶ The intended purpose of the nationwide deposit cap was to help guard against undue concentrations of economic power.¹⁷ For purposes of the BHC Act, the home state of Capital One is Virginia, and the home state of FSB is Delaware.¹⁸

Based on the latest available data reported by all insured depository institutions in the United States, the total amount of deposits of insured depository institutions is \$8.9 trillion.¹⁹ On consummation of the proposed transaction, Capital One would control approximately 2.3 percent of the total amount of deposits in insured depository institutions in the United States. Accordingly, in light of all the facts of record, the Board is not required to deny the proposal under section 4(i) of the BHC Act.

¹⁶ Dodd-Frank Act § 623(b), codified at 12 U.S.C. § 1843(i)(8). For a detailed discussion of the nationwide deposit cap, see Bank of America Corporation/LaSalle, 93 Federal Reserve Bulletin C109, C109-C110 (2007); Bank of America Corporation/Fleet, 90 Federal Reserve Bulletin 217, 219-220 (2004) (“Fleet Order”).

¹⁷ Fleet Order at 219.

¹⁸ A bank holding company’s home state is the state in which the total deposits of all banking subsidiaries of such company were the largest on July 1, 1966, or the date on which the company became a bank holding company, whichever is later. 12 U.S.C. § 1841(o)(4)(C). For a federal savings association, the home state is the state in which the home office of the savings association is located. 12 U.S.C. § 1841(o)(4)(E).

¹⁹ See Fleet Order at 219. Deposit data are calculated based on reports filed by insured depository institutions and are as of September 30, 2011. Each bank insured by the Federal Deposit Insurance Corporation (“FDIC”) in the United States must report data regarding its total deposits in accordance with the definition of “deposit” under the Federal Deposit Insurance Act, 12 U.S.C. § 1813(l), on the institution’s Consolidated Report of Condition and Income. Each insured savings association similarly must report its total deposits on the institution’s Thrift Financial Report. Deposit data for FDIC-insured U.S. branches of foreign banks and federal branches of foreign banks are obtained from the Report of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks. These data are reported quarterly to the FDIC and are publicly available.

Competitive Considerations

As part of the Board's consideration of the factors under section 4 of the BHC Act, the Board has considered the competitive effects of Capital One's acquisition of FSB and its nonbanking subsidiaries, in light of all the facts of record. Capital One's subsidiary banks and FSB's deposit-taking and lending operations are located in different banking markets. Based on all the facts of record, including the differences in business models, products, and methods for providing services to consumers, the Board has concluded that the acquisition by Capital One of FSB's deposit-taking and lending operations would not result in any significant adverse effect on competition in any relevant banking market.

The Board also has considered the competitive effects of Capital One's proposed acquisition of FSB's other nonbanking subsidiaries and activities in light of all the facts of record.²⁰ Capital One and FSB both engage in investment advisory and securities brokerage services through subsidiaries that are registered broker-dealers.²¹ The Board previously has determined that these activities are permissible for bank holding companies.²²

²⁰ Under the 2010 Horizontal Merger Guidelines ("Guidelines") issued by the DOJ and the Federal Trade Commission, the post-merger level of market concentration and the change in concentration resulting from a merger are important factors in evaluating the effect of the merger on competition. Market shares alone may not fully reflect the competitive significance of firms in the market or the impact of a merger and are used in conjunction with other evidence of competitive effects.

The Guidelines use the Herfindahl-Hirschman Index ("HHI") as a measure of concentration. For mergers that do not involve banks, the Guidelines state that mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis. The Guidelines also state that mergers involving an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and ordinarily require no further analysis. Press Release, Department of Justice, August 19, 2010, www.justice.gov/opa/pr/2010/August/10-at-938.html.

²¹ Although both Capital One and FSB currently own insurance subsidiaries, FSB's insurance subsidiary, ING Direct Insurance Agency, LLC, is inactive and did not engage in any sales activity in 2010 or 2011. Accordingly, there is no overlap in competition between Capital One and FSB in providing insurance services.

²² See 12 CFR 225.28(b)(7).

Capital One and FSB compete in the securities brokerage business.²³ The Board previously has determined that the geographic market for securities brokerage is either regional or national in scope.²⁴ On consummation of the proposal, the securities brokerage market would remain unconcentrated, and numerous competitors would continue to engage in the securities brokerage business.

Capital One and FSB also compete in the investment advisory business.²⁵ The Board previously has determined that the geographic market for investment advisory services is either regional or national in scope.²⁶ The record in this case indicates that there are numerous competitors that would continue to engage in the investment advisory business on consummation of the proposal and that Capital One's and FSB's levels of participation are relatively small.

Based on all the facts of record, the Board concludes that consummation of the proposed transaction would not have a significantly adverse effect on competition or

²³ Capital One has two registered broker-dealers: Capital One Southcoast, Inc., which is a full-service investment banking firm that provides corporate finance, equity research, and institutional equity sales and trading services; and Capital One Investment Services LLC, which offers services to retail investors. FSB owns IDII, which is an Internet-based broker-dealer that provides brokerage services to retail investors and employer-sponsored 401(k) plans.

²⁴ See Bank of America Order at C86; Allied Irish Banks, p.l.c., 94 Federal Reserve Bulletin C11 (2007); Wachovia Corporation, 92 Federal Reserve Bulletin C183 (2006); Marshall & Ilsley Corporation, 92 Federal Reserve Bulletin C121 (2006); Wells Fargo & Company, 88 Federal Reserve Bulletin 103 (2002); and NationsBank Corporation, 84 Federal Reserve Bulletin 858 (1998).

²⁵ Capital One has two registered investment advisors: Capital One Financial Advisors, which distributes third-party investment management products through Capital One's branch network; and Capital One Asset Management, which provides investment advisory services to certain clients of CONA. FSB indirectly owns ShareBuilder, a registered investment advisor that creates exchange-traded funds for consideration by retail brokerage customers of IDII. ShareBuilder does not offer personalized investment advice.

²⁶ See Marshall & Ilsley Corporation, 92 Federal Reserve Bulletin C121 (2006); SunTrust Banks, Inc., 90 Federal Reserve Bulletin 533 (2004); and Fifth Third Bancorp, 87 Federal Reserve Bulletin 330 (2001).

on the concentration of resources in any relevant banking or nonbanking activities market and is consistent with approval.

Financial and Managerial Resources

The Board considered the financial and managerial resources of Capital One, FSB, and their subsidiaries and the effect of the transaction on those resources, in light of confidential reports of examination, other supervisory information from the primary federal supervisor of the organizations involved in the proposal, publicly reported and other financial information, information provided by Capital One and FSB, and other relevant information. The Board also consulted with the OCC as the primary federal supervisor of Capital One's subsidiary depository institutions and FSB.

In addition, the Board considered the public comments that relate to these factors. As noted above, the Board received a number of comments requesting that it consider the current proposal in light of Capital One's proposed acquisition of assets from subsidiaries of HSBC. Commenters asserted that these proposals represent unsound banking practices that would allow Capital One to acquire high-cost deposits from FSB to fund the origination and acquisition of subprime credit card assets.

In evaluating financial resources in expansionary proposals by banking organizations, the Board reviews the financial condition of the organizations involved on both a parent-only and consolidated basis, as well as the financial condition of the subsidiary insured depository institutions and the organizations' significant nonbanking operations. In this evaluation, the Board considers a variety of information, including capital adequacy, asset quality, and earnings performance. In assessing financial factors, the Board consistently has considered capital adequacy to be especially important. The Board evaluates the financial condition of the combined organization at consummation, including its capital position, asset quality, and earnings prospects, and the impact of the proposed funding of the transaction. The Board also considers the ability of the organization to absorb the costs of the proposal and the proposed integration of the operations of the institutions.

The Board has considered the financial factors of the proposal. Capital One's regulatory capital ratios are well above the minimums required of well-capitalized

bank holding companies and would remain so on consummation of the proposal. Capital One's subsidiary depository institutions and FSB also are well capitalized and would remain so after consummation. The proposed transaction is structured as a cash and share exchange. Capital One would acquire FSB from ING Groep in exchange for approximately \$6.2 billion in cash and 55.9 million Capital One common shares, valued at approximately \$2.8 billion.²⁷ Capital One represented that the cash portion of the purchase price of FSB would be funded with the proceeds from the sale of \$2 billion of additional shares and the issuance of \$3 billion of senior unsecured debt,²⁸ with the remaining \$1.2 billion to be funded from available cash resources. This transaction would not materially increase the debt service requirements of the combined company.²⁹ Asset quality and earnings prospects also are consistent with approval.³⁰

²⁷ The Capital One common shares to be acquired by ING Groep represent approximately 9.6 percent of Capital One's voting shares. One commenter asserted that ING Groep must file an application for control of more than 4.9 percent of Capital One's voting stock. The commenter also argued that ING Groep would control Capital One by virtue of its ownership of up to 9.9 percent of Capital One's voting shares. These assertions are not legally correct in this case. As a result of the proposal, ING Groep would no longer control a savings association and, consequently, would no longer be a regulated savings and loan holding company or bank holding company. As such, ING Groep would not require the Board's approval to acquire up to 9.9 percent of the voting stock of Capital One. In addition, the Board has determined in a separate action that ING Groep would not control Capital One as a result of this proposal. See Board letter to Mark Menting, Esq. (February 14, 2012).

²⁸ In July 2011, Capital One entered into forward sale agreements totaling \$2 billion in connection with a public offering of 40 million common shares. Also in July 2011, Capital One closed a public offering of \$3 billion of senior unsecured notes. Capital One represented that it expects to use the proceeds of the forward sale agreements and the debt offering to fund the proposed acquisition of FSB.

²⁹ In reviewing the financial factors in this case, the Board has taken account of Capital One's plan to acquire certain assets from HSBC and to fund the acquisition of HSBC assets primarily with cash and the proceeds from the repositioning of FSB's balance sheet. In addition, Capital One expects to issue additional equity, including up to \$750 million in equity that Capital One has the option to issue to HSBC.

³⁰ Several commenters expressed concern that Capital One's asset portfolio is highly concentrated in credit cards, including a substantial amount of subprime credit card assets. The Board believes that Capital One has the financial and managerial resources to manage its asset portfolio. Capital One lends across a full spectrum of borrowers,

The Board also has considered the managerial resources of the organizations involved and the proposed combined organization. The Board has reviewed the examination records of Capital One, its subsidiary depository institutions, and FSB, including assessments of their management expertise, internal controls, risk-management systems, and operations. In addition, the Board has considered its supervisory experiences and those of other relevant financial supervisory agencies with the organizations and the organizations' records of compliance with applicable banking laws and with anti-money-laundering ("AML") laws.³¹

Capital One and its subsidiary depository institutions are considered to be well managed. Capital One has a demonstrated record of successfully integrating large organizations into its operations and risk-management systems following acquisitions, including its integrations of Hibernia Corporation in 2005, North Fork Bancorporation in 2006, and Chevy Chase Bank in 2009. Capital One is devoting significant financial and other resources to address all aspects of the post-acquisition integration process for this proposal. Capital One would implement its risk-management policies, procedures, and controls at the combined organization. In addition, Capital One's management has the experience and resources to ensure that the combined organization operates in a safe and sound manner.

The Board also has considered comments that allege weaknesses in Capital One's compliance management as it relates to consumer protection practices. Commenters criticized Capital One for attempting to collect credit card debts from

and its overall business is diversified. Capital One has substantially decreased its reliance on credit card revenue since 2005. Currently, credit card loans represent approximately 48 percent of Capital One's loan portfolio and approximately 28 percent of the company's total assets.

³¹ One commenter contended that ING Groep and FSB are being reviewed by U.S. authorities, including the DOJ, for possible violations of AML and economic sanctions laws. ING Groep has represented that these reviews focus on ING Bank N.V., Amsterdam. Capital One represented that it plans to integrate its corporate compliance program at FSB and each of its subsidiaries, that it has begun to engage in full assessments of FSB's AML and economic sanctions programs in order to immediately manage compliance by Capital One and FSB at consummation, and that it plans to integrate the organizations' different compliance processes over time.

customers whose debts previously had been discharged in bankruptcy,³² not complying with laws governing repossession of automobiles,³³ not following state and federal laws that protect exempt income from debt collection,³⁴ and failing to comply with fair lending laws, among other matters.³⁵

The Board believes that it is appropriate in connection with the acquisition of FSB for Capital One to enhance its risk-management systems and policies to account for the size, complexity, and diversification of the business lines that would result from the acquisition of FSB. To ensure minimal disruption to FSB's customers and maintain focus on risk management during the integration, Capital One has committed that it will ensure the adequate completion of the integration of FSB as well as the HSBC portfolio, referenced above, in a timely manner consistent with supervisory expectations.

In addition, the Board expects that Capital One will ensure that its risk-management framework and methodologies, including its compliance functions, are commensurate with its new size and complexity. The various consumer complaints

³² In early 2007, Capital One determined that it had inadvertently filed proofs of claim on discharged debts. Capital One cooperated with a U.S. bankruptcy trustee's investigation and, pursuant to a November 2008 consent order, retained an independent auditor to oversee a review of its proofs of claim to determine whether Capital One had filed claims on previously discharged debts. Capital One addressed this issue by retaining an outside vendor to perform an additional review in advance of any filing of a claim by Capital One. Capital One represented that the court-mandated auditor has revealed that the error rate in filing proofs of claim dropped significantly after the outside vendor was retained. Capital One paid \$2.35 million in restitution to affected customers. The Federal Reserve will use the supervisory and examination process to ensure the effectiveness of the debt collection practices and programs adopted by Capital One.

³³ Capital One has settled several class action lawsuits regarding its automobile repossession practices prior to 2008. Capital One corrected errors in its automobile finance processing systems in 2008 by fully integrating systems from its acquisitions of Hibernia Corporation and North Fork Bancorporation.

³⁴ Capital One represented that in mid-2011, a small number of depositors had been improperly subjected to garnishment orders requested by Capital One. Capital One subsequently took corrective steps to provide remediation to the depositors and to implement new processes and controls to prevent improper garnishment requests.

³⁵ Comments relating to fair lending compliance are discussed in Other Considerations, infra.

and legal actions against Capital One referenced in this order suggest that Capital One's processes and procedures for enterprise-wide compliance transaction testing could be improved. Accordingly, the Board conditions its decision on Capital One augmenting these processes and procedures by adopting a plan within 90 days acceptable to the Federal Reserve Bank of Richmond that specifies the areas in which transaction testing will be conducted, the type of testing appropriate for each area, and an appropriate sampling methodology; addresses the frequency and scope of compliance transaction testing; provides for periodic reporting to management and the Audit and Risk Committee of the board of directors; provides for improved employee training; and includes requirements for at least an annual review by internal audit of the testing implementation for at least the next three years. Compliance with this condition will be monitored as part of the supervisory process.

Based on all the facts of record, including a review of the comments received, and in reliance on the commitments and conditions discussed above, the Board has concluded that considerations relating to the financial and managerial resources of the organizations involved in the proposal are consistent with approval under section 4 of the BHC Act.

Records of Performance Under the CRA

As noted previously, the Board reviews the records of performance under the CRA of the relevant insured depository institutions when acting on a notice to acquire any insured depository institution, including a savings association.³⁶ The CRA requires the federal financial supervisory agencies to encourage insured depository institutions to help meet the credit needs of the local communities in which they operate, consistent with their safe and sound operation,³⁷ and requires the appropriate federal financial supervisory agency to take into account a relevant depository institution's record of

³⁶ 12 U.S.C. § 2901 et seq.

³⁷ 12 U.S.C. § 2901(b).

meeting the credit needs of its entire community, including low- and moderate-income (“LMI”) neighborhoods, in evaluating bank expansionary proposals.³⁸

The Board has considered all the facts of record, including reports of examination of the CRA performance records of Capital One’s subsidiary banks and of FSB, data reported by Capital One and FSB under the CRA and the Home Mortgage Disclosure Act (“HMDA”),³⁹ other information provided by Capital One, confidential supervisory information, and public comments received on the proposal. As noted above, the Board held three public meetings to allow interested members of the public an opportunity to provide oral testimony regarding the proposal in addition to having the opportunity to submit written information and views. As a result of the meetings and through the course of the public comment period, the Board received approximately 915 comments.

Approximately 340 individuals, organizations, and businesses submitted comments or testified in support of the proposal. These commenters generally commended Capital One’s record of performance under the CRA, particularly its support for community development and small business programs, through loans, investments and grants, donated space, and corporate volunteers; its business education programs to small business owners, including in LMI communities; its development of affordable home purchase loans for borrowers in LMI communities; and its other programs.

Approximately 575 other individuals and groups expressed concern in their comments and testimony about the mortgage, small business, and consumer lending records of Capital One and FSB; Capital One’s ability to satisfy its CRA obligations after consummation of the proposal; or related matters.⁴⁰ Among the criticisms made by commenters were that:

³⁸ 12 U.S.C. § 2903.

³⁹ 12 U.S.C. § 2801 et seq.

⁴⁰ Many commenters urged the Board to require Capital One to provide specific pledges or plans, or to take certain future actions, or asked the Board to condition its approval on a commitment by Capital One to provide loans or investments to specific communities. The Board focuses on the existing CRA performance record of an applicant and the

- Capital One has not engaged in an adequate amount of home mortgage lending to LMI and minority borrowers.
- Capital One has failed to meet the community development and small business needs in communities served by banks that Capital One previously acquired. Some of these commenters asserted that Capital One had reduced its small business loans in various communities and replaced affordable loans to small businesses with higher-cost credit cards.
- Capital One's lending in California, especially to minority- and women-owned businesses, has been inadequate.
- Capital One and FSB have been inconsistent in making branches and services available to LMI communities.
- FSB's record of lending to LMI and minority borrowers and FSB's café locations have disproportionately excluded LMI consumers.⁴¹

A. CRA Performance Evaluations

As provided in the CRA, the Board has evaluated the proposal in light of the examinations by the appropriate federal supervisors of the CRA performance records of the relevant insured depository institutions. An institution's most recent CRA performance evaluation is a particularly important consideration in the applications process because it represents a detailed, on-site evaluation of the institution's overall record of performance under the CRA by its appropriate federal supervisor.⁴²

Capital One's lead bank, CONA, received an "outstanding" rating at its most recent CRA performance evaluation by the OCC, as of April 4, 2011 ("CONA

programs that an applicant has in place to serve the credit needs of its assessment areas at the time the Board reviews a proposal. See Bank of America Order at C87.

⁴¹ Two commenters also asserted that FSB personnel cash checks and otherwise perform activities that qualify those cafés as branches of FSB. Capital One has represented that café personnel currently do not cash checks or accept deposits, and, consequently, that these cafés are not branches of FSB under the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1461 et seq., and were not included in the OTS analysis of FSB's record under the CRA. Four of the cafés are in LMI census tracts, one is in a middle-income tract, and three are in upper-income tracts. Capital One has represented that it intends to add deposit-taking ATMs at FSB's cafés and expand its CRA assessment areas to include the relevant communities served by these cafés.

⁴² See Interagency Questions and Answers Regarding Community Reinvestment, 66 Federal Register 11,642 at 11,665 (2010).

Evaluation). COBNA received a “satisfactory” rating at its most recent CRA performance evaluation by the OCC, as of April 4, 2011 (“COBNA Evaluation”).⁴³

FSB received an “outstanding” rating at its most recent CRA performance evaluation by the OTS, as of August 6, 2008 (“FSB Evaluation”).⁴⁴ Capital One has represented that it will institute elements of the community development and community investment policies of CONA and COBNA at FSB to strengthen FSB’s ability to meet the banking needs of the communities it serves.⁴⁵

CRA Performance of CONA. CONA is the largest insured depository institution controlled by Capital One, representing approximately 65 percent of Capital One’s insured depository institution assets. In the CONA Evaluation, the bank received “outstanding” ratings for the lending and investment tests and a “high satisfactory” rating for the service test. CONA’s performance in the New York-Northern New Jersey-Long Island Multi-State Metropolitan Area (“NY Metro AA”), the Washington, D.C. Multi-State Metropolitan Area (“D.C. Metro AA”), and the State of Louisiana (“Louisiana AA”) was given considerably more weight than its

⁴³ The period for the CONA Evaluation was January 1, 2007, through December 31, 2010. COBNA is a limited-purpose bank for purposes of the CRA, and it is evaluated under the community development test. The period for the COBNA Evaluation was March 1, 2008, through December 31, 2010.

⁴⁴ The period for the FSB Evaluation was January 1, 2005, through December 31, 2007.

⁴⁵ Several commenters asserted that Capital One should meet the credit needs of LMI customers in California. The CRA requires a bank or savings association to meet the credit needs of the communities in which it operates, which include geographies of the institution’s main office, its branches, and its deposit-taking ATMs. 12 CFR part 228; 12 CFR part 195. As noted above, Capital One expects to add services to FSB’s cafés that will cause the cafés to be branches for purposes of HOLA, beginning with the cafés in San Francisco and Los Angeles. After the cafés become branches, Capital One will be required under the CRA to provide banking products and services to LMI customers in San Francisco and Los Angeles. 12 U.S.C. § 2901 *et seq.*; 12 CFR part 195.

Several commenters also suggested that the Board delay action on the proposal to allow the federal banking agencies to promulgate updated CRA regulations that would impose broader CRA requirements on companies like Capital One and FSB that conduct business outside their branch footprints. The Board has analyzed the proposal under the existing CRA regulations and procedures.

performance in the other states that are part of CONA's assessment area⁴⁶ to reflect the fact that 90 percent of the bank's deposits are booked in branches in those areas.

Examiners stated that CONA had good lending activity and characterized its distribution of loans among geographies of different income levels as excellent.⁴⁷ Examiners reported that CONA's distribution of HMDA-reportable mortgage loans among borrowers of different income levels was good.⁴⁸ Examiners commended CONA's community development lending, which they described as serving significant community development needs. Examiners also stated that CONA exhibited an adequate distribution of loans among borrowers of different income levels. Examiners noted that CONA's branches were accessible to geographies and individuals of different income levels and stated that product innovation and flexibility had a positive impact on the lending test. In addition, examiners noted an excellent level of community development investments that were responsive to the needs of the bank's assessment areas and community development services that were responsive to the areas' needs as well.

⁴⁶ The other states are Delaware, Maryland, New Jersey, Texas, and Virginia.

⁴⁷ Some commenters alleged that Capital One's depository institution subsidiaries decreased their home mortgage lending between 2007 and 2009. The Board reviewed HMDA data for 2008 and 2009, which indicate that Capital One's home mortgage application volume decreased nationwide by more than 61 percent. This decline was attributable to general economic conditions and Capital One's decisions to concentrate on direct lending and to close the legacy mortgage businesses of recently acquired North Fork Bank and Chevy Chase Bank, which focused on broker-originated alternative mortgage products.

⁴⁸ In CONA's NY Metro AA, examiners generally found that the bank's lending levels were excellent. The examiners concluded that the distribution of home purchase, home improvement, and home refinance loans was excellent and that the distribution of multifamily loans was good. In the D.C. Metro AA, examiners found that CONA's lending activity was good, that the distribution of home purchase loans in LMI geographies was consistent with the number of owner-occupied housing units, and that the distribution of home improvement loans was adequate. In the Louisiana AA, examiners reported that CONA's lending activity and geographic distribution of home mortgage loans and home refinance loans was good and that the geographic distribution of home purchase loans was excellent. The geographic distribution for home improvement loans was adequate in this assessment area.

Examiners also reported that CONA's level of community development lending significantly enhanced its lending test performance.⁴⁹

In addition, examiners reported that CONA's distribution of small business loans was good.⁵⁰ As noted above, many commenters expressed concern that Capital One had reduced its small business lending and, in particular, alleged that Capital One had replaced affordable loans to small businesses with higher-cost credit cards. Although Capital One's CRA-reportable small business loan volume declined by more than 81 percent between 2008 and 2009 (compared with a decrease of 56 percent for lenders in the aggregate), Capital One increased its CRA-reportable small business loan volume by more than 18 percent in 2010 (compared with an additional decrease of more than 9 percent for lenders in the aggregate). In addition, the percentage of Capital One's CRA-reportable small business loans that were made in minority or LMI census tracts in 2010 exceeded that of lenders in the aggregate. The Board also has reviewed data provided by Capital One and determined that credit cards account for a small portion of its small business lending.⁵¹

In the CONA Evaluation, examiners commended the bank's performance under the investment test. During the evaluation period, CONA made more than 1,350 investments, including grants and contributions, that totaled more than \$1 billion. Examiners also commended CONA's demonstrated leadership and responsiveness to

⁴⁹ Examiners commended CONA's community development lending performance in Louisiana for being complex, innovative, and responsive to the needs of the area. In the NY Metro AA, CONA originated 300 community development loans totaling \$1.1 billion during the assessment period. Examiners also praised CONA's community development lending in the D.C. Metro AA as demonstrating a high level of responsiveness. CONA made over \$71 million in loans to rehabilitate affordable housing units in the D.C. Metro AA.

⁵⁰ In this context, "small business loans" are loans with original amounts of \$1 million or less that either are secured by nonfarm, nonresidential properties or are classified as commercial and industrial loans. In both the NY Metro AA and the Louisiana AA, examiners noted that the percentage of loans to small businesses in LMI areas exceeded the percentage of such businesses in these geographies.

⁵¹ Capital One represented that it does not market small business credit cards to applicants who are denied traditional small business loans.

community development needs.⁵² In addition, examiners found that CONA exhibited leadership and used innovative and complex methods to continue investing in Low Income Housing Tax Credits (“LIHTC”).⁵³

CONA received an overall “high satisfactory” rating under the service test in the CONA Evaluation. Examiners found that CONA’s distribution of branches was accessible to geographies and individuals of different income levels.⁵⁴ Examiners reported that the bank provided a good level of community development services and praised the amount of time bank employees volunteered with different organizations.⁵⁵

*CRA Performance of COBNA.*⁵⁶ COBNA’s overall CRA rating was lowered from “outstanding” to “satisfactory” as a result of a review of the bank’s credit

⁵² Examiners stated that CONA demonstrated exceptional levels of commitment and leadership in supporting the Louisiana AA’s recovery from the devastation of Hurricanes Katrina and Rita. In the Louisiana AA, CONA originated or renewed 38 community development loans and lines of credit totaling \$338 million.

⁵³ CONA provided more than \$70 million in LIHTC investments in affordable housing in the NY Metro AA. In 2010, CONA made \$20.4 million in LIHTC investments in the D.C. Metro AA. In the Louisiana AA, CONA made more than \$50 million in LIHTC investments that included providing critical financing for a low-income-housing project in Jefferson, Louisiana, when another lender was unable to fulfill its commitment.

⁵⁴ Some commenters noted that in CONA’s CRA evaluation in 2007, the bank received a “low satisfactory” rating on the service test. At that time, examiners reported that CONA lacked an appropriate distribution of branches and ATMs in LMI communities in Louisiana and Texas. Capital One represented that this rating was attributable to Capital One’s acquisition of Hibernia Bank in 2005, which had not invested sufficiently in building branches in LMI communities in Louisiana and Texas. Capital One represented that, of the 33 new branches CONA opened in LMI areas since 2007, 19 are in Louisiana and Texas.

⁵⁵ In the NY Metro AA, examiners found that CONA provided an excellent level of community development services and stated that bank employees were involved with 188 different organizations. Examiners reported that in the D.C. Metro AA, CONA provided a good level of community development services, with a majority of those services being geared toward community services, such as providing financial education to students. In the Louisiana AA, examiners found that the level of community development services was good and that bank employees were involved with more than 200 different organizations.

⁵⁶ COBNA’s assessment area includes all of Henrico County and the City of Richmond, both in Virginia. COBNA’s community development strategy targeted opportunities first

card program that reflected certain disclosure issues identified by COBNA.⁵⁷ During the evaluation period, COBNA made more than \$527 million in qualified investments. Examiners stated that COBNA demonstrated a high level of qualified investments and community development services. Examiners found that COBNA made extensive use of complex or innovative qualified investments, community development services, and community development loans. Examiners also found that COBNA demonstrated excellent responsiveness to community development needs in its assessment area.⁵⁸ In addition, examiners praised bank personnel for providing approximately 5,000 hours of participation as members of boards of directors and for providing financial and technical expertise.

CRA Performance of FSB. As noted above, FSB received an overall “outstanding” rating in its 2008 CRA evaluation, with a “high satisfactory” rating on the lending test and “outstanding” ratings on both the investment and service tests. Examiners noted that FSB’s distribution of home mortgage loans reflected good penetration of LMI geographies in its assessment area and in the supplemental areas used to evaluate performance.⁵⁹ In addition, examiners found that FSB’s lending performance to borrowers of different income levels in its assessment areas and in the supplemental areas was satisfactory, considering the bank’s nationwide lending strategy and unique branchless platform. Examiners noted a significant level of qualified

within its assessment area; then within the Commonwealth of Virginia, the surrounding states, and the Northeast region; and finally opportunities nationwide. Because there was a great need for qualified community development investments and lending in the Gulf Coast region following Hurricanes Katrina and Rita, COBNA focused its community development opportunities in that region.

⁵⁷ The violations related to credit card disclosures for a specific add-on product offered between January 2004 and April 2010. COBNA identified the violation in early 2010 and had provided restitution to affected consumers by June 2010.

⁵⁸ COBNA invested \$25.5 million in 5 LIHTC developments, creating 654 units of affordable housing for LMI individuals.

⁵⁹ FSB’s assessment area consists of the Philadelphia-Camden-Wilmington Metropolitan Statistical Area (or “MSA”). FSB’s Supplemental MSAs include MSAs that encompass many large and midsize cities across the United States, including Washington, D.C., San Francisco, Chicago, Los Angeles, Phoenix, and Denver.

investments and grants to community development organizations, which showed a good responsiveness to credit and community economic development needs, particularly the needs of small businesses. In addition, examiners found that FSB was a leader in providing access to community development services in its assessment area through alternative delivery systems, such as the Internet, call centers, and a network of ATMs. Examiners also commended FSB on the record of its employees in providing community development services.

B. Conclusion on CRA Performance

The Board has considered all the facts of record, including the CRA performance records of the institutions involved, information provided by Capital One, comments received on the proposal and responses to those comments, and confidential supervisory information. Based on a review of the entire record, and for the reasons discussed above, the Board concludes that the CRA performance records of the relevant insured depository institutions are consistent with approval of the proposal.

Other Considerations

In its evaluation, the Board has considered the records of Capital One and FSB in complying with fair lending and other consumer protection laws.

A. HMDA Analysis

The Board has reviewed HMDA data from 2008, 2009, and 2010 reported by CONA and FSB and their lending affiliates.⁶⁰ Several commenters alleged that Capital One and FSB denied the home mortgage loan applications of minority borrowers more frequently than those of nonminority applicants in certain MSAs.⁶¹ The HMDA

⁶⁰ The Board reviewed HMDA data for CONA in its combined assessment areas, in each of its states, in its multistate assessment areas (Texarkana MSA, D.C. Metro AA, and NY Metro AA), and in two out-of-market areas of interest to the commenters (the State of California and the Chicago MSA). The HMDA data for CONA include Chevy Chase Bank, which Capital One acquired in 2009, in order to ensure consistent results. The Board reviewed HMDA data for FSB nationwide, in its assessment area, in its Supplemental MSAs, and in MSAs of interest to the commenters.

⁶¹ Some commenters also questioned Capital One's efforts in awarding contracts to minority- and women-owned businesses. Although the Board fully supports programs designed to promote equal opportunity and economic opportunities for all members of

data indicate that, with the exception of certain areas outside CONA's branch footprint, the percentage of CONA's applications from and originations to minority borrowers, LMI borrowers, and borrowers in predominantly LMI areas generally exceeded the percentage for lenders in the aggregate. In addition, the data indicate that CONA did not exhibit a higher denial rate for minority applicants relative to its denial rate for nonminority applicants ("denial disparity ratio"), as compared with the denial disparity ratio for minority and nonminority applicants of lenders in the aggregate. The HMDA data do not suggest that Capital One excluded any racial, ethnic, economic, or geographic segment of the population within its branch footprint.⁶²

In a small number of markets outside Capital One's branch footprint, including California and the Chicago MSA, the data indicate that CONA's percentage of HMDA applications from and originations to minority borrowers was lower than for lenders in the aggregate in 2008 and 2009.⁶³ The Board is concerned when HMDA data

society, the comments about supplier diversity practices are beyond the factors the Board is authorized to consider under the BHC Act. See, e.g., Bank of America Order at C90.

In addition, one commenter asserted that the Board should ensure that Capital One's supplier diversity practices are consistent with section 342 of the Dodd-Frank Act, codified at 12 U.S.C. § 5452, which instructs the Board, including the Federal Reserve Banks, and certain other federal agencies each to establish an Office of Minority and Women Inclusion that is authorized to develop standards for "assessing the diversity policies and practices of entities regulated by the agency." The Board and the other federal agencies are developing standards for assessing the diversity policies and practices of regulated firms in accordance with section 342. Section 342 specifically provides, however, that those standards may not mandate any particular diversity practice or require any specific action based on the agency's assessment. 12 U.S.C. § 5452(b)(4).

⁶² The HMDA data also indicate that although FSB generally received a lower proportion of its applications from minorities relative to lenders in the aggregate, FSB's denial disparity ratio for minority borrowers generally approximated or was more favorable than lenders in the aggregate.

⁶³ California and the Chicago MSA accounted for a relatively small proportion of CONA's application volume in 2008 and 2009, consistent with Capital One's strategy to make mortgage loans primarily within its branch footprint. In 2009, CONA received 3,329 applications in California and 1,304 applications in the Chicago MSA, representing 4.6 percent and 1.8 percent of its HMDA-related application volume, respectively. In 2010, Capital One's HMDA-related application volume dropped to 110 in California and 20 in the Chicago MSA.

for an institution indicate disparities in lending and believes that all lending institutions are obligated to ensure that their lending practices are based on criteria that ensure not only safe and sound lending but also equal access to credit by creditworthy applicants regardless of their race or ethnicity. Moreover, the Board believes that all bank holding companies and their affiliates must conduct their mortgage lending operations without any abusive lending practices and in compliance with all consumer protection laws.

Although the HMDA data might reflect certain disparities in the rates of loan applications, originations, and denials among members of different racial or ethnic groups in certain local areas, they provide an insufficient basis by themselves on which to conclude whether Capital One or FSB has excluded or imposed higher costs on any group on a prohibited basis. The Board recognizes that HMDA data alone, even with the recent addition of pricing information, provide only limited information about the covered loans.⁶⁴ HMDA data, therefore, have limitations that make them an inadequate basis, absent other information, for concluding that an institution has engaged in illegal lending discrimination.

Because of the limitations of HMDA data, the Board has considered these data and taken into account other information, including examination reports that provide on-site evaluations of compliance with fair lending and other consumer protection laws and regulations by CONA and its lending affiliates.⁶⁵ The Board also has consulted with the OCC, the primary federal supervisor of Capital One's subsidiary banks and FSB.

⁶⁴ The data, for example, do not account for the possibility that an institution's outreach efforts may attract a larger proportion of marginally qualified applicants than other institutions attract and do not provide a basis for an independent assessment of whether an applicant who was denied credit was, in fact, creditworthy. In addition, credit history problems, excessive debt levels relative to income, and high loan amounts relative to the value of the real estate collateral (the reasons most frequently cited for a credit denial or higher credit cost) are not available from HMDA data.

⁶⁵ Examiners reported that the CONA Evaluation was not impacted by fair lending issues at the former Chevy Chase Bank, which Capital One acquired in 2009. Capital One identified fair lending issues at Chevy Chase Bank shortly after the acquisition but before Capital One merged Chevy Chase Bank into CONA. Examiners reported that Capital One took appropriate actions to address the issues.

In addition, the Board has considered information provided by Capital One about its compliance risk-management systems.

As discussed further below, Capital One's compliance program includes fair lending policy and product guides, testing of the integrity of its HMDA data, and fair lending training for lending-related employees. In addition, Capital One has adopted a process for evaluating new laws and regulations for applicability to its mortgage lending operations. Moreover, the CRA examinations of CONA and COBNA found that both banks demonstrated good lending activity with a good dispersion of loans across income levels in the areas within the banks' CRA assessment areas. The Board notes that lending in the areas referenced by commenters outside the banks' assessment areas was not significant. Overall, despite the disparities indicated by the HMDA data for Capital One, the Board's analysis of the HMDA data, consultations with the OCC, and review of Capital One's compliance programs suggest that Capital One's mortgage lending operations and compliance programs are adequate to ensure compliance with fair lending and other consumer protection laws.

B. Other Commenter Concerns

Commenters expressed a number of specific concerns regarding Capital One's compliance with fair lending and consumer protection laws. For instance, commenters alleged that Capital One's policies on originating home mortgage loans insured by the Federal Housing Administration ("FHA") have had an illegal discriminatory impact on minorities. Specifically, commenters alleged that Capital One refused to lower its minimum FICO credit score required for FHA loans from 620 to 580, the minimum threshold established by FHA for such loans, and that Capital One's policy had a discriminatory impact.⁶⁶ To address these concerns, Capital One is preparing to offer FHA loans to borrowers with FICO scores of between 580 and 620, with appropriate protections to minimize the risk of the borrower's default, by developing the servicing and reporting platforms necessary to sell such loans directly to the Government National Mortgage Association.

⁶⁶ One organization noted that it had filed a complaint with HUD regarding Capital One's policies.

Commenters also alleged that Capital One had failed to participate in the Department of the Treasury's Hardest Hit Fund ("HHF") Program under the Troubled Asset Relief Program and that the alleged inaction has had a discriminatory impact on minorities and LMI borrowers. Commenters further alleged that Capital One has not participated in other mortgage modification programs, such as the Home Affordable Mortgage Program ("HAMP"), which commenters asserted also has had a discriminatory impact on minorities and LMI borrowers. Capital One enrolled in four state HHF programs, including those of Oregon and Washington, D.C., after receiving requests on behalf of borrowers. In addition, Capital One participates in HAMP and also offers a proprietary mortgage modification program similar to HAMP. More borrowers are eligible for mortgage modifications under Capital One's proprietary program than under HAMP because the proprietary program has broader eligibility requirements, including a higher balance limit.

Commenters also alleged that Capital One's overdraft protection practices are unfair. Capital One has adopted policies and procedures regarding the payment of overdrafts consistent with the requirements of Regulation E.⁶⁷ In addition, Capital One has a daily limit on overdraft fees charged to an individual customer and a threshold account balance below which overdraft fees are not assessed. Capital One also provides consumer financial education about avoiding overdrafts to its customers with repeat overdrafts and makes available a line of credit linked to the customers' checking accounts to prevent overdraft fees.

Several commenters expressed concern that Capital One has engaged in false, misleading, or deceptive credit card practices. Commenters referenced pending litigation against Capital One alleging misleading marketing practices.⁶⁸ Some commenters stated that Capital One had received a high number of complaints regarding

⁶⁷ 12 CFR part 205.

⁶⁸ On January 7, 2012, Capital One entered into a settlement agreement with the West Virginia Attorney General to resolve a lawsuit alleging that Capital One violated the West Virginia Consumer Credit and Protection Act between 2001 and 2005 by, among other things, offering a payment protection product to customers who were ineligible for certain benefits at the time of enrollment and encouraging customers to

its credit card practices and alleged that Capital One's statements about its credit cards and the interest rates and fees are unfair or deceptive. In addition, a commenter expressed concern that Capital One has engaged in abusive credit card practices by offering borrowers multiple high-fee cards with low credit limits rather than a single card with a higher credit limit.

The Board has consulted with the OCC about Capital One's compliance with regulatory requirements related to its credit card lending operations and the systems Capital One has adopted to prevent false, misleading, or deceptive practices. Capital One conducts ongoing reviews to ensure that the terms and marketing of its credit card and other products are appropriate and comply with applicable laws and regulations, including the Truth in Lending Act and Regulation Z. Capital One's compliance program includes fair lending policy and product guides, compliance file reviews, testing of the integrity of its HMDA data, and other quality-assurance measures to help ensure compliance with consumer protection laws. Capital One also provides computer-based fair lending training for lending-related employees and supplemental, in-person training for personnel with higher fair lending compliance risks in their jobs. Capital One has represented that it will implement its compliance management program at FSB. In addition, the Board has considered the commitments made by Capital One and the conditions imposed by the Board, discussed above, that are designed to further enhance the compliance programs at Capital One. Finally, Capital One does not issue "high fee" cards as defined by the Credit Card Accountability Responsibility and Disclosure Act of 2009. Capital One also has policies that limit an individual customer to a maximum of two unsecured, general-purpose credit cards.

enter into debt repayment plans through solicitations that purported to be offers of new credit. As part of the settlement, under which Capital One did not admit guilt, Capital One agreed to provide \$13.5 million for debt forgiveness, debt relief, and consumer education for West Virginia consumers. Capital One has enhanced its compliance risk-management practices since the period to which the complaint relates and discontinued one of the lines of business that was the focus of the lawsuit.

Financial Stability

The Dodd-Frank Act added “risk to the stability of the United States banking or financial system” to the list of possible adverse effects that the Board must weigh against any expected public benefits in considering proposals under section 4(j) of the BHC Act.⁶⁹ A financial stability factor also was added by the Dodd-Frank Act to the list of considerations in reviewing proposals under section 3 of the BHC Act.⁷⁰

Financial Stability Standard

In reviewing applications and notices under sections 3 and 4 of the BHC Act, the Board expects that it will generally find a significant adverse effect if the failure of the resulting firm, or its inability to conduct regular-course-of-business transactions, would likely impair financial intermediation or financial market functioning so as to inflict material damage on the broader economy. This kind of damage could occur in a number of ways, including seriously compromising the ability of other financial institutions to conduct regular-course-of-business transactions or seriously disrupting the provision of credit or other financial services.

To assess the likelihood that failure of the resulting firm may inflict material damage on the broader economy, the Board will consider a variety of metrics. These would include measures of the size of the resulting firm; availability of substitute providers for any critical products and services offered by the resulting firm; interconnectedness of the resulting firm with the banking or financial system; extent to which the resulting firm contributes to the complexity of the financial system; and extent

⁶⁹ Dodd-Frank Act, § 604(e), codified at 12 U.S.C. § 1843(j)(2)(A). Other provisions of the Dodd-Frank Act impose a similar requirement that the Board consider or weigh the risks to financial stability posed by a merger, acquisition, or expansion proposal by a financial institution. See sections 163, 173, and 604(d) and (f) of the Dodd-Frank Act. A special process was established by the Dodd-Frank Act for requiring the divestiture of a business by a financial firm. Section 121 of the Dodd-Frank Act provides that the Board shall require a financial firm to divest or terminate a business if the Board determines that the company “poses a grave threat to the financial stability of the United States;” the Financial Stability Oversight Council (“FSOC”), by a vote of two-thirds of its members, approves the action; and the Board has determined that actions other than divestiture or termination of the business are inadequate to mitigate the grave threat. 12 U.S.C. § 5331.

⁷⁰ Dodd-Frank Act, § 604(d), codified at 12 U.S.C. § 1842(c)(7).

of the cross-border activities of the resulting firm.⁷¹ These categories are not exhaustive, and additional categories could inform the Board’s decision.⁷² These metrics are useful in evaluating the extent to which an institution’s creditors, counterparties, investors, or other market participants may have financial exposure to the institution and thus may experience strain when the firm does not meet its financial obligations to them; the extent to which the institution holds assets that, if liquidated quickly, would significantly disrupt trading or funding in key markets or cause significant losses or funding problems for other firms with similar holdings due to falling asset prices; the extent to which financial distress in the resulting institution may cause other institutions that hold similar assets or are engaged in similar activities or are perceived to be dependent in important ways upon the distressed institution to experience a loss of market confidence; and the extent to which an institution in financial distress may no longer be able to provide a service that market participants rely upon and for which there are limited readily available substitutes.

In addition to these quantitative measures, the Board will consider qualitative factors, such as the opaqueness and complexity of an institution’s internal organization, that are indicative of the relative degree of difficulty of resolving the

⁷¹ A large value of a metric for any one category may suggest that distress at the resulting firm is likely to result in material damage to the broader economy. Many of the metrics considered by the Board measure an institution’s activities relative to the U.S. financial system (“USFS”). For example, pro forma asset size of the resulting firm is expressed in terms of the resulting firm’s pro forma assets as a share of total assets of the USFS. For this purpose, the USFS comprises all U.S. financial institutions (“USFIs”) used in computing total liabilities for the purposes of calculating the limitation on liabilities of a financial company required under section 622 of the Dodd-Frank Act and includes U.S.-based bank and nonbank affiliates of foreign banking organizations. In connection with its supervision of nonbank financial institutions that the FSOC determines could pose a threat to the financial stability of the United States, the Board may require financial and other reporting by these institutions, which would increase the pool of available data for financial stability analyses. See sections 113 and 151 of the Dodd-Frank Act, codified at 12 U.S.C. §§ 5323 and 5341, respectively.

⁷² The metrics for the resulting entity are not, by themselves, determinative. The Board will take into account all factors that are relevant to a transaction, some of which may not be captured by the metrics.

resulting firm. A financial institution that can be resolved in an orderly manner is less likely to inflict material damage to the broader economy.

The Board's methodology is compatible with the Basel Committee's approach to identifying global systemically important banks ("GSIBs")⁷³ but differs from the Basel Committee's approach in three important ways. First, the Board will consider a broader and somewhat different set of metrics. Second, the Board will consider the systemic footprint of the resulting firm relative to the USFS. Third, under the Board's approach, it is possible that if even a single category of metrics indicates that a resulting firm would pose a significant risk to the stability of the U.S. banking or financial system, the Board may determine that there is an adverse effect of the proposal on the stability of the U.S. banking or financial system.⁷⁴ This methodology will help identify not only the more obvious risks associated with significant expansion proposals by GSIBs, but also transactions involving other firms that could pose a risk to the stability of the U.S. banking or financial system, even if the resulting firm is not a GSIB.

On the other hand, certain types of transactions likely would have only a de minimis impact on an institution's systemic footprint and, therefore, are not likely to raise concerns about financial stability. For example, a proposal that involves an acquisition of less than \$2 billion in assets, results in a firm with less than \$25 billion in total assets, or represents a corporate reorganization may be presumed not to raise financial stability concerns absent evidence that the transaction would result in a significant increase in interconnectedness, complexity, cross-border activities, or other risk factor.

⁷³ See Basel Committee on Banking Supervision ("Basel Committee"). "Global systemically important banks: assessment methodology and the additional loss absorbency requirement. Rules text." November 2011.

⁷⁴ The Board will consider each metric both individually and in combination with others, rather than following the Basel Committee approach of focusing solely on a weighted average of all the metrics. For example, a merger of two firms that are dominant providers of critical products or services would likely present a significant risk to U.S. financial stability, even if the values of the resulting firm's metrics were low in all other categories.

Analysis of the Financial Stability Impact of this Proposal

In this case, the Board has undertaken its metrics-based analysis to determine whether this proposal presents a significant risk to the stability of the U.S. banking or financial system. The Board also has considered the relative degree of difficulty of resolving the resulting firm. The Board reviewed publicly available data, comments received from the public, data compiled through the supervisory process, and data obtained through information requests to the institutions involved in the proposal, as well as qualitative information.

Size. An organization's size is one important indicator of the risk that the organization poses to the financial system. Congress has imposed a specific 10 percent nationwide deposit limit and a 10 percent nationwide liabilities limit on potential combinations by banking organizations.⁷⁵ Other provisions of the Dodd-Frank Act impose special or enhanced supervisory requirements on large banking organizations.⁷⁶ These measures are helpful indicators of potential systemic risk; however, the fact that Congress also requires the Board to review the potential systemic impact of a transaction that does not reach these limits likely indicates they were not meant to substitute for an analysis of size as part of the systemic risk factor.

⁷⁵ 12 U.S.C. §§ 1843(i)(8) and 1852.

⁷⁶ Section 165 of the Dodd-Frank Act, codified at 12 U.S.C. § 5365, requires the Board to subject all bank holding companies with total consolidated assets of \$50 billion or more, and any nonbank financial company designated by the FSOC for supervision by the Board, to enhanced prudential standards in order to prevent or mitigate risks to the financial stability of the United States that could arise from the severe distress or failure of these firms. Two commenters urged the Board not to approve the proposed transaction until the Board adopts rules to implement section 165 of the Dodd-Frank Act. The Board, jointly with the FDIC, has issued a notice of final rulemaking that implements the requirements of section 165(d). See 76 Federal Register 67,323 (November 1, 2011). The Board also has issued a notice of proposed rulemaking, implementing the other requirements within section 165 of the Dodd-Frank Act. 77 Federal Register 594 (January 5, 2012).

The Board has considered measures of Capital One's size relative to the USFS, including Capital One's consolidated assets, its consolidated liabilities,⁷⁷ its total leverage exposures,⁷⁸ and its U.S. deposits. As a result of the proposed acquisition of FSB and the HSBC assets,⁷⁹ Capital One would become between the 14th and 20th largest USFI based on assets, liabilities, and leverage exposures with between 1.1 percent and 1.6 percent of the USFS total. Based on deposits, Capital One would become the fifth largest USFI, with 2.3 percent of the total. These measures suggest that, although the combined organization would be large on an absolute basis, its shares of USFS assets, liabilities, leverage exposures, and deposits would remain modest, and its shares of national deposits and liabilities would fall well below the 10 percent limitations set by Congress.

Measures of a financial institution's size on a pro forma basis could either understate or overstate risks to financial stability posed by the financial institution. For instance, a relatively small institution that operates in a critical market for which there is no substitute provider, or that could transmit its financial distress to other financial organizations through multiple channels, could present significant risks to the stability of the USFS.

Although the proposed transaction would increase Capital One's overall size, and result in it becoming the fifth largest bank in the United States based on U.S. deposits, its larger size must be viewed in conjunction with the other metrics. Accordingly, the Board has considered other factors, both individually and in

⁷⁷ The Board has considered both consolidated liabilities on Capital One's balance sheet and liabilities as computed under the limitations on consolidated liabilities in section 622 of the Dodd-Frank Act, codified at 12 U.S.C. § 1852.

⁷⁸ Total leverage exposure is calculated in a manner roughly equivalent to the methodology set out in "Basel III: A global regulatory framework for more resilient banks and banking systems" and takes into account both on- and off-balance-sheet assets.

⁷⁹ As noted above, Capital One has applied to the OCC for approval under the Bank Merger Act to acquire up to \$29 billion in credit card assets from HSBC. The Board has assumed the acquisition of the entire \$29 billion in assets.

combination with size, to evaluate the likely impact of this transaction on financial stability.

Substitutability. The Board has examined whether Capital One or FSB engages in any activities that are critical to the functioning of the USFS and whether there would be adequate substitute providers that could quickly step in to perform such activities should the combined entity suddenly be unable to do so as a result of severe financial distress. Capital One accepts retail deposits and engages in mortgage lending, mortgage and credit card servicing, commercial real estate financing, small business lending, credit card and other consumer lending, and securities brokerage services. FSB offers savings accounts, certificates of deposit, residential mortgage loans, and retail securities brokerage services. In most of these activities, Capital One has, and as a result of the proposals, would continue to have a small share on a nationwide basis, and numerous competitors would remain for each of the activities in which Capital One and FSB engage.

Capital One is currently the fifth largest provider of credit cards in the United States. Assuming the acquisition of the HSBC credit card assets (a transaction subject to review by the OCC in a separate proceeding), Capital One would increase its share of outstanding credit card balances in the United States from 7.7 percent to 11.8 percent and thereby become the fourth largest provider of credit cards in the United States. In considering the potential effect on financial stability in this case, the Board also has considered that three competing credit card lenders would each have outstanding credit card balances that are between one-third and two-thirds larger than those of Capital One, and two other lenders would each have balances approximately half the size of the outstanding credit card balances of Capital One. In addition, there are numerous other credit card lenders that operate on a national or regional basis. Capital One's share of credit card loans does not appear to be substantial enough to cause significant disruptions in the supply of credit card loans if Capital One were to experience distress, due to the availability of substitute providers that could assume Capital One's business.

Interconnectedness. The Board has examined data to determine whether financial distress experienced by the combined entity could create financial instability by being transmitted to any other institutions or markets within the U.S. banking or financial system.⁸⁰

Capital One does not engage currently and as a result of this transaction would not engage in business activities or participate in markets to a degree that would pose significant risk to other institutions, in the event of financial distress of the combined entity. The combined entity's use of wholesale funding, as a share of USFS wholesale funding usage, is less than 1 percent and is well below its corresponding share of USFS consolidated assets. The combined entity's shares of USFS intra-financial system assets and liabilities also are less than 1 percent. The transaction under review in this case also would not increase exposure to any single counterparty that is among the top three counterparties of either Capital One or FSB before the merger.

⁸⁰ Commenters argued that Capital One is materially interconnected with the USFS because it securitizes a portion of its credit card receivables into securities that are sold to pension funds, insurance companies, and other large, systemically important institutions. This factor is mitigated in several ways. Capital One's credit card securitizations represent a relatively small portion of the credit card securitization market. Taking into account the acquisition of HSBC's credit card business, Capital One's total share of credit card securitizations is less than 9 percent, consistent with its share of outstanding credit card loans. A number of factors align Capital One's interest in ensuring sound underwriting of the underlying credit card accounts with those of investors in the securitization. These include recent changes to accounting rules that require credit card securitizations to be consolidated on the balance sheet of the securitizer in many situations and capital rules that require a capital reserve. See Statements of Financial Accounting Standards Nos. 166 and 167, codified in Accounting Standards Codification Topics 860 and 810; Final Rule for Regulatory Capital Standards Related to Statements of Financial Accounting Standards Nos. 166 and 167, 75 Federal Register 4636 (January 28, 2010). In addition, Capital One retains a seller's interest that exposes the institution to losses from the underlying credit card receivables on a pari passu basis with investors in its credit card securitizations. The Dodd-Frank Act also enhanced the disclosure and reporting obligations of securitizers to provide better information to investors to analyze the credit risks and ongoing performance of the securitized assets and, ultimately, whether to purchase or sell the asset-backed securities. See §§ 942, 943, and 945 of the Dodd-Frank Act, as codified by 15 U.S.C. §§ 780-7, 77d, and 77g, respectively.

Complexity. The Board has considered the extent to which the combined entity would contribute to the overall complexity of the USFS. The combined entity's complex assets and trading book and available-for-sale securities represent a significantly lower share in the USFS than its corresponding share of consolidated assets. The Board also has considered whether the complexity of the combined entity's assets and liabilities would hinder its timely and efficient resolution in the event it were to experience financial distress. Capital One and FSB do not engage in complex activities, such as being a core clearing and settlement organization for critical financial markets, that might complicate the resolution process by increasing the complexity, costs, or timeframes involved in a resolution. Under the circumstances, resolving the combined organization would not appear to involve a level of cost, time, or difficulty such that it would cause a significant increase in risk to the stability of the USFS.⁸¹

Cross-Border Activity. The Board has examined the cross-border activities of Capital One and FSB to determine whether the cross-border presence of the combined organization would create difficulties in coordinating any resolution, thereby significantly increasing the risk to U.S. financial stability. Capital One has credit card operations in the United Kingdom and Canada that total approximately \$8.7 billion. These businesses are similar to Capital One's operations in the United States and do not add any substantial complexity to its operations. Although FSB currently is owned by ING Groep, a Dutch financial institution, FSB operates only in the United States. The combined organization is not expected to engage in any additional activities outside the United States as a result of the proposed transaction. In addition, the combined organization would not engage in the provision of critical services whose disruption would impact the macroeconomic condition of the United States by disrupting trade or resulting in increased resolution difficulties.

⁸¹ As noted previously, the Dodd-Frank Act requires bank holding companies that hold more than \$50 billion in total consolidated assets, such as Capital One, to submit resolution plans, which are intended to assist the institutions in managing their risks and to plan for a rapid and orderly resolution in the event of material distress or failure and to enable the regulators to understand an institution's complexity. See 12 U.S.C. § 5365.

Financial Stability Factors in Combination. The Board has assessed the foregoing factors individually and in combination to determine whether interactions among them might mitigate or exacerbate risks suggested by looking at them individually. The Board also has considered whether the proposed transaction would provide any stability benefits and whether enhanced prudential standards applicable to the combined organization would offset any potential risks.⁸²

For instance, concerns regarding Capital One's size would be greater if Capital One were also highly interconnected to many different segments of the USFS through its counterparty relationships or other channels, or if Capital One participated to a larger extent than it does in short-term funding and capital markets. The Board's level of concern also would be greater if the structure and activities of Capital One were sufficiently complex that, if Capital One were to fail, it would be difficult to resolve quickly without causing significant disruptions to other financial institutions or markets.

As discussed above, the combined entity would not be highly interconnected. Furthermore, the organizational structure and operations of the combined organization would be centered on a commercial banking business, and in the event of distress, the resolution process would be handled in a predictable manner by relevant authorities. The Board also has considered other measures that are suggestive of the degree of difficulty with which Capital One could be resolved in the event of a failure, such as the organizational and legal complexity and cross-border activities of the resulting firm. These measures suggest that Capital One would be significantly less complicated to resolve than the largest U.S. universal banks and investment banks.

Based on these and all the other facts of record, the Board has determined that considerations relating to financial stability are consistent with approval.

Public Benefits of the Proposal

As noted above, the Board is required to consider whether the proposed acquisition of FSB and its nonbanking subsidiaries "can reasonably be expected to

⁸² Section 165 of the Dodd-Frank Act, codified at 12 U.S.C. § 5365.

produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, unsound banking practices, or risk to the stability of the United States banking or financial system.”⁸³

As part of this review, the Board considered that the European Commission required ING Groep to divest FSB by 2013 as a condition of its approval to allow the government of The Netherlands to provide aid to ING Groep in 2008 and 2009. The sale of FSB to Capital One provides depositor continuity to the U.S. operations of FSB and to FSB customers and enables all FSB customers to continue receiving their banking services by virtue of its acquisition by a single organization.

The record indicates that consummation of the proposal would result in additional benefits to consumers currently served by FSB. The proposal would allow Capital One to offer a wider array of mortgage loans and banking products and services to FSB’s customers, including fixed-rate 30-year mortgage loans, full-access checking accounts, automobile loans, small business loans, commercial loans, and credit card and other consumer loans, none of which are provided by FSB. In addition, FSB customers would have access to Capital One’s branch locations and ATM network, small business technical assistance programs, and corporate trust services.⁸⁴

As noted above, Capital One plans to add deposit-taking facilities to FSB’s eight cafés, which will enhance the services available to the customers and communities served by these cafés. The conversion of these locations to branches of FSB would also expand Capital One’s CRA assessment areas to the relevant communities served by those cafés. Seven of the eight cafés are in areas that are not currently served by branches of FSB; four of these cafés are in LMI census tracts.

⁸³ 12 U.S.C. § 1843(j)(2)(A).

⁸⁴ Some commenters advocated that Capital One continue to offer the same terms and conditions applicable to FSB’s savings accounts. Capital One has represented that it does not plan to change any of FSB’s current product features.

In addition, Capital One's customers would benefit from access to a more efficient and robust Internet banking service than is currently offered by Capital One. This provides Capital One customers a broader suite of products and services and more convenient ways to access their accounts than currently available.

The proposed acquisition of FSB would also increase Capital One's access to low-cost deposits, which will diversify Capital One's funding base. The proposal also would result in significant operational efficiencies for Capital One. Capital One would realize significant cost savings from consolidating systems, platforms, and corporate staff functions. In addition, Capital One would achieve substantial funding savings from optimizing management of the combined deposit portfolio. By improving efficiencies and strengthening its funding and liquidity profile, Capital One would be better placed to provide credit and other banking services to its entire customer base, including current customers of FSB.

The Board has determined that the conduct of the proposed nonbanking activities within the framework of Regulation Y and Board precedent is not likely to result in significant adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, unsound banking practices, or risk to the stability of the United States banking or financial system. Moreover, for the reasons discussed above, the Board believes that the factors related to competition, financial and managerial resources, convenience and needs, and financial stability are consistent with approval of this case.

Based on all the facts of record, including the commitments and conditions noted in this case, the Board has concluded that consummation of the proposal can reasonably be expected to produce public benefits that would outweigh any likely adverse effects. Accordingly, the Board has determined that the balance of the public benefits under the standard of section 4(j)(2) of the BHC Act is consistent with approval.

Conclusion

Based on the foregoing and all the facts of record, the Board has determined that the proposal should be, and hereby is, approved.⁸⁵ In reaching its conclusion, the Board has considered all the facts of record in light of the factors that it is required to consider under the BHC Act. The Board's approval is specifically conditioned on compliance by Capital One and FSB with the conditions imposed in this order and the commitments made to the Board in connection with the notice. The Board's approval also is subject to all the conditions set forth in Regulation Y, including those in sections 225.7 and 225.25(c),⁸⁶ and to the Board's authority to require such modification or termination of the activities of a bank holding company or any of its subsidiaries as the Board finds necessary to ensure compliance with, and to prevent evasion of, the provisions of the BHC Act and the Board's regulations and orders issued thereunder. For purposes of this action, these conditions and commitments are deemed to be conditions imposed in writing by the Board in connection with its findings and decision herein and, as such, may be enforced in proceedings under applicable law.

⁸⁵ Several commenters requested that the Board hold a public hearing on the proposal. The Board's regulations provide for a hearing on a notice filed under section 4 of the BHC Act if there are disputed issues of material fact that cannot be resolved in some other manner. 12 CFR 225.25(a)(2). Under its rules, the Board also may, in its discretion, hold a public hearing if appropriate to allow interested persons an opportunity to provide relevant testimony when written comments would not adequately present their views. The Board has considered the commenters' requests in light of all the facts of record. In the Board's view, the commenters have had ample opportunity to submit comments on the proposal and, in fact, submitted written comments that the Board has considered in acting on the proposal. The commenters' requests fail to identify disputed issues of fact that are material to the Board's decision and would be clarified by a public hearing. In addition, the requests fail to demonstrate why the written comments do not present the commenters' views adequately or why a hearing otherwise would be necessary or appropriate. For these reasons, and based on all the facts of record, the Board has determined that a public hearing is not required or warranted in this case. Accordingly, the requests for a public hearing on the proposal are denied.

⁸⁶ 12 CFR 225.7 and 225.25(c).

The acquisition shall not be consummated later than three months after the effective date of this order, unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Richmond, acting pursuant to delegated authority.

By order of the Board of Governors,⁸⁷ effective February 14, 2012.

(signed)

Robert deV. Frierson
Deputy Secretary of the Board

⁸⁷ Voting for this action: Chairman Bernanke, Vice Chair Yellen, and Governors Duke, Tarullo, and Raskin.