



**Comptroller of the Currency
Administrator of National Banks**

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Washington, DC 20219
202-874-5060

Licensing Activities

October 17, 2012

Ms. Lisa Goodglick
Associate General Counsel - Regulatory
Capital One Financial Corporation
1680 Capital One Drive
McLean, Virginia 22102

Re: Application to merge ING Bank, fsb, Wilmington, Delaware,
into Capital One, National Association, McLean, Virginia
Application Control Number: 2012-NE-02-0017

Application by Capital One, National Association, Wilmington, Delaware,
for a Reduction in Capital
Application Control Number: 2012-NE-12-0182

Dear Ms. Goodglick:

The Office of the Comptroller of Currency (“OCC”) hereby conditionally approves the application to merge ING Bank, fsb, Wilmington, Delaware (“ING Bank”), into Capital One, National Association, McLean, Virginia (“CONA”). The OCC also hereby conditionally approves the application by CONA for a reduction in capital. These approvals are granted after a thorough review of the applications, other materials you have supplied, and other information available to the OCC, including commitments and representations made in the applications and by the applicant’s representatives during the application process. These approvals are also subject to the conditions set out herein.

I. Background

Both CONA and ING Bank are wholly-owned subsidiaries of Capital One Financial Corporation (“COFC”). COFC acquired ING Bank from ING Groep, N.V., in February 2012,¹ and continued to operate it as a separate institution thereafter. COFC now plans to effect an

¹ See Order of the Board of Governors of the Federal Reserve System approving the notice by Capital One Financial Corporation, McLean, VA, to acquire ING Bank, fsb, Wilmington, DE, and indirectly acquire shares of ShareBuilder Advisors, LLC., and ING Direct Investing, Inc. (FRB Order No. 2012-2, February 14, 2012) (“FRB Capital One/ING Order”), available at <http://www.federalreserve.gov/newsevents/press/orders/order20120214.pdf>.

internal reorganization to combine the operations of ING Bank with CONA, COFC's lead bank. Accordingly, CONA filed an application with the OCC to merge ING Bank into CONA under 12 U.S.C. § 215c and 12 C.F.R. § 5.33. In connection with the merger, CONA also filed an application with the OCC for a reduction in capital under 12 U.S.C. § 59 and 12 C.F.R. § 5.46. After the distribution and merger, CONA will remain well-capitalized under 12 C.F.R. Parts 3 and 6.

CONA is an insured national bank and offers a full range of banking products and services. It operates branch offices in eight states (Connecticut, Delaware, Louisiana, Maryland, New Jersey, New York, Texas, and Virginia) and Washington, D.C. CONA's most significant presence is in the metropolitan areas of New York City, Washington, D.C., and New Orleans. CONA has fiduciary powers under 12 U.S.C. § 92a.

ING Bank is an insured federal savings bank. It operates primarily as an internet-only bank. Its products and services are principally deposits and one-to-four family residential mortgage loans. ING Bank operates from its main office in Wilmington, Delaware, and has no branch offices. It operates eight offices (which have become known as cafés) in the following cities – Chicago, Illinois; Honolulu, Hawaii; Los Angeles, California; San Francisco, California; New York, New York; Philadelphia, Pennsylvania; St. Cloud, Minnesota; and Wilmington, Delaware. The cafés are locations where customers can conduct banking transactions on computer terminals and can ask questions of ING representatives.² The cafés currently contain nondeposit-taking automatic teller machines (“ATMs”). CONA plans to install deposit-taking ATMs in the cafés by the end of 2013.

To assist in promoting the bank and attracting customers, the cafés also sell a limited amount of promotional items – such as coffee cups, mugs, and other merchandise, most of which are branded, bearing the bank's logo or other trade or service marks. As the inventory of ING-branded items and non-branded items are sold, they are not being replaced. After the merger, CONA intends to limit the sale of promotional items to only a limited number of branded items.³ Similarly, the cafés also sell a limited range of food and beverages, such as coffee, tea, muffins, and sandwiches.

² The eight offices are agency offices under 12 C.F.R. § 145.96. They are staffed by ING Bank employees who are available to assist customers with their accounts, but who do not accept deposits, provide receipts, or make loans. Customers who wish to make deposits must do so by electronic funds transfer, mailing a check, or remote deposit capture using their smart phone or personal computer. In light of their limited function, the Office of Thrift Supervision determined the offices were agency offices, not branches. Similarly, as discussed below, after the merger, they would not be branches of CONA under 12 U.S.C. § 36(j) and 12 C.F.R. § 5.30.

³ ING Bank also operated an online store from the website “shop.ingdirect.com.” Sales from the website were discontinued in September 2012, and CONA does not plan to retain or operate this online store after the merger.

ING Bank has four active subsidiaries that will become operating subsidiaries of CONA after the merger.⁴ ING Bank directly wholly owns ING Direct Securities, Inc. This is a first-tier service corporation that is a holding company that wholly owns ShareBuilder Corporation, a lower-tier service corporation. ShareBuilder Corporation is also a holding company and wholly owns ShareBuilder Advisors, LLC, and ING Direct Investing, Inc. (“IDII”), both of which are lower-tier service corporations.

ShareBuilder Advisors is a registered investment advisory firm. It provides consulting services and information to employers and plan sponsors regarding the establishment of defined contribution and defined benefit plans for its employees, and provides select exchange-traded funds and model portfolios to plan participants, who choose their exact investments from the options provided.

IDII is a registered broker-dealer that provides an online retail brokerage service called ShareBuilder. In the course of its brokerage activities, IDII acquires a limited amount of odd lot and fractional shares (together, “brokerage-related shares”) of readily marketable common stock, exchange-traded funds, and mutual funds retained when IDII purchases shares on behalf of customers.

II. Legal Authority for the Transactions

A. The Merger

This is a merger of an insured federal savings association with and into a national bank. Such mergers are authorized under 12 U.S.C. § 215c.⁵

After the merger, CONA will retain and continue to operate its main office and branches. It will also acquire ING Bank’s main office in Wilmington, Delaware. This office will not be a branch of CONA under 12 U.S.C. § 36 because members of the public do not have physical access to it for the purpose of making deposits, paying checks, or borrowing money. *See* 12 C.F.R. § 5.30(d)(1)(ii)(A). CONA will also acquire and operate the cafés. The public does have access to these offices, but they will not be branches under 12 U.S.C. § 36 because of the limited functions carried on at them. These offices are an example of an office that combines

⁴ ING Bank also has two other subsidiaries that will become subsidiaries of CONA after the merger: ING Direct Kids Foundation and ING Direct Insurance Agency, LLC. Both of these entities are inactive, and CONA intends to dissolve them. If CONA’s plans change, and it would seek to engage in new activities in them, it must follow the requirements of 12 C.F.R. § 5.34. ING Bank also has a non-controlling investment of 0.01% in ING Direct Community Development, LLC. The remaining 99.99% is held by COFC. ING Direct Community Development, LLC, is inactive. COFC and CONA intend to dissolve this entity.

⁵ Section 215c(a) makes such mergers subject to compliance with 12 U.S.C. § 1815(d)(3) and 12 U.S.C. § 1828(c). Section 1815(d)(3) was amended in 2006 and no longer has direct relevance to mergers under section 215c. Compliance with section 1828(c), the Bank Merger Act, is discussed below. ING Bank is authorized to engage in the merger under 12 U.S.C. § 1467a(s) and 12 C.F.R. §§ 152.13 & 163.22.

attributes of a deposit production office, a loan production office, and a remote service unit. Such an office is not a “branch” within the meaning of 12 U.S.C. § 36(j).⁶

After the merger CONA plans to continue to sell a few promotional items. The sale of promotional items by a national bank for purposes of marketing, advertising, and promoting awareness of the bank is permissible as being incidental to the business of banking under 12 U.S.C. § 24(Seventh).⁷ OCC Interpretive Letter Number 690 summarized factors used in distinguishing between a permissible promotional program and impermissible merchandising. The factors include: the items being sold are small, low-priced items that possess the bank’s logo, the items are sold on a small scale, the items are sold at a nominal mark-up to cover the expense of the promotion, and the items are sold only or mainly to bank customers without any attempt to distribute items on a large scale. Generally, the determination whether a particular promotional program is permissible for national banks must be based on a review of individual facts and circumstances. CONA represents that it will conduct its promotional sales in accordance with Letter No. 690.⁸

CONA also plans to continue the sale of food and beverages at the cafés. CONA believes the sale of food and beverages, like the sale of promotional items, is a permissible marketing and promotional activity. However, the nature and scale of the food and beverage operations at the cafés raise serious issues of permissibility. Unlike the sale of minor branded items, the sale of food and beverages at the cafés is more likely to attract members of the general public (and not only bank customers or those that may become customers). Similarly, unlike the sale of minor branded items, the sale of food and beverages gives the appearance of a separate business, in addition to the banking business, occurring at the bank’s offices. In order to address these concerns, the OCC is requiring CONA to discontinue the food and beverage service at the cafés, or to conform the provision of the food and beverage service to activities permissible for a national bank, within two years after the merger. The OCC is further requiring CONA to inform the OCC if it plans to discontinue or conform the activity within 120 days after the merger and, if it proposes to conform the activity, to submit a plan describing how it will do so.

In the merger CONA will acquire four active subsidiaries of ING Bank.⁹ ING Direct Securities, Inc., and ShareBuilder Corporation are holding companies whose only activity is to

⁶ See 12 C.F.R. § 7.4005. See also *First National Bank of McCook v. Fulkerson*, Civil Action No. 98-D-1024, 2000 U.S. Dist. LEXIS 21459 (D. Colo. March 7, 2000).

⁷ See OCC Interpretive Letter No. 690 (October 2, 1995), reprinted in [1995-1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,005.

⁸ CONA represents that it will discontinue the sale of any non-branded items at the cafés within two years following the merger and any nonbranded items remaining at that time will be donated, given away, or otherwise disposed of. The OCC allows a national bank a reasonable period of time after a merger to conform or divest impermissible assets or activities. See 12 C.F.R. § 5.33(e)(5).

⁹ CONA will also acquire two inactive subsidiaries -- ING Direct Kids Foundation and ING Direct Insurance Agency, LLC. It is permissible for CONA to acquire them as operating subsidiaries, and OCC hereby

hold the shares of subsidiary companies. ShareBuilder Advisors engages in investment advice and related consulting services. This is permissible for a national bank operating subsidiary. *See, e.g.*, 12 C.F.R. § 5.34(e)(5)(v)(I). IDII is a registered broker-dealer and provides retail brokerage services. This is generally a permissible activity for a national bank operating subsidiary. *See, e.g.*, 12 C.F.R. § 5.34(e)(5)(v)(N).

However, because of certain services IDII provides to its customers, IDII purchases and holds small amounts of equity securities for its own account (the brokerage-related shares discussed above). The amount of these brokerage-related shares is small and the activity is engaged in only in connection with facilitating customer transactions. However, it implicates the limitations on the purchase and sale of equity securities by national banks for their own account in 12 U.S.C. § 24(Seventh). Therefore, the OCC is requiring CONA to conform or divest this activity within a reasonable time period after the merger, as set out in a condition below.

The merger of ING Bank into CONA is permissible under 12 U.S.C. § 215c. CONA's operation of ING Bank's nonbranch offices and limited sales of promotional items at them are permissible under 12 U.S.C. § 24(Seventh). CONA may acquire the subsidiaries of ING Bank as operating subsidiaries under 12 U.S.C. § 24(Seventh) and 12 C.F.R. § 5.34, provided it conforms or divests the brokerage-related shares activity as required in this approval. Accordingly, the OCC approves the merger application.

B. The Reduction in Capital

CONA also applied for a reduction in capital. CONA proposes to change its capital structure by reducing its surplus. Under 12 U.S.C. § 59 and the OCC's implementing regulations at 12 C.F.R. § 5.46, a national bank may reduce its capital with the prior approval of the OCC. In determining whether to approve a proposed change to a national bank's permanent capital, the OCC considers whether the change is consistent with law, regulation, and OCC policy, provides an adequate capital structure, and, if applicable, complies with the bank's capital plan. 12 C.F.R. § 5.46. After the proposed distribution and the merger, CONA will continue to exceed the regulatory minimum standards for a well-capitalized bank. The OCC also considered other supervisory information and determined approval of the capital distribution was acceptable. The OCC hereby approves the reduction in capital requested in CONA's filing. This approval of the reduction in capital is specifically based on the understanding that the reduction in capital will occur only in connection with the merger and that CONA will remain well-capitalized after the distribution and merger.

III. The Bank Merger Act

The merger is also subject to OCC review under the Bank Merger Act. Under the Bank Merger Act, the OCC generally may not approve a merger that would substantially lessen

approves them, provided they remain inactive until dissolved. If CONA later plans to engage in any activity in them, it must comply with 12 C.F.R. § 5.34.

competition. The Bank Merger Act also requires the OCC to take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, and the risk of the transaction to the stability of the United States banking or financial system. 12 U.S.C. § 1828(c)(5). The OCC must also consider the effectiveness of the banks in combating money laundering activities. 12 U.S.C. § 1828(c)(11). Lastly, the OCC may not approve any interstate merger transaction that results in the resulting insured depository institution controlling more than 10 percent of the total amount of deposits of insured depository institutions in the United States. 12 U.S.C. § 1828(c)(13). As set out below, the OCC considered these factors and found them consistent with approval of this application.

A. Competitive Analysis

CONA and ING Bank are affiliates, each wholly owned by COFC, and so the merger is competitively neutral.

B. Financial and Managerial Resources and Future Prospects

CONA has sufficient financial resources to engage in the proposed merger. After the merger and the capital distribution, CONA will remain well-capitalized, and its projected net income level will remain sufficient. In addition, COFC and CONA have sufficient financial resources to offset any additional risks assumed in connection with the proposed transaction.

The managerial resources available to COFC, CONA, and ING Bank to manage these businesses as separate institutions will not be materially affected by their combination into CONA. CONA has adequate managerial resources to effect a successful merger and to operate the combined business thereafter. However, CONA and its affiliate, Capital One Bank, N.A. (“COBNA”) are subject to a number of enforcement actions, have been assessed significant fines, and have been required to make restitution as a result of less than satisfactory management and board oversight of the compliance function.

COBNA entered a Consent Order with the OCC on July 17, 2012, addressing violations of section 5 of the Federal Trade Commission Act (“FTC Act”). COBNA also stipulated to a Consent Order with the Consumer Financial Protection Bureau with respect to FTC Act violations. COBNA and CONA stipulated to Consent Orders with the OCC on July 25, 2012, addressing violations of the Servicemembers Civil Relief Act (“SCRA”). In addition, in the FRB Capital One/ING Order, the Federal Reserve Board conditioned its approval of COFC’s acquisition of ING Bank on COFC’s submission of an acceptable plan to address weaknesses in the company’s compliance management function and enterprise-wide compliance transaction testing.

Through the Consent Orders, the OCC has required CONA and COBNA to implement specific corrective action addressing these weaknesses within specified timeframes. The orders required that COFC’s depository institutions develop a written (i) enterprise-wide risk

management program for any consumer products marketed or sold by the banks or through vendors and (ii) program to ensure compliance with the SCRA. The Consent Orders require CONA and COBNA to submit compliance plans, develop written policies and procedures for vendor management, improve the monitoring and testing of the Compliance and Internal Audit units, provide remediation to eligible customers, and submit quarterly reports of the banks' progress to the OCC.

The compliance-related management weaknesses identified at CONA are being addressed through the supervisory process. Moreover, the merger is an internal corporate reorganization, will simplify COFC's corporate structure, and should help streamline operations for COFC. This simplification and streamlining can be reasonably expected to enhance the ability of management to operate more effectively and implement the corrective actions required by the OCC and the Federal Reserve Board. The OCC finds the financial and managerial resources and future prospects of CONA do not raise concerns that would cause this merger of affiliates to be disapproved.

C. Convenience and Needs of the Community

CONA's application states it does not plan to discontinue any of the products or services currently offered by either institution. Moreover, CONA offers a broader array of products and services to its customers than does ING Bank currently. ING Bank customers will have easier access to CONA's traditional fixed-rate mortgage loans, auto loans, credit cards, traditional and rewards checking accounts, small business loans, small business technical assistance programs, and commercial loans. Additionally, CONA maintains that its current customers will have easier access to ING Bank's innovative savings products. While CONA acknowledges that existing internet-only ING Bank and CONA customers will not be able to conduct account transactions through branch personnel, CONA notes that they have, and will continue to have, the option to apply to open branch-based accounts that offer enhanced access, features, or options.

CONA maintains that there will not be any branch closures due to this merger. Moreover, CONA plans to install deposit-taking ATMs in the cafés. This will increase the cafés' usefulness for customers. It will also result in the areas around the cafés being added to CONA's Community Reinvestment Act ("CRA") assessment areas. This will result in additional responsibilities for CONA under the CRA, and can reasonably be expected to directly benefit the communities surrounding the cafés.

The effect of the merger on the convenience and needs of the community does not raise concerns that would cause this affiliated merger to be disapproved.

D. Risk to the United States Banking or Financial System

As part of its review of the application by COFC to acquire ING Bank, and as set forth in the FRB Capital One/ING Order, the Federal Reserve Board conducted an extensive analysis of the effect of the transaction on the stability of the United States banking or financial system. The

Board determined that considerations relating to financial stability were consistent with approval. With respect to the current CONA-ING Bank merger proposal, the merger of two affiliated institutions ordinarily would not have a material impact on the overall company's risk to the financial stability of the United States banking or financial system. There is no information in the record of this application or otherwise available to the OCC that would indicate any change in risk to the stability of the United States banking or financial system due to the proposed merger.

E. Effectiveness of the Banks in Combating Money Laundering Activities

The OCC considered the effectiveness of the banks in combating money laundering activities and found it satisfactory

F. Limit on Total Amount of Deposits

Under the Bank Merger Act, the OCC may not approve an interstate merger transaction if the resulting institution would control more than ten percent of the total amount of deposits in insured depository institutions in the United States. However, this provision does not apply to mergers between affiliates.¹⁰

IV. Community Reinvestment Act

The CRA requires the OCC to take into account the records of the institutions' performance in helping to meet the credit needs of their communities, including low- and moderate-income ("LMI") neighborhoods when evaluating applications under the Bank Merger Act. 12 U.S.C. § 2903(a)(2) and 2902(3)(E); 12 C.F.R. § 25.29(a)(3). The OCC considered the CRA performance evaluation of each institution involved in this transaction.

A. CONA

The CRA public performance evaluation ("PE") for CONA, dated April 4, 2011, was issued by the OCC.¹¹ CONA received an overall "Outstanding" rating under performance tests applicable to large banks.¹² Among the major factors supporting the overall "Outstanding" rating were: (i) an excellent level of community development investments responsive to assessment area ("AA") needs; (ii) community development lending that reflected a significant positive impact in the bank's lending test rating; (iii) an excellent distribution of loans among

¹⁰ See 12 U.S.C. § 1828(c)(13)(C)(i). Moreover, CONA and its depository institution affiliates would control significantly less than ten percent of deposits.

¹¹ PEs issued by the OCC may be found at <http://www.occ.treas.gov/tools-forms/tools/compliance-bsa/cra-perf-eval-search.html>.

¹² In the April 4, 2011, PE, CONA was assigned an "Outstanding" rating for its performance under the lending and investment tests and a "High Satisfactory" rating for its performance under the service test.

geographies of different income levels; (iv) leadership and the use of an innovative method of investing in Low-Income Housing Tax Credits; (v) an adequate distribution of loans among borrowers of different incomes; and (vi) a branch and delivery system that is accessible to geographies and individuals of different income levels. CONA's overall CRA rating was a blend of CONA's multi-state metropolitan area ("MMA") and state ratings. However, performance ratings in the New York-Northern New Jersey-Long Island ("NY-NJ-LI") MMA, the Washington, D.C.-Maryland-Virginia ("DC") MMA, and the state of Louisiana were weighted more heavily because the vast majority of the bank's deposits (90 percent), as well as the lending volume and branch locations, were most heavily concentrated in those areas.

B. ING Bank

ING Bank's most recent CRA PE, dated August 6, 2008, and issued by the Office of Thrift Supervision, assigned the thrift an overall "Outstanding" rating under the performance tests applicable to large savings associations.¹³ Major factors supporting the "Outstanding" rating were: (i) significant levels of community development investments and grants in its AA; (ii) good distribution of loans to LMI borrowers in its AA and in the supplemental areas used to evaluate ING's CRA performance; and (iii) a leadership role in providing community development services in the AA.

V. Public Comments

The OCC received 20 letters from the public expressing concerns related to this application. Many of the letters included comments that closely resembled comments received by the Federal Reserve Board on the bank holding company acquisition application for COFC to acquire ING Bank.¹⁴ Generally, the CRA-related concerns focused primarily on (i) CONA's performance record, which was alleged to be inadequate relating to home mortgage loans to LMI individuals and small business lending; (ii) CONA's failure to meet community needs; and (iii) how activities in areas where the cafés are located will be assessed for CRA performance after the merger. In addition, related to fair lending, commenters raised concerns about CONA's lending to minorities, particularly in the context of home mortgage lending. With regard to other consumer protection laws, commenters expressed concerns regarding CONA's alleged abusive and illegal debt collection practices. A number of commenters also questioned CONA's \$180 billion community development commitment. Finally, commenters raised concerns regarding how the merger would meet the convenience and needs of the communities to be served.¹⁵ The commenters' concerns are addressed below. Bank representations noted throughout this section were made on behalf of CONA and COFC ("Capital One").

¹³ In the August 6, 2008, PE, ING Bank was assigned a "High Satisfactory" rating for its performance under the lending test and "Outstanding" ratings for its performance under the investment and service tests.

¹⁴ See FRB Capital One/ING Order.

¹⁵ See page 7 for a discussion on convenience and needs.

A. Home Mortgage Lending to LMI Borrowers and in LMI Communities

A number of commenters expressed concern that CONA's mortgage lending to LMI borrowers and in LMI communities has failed to address community credit needs. Other commenters alleged that there has been a significant decrease in affordable home mortgage lending.

1. CRA Performance Evaluations

As summarized above, CONA received an overall "Outstanding" rating, with an "Outstanding" rating on the lending test. Among the key factors contributing to CONA's "Outstanding" lending test rating were overall good lending activity with an excellent distribution of all loans among geographies of different income levels and an adequate distribution of all loans among borrowers of different income levels. The PE provided the context for the 2007 through 2010 examination period by observing that it included economic volatility, a suffering housing market, and a financial crisis that has been described as being the worst since the Great Depression.

2. Representations

COFC states that it is firmly committed to working with LMI individuals and communities. As part of its business strategy, it has sought to avoid aggressive originations of mortgages outside of its branch footprint and as a result, CONA's current mortgage origination activities are modest in scale overall. COFC also indicates that commenters accurately noted that CONA reduced its mortgage lending during the period from 2007 to 2009 – the timeframe during which the financial crisis was at its worst – but that this reduction was largely attributable to the decision to terminate the overly risky legacy mortgage lending business that North Fork Bank and Chevy Chase Bank established prior to being acquired by COFC. COFC represents that Capital One continues to engage in core mortgage lending activities, with a focus on direct mortgage lending within its footprint.

In response to the commenters' concerns that CONA's Federal Housing Administration ("FHA") lending has decreased, CONA represents that its former subsidiary, Capital One Home Loans ("COHL") accounted for CONA's large increase in FHA loans in 2008. COHL, a national home mortgage lender, originated conventional loans and sold them in the secondary market. As the economic crisis unfolded and the secondary market funding sources diminished, COHL began originating FHA loans. However, after 2008, due to safety and soundness concerns, Capital One shrunk its national mortgage lending business to focus on lending in its bank footprint, causing FHA lending volume to decline. CONA represents that it is rebuilding its FHA lending business, with enhancements to underwriting flexibility to increase volume. FHA loan volume in 2012 is projected to exceed 2011's volume; as of July 31, 2012, CONA had originated 325 FHA loans totaling \$71.9 million.

CONA represents that it is committed to working with LMI individuals to help them become successful homebuyers and to providing banking products that directly address the needs of LMI communities. CONA has a dedicated group, Community Development Mortgage (“CDM”), which originates specialized, high-impact mortgage loans to LMI borrowers. CONA states that these are often labor-intensive loans, originated for CONA’s portfolio, that may involve homebuyer counseling and leveraging of down payment assistance programs. The CDM group originated \$42 million in transactions during the 2007 through 2010 time period, and in 2011, CDM’s loan officers provided 133 LMI-focused homebuyer training events that reached 9,045 individuals.

In addition to the delivery of direct services to LMI clients, CONA represents that it engages in several affordable housing policy initiatives. One example of such an initiative is the Restored Homes Housing Development Finance Corporation. This not-for-profit organization was established to respond to the growing foreclosure crisis in New York City neighborhoods and the need to convert foreclosures into decent, affordable housing. Capital One has provided a bank associate to sit on the organization’s board of directors, has invested in the organization, and has provided mortgage loans to home purchasers. The organization has been able to purchase and rehabilitate 154 foreclosed properties located primarily in LMI census tracts with high concentrations of foreclosures. Capital One also represents that it provides ongoing support to community-based organizations engaged in affordable housing, including homeownership counseling. From 2007 through 2011, Capital One provided \$3.1 million to 103 organizations engaged in homeownership counseling for LMI families.

B. Small Business Lending

Commenters expressed concern about CONA’s record of making loans to small businesses and alleged that high-cost credit cards were being offered as substitutes for traditional small business loans. Further, commenters noted that the number of loans made by Capital One and backed by the Small Business Administration (“SBA”) has substantially declined since 2006.

1. CRA Performance Evaluations

CONA’s lending test rating was “Outstanding” in the NY-NJ-LI MMA and the state of Louisiana. Small business lending was the bank’s primary business strategy in the state of Louisiana and one of the bank’s primary focus areas in the NY-NJ-LI MMA. CONA ranked fourth, with nearly a six percent market share by number of loans, in originating small loans to businesses in the NY-NJ-LI MMA. The geographic distribution of small loans to businesses was excellent and the percentage of small loans to businesses made in both LMI geographies exceeded the percentage of businesses located within these geographies in both AAs. The distribution of small loans to businesses of different sizes was adequate in both AAs, with the percentage of loans made to businesses with revenues of \$1 million or less much lower than the percentage of such businesses. In these AAs, the majority of the small business lending was through credit cards, for which business revenue is not considered in the underwriting process.

Consequently, it was difficult to accurately gauge the percentage of loans to small businesses because a large percentage of the small businesses did not report their revenue. CONA's geographic distribution of small loans to businesses in the DC MMA was good, while its distribution of small loans to businesses of different sizes was adequate.

2. Representations

COFC represents that Capital One is fully committed to meeting the lending needs of, and has a strong record of providing loans to, small businesses. In addition, Capital One considers micro- and small business lending to be an important part of the company's economic development strategy and partners with organizations that support micro- and small companies to deliver entrepreneurial training, mentoring, and coaching to micro-businesses in the communities where Capital One operates.

COFC acknowledges reducing SBA lending, particularly outside the company's footprint states, because of the poor performance of this portfolio during the financial crisis. Capital One states that it is in the process of rebuilding its SBA operation with a focus on the bank's footprint, including the recent hire of an experienced SBA executive and four SBA lending experts to lead the business and implement a staff expansion plan. CONA is currently originating SBA Express and 504 loans, and plans to start offering SBA 7(a) loans during the fourth quarter of 2012. COFC further states that SBA loans are only one way that Capital One accomplishes the goals of meeting small business lending needs and that, despite challenges facing the industry, small business loans (187,075, totaling \$2.9 billion) rose 19 percent in 2010 from 2009 levels. Capital One indicates that a large majority of the bank's small business loans are in amounts of \$100,000 or less.

In response to assertions that Capital One relies on credit card lending for its small business loans, COFC also represents that its non-card small business lending portfolio is comparable to its small business credit card portfolio. As of June 30, 2012, COFC owned \$4.4 billion in outstanding non-card small business loans and \$4.6 billion in its small business credit card portfolio. Capital One indicates that its small business loans and business credit cards are also marketed and offered through separate business channels. COFC represents that the purpose of each type of credit is different. Credit cards are generally backed by small lines of credit and used to manage operating expenses, whereas small business loans are used to cover capital costs and longer-term working capital needs. Capital One asserts that its small business credit cards provide a flexible and efficient means of managing business expenditures. COFC further represents that, after the passage of the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("CARD Act"),¹⁶ it voluntarily applied many of the CARD Act's protections to its small business credit card customers, even though the CARD Act did not apply to them.

¹⁶ Pub. Law 111-24, 123 Stat. 1734 (May 22, 2009).

C. Record of Meeting Community Needs through Branch/Delivery Systems

Some commenters were concerned that Capital One did not consistently meet the needs of LMI borrowers through branch delivery systems in their market areas and asserted that CONA's branches have been established primarily in affluent neighborhoods. Several commenters mentioned CONA's "Low Satisfactory" rating in several rating areas on the service test. Several commenters also were concerned that CONA's dismissal of 490 assistant branch managers in April 2012 suggests a cutback in services, as well as branch closings. Commenters also questioned CONA's CRA commitment in the areas surrounding the existing cafés.

1. Performance Evaluation

The CRA PE for CONA rated the service test overall as "High Satisfactory" and indicated that the bank's branches are accessible to geographies and individuals of different income levels given consideration of bordering branches in middle- and upper-income geographies.

In CONA's most heavily weighted areas, the NY-NJ-LI MMA, the DC MMA, and the states of Louisiana and Texas, CONA's performance under the service test was rated "High Satisfactory." The PE noted that delivery systems were accessible to all portions of the full-scope AAs in those rating areas. Several of CONA's branches were not located in LMI census tracts but were accessible to, and served, LMI populations and geographies. Besides being within walking distance of these LMI geographies, many branches were located in areas accessible by public transportation.

As indicated by commenters, CONA's performance under the service test was rated "Low Satisfactory" in the states of Connecticut, Delaware, Maryland, New Jersey, and Virginia. The PE noted that the bank's delivery systems were reasonably accessible to geographies and individuals of different income levels in those rating areas.

2. Representations

COFC represents that it has a strong commitment to serving LMI areas. It indicates that 202 (21 percent) of the bank's 977 branches are located in LMI areas. COFC provides as evidence the fact that it opened 33 branches in LMI areas during the period 2007 to 2010 despite a very challenging economic environment. COFC explains that its branch distribution record in Maryland was based on the full-scope AA of Baltimore, which was an AA that was inherited by CONA from Chevy Chase Bank in 2009. CONA represents that it had not had sufficient time to improve its branch distribution in that AA prior to the CRA examination. CONA is investigating additional sites in LMI locations in its Baltimore AA for possible branches.

COFC indicates that in Connecticut, Delaware, Virginia, and New Jersey, the full-scope AAs upon which CONA's evaluation was based, the bank had only one branch in each AA. As such, COFC asserts that branch distribution in those AAs is meaningless.

With regard to the dismissal of 490 assistant branch managers in April 2012, CONA represents that it developed a more efficient local distribution operating structure to help ensure that CONA has a sustainable branch network. The change in structure came only after consideration of a number of factors, including a review of duplication of efforts among associates and staffing models at other banks. CONA states that assistant branch manager positions were eliminated from a number of bank branches, which were selected based on several factors, such as branch size, number of transactions, customer usage patterns, and overall branch complexity. CONA represents that as part of the local distribution operation structure, it has created a new role of “relationship banker” that will ensure that branches are appropriately staffed. CONA is in the process of hiring approximately 200 associates for this new role. CONA further represents that a decision by CONA to close a branch is in no way tied to the presence, or lack thereof, of an assistant branch manager.

With regard to the cafés, CONA represents that, in 2013, it intends to install deposit-taking ATMs at the cafés located in California, Delaware, Hawaii, Illinois, Minnesota, New York and Pennsylvania, which will provide deposit-taking services to current ING Bank customers. Also, under the CRA regulation, the placement of the new deposit-taking ATMS will require CONA to delineate a new CRA assessment area in those areas (unless the café is already located in an existing CONA assessment area). *See* 12 C.F.R. § 25.41(c). CONA represents that it intends to delineate the counties in which the cafés are located as its new AAs. As with CONA’s other AAs, the OCC will evaluate the bank’s record of helping to meet the credit needs of its community in those new AAs.

D. Compliance with Fair Lending Laws

Public comments have alleged that Capital One engaged in discriminatory practices, particularly in relation to home mortgage lending.

1. CRA PE Finding

The results of the OCC’s evaluation of a bank’s CRA performance may be adversely affected by evidence of discriminatory or other illegal credit practices. The OCC may lower an institution’s overall CRA rating if evidence of discrimination or illegal credit practices by the bank is found in any geography, or in any assessment area by any affiliate whose loans were considered as part of the bank’s lending performance.

The CONA PE indicated that CONA’s 2011 CRA rating was not impacted by fair lending issues noted at the former Chevy Chase Bank prior to its acquisition by COFC. The underlying issues were initially self-identified by COFC fair lending bank associates shortly after Chevy Chase Bank was acquired by COFC but before the merger into CONA in 2009. Based on an analysis performed as part of the CRA evaluation, it was determined that CONA took appropriate actions to address the identified issues.

The ING Bank PE noted no evidence of discriminatory or other illegal credit practices inconsistent with helping to meet community credit needs.

2. Concerns and Representations

After the CRA evaluation period, but prior to the issuance of the CONA PE, a fair lending-related complaint was filed by the National Community Reinvestment Coalition (“NCRC”) against CONA. Specifically, NCRC alleged that Capital One required a minimum FICO credit score for FHA loans of 620, rather than the minimum threshold of 580 established by the FHA for such loans, and that Capital One’s policy violated the Fair Housing Act. The complaint remains under investigation by the Department of Housing and Urban Development (“HUD”) and the OCC will continue to monitor its status and potential impact to CONA. CONA represents that it began accepting FHA-guaranteed mortgage loan applications from borrowers with FICO scores as low as 580 earlier this year. CONA states that it considers applicants with 580 FICO scores, with appropriate underwriting safeguards, and holds these loans in portfolio.

NCRC also filed two additional complaints against CONA in September 2011. One complaint was filed with HUD; the other was filed with the District of Columbia Office of Human Rights (“OHR”). Both complaints were filed on behalf of a resident of the District and similarly situated borrowers. The complaints alleged that CONA discriminated on the basis of race and source of income in its loan modification and loss mitigation policies and practices. In particular, the complainant was not offered a Home Affordable Mortgage Program (“HAMP”) modification and CONA did not participate in the District’s Hardest Hit Fund (“HHF”). CONA is awaiting a recommendation by the OHR in this case. CONA represents, however, that it now participates in the District HHF, as well as similar programs in eight states and is enrolling in several more programs in other areas. CONA also asserts that between late 2009 and December 31, 2010, it approved 12 applications for loan modifications in the District of Columbia. To the extent race information was available on the applicants, the approval rates among African American and Hispanic applicants were 14.3 percent and 12.5 percent, respectively, while the approval rate for White applicants was only 11.1 percent.

OCC examiners have also reviewed the FRB’s conclusions from a HMDA analysis that was performed in connection with FRB approval of COFC’s acquisition of ING Bank. The FRB investigated commenters’ claims that Capital One (and ING Bank) denied the home mortgage loan applications of minority borrowers more frequently than those of nonminority applicants in certain MSAs.¹⁷ With regard to CONA, the FRB found that “[t]he HMDA 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

¹⁷ Denial and pricing disparities are of concern to the OCC and are evaluated in fair lending examinations. However, HMDA data alone is not adequate to provide a basis for concluding that a bank is engaged in lending discrimination or to indicate whether its level of lending is sufficient. HMDA data does not take into consideration borrower creditworthiness, housing prices, collateral values, credit scores, and other factors relevant to each credit decision, nor does it fully reflect the range of the bank’s lending activities or efforts.

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.”¹⁸ COFC represented earlier this year that it has implemented a comprehensive fair lending compliance risk management program with various measures and safeguards to help ensure compliance with fair lending, as well as other consumer compliance laws and regulations.

Some commenters alleged that CONA’s failure to participate in certain loan modification programs, such as the HHF program, has had a discriminatory impact on minorities and LMI borrowers. CONA participates in the HAMP, and also offers a proprietary mortgage modification program similar to HAMP. According to CONA, more borrowers are eligible for mortgage modifications under CONA’s proprietary program than under HAMP due to different underwriting and other criteria, including a higher balance limit. CONA is obligated to participate in the HHF program in connection with loans that it services on behalf of the Government-Sponsored Enterprises and has also enrolled in eight state-level HHF programs as mentioned above.

E. Compliance with Other Consumer Laws

1. Debt Collection Comments

Several commenters have alleged that CONA has engaged in unlawful and abusive debt collection practices. Their allegations include that CONA (i) does not properly investigate identity theft claims; (ii) sells disputed debts to collection agencies; (iii) pursues exempt funds as post judgment remedies; (iv) intentionally delays pursuing collections to increase finance charges, fees, and interest; (v) pursues debts that have either been discharged in bankruptcy or previously pursued and dismissed with prejudice; and (vi) engages third-party debt collectors who do not properly identify themselves.

2. Representations

In response to commenters’ concerns about identity theft investigations, CONA states that it has brought its fraud dispute process in-house and, thus, represents that it can ensure that all identity theft claims are thoroughly investigated.

¹⁸ FRB Capital One/ING Order at 22-23. The FRB Order also noted that, “[i]n 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.” *Id.* at 23. The FRB Order also noted that 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. *Id.*

CONA further represents that it does not sell debts that are the subject of a valid fraud or other dispute. Rather, CONA investigates claims of fraud and provides source documentation validating the debt at the end of its investigation. If an investigation concludes that a debt is not valid, CONA neither sells the debt nor pursues further collection efforts. If the debt is valid, however, CONA may continue with debt collection efforts, and may consider selling the asset.

CONA represents that it complies with all applicable federal and state laws governing exempt consumer assets and benefit payments. CONA notes, however, that judgment creditors are unable to know whether specific bank accounts at other institutions are covered by an exemption before filing garnishment orders or attaching the accounts. The depository institution holding such funds has an affirmative legal obligation to protect those funds. Even so, CONA contends that it strives to make impacted customers whole when protected funds are taken wrongfully. As an example, CONA states that in 2011, when one of the commenters brought to CONA's attention that a small number of New York depositors had been subject to an inadvertent processing error related to the processing of garnishment orders served on CONA, CONA promptly took corrective steps to provide remediation to the affected depositors. CONA also implemented new processes and controls to ensure that the error would not be repeated.

CONA states that it is aware of the impact on customers of its efforts to lawfully collect debt, and is particularly mindful of the impact of lawsuits. By the time CONA files a suit against a customer, CONA represents that it has undertaken substantial efforts, often at a loss, to resolve the matter without litigation. Most lawsuits are filed within the first year post charge-off, although individual situations may vary. CONA represents that it has adopted practices, including the following, to protect customers: CONA (i) will not place an account with a law firm if customers are making regular payments; (ii) no longer assesses post charge-off interest except for the interest that is awarded by a court; (iii) will only sue to collect a debt if permitted under the applicable statute of limitation; (iv) will cease litigation if it learns that a customer has experienced a significant hardship and is unlikely to recover financially; (v) explains the consequences of non-payment to customers prior to sending their accounts to a law firm; (vi) has adopted a well-managed process for generating affidavits in support of lawsuits that it files and also upon the request of its debt buyers; (vii) expressly prohibits any threat of arrest or pursuit of arrest related to a debtor's failure to pay or appear in court; and (viii) prohibits seizing personal property as a post-judgment remedy.

CONA represents that it has adopted controls to ensure that no collection efforts are made on debts that have been previously pursued and dismissed with prejudice. Further, for accounts that are sold, CONA's standard asset sale agreement requires buyers to conduct a review to identify accounts in bankruptcy within 30 days after the sale to ensure appropriate customer treatment post-sale. The same agreement also requires buyers to comply with all applicable consumer protection laws.

CONA utilizes the services of third-party debt collection agencies in some cases. Once an account is assigned to such a third-party for servicing, CONA represents that the agency must notify customers that it is responsible for servicing the account and provide contact information,

including a telephone number. All phone calls to that telephone number must be answered directly by the third-party debt collection agency in the name of the third-party debt collection agency. In addition, CONA represents that third-party collection agencies must identify themselves immediately by the true and correct name of the third-party agency. CONA further represents that it monitors phone calls to ensure compliance with this policy.

F. Other Matters

Capital One's CRA Commitment

At the public meeting convened by the Board of Governors of the Federal Reserve System in Washington, D.C. on September 20, 2011, COFC announced a ten-year public commitment of \$180 billion in new community development lending and investments, as well as increased lending and services to LMI borrowers.¹⁹ Some of the comment letters questioned the sincerity of this commitment, indicating that it “reflects little more than business as usual.”

It is noted that this is a voluntary commitment made by COFC. The CRA does not require banks to enter into commitments or agreements with any organization.²⁰ Moreover, the CRA does not require a bank to engage in any particular type of lending, investment, or service. CRA performance for large banks is based on an overall assessment under the lending, investment, and service tests. *See* 12 C.F.R. §§ 25.21 to 25.24.

COFC has represented that this commitment will build on Capital One's record of CRA activity and is intended to be a comprehensive approach that includes housing, economic development, and support for individual consumers, families, and nonprofits. The commitment is distributed throughout Capital One's major lines of business, including (i) LMI home mortgage loans and home equity lending (\$28.5 billion); (ii) small business and small farm lending (\$22.5 billion); (iii) affordable housing development and commercial revitalization (\$25 billion); (iv) LMI consumer lending, including automobile loans, credit cards, and other consumer loans (\$104 billion); and (v) grants to support community services including housing, economic development, and financial education (\$450 million). COFC represents that as the economy improves, this commitment will be reevaluated and updated, as appropriate.

Capital One represents that it has begun to implement the commitment. The full text of the commitment is, and annual reports of Capital One's performance will be, available on its corporate website.²¹

¹⁹ Any pledges, commitments, or representations made by a bank to its community are not enforceable by the OCC.

²⁰ Question and Answer § __.29(b) – 2, 75 Fed. Reg. 11,642, 11,666 (Mar. 11, 2010).

²¹ Capital One's Public Community Commitment is available at http://www.capitalone.com/about/?linkid=WWW_1009_Z_A0B2086C4CE4DCA9E4CAAF8F45G4CD9H7EFA17DE0_GBLFO_F1_01_T_ABT.

G. Request for an Extension of the Comment Period and for Public Hearings

Several of the comment letters received by the OCC requested that the public comment period be extended and that the OCC conduct public hearings in connection with this application. Regarding the request that the public comment period be extended, the general standard that the OCC applies to determine whether to extend a public comment period is set forth in 12 C.F.R. § 5.10, which provides:

The OCC may extend the comment period if (i) the applicant fails to file all required publicly available information on a timely basis to permit review by interested parties or makes a request for confidential treatment not granted by the OCC that delays the public availability of that information; (ii) any person requesting an extension of time satisfactorily demonstrates to the OCC that additional time is necessary to develop factual information that the OCC determines is necessary to consider the application; or (iii) the OCC determines that other extenuating circumstances exist.

As to the request for public hearings, the general standard the OCC applies to determine whether to hold public hearings is found at 12 C.F.R. § 5.11(b), which provides:

The OCC generally grants a hearing request only if the OCC determines that written submissions would be insufficient or that a hearing would otherwise benefit the decision-making process. The OCC also may order a hearing if it concludes that a hearing would be in the public interest.

After careful consideration, the OCC determined not to extend the public comment period or to hold public hearings. None of the standards set forth in 12 C.F.R. § 5.10 or 5.11(b) were applicable to this application. The OCC received extensive and detailed comments and is not aware of any reason why the written comments that have been submitted would be insufficient or why holding a public hearing would be in the public interest.

H. Summary

Accordingly, upon review of the records of the banks involved in the transaction, the application and submitted materials, the public comments and responses, representations made by the Applicant, and supervisory materials and other information available to the OCC as a result of its regulatory responsibilities, the OCC has determined that CONA's record of helping to meet the credit needs of its communities is consistent with approval of the application. Comprehensive oversight will continue with respect to the merged entity.²²

²² On July 21, 2011, the Consumer Financial Protection Bureau assumed exclusive examination and primary enforcement authority over CONA for Federal consumer compliance law issues. The OCC remains the prudential regulator of the bank. 12 U.S.C. § 5515.

VI. Conditions

These approvals are subject to the following conditions:

1. CONA shall install deposit-taking ATMs in each café by the end of 2013.
2. CONA shall revise its CRA Plan to include the cafés, and, as part of the revised plan, submit to the OCC within 120 days of the installation of each of the deposit-taking ATMs the proposed assessment area around the café. CONA shall not adopt the proposed assessment area until it has received supervisory non-objection from the OCC.
3. As requested by the OCC, CONA shall provide any information, whether inside or outside delineated assessment areas, that the OCC determines is necessary to assess CONA's compliance with the Community Reinvestment Act. Such information may include, but is not limited to, deposits and loans generated through CONA's expanded internet platform.
4. CONA shall discontinue the sale of any nonbranded promotional merchandise within two (2) years after consummation of the merger, and shall thereafter conduct any sales of promotional items in a manner consistent with OCC Interpretive Letter No. 690.
5. Within two (2) years after consummation of the merger, CONA either shall discontinue the sale of all food and beverages at the cafés or shall conform the provision of the food and beverage service to activities permissible for a national bank. CONA shall inform the OCC of its plans within 120 days after the merger and, if it proposes to conform the activities, to submit a plan describing how it will do so. CONA shall not implement the plan unless it receives supervisory non-objection from the OCC.
6. CONA and all relevant subsidiaries of CONA shall cease purchasing any additional brokerage-related shares within six months of consummation of the merger and shall divest of any remaining existing holdings of brokerage-related shares within two years of consummation of the merger. Within 120 days after consummation of the merger, CONA shall inform the OCC of its plans for the brokerage-related shares activity and the relevant subsidiaries.

These conditions of approval are conditions "imposed in writing by a Federal banking agency in connection with any action on any application, notice or other request" within the meaning of 12 U.S.C. § 1818. As such, the conditions are enforceable under 12 U.S.C. § 1818.

VII. Conclusion

These approvals are granted based on our understanding that other applicable regulatory approvals, non-objections or waivers with respect to the proposed transactions will have been received prior to the transactions.

If the transactions have not been consummated within twelve months from the approval date, the approval will automatically terminate unless the OCC grants an extension of time.

This approval, and the activities and communications by OCC employees in connection with the filing, do not constitute a contract, express or implied, or any other obligation binding upon the OCC, the United States, any agency or entity of the United States, or any officer or employee of the United States, and do not affect the ability of the OCC to exercise its supervisory, regulatory, and examination authorities under applicable law and regulations. The OCC may modify, suspend or rescind this decision if a material change in the information on which the OCC relied occurs prior to the date of the transaction to which this decision pertains. The foregoing may not be waived or modified by any employee or agent of the OCC or the United States.

If you have any questions regarding this letter, please contact Senior Licensing Analyst Thomas B. Smith at 212-790-4063 or by e-mail at thomas.smith@occ.treas.gov. Please include the application control number on any correspondence related to this filing.

Sincerely,

Stephen A. Lybarger
Deputy Comptroller, Licensing