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August 16, 2011

By Federal Express and Electronic Submission

Secretary Jennifer J. Johnson
Board of Governors of the Federal Reserve System
20th Street & Constitution Avenue, N.W.
Washington, DC 20551

Mr. Adam M. Drimer
Assistant Vice President
Federal Reserve Bank of Richmond
701 E. Byrd Street
Richmond, VA 23261-4528

RE: The Notice and Application filed by Capital One Financial Corporation ("Capital One") to acquire ING Bank, FSB and its subsidiaries Sharebuilder Advisors, LLC and ING Direct Investing, Inc. ("ING Direct") presently pending before the Federal Reserve Bank of Richmond

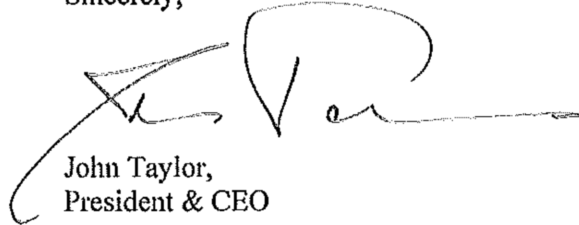
Dear Ms. Johnson and Mr. Drimer:

Attached is NCRC's formal request for an extension of the comment period, public meetings, and a formal hearing regarding Capital One's proposal to acquire ING Direct. This formal request was previously alluded to in our July 25th letter. That letter was only meant to serve as notice of NCRC's intention to file a protest, not as the protest itself. Therefore, we are concerned by the letter that we received from the Federal Reserve and, as of today, the response from Capital One; each appears to treat our initial letter as the formal protest. To clarify the matter entirely, it was not. The appropriate basis for the Federal Reserve to determine the propriety of our request is the attached document.

NCRC looks forward to replying to Capital One's response to our notice, but—more importantly, giving Capital One the opportunity to respond to our actual protest. We also look forward to being able to reply to their response.

Again, NCRC urges the Federal Reserve to extend the comment-period deadline in order to give both parties adequate time to address the issues presented in these documents.

Sincerely,



John Taylor,
President & CEO

Attachment

cc: Kathleen M. O'Day, Esq., Board of Governors
Lisa M. DeFerrari, Board of Governors
Andres L. Navarette, Esq., Capital One

August 16, 2011

ATTN: Secretary Jennifer J. Johnson
Board of Governors of the Federal Reserve System ("Board")
20th Street & Constitution Avenue, N.W.
Washington, DC 20551

PROTESTANT: National Community Reinvestment Coalition ("NCRC")
727 15th Street, N.W., Suite 900
Washington, D.C. 20005-6027
Contact: John Taylor, President and CEO

RE: The Notice and Application filed by Capital One Financial Corporation ("Capital One") to acquire ING Bank, FSB and its subsidiaries Sharebuilder Advisors, LLC and ING Direct Investing, Inc. ("ING Direct") presently pending before the Federal Reserve Bank of Richmond

NCRC'S REQUEST FOR A FORMAL HEARING, EXTENSION, AND PUBLIC MEETINGS

Dear Secretary Johnson,

In a July 25th letter, NCRC and its 600 members informed the Board of our protest to Capital One's proposed acquisition of ING Direct and requested a two-month extension of the comment period to allow the Board to hold public meetings in at least five cities. That request, authorized by 12 CFR §262.25(d), was based upon our knowledge that there are citizens throughout the country who wish to speak on the issue in public forums. The purpose of this second letter is to expand upon our initial request and petition for a formal hearing on Capital One's proposal.

The Board is careful in the exercise of its formal hearing authority under 12 CFR §262.3(e) and public meeting authority under 12 CFR §262.25(d).[i] Still, we believe that the factual and regulatory issues posed by Capital One's proposal, particularly in the application of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") to this acquisition, Capital One's unresolved legal disputes involving fair lending, and a number of material disputes of fact raised by the substance of Capital One's notice and application justify taking both of our requested actions.

STANDARDS OF REVIEW

Three requirements exist for the Board to grant a formal hearing on a proposed acquisition. The petitioner must: (1) identify any disputed questions of fact, (2) summarize evidence that

would be presented at a formal hearing, and (3) state why a written presentation will not suffice.[ii] If the disputed questions of fact are material, a formal hearing is mandatory.[iii]

Under 12 CFR §262.25(d), the Board also has discretion to hold public meetings on a pending application. These meetings are designed to elicit information, clarify factual issues related to the application, and give interested individuals a chance to testify. To request the exercise of this authority, a petitioner must: (1) file a timely protest; (2) identify objections to the application; and (3) provide available written evidence. To be valid, all objections "must relate to the factors that the Board is authorized to consider in acting on an application."[iv]

NCRC'S OBJECTIONS AND DISPUTED QUESTIONS OF FACT

1. Questions of fact exist about Capital One's acquisition increasing systemic risk in the economy.

Capital One's application states that none of the factors properly used to evaluate the systemic risk standard "will be impacted by the proposed transaction."[v] However, there are some serious problems with that analysis. First, by its own admission, Capital One is inventing the very test that it wants the Board to use in determining this issue.[vi] Second, NCRC believes that Capital One's proffered analysis of Dodd-Frank's systemic risk standard is both inaccurate and woefully incomplete.

a. Applying Dodd-Frank's systemic-risk standard under the circumstances presented by Capital One's proposal is an issue of first impression.

At the outset, it is important to note the context of the question being presented by Capital One's proposal to buy ING Direct. Dodd-Frank's requirement to employ a balancing test to weigh systemic risk under §604(e) went into effect July 21, 2011. This is the first time since Dodd-Frank's passage that the Board is considering a plan that would merge two systemically important institutions. Accordingly, the application of those facts to Dodd-Frank's requirement that the Board consider an acquisition's impact on the growth of systemic risk in the U.S. economy triggers a question of first impression for the Board.

That fact, by itself, highlights the need for greater transparency in the Board's deliberations. It also illuminates the benefits of a formal hearing in this case. In the past, federal agencies have traditionally granted oral arguments on matters of first impression. Those have been based on the understanding that novel questions of fact and law establish binding precedent on future regulatory action. Accordingly, a formal hearing and public meetings will set the stage for a full discussion on the novelty of the issue raised by Capital One's expansion. It will also allow the public to have its say on the growth of an institution whose failure it may be required to insure.

Congress, the Administration, and the American public intended for Dodd-Frank to signify an end to business as usual. In the wake of that mandate, the integrity of the Board's

decisionmaking depends upon rejecting the notion that it can create the systemic risk standard in the dark.

b. In asking the Board to accept its systemic-risk analysis, Capital One proposes a standard that all but eviscerates Congress' intent under Dodd–Frank.

In its application, Capital One attempts to ignore the systemic-risk standard by re-imposing the standards that existed before Dodd-Frank. There would be no reason for Congress to create the systemic-risk provision if it believed that the antitrust standard, the 10 percent national deposit cap, and the 10 percent national liabilities cap were the appropriate standards for review. On the contrary, in a case of first impression, such as the one presented here, the Board should set this new systemic-risk standard only after a sufficient comment period, a formal hearing, and public meetings have been held—the exact remedy we petition for.

Distilled to its essence, Capital One's standard implicitly holds that no bank—outside of the top four—proposing to expand would ever be subject to denial based on the systemic risk factor. For rebuttal of Capital One's point, NCRC will focus on two of the factors that the Board indicated were pertinent in determining systemic risk in Mitsubishi UFJ Financial Group, Inc.: size and interconnectedness.[vii]

The size of Capital One's acquisition is much larger than the application says.

On August 10th, Capital One formally announced its intentions to buy HSBC's $30 billion credit-card portfolio. After both deals, Capital One will have a credit-card portfolio worth $85 billion and deposits totaling more than $200 billion. Those figures make the company the fourth-largest, general-purpose, credit-card issuer in the U.S.; the third-largest, private-label, credit-card issuer; and the fifth-largest bank as ranked by deposits.

Nearly every analyst publicly speaking on the matter agrees that these two proposals are related. Capital One seeks to buy ING Direct's deposits along with ING Direct's internet bank to deploy them in consumer lending through HSBC's credit-card business. Much of that business was bought by HSBC from the notoriously predatory lender Household International. Accordingly, the Board should not consider Capital One's proposal to acquire ING Direct in isolation from its plans to buy HSBC's credit-card portfolio.

It is unclear whether a credit-card acquisition triggers an application subject to the Community Reinvestment Act ("CRA"). When HSBC bought Household, Household disposed of its savings bank before HSBC had to apply to the Board to acquire it—presumably to avoid compliance with CRA.

Even before the announcement of Capital One's purchase of HSBC, SunTrust Robinson Humphrey analyst John Stilmar stated that its credit-card portfolio would significantly boost Capital One's earnings power. He noted, however, that this purchase would be troubled because

the portfolio "is more credit challenged than [Capital One's] or other public card portfolios." Stilmar's point raises the bar for Capital One to demonstrate how those "separate" transactions are not, in fact, one much larger deal. We think a hearing would find that they both are inextricably intertwined. Because the purchase of HSBC was only announced 12 days before the end of the comment period, the Board should, at a minimum, extend the deadline to allow simultaneous comment and review of both proposals.

Once the Board accepts that Capital One's ING Direct and HSBC deals are related, problems arise with Capital One's competition analysis. In its application, Capital One states that the impact of competition will be minimal as measured by the Herfindahl-Hirschman Index (HHI). That claim, however, fails to perform any competition analysis of entity's credit-card business. Because Capital One's acquisition of ING Direct is intertwined with its acquisition of HSBC's credit-card portfolio, the credit-card markets could become significantly more concentrated. HSBC is the 6th largest credit card issuer in the world with $58.5 billion. Capital One is the 5th largest credit card issuer in the world with $68 billion in outstanding credit.

In the United States, HSBC has 2 percent of the U.S. market while Capital One has 7 percent of the U.S. market. Capital One's acquisition of HSBC will therefore result in one institution having 9 percent of the market. To compare, banking law prohibits any one bank from holding more than 10 percent of the nation's deposits. Accordingly, the combined market share of Capital One and HSBC must be carefully scrutinized for its impact on competition, price and access.

Capital One and ING Direct are far more interconnected to the American and global financial markets than the application seems to suggest.

By Capital One's own admission, "[t]he mechanism by which ... financial contagion is transmitted is the "interconnectedness" on both sides of the institution's balance sheet with other financial firms."[viii] Yet, curiously, the application then proceeds to focus solely on analyzing ING Direct's interconnectedness in the American financial market, as opposed to dedicating even a paragraph to examining the existing banking relationships of Capital One. The rationale behind that choice may be obvious. As the recipient of more than $3.5 billion in taxpayer funds in the last financial crisis, it's somewhat difficult to argue that Capital One—even pre-expansion—is not heavily interconnected in the American financial market.

Less than three years ago, the Department of Treasury deemed Capital One to be so intertwined in the American financial markets that the pending collapse of other financial institutions required a $3.55 billion injection of taxpayer dollars to buffer the bank's balance sheet. Likewise, ING Direct's corporate parent, ING Groep, was so interconnected to the global financial economy that it needed an injection of €10 billion Euros—approximately $13.5 billion

U.S. dollars[ix]—from European authorities to avoid financial failure.[x] Neither of these facts seem to support Capital One's assertion that no "interconnectedness concerns are present here."[xi]

Dodd-Frank defines systemically important financial institutions as any banking holding company with $50 billion or more in revenue. That provision alone creates a strong inference that Congress intended a broader standard for analyzing systemic risk than what Capital One proposes. NCRC believes that classification as a systemically important institution, prior acceptance of Troubled Asset Relief Program ("TARP") funds, movement into the top 5 depositories, and growth by more than 50 percent should be prima facie evidence that this expansion poses systemic risk. That evidence should create a presumption against the expansion unless clearly significant benefits to society are proven. This is where the required balancing test should come in. The test should weigh the degree of systemic risk against the relative significance of the public benefits that the expansion would create.

Again, the novelty of this issue weighs in favor of holding a formal hearing and public meetings. Simply put, if Capital One's failure to address these facts in its application, the novelty of the question presented, and the absence of a legally defined standard for consideration are not grounds for requiring the transparency that only a formal hearing and public meetings can create, what is?

c. **As a systemically important financial institution buying another systemically important institution, Capital One's proposal requires a higher level of scrutiny and a public forum.**

Board Chairman Ben Bernanke has previously stated that "[a]ny firm whose failure would pose a systemic risk must receive especially close supervisory oversight of its risk-taking, risk management, and financial condition, and be held to high capital and liquidity standards."[xii] By law, Capital One is a systemically important financial institution.[xiii] So, any analysis of the risks inherent in its proposed acquisition of ING Direct requires a greater level of scrutiny.

Though the Board rarely conducts public meetings on acquisitions, the occasions where it has share one fact in common. Each involved the expansion of a systemically important financial institution. The rationale behind allowing public forums on the growth of these particular financial institutions is obvious: "government rescues of too-big-to-fail firms can be costly to taxpayers." [xiv] In fact, just three years ago, the bailout of too-big-too-fail institutions cost the American public an estimated $19 billion.[xv] Yet, even those costs pale in comparison to the overall impact:

> "[S]ystemic risk transcends economic efficiency per se. Failure of the financial system can generate social costs in the form of widespread poverty and unemployment, which in turn can destroy lives and foster crime."[xvi]

Three years after the last financial crisis, the nation's unemployment rate still hovers at 9.1 percent.[xvii] In communities of color, the results of the economic downturn have been particularly hard hit. A recent study by the Pew Research Center shows that that median wealth for Latino households has declined by 66 percent. For African-American households, that figure is an equally alarming 53 percent.[xviii] Nearly everyone agrees that these low numbers are attributable to the recession caused by the last financial crisis. We all know that crisis was sparked by the potential failure of systemically important financial institutions. The severity of these costs and their lingering consequences led Board Governor Tarullo to state that "the regulatory structure for systemically important financial institutions should discourage ... mergers ***unless the benefits to society are clearly significant***."[xix]

NCRC believes that holding formal hearings and public meetings on the proposed growth of a systemically important institution like Capital One is not only consistent with the Board's precedents in handling acquisitions of this nature, but also aligns the treatment of this application with Chairman Bernanke's own belief in the need to hold systemically important institutions to a higher standard. Finally, scheduling a formal hearing and public meetings recognizes the public's potentially costly assumption of risk in allowing the expansion to proceed.

2. Questions of fact exist on whether Capital One's proposal identifies any specific public benefits that outweigh the increased systemic risk posed by this transaction.

Capital One's proposal to completely subsume another systemically important institution should, on its face, creates a presumption that the deal will cause a material growth of systemic risk in the economy. That fact, by itself, does not require the Board to deny the transaction. Instead, the law suggests that the burden shifts to Capital One to prove that the public benefits of this transaction outweigh the potential harm.

a. As a systemically important financial institution, Capital One not only bears the burden of showing that the public benefits from its proposal, but of also proving that those public benefits are clearly significant.

Under §225.24(a)(iii) of Regulation Y, every applicant has a duty to state the public benefits that can reasonably be expected to result from the acquisition.[xx] For systemically important institutions, that standard is even higher. According to Board Governor Tarullo, "the regulatory structure...should discourage systemically consequential growth ... unless the benefits to society are ***clearly significant***."[xxi] By law, Capital One is already defined as a systemically important financial institution. Therefore, the correct standard for weighing this application is not whether it identifies any public benefits at all, but whether Capital One has met its burden of proving that the public benefits it identifies are clearly significant.

Capital One claims in its notice that the proposed "[a]cquisition satisfies all of the ... public benefits ... that the Board must review."[xxii] Specifically, the bank notes that it fulfilled that duty

in its introductory statement.[xxiii] Yet, the entire notice devotes a mere four sentences—amounting to less than 100 words—to meeting that task.[xxiv] By Capital One's own admission, the direct public advantages of granting this acquisition are:

1. "Customers [will have] greater convenience through access to a broader range of financial products and services;" and
2. "Customers will benefit from gaining access to a larger network of branches and ATMs in the United States."[xxv]

b. More Products + More ATMs ≠ Clearly Significant Benefits to Society.

NCRC submits that Capital One's math on public benefits does not add up. At best, Capital One's token assertions of public benefit are vague and superficial. The notice does not even bother to name a single product, program, or activity that it relies upon or—better yet—explain how those unidentified products, programs, or activities actually enhance Capital One's ability to benefit the public. At worst, Capital One's proffer of such trivial benefits as a trump card to the systemic risk posed by this transaction makes a mockery of the seriousness of the financial regulatory process. This is especially true in light of the reality that this nation's economy is still fighting to recover from the toll of the last financial crisis.

More products and more ATMs are not "clearly significant" benefits to society. Instead, they amount to little more than the natural consequences of merging any two previously distinct financial institutions. Any assertion to the contrary by Capital One is nonsensical.

c. Capital One's proposal does not tip the scale in the public's favor.

The private benefits of this expansion for Capital One are clear: more customers and more earnings. But even these obvious benefits pale in comparison to the largest benefit it stands to accrue:

> *the ability to maximize its private profits by increasing its size to a level where the market shifts the risk of its failures to the American public.*

By swallowing another systemically important financial institution whole and expanding by more than two-thirds, Capital One proposes to position itself right behind the four largest depository institutions in the United States—Bank of America, Wells Fargo, JP Morgan Chase, and Citigroup—to become fifth in a list of entities the financial market deems "too-big-to-fail." The Board's own research shows that the private benefits to Capital One and its shareholders are more than significant:

> "The benefits of [too-big-to-fail ("TBTF")] may be captured in a number of ways. These include gaining favor with uninsured bank creditors and other market participants, operating with lower regulatory costs, and increasing the chances of receiving regulatory forbearance. Access to the federal government's safety net allows TBTF institutions to

operate with less capital and a lower funding cost relative to other institutions. To the extent that the public believes that the government would protect the TBTF banking organizations, their uninsured creditors do not charge as high a price for the use of their funds as they would in the absence of this perception."[xxvi]

Ultimately, the Board's balancing test for approving this proposal does not hinge on how much a private entity stands to gain as a result of the acquisition. Instead, the Board's decision must find that the transaction is in the public's interest.[xxvii] Based on the scant information contained in the proposal, Capital One has failed to establish that the scale is tipped in the public's favor. Indeed, public meetings and a formal hearing are arguably the *only* way in which the Board can test the mettle of the proposal's balancing of risks, public benefit, and forward CRA commitments.

d. The best way to gauge if clearly significant public benefits exist is to require Capital One to present those benefits to the public in a formal hearing and public meetings.

By granting NCRC's request to hold a formal hearing and public meetings on this transaction, the Board's decisionmaking will be enhanced. What better way is there to decide if the value of this proposal's specific public benefits rise to the level of being "clearly significant" than hearing from the very people that those benefits are designed to reach—the general public? This evidence is not only the best source of information, but also allows Capital One to provide more specific details on its plan that could, in turn, justify the Board's approval of its application. On the other hand, refusing to question Capital One in a public hearing might signal the Board's return to its pre-crisis treatment of risky institutions a mere two years after Capital One repaid its TARP loans.

3. Questions of fact remain about Capital One's ability to adequately meet the needs of the communities it serves.

In its application, Capital One says that it "has a proven record of meeting the needs of the communities it serves."[xxviii] NCRC, however, strongly disputes that claim for the following reasons:

a. Both of Capital One's CRA performance evaluations are more than four-years old. The most recent exam results will be released shortly.

Capital One claims its performance evaluations under the Community Reinvestment Act ("CRA") prove that it meets the community's needs.[xxix] It is true that the Board considers "an institution's most recent CRA performance evaluation … a particularly important consideration in the applications process." [xxx] Capital One states the fact that both of its cited exams resulted in outstanding and satisfactory scores and should weigh heavily in its favor. We believe two other critical facts cast doubt on Capital One's claim that either evaluation should be used as a measure of the institution's present or future performance:

(1) The bank is relying upon exams that are more than four-years old, occurring in either 2005 or 2007; and

(2) The institution's most recent CRA evaluation results will be released shortly.

According to information from the Office of the Comptroller of the Currency, Capital One's two most recent CRA performance results are scheduled for release shortly after the Board's current order ends public comments. If those results truly are "a particularly important consideration in the application process," the Board's decision to deprive itself and the public of the chance to review the latest CRA exam findings just does not make sense. Rather than basing an opinion on the outdated data supplied by Capital One, an extension of the public comment period gives everyone access to the most recent and, therefore, likely more accurate information. To be clear, lots of things can change in four to six years. As the rest of this section will show, we believe things have since changed for Capital One.

b. Newer changes to Capital One's mortgage lending policies single out racial minorities and LMI communities for unfair treatment.

As part of this proposal, Capital One stands to inherit $40 billion worth of residential mortgages from ING Direct.[xxxi] That figure accounts for nearly 50 percent of the assets at stake in the ING Direct transaction. Accordingly, Capital One's handling of mortgage lending is a critical component of the Board's analysis of whether this acquisition will meet the needs of the communities it plans to serve. NCRC asserts that there are critical facts about Capital One's mortgage policies that should raise flags about adding to the bank's portfolio.

There is evidence of discriminatory treatment of minorities in FHA-insured lending.

In 2010, Capital One modified its FHA mortgage lending policy to exclude all borrowers with credit scores below 620. FHA guidelines, however, clearly state that its mortgage insurance program is available for borrowers with credit scores as low as 580. Capital One's artificial increase of the credit floor on FHA-insured mortgages has a strong and disparate impact on people of color.

"[A]ll lending institutions are obligated to ensure that their lending practices are based on criteria that ensure … equal access to credit by creditworthy applicants regardless of their race or ethnicity."[xxxii] Currently, Capital One's willful refusal to issue FHA mortgages to all legally eligible applicants puts the organization, rather than the FHA, in the position of picking and choosing which creditworthy individuals gain access to government-insured credit. The law does not allow Capital One to make that choice.[xxxiii] FHA has determined that applicants with credit scores between 580 and 619 are creditworthy for purposes of issuing FHA-insured mortgages. NCRC's evidence, if granted a formal hearing and public meetings, will prove that borrowers within this credit range are far more likely to be people of color. Accordingly, the

absence of any legitimate business excuse indicates that Capital One is engaging in a practice that violates federal fair lending laws.

At a formal hearing and in public meetings, NCRC is prepared to provide data showing the correlation between the availability of loans for credit scores between 580 and 620 and the opportunity for African-Americans and Latinos to realize homeownership. That data reveals a statistically sharp decrease in loan availability for those same communities when Capital One's policy of raising the credit floor is layered on top of the FHA's actual guidelines. In late 2010, NCRC filed a complaint with the Department of Housing and Urban Development after efforts to get Capital One to voluntarily conform its policy to the law faltered. That complaint remains an open and active investigation by HUD.

There is evidence of discriminatory treatment in the Hardest Hit Initiative.

In February 2010, the Department of the Treasury launched the Hardest Hit Fund ("HHF"), a program authorized by §109 of the Emergency Economic Stabilization Act.[xxxiv] The program's purpose is to empower state housing finance agencies ("HFAs") to prevent foreclosures and stabilize housing markets wherever housing prices have declined by more than 20 percent or the unemployment rate equals or exceeds the national average. Shortly after the program's enactment, both Freddie Mac and Fannie Mae issued guidance to all of its servicers mandating their participation. Thus, Freddie Mac's guidance provides that:

> "Effective immediately, for Freddie Mac-owned or guaranteed Mortgages, Servicers must respond to HFA requests and accept funds provided on behalf of the Borrower under the HFAs' mortgage assistance programs....Servicers must have procedures and specific points of contact in place to be able to respond to the HFA (or its designated third-party provider) requests and notifications with respect to Borrowers receiving assistance under the HHF."[xxxv]

A servicer's refusal to participate in the Hardest Hit Initiative is subject to state fair housing laws that prohibit discrimination based on source of income.

Oregon and the District of Columbia are two of four jurisdictions that recognize source of income as a protected class and participate in the Hardest Hit Fund program. Yet, despite mandated participation, Capital One has failed to honor its obligation in either state. That failure led the District of Columbia Housing Finance Agency to file a Director's Inquiry with the District's Office of Human Rights to investigate Capital One's nonparticipation as a violation of the District's fair housing laws. Currently, the investigation remains open and to date Capital One has failed to cure its violation.

Capital One's choice to defy Fannie Mae and Freddie Mac's mandates has discriminatory implications that go beyond impacting low and moderate-income communities alone. The D.C. Housing Finance Agency's quarterly report to the Treasury Department reveals that, of the 36

homeowners approved for the program, 35 were African-American and one was Latino. Accordingly, a strong inference exists that Capital One's refusal singles out racial minorities for discriminatory treatment. The link between source of income and race discrimination is not new. As John Trasviña, Assistant Secretary for Fair Housing and Equal Opportunity at HUD, points out, "source-of-income discrimination is very often just a subterfuge and a pretext for race discrimination...."[xxxvi]

Compliance with the law is not just a factor for consideration in the Board's analysis; it is a prerequisite to every application's approval. NCRC believes that it would be a miscarriage of justice to allow Capital One to expand its mortgage portfolio by $40 billion without first fully considering the discriminatory effect of its current practices. A formal hearing is needed to resolve all concerns related to Capital One's FHA lending policies and the bank's failure to participate in the Hardest Hit Initiative. At that formal hearing and at public meetings, NCRC and its members are prepared to show the existence of Capital One's discriminatory policy and to prove the severity of its effects. Before the Board decides if Capital One's proposal to expand will serve the needs of the community, it should take the time to hear from those who have learned that Capital One's policies make it clear that it has no intention of serving them at all.

c. More recent data from 2009 reveal that Capital One and ING Direct's performance has declined in serving communities of color and low to moderate-income communities.

Regulation C allows the Board to use HMDA data to determine if a financial institution is serving the needs of their communities by identifying possible patterns of discriminatory lending.[xxxvii] If granted a formal hearing, NCRC will provide evidence that Capital One has failed to meet the credit needs of the community by disproportionately denying loans to African-American, Latino, and low and moderate-income borrowers. Unlike the old data from 2005 and 2007 that Capital One urges the Board to consider, NCRC's evidence is based upon the bank's actions in 2009. For example, Capital One and ING Direct dramatically underperformed in loans to Hispanics of all income strata in New Orleans, Baltimore, Wilmington, Chicago, Los Angeles, Phoenix, San Francisco, Boston, and Atlanta.

Perhaps the best example of the troubling lending patterns shown by 2009 HMDA data takes place in Capital One's very own backyard. Capital One is not only based in the Washington, D.C. metropolitan area, but it also controls the largest market share of banking activity. Yet, NCRC's analysis of 2009 HMDA data shows that in Washington, DC:

- African-American borrowers were 4 times more likely to be denied a home loan by Capital One than White borrowers;
- Latino applicants were more than 3.5 times more likely to be denied a home loan by Capital One than White borrowers;

- Only 9.5 percent of Capital One prime loans were issued to African-Americans, compared to 15.7 percent of loans by all lenders, as a group; and
- Only 19.5 percent of Capital One prime loans were issued to borrowers in minority neighborhoods, compared to 22.5 percent of loans by all lenders.[xxxviii]

According to the nation's most recent census, African-Americans make up 25.8 percent of the population in the Washington, DC metropolitan area and Latinos make up another 13.8 percent. Therefore, the lending disparities made apparent by 2009 HMDA data suggest that Capital One is already failing to meet the needs of nearly 40 percent of the community located in its own backyard.[xxxix]

d. Capital One's credit-card practices raise serious doubts about its commitment to consumers.

Currently, Capital One is the fifth largest provider of credit cards in the world. The bank's credit card practices clearly represent a primary mechanism for gauging the institution's commitment to meeting community and consumer needs. Yet, even a preliminary glimpse into Capital One's credit card practices reveals long-standing problems with predatory practices.

Class action lawsuits and other consumer complaints lodged against Capital One trigger concerns about the institution's ability to serve customers

Two of the best ways the Board can determine whether Capital One is meeting consumer needs are to hear directly from its customers on the issue and to provide the new Consumer Financial Protection Bureau ("CFPB"), which only recently took over responsibility for enforcing credit card laws, the opportunity to weigh in at a formal hearing or public meetings. Hearing from these sources is especially important given that data on Capital One's credit card terms and conditions are not publicly available.

At a public hearing, Capital One customers will likely raise many of the same allegations leveled against the institution in recent years. Several class-action lawsuits and allegations of consumer abuse —including the use of false, misleading, and deceptive statements about its credit cards, the targeting of consumers for subprime programs, and the misrepresentation of interest rates and fees—all raise serious doubts about Capital One's commitment to meeting the community's needs.

In addition, though the CFPB only opened its doors this last month—July 21, 2011—the new agency has already begun to exercise its consumer protection authority by collecting and analyzing consumer complaints. In fact, the CFPB's first focus would appear to be on credit-card complaints and concerns. This new agency should be given the opportunity to weigh in on concerns about Capital One's past consumer abuses and the Board should determine if that pattern continues.

CONCLUSION

The Board should grant NCRC's request to extend the comment period to hold formal hearings and public meetings on Capital One's proposed acquisition of ING Direct for three reasons:

(1) In this request, NCRC has raised objections and disputed several questions of fact made by Capital One's acquisition notice and application;

(2) These objections and disputes of fact are material since they touch upon three of the factors that the law requires the Board to consider in deciding whether the application should be approved; and

(3) A written presentation of these issues will not suffice because:

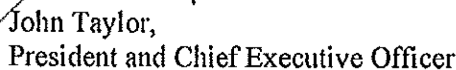
- The required systemic risk analysis is a matter of first impression for the Board and there is a heightened need for transparency in the decisionmaking process to ensure the public, as the ultimate insurers of systemic risk, that the mandates of Dodd-Frank are being fully carried out;

- Evidence in the form of first-hand testimony by the public is the best source of information for the Board to gauge the significance of the public benefits that Capital One has identified; and

- Evidence in the form of testimony by the community is also the best source of information for deciding if both Capital One and ING Direct have track records of convenience and meeting the needs of the communities that they serve.

Accordingly, NCRC respectfully requests that the Board honor our timely request by exercising your authority under 12 CFR §§262.3(d) and 262.25(e) to extend the public comment period to arrange a formal hearing and public meetings on this acquisition.

Sincerely,



John Taylor,
President and Chief Executive Officer

CC:

Federal Reserve Bank of Richmond

[i] We recognize that the Board has, in the past, exercised its discretionary authority under 12 CFR §262.25(d) to conduct public meetings on proposed mergers and acquisitions. The most recent of these occurred in 2008 when the Board held meetings in California on the merger of Bank of America and Countrywide.
[ii] 12 CFR §262.25(d).
[iii] *See Independent Bankers Asso. v. Board of Governors of Federal Reserve System*, 516 F.2d 1206 (D.C. Cir. 1975).
[iv] 12 CFR §263(d)(ii).
[v] Capital One Application to Acquire ING at 26.
[vi] Id.
[vii] See 97 Fed. Res. Bull. 31 (2011).
[viii] Capital One at 29.
[ix] NCRC also notes that both ING Direct and its parent ING Greop are currently under investigation for violating US sanctions and doing business in such countries as Sudan and Syria. While we have become aware of the request by ING Direct not to be deemed to control Capital One while owning up to 9.9 percent of Capital One, we hereby oppose that request, noting for the record for example the allegations of sanctions and money laundering violations at ING Direct. ING Direct should be required to submit an application subject to public comment to control anything over 4.9 percent of Capital One, the adverse managerial and financial issues at ING Direct must be considered and made part of the record and the public comment period must be extended for these purposes.
[x] Matt Egan. "ING Direct USA Reportedly Being Shopped." *FoxBusiness.com*. Fox News, Mar. 9, 2011. Web. Aug. 11, 2011.
[xi] Capital One at 30.
[xii] Ben Bernanke. "Framework For Regulatory Reform." Council on Foreign Relations. Washington, D.C. Mar. 10, 2009. Public Address.
[xiii] Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), Section 803 et. seq.
[xiv] Ben Bernanke. "Framework For Regulatory Reform." Council on Foreign Relations. Washington, D.C. Mar. 10, 2009. Public Address.
[xv] Jon Prior. "CBO Drops Estimate of TARP Cost to $19 Billion." *HousingWire.com*. Mar. 30, 2011. Web. Aug. 11, 2011.
[xvi] Steven L. Schwarcz, *Systemic Risk*, 97 Geo. L.J. 193 (2008) at 207.
[xvii] United States. Dept. of Labor. *Economic News Release: Employment Situation Summary*. Bureau of Labor Statistics, Aug. 2011. Web. Aug. 11, 2011.
[xviii] Pew Research Center, Social & Demographic Trends, *Twenty-to-One: Wealth Gaps Rise to Record Highs Between Whites, Blacks, and Hispanics*, 2010, *available at* http://pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf (last visited Aug. 11, 2011).
[xix] James Tyson. "Tarullo Says Fed Should Oppose Mergers That Increase Risk." *Bloomberg Businessweek*. Bloomberg. Aug. 12, 2011. Web. Aug. 12. 2011.
[xx] 12 CFR §225.24.
[xxi] James Tyson. "Tarullo Says Fed Should Oppose Mergers That Increase Risk." *Bloomberg Businessweek*. Bloomberg. Aug. 12, 2011. Web. Aug. 12. 2011.
[xxii] Capital One at 4.
[xxiii] Capital One at 40.
[xxiv] Capital One at 38-39.
[xxv] *Id.*
[xxvi] Elijah Brewer, III and Julapa Jagtiani, Federal Reserve Bank of Philadelphia, *Working Paper No. 09-34: How Much Did Banks Pay to Become Too-Big-To-Fail And to Become Systemically Important?*, 2009, available at http://www.philadelphiafed.org/research-and-data/publications/working-papers/2009/wp09-34.pdf (last visited Aug. 11, 2011).
[xxvii] See, e.g., Federal Reserve Board. Order Denying Illini Corporation Application, Dec. 2002, available at http://www.federalreserve.gov/boarddocs/press/orders/2002/20021223/default.htm (last visited Aug. 11, 2011).
[xxviii] Capital One at 30.
[xxix] Capital One at 5.

[xxx] Interagency Questions and Answers regarding Community Reinvestment, 75 Federal Register 11642 at 11665 (2010) and Federal Reserve Approval of Comerica Application.
[xxxi] Helen Thomas. "ING Direct Catapults Capital One Into Big League." *Financial Times*, June 16, 2011. Web. Aug. 11, 2011.
[xxxii] Federal Reserve Board. Order Approving Comerica Application, July 2011, *available at* http://www.federalreserve.gov/newsevents/press/orders/orders20110713a1.pdf (last visited Aug. 11, 2011).
[xxxiii] While NCRC recognizes that an underwriter has discretion to write loans, we believe that the credit guidelines that HUD has promulgated under its rulemaking authority make it legally incorrect for an underwriter to adopt a uniform policy excluding an entire class of individuals within those guidelines without a legally justifiable rationale.
[xxxiv] *See* Division A of Pub. L. 110-343, 112 Stat. 3774 (2008).
[xxxv] United States. Freddie Mac. *Number 2010-25 Single-Family Seller/Servicer Guide Bulletin Subject: Servicer Requirements Related to State Housing Finance Agencies' Mortgage Assistance Programs*. Oct. 29, 2011, *available at* http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1025.pdf (last visited Aug. 11, 2011).
[xxxvi] Miriam Axel-Lute. *"Interview: Assistant Secretary for Fair Housing and Equal Opportunity John Trasvina."* Shelterforce.org, Spring 2011, *available at* http://www.shelterforce.org/article/2173/interview_assistant_secretary_for_fair_housing_and_equal_opportunity_john_t/P1/ (last visited Aug. 11, 2011).
[xxxvii] United States. Federal Financial Institutions Examination Council. *Home Mortgage Disclosure Act: Background & Purpose*. Sept. 22, 2010. Web. Aug. 11, 2011.
[xxxviii] Josh Silver."NCRC Analysis of Capital One and ING HMDA Data." Unpublished data, 2011.
[xxxix] Washington, DC is not unique. NCRC has found that a similar national pattern exists.