Final Comment

October 13, 2011

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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 Board of Governors

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STANDARD OF REVIEW

In reviewing Capital One's application to buy ING Direct, the Federal Reserve Board of Governors is required to determine whether this acquisition "can reasonably be expected to produce benefits to the public that outweigh possible adverse effects."[1] The application can only be approved by the Board when the answer is yes.[2]

The Board must balance a number of factors in reaching a decision, such as: (1) financial and managerial resources, (2) undue concentration of resources, (3) decreased or unfair competition, (4) conflicts of interest, (5) unsound banking practices, (6) the future prospects of the companies involved, (7) the companies' performance under the Community Reinvestment Act, and (8) the convenience and needs of the community to be served.[3]

Effective July 21, 2011, the Board is also required to consider another factor in its analysis: "the extent to which a proposed acquisition … would result in greater or more concentrated risks to the stability of the United States banking or financial system.''[4]

Ultimately, the Board's authority to approve Capital One's application hinges upon a finding that the bank's acquisition of ING Direct is in the public's interest.

INTRODUCTION

The Board of Governors bears primary responsibility for protecting our financial system from unwarranted increases in systemic risk. That means:

- It is the Board's duty to make sure that banks involved in acquisitions follow safe and sound practices;
- It is the Board's duty to make sure that allowing banks to expand their activities will not put the American people at significant risk for another financial crisis; and
- It is the Board's duty to make sure that any increase in systemic risk is offset by a net gain in benefits to the public.

Viewed within this framework, NCRC, our Board of Directors, and our 600 community organization members believe that the Board's duties with respect to Capital One's proposal to buy ING Direct should be very clear. **You have a duty to deny Capital One's application to acquire ING Direct.**

Throughout these proceedings, Capital One has told anyone who will listen that, somehow, allowing it to become the fifth-largest bank in the United States will decrease—rather than increase—systemic risk. That contention suggests that Capital One either: (1) is out of touch with the risks and complexities of its own business model, (2) truly does not understand the concept of systemic risk, or (3) is simply not taking the Board's approval process or the American public's concerns seriously.

Regardless of Capital One's motivation, the conclusion remains the same. The issue before the Board hinges on a national risk that can only be offset by national public benefits. The risks are substantial. The benefits offered by Capital One are not. Accordingly, the public interest is not served by the Board approving this application.

ANALYSIS

THE APPROVAL OF CAPITAL ONE'S APPLICATION WILL IMPOSE A GREATER RISK TO THE STABILITY OF THE U.S. BANKING SYSTEM.

1. Capital One's post-acquisition size supports a finding that the Board's approval would increase systemic risk in the American financial system.

As a result of this transaction, Capital One is poised to become the fifth-largest bank by deposits in the United States. Still, throughout these proceedings, Capital One has downplayed the magnitude of the bank holding company it seeks to form by acquiring ING Direct. In suggesting that its size pales in comparison to the nation's four largest institutions,[5] the bank apparently hopes to convince its regulator that the size of this deal is just **too small** to trigger any meaningful risk inquiry.

a. Precedent holds that the size of this transaction would allow Capital One to grow to a level that materially increases systemic risk.

Capital One's efforts at minimization ask the Board to ignore the obvious. Banks much smaller in size than what Capital One seeks to accomplish with this application have already been deemed to be too-big-to-fail. For example, the phrase "too-big-to-fail" first became a part of the public discourse due to the collapse of Continental Illinois Bank in 1984.[6] Both this Board and the FDIC determined that Continental's failure could cause widespread financial trouble and instability, justifying federal intervention and a $4.5 billion rescue.[7]

Compare Continental's numbers with the present application. At the time, Continental was only the nation's 7th largest bank by deposits and had approximately $40 billion in assets.[8] In this case, Capital One is asking to become the fifth largest bank by deposits with nearly $300 billion in assets. If the Board found that Continental's failure could ignite a run that would

threaten the stability of the entire American financial system, then there is no basis for asserting that—on size alone—allowing Capital One to become the fifth largest bank by deposits with nearly $300 billion in assets would not create a heightened possibility of producing the same effect. Accordingly, Capital One's claim that the size of this transaction is insignificant in terms of systemic risk lacks merit.

b. Capital One is already classified by the Board as being "too-big-too-fail."

Moreover, the truth is that Capital One—at its current size—is already a financial institution that federal regulators have identified as being too-big-to-fail. Nineteen banks were required by this Board, Federal Reserve Banks, the FDIC, and the OCC to participate in the Supervisory Capital Assessment Program. According to the Board's own report, the rationale for mandating 'stress testing' was based on the conclusion that "[t]hese 19 firms collectively hold two-thirds of the assets and more than half of the loans in the U.S. banking system, and support a very significant portion of the credit intermediation done by the banking sector."[9] Capital One was among the nineteen entities the Board selected on that basis.

"Identifying specific institutions that federal regulators currently believe may be too-big-to-fail does not present a mystery."[10] Federal regulators, including the Board, have already acknowledged that the **current size** of Capital One places it in a league of financial firms whose collapse already poses a threat to financial stability. How, then, can Capital One plausibly argue that expanding by more than two-thirds does not— on the basis of size alone—support a presumption that the approval of its application would significantly increase systemic risk?

2. If approved, Capital One's acquisition will enlarge the interconnectivity of the U.S. banking system and financial market.

Size is, admittedly, "only one factor to be considered."[11] The weighing of an acquisition's ability to increase systemic risk assigns a "greater importance" to "measures more directly related to the interconnectedness of the firm with the rest of the financial system." [12]

In its quest to buy ING Direct, Capital One has repeatedly told the Board that this "[a]cquisition …will not add any significant interconnectedness to the combined institution."[13] The problem with that claim, however, is that it directly contradicts prior representations that both Capital One and ING Direct have made to other federal regulators.

a. Capital One and ING Direct's regulatory filings expressly contradict any claims of minimal interconnectivity.

In filings with the Securities and Exchange Commission, Capital One has repeatedly stated that it is **already** a heavily interconnected bank:

> *"We have exposure to many different industries and counterparties, and we routinely execute transactions with counterparties in the financial services industry, including brokers and dealers, commercial banks, investment banks, mutual and hedge funds, and other institutional clients, resulting in significant credit concentration with respect to the financial services industry overall. As a result, defaults by, or even rumors or questions about one or more financial services institutions, or the financial services industry generally, ...could lead to losses or defaults by us…."*[14]

ING Direct's parent company, ING Groep, has been no less candid in its own confessions to the Securities and Exchange Commission regarding interconnectivity:

> *"Management believes that despite increased attention recently, systemic risk to the markets in which we operate continues to exist, and dislocations caused by the interdependency of financial market participants continues to be a potential source of material adverse changes to our business, results of operations and financial condition."*[15]

Both Capital One and ING Direct have already admitted to federal regulators that their interconnectivity to the financial markets is both significant and material. To allow Capital One to now suggest otherwise is to permit the institution to merely pick and choose when it has a duty to tell the truth. Yet, "[t]he truth is no less important to an administrative body acting in a quasi-judicial capacity than it is to a court of law."[16]

Look at the facts. Currently, ING Direct believes that its "interdependence" in the financial markets could pose "material adverse changes" to its business, operations results, and financial condition.[17] Pre-acquisition, the obligation to insure those risks is not a duty assumed by the American financial system or, more directly, American taxpayers. Instead, ING Groep's bailout in 2008 by Dutch authorities firmly establishes that the risk associated with ING Direct's interconnectivity is one that presently rests squarely on the shoulders of the European Commission.

If the Board chooses to approve this deal, the post-acquisition reality brings about a different result. The interconnectedness of ING Direct, and the resulting increase in potential systemic risk, will become a direct obligation of the American people.

These prior factual representations by Capital One and ING Direct should amount to estoppel and block Capital One from now attempting to downplay the interconnectedness of both entities. If Dodd-Frank was intended to accomplish anything, it was meant to put an end to the information disconnect between the regulators of the American financial system. The right hand must not only know what the left hand is doing, but the federal financial regulatory process must, as a whole, be so coordinated that no banking entity has the luxury of picking and choosing different versions of the truth depending upon its audience. Apparently, Capital One is counting

on its ability to conduct business as usual. NCRC, however, is counting on the Board enforcing the higher standard that Dodd-Frank was passed to ensure.

b. Capital One's regulatory filings openly contradict its statements to the Board that it does not engage in the activities that triggered the most recent financial crisis.

According to Capital One's General Counsel, "[n]either Capital One nor ING Direct engage in any of the activities that precipitated the financial crisis."[18] As proof of that assertion, the bank has repeatedly stated that it **does not** engage in derivatives or securitization activities.[19] The problem with these statements, however, is that—again—they are in direct conflict with Capital One's own filings with the Securities and Exchange Commission.

In the testimony offered by Capital One's General Counsel on September 20, 2011, it was asserted that "[n]either Capital One nor ING Direct is engaged in trading derivatives, writing credit default swaps, financial guarantees, structured products and other complex derivatives." [20] But compare that statement with Capital One's most recent 10-Q filing with the Securities and Exchange Commission:

> *"We manage our interest rate sensitivity through several techniques, which include ... entering into interest rate derivatives. Derivatives are also utilized to manage our exposure to changes in foreign exchange rates. .... We execute our derivative contracts in both the [over-the-counter] and exchange-traded derivative markets. In addition to interest rate swaps, we use a variety of other derivative instruments, including caps, floors, options, futures and forward contracts…."*[21]

Capital One filed its most recent Form 10-Q on August 5, 2011. Both Richard D. Fairbank—as Chairman of the Board, Chief Executive Officer and President of Capital One—and Chief Financial Officer Gary L. Perlin certified the truthfulness of the statements it contained.[22] Thus, to accept the veracity of General Counsel Finneran's statement on September

20, 2011 and reconcile it with the representations the bank made to the Securities and Exchange Commission, the Board must believe that Capital One's business strategy has changed in a span of 46 days. Perhaps, it is possible, but it is also highly improbable.

Capital One has also asserted that it no longer uses the asset-backed securities market as a funding source. Yet, as of August 5, 2011, it informed the Securities and Exchange Commission that:

> *"Our funding objective is to establish an appropriate maturity profile using a cost-effective mix of both short-term and long-term funds. We use a variety of funding sources, including deposits, loan securitizations, debt and equity securities, securitization borrowing facilities and FHLB advances."*[23]

> *"We also access the capital markets to meet our funding needs through loan securitization transactions and the issuance of senior and subordinated debt."*[24]

As of last year, Capital One had more than $44.3 billion in securitization debt issued by its trusts to third-party investors.[25] Within that debt, more than 80 percent of Capital One's primary source of income—its credit card portfolio—is already pledged to backstop its securitization activity. Therefore, even before this acquisition, Capital One makes up a significant portion of the entire credit card asset-backed securities market. If this acquisition is approved and Capital One is allowed to use ING Direct's deposits to buy HSBC's credit-card portfolio, the bank's role in this market will become even bigger.

Financial analysts, federal regulators, and Members of Congress have all identified credit card securities as the likely trigger for America's next financial crisis.[26] To quote one financial analyst, "mortgages were simply the first storm to make landfall; credit cards are next."[27]

Moreover, according to the FDIC, "banks involved in securities activities, subprime

credit card securities in particular, have experienced a multitude of problems, including some bank failures."[28] One-third of Capital One's credit card portfolio is already subprime. That fact is not in dispute. However, if Capital One uses ING Direct's deposits to buy HSBC's credit card portfolio, that subprime number only gets bigger.

The relationship between credit-card securities and systemic risk rests on the fact that the entire market is heavily interconnected to key nonbanking and banking financial institutions. The primary investors in credit-card securities are pension funds, insurance companies, and the existing "too-big-to-fail" banks.[29] That is the very essence of interconnectedness. And the facts demonstrate that Capital One is not only already a major player, but is also using this acquisition as a tool to allow it to take on an even larger role.

3. Capital One's business model should raise red flags about the increased risk to the financial system posed by this deal.

a. Capital One is a monoline credit-card company, not a traditional consumer bank.

Capital One has repeatedly suggested to the Federal Reserve that it is a traditional consumer bank.[30] But, by definition, a consumer bank is one whose "primary focus is accepting deposits from and making loans to individuals."[31] According to Capital One's own most recent 10-K statement, only 28 percent of the bank's revenue actually comes from its consumer banking activities.[32] Instead, 66 percent of the Capital One's revenue and 75 percent of its net income comes from a single source: credit cards.[33]

Despite these facts, Capital One continues to try to bury the truth of its monoline nature under distractions. Specifically, Capital One urges the Board to consider the fact that only a quarter of its assets are credit cards.[34] Yet, by highlighting the fact that 75 percent of its income is derived from only 25 percent of its assets, Capital One only reinforces the view that its main

business is its credit-card portfolio. If 75 percent of Capital One's assets account for only 25 percent of its earnings, it means that the bank's basic consumer and commercial banking operations are disproportionately less profitable.

Capital One's inability to successfully diversify its banking model should trigger alarm about its long-term prospects for success. When it bought Hibernia bank in 2005, Capital One told the world that it was diversifying its business to a 55 percent credit-card/45 percent consumer banking ratio.[35] A review of each of Capital One's annual financial statements since that year proves one thing. Six years and three bank purchases later, Capital One is **still** a monoline.

b. Capital One's performance during the Great Recession is inconsistent with the bank's depiction of itself as a strong financial institution.

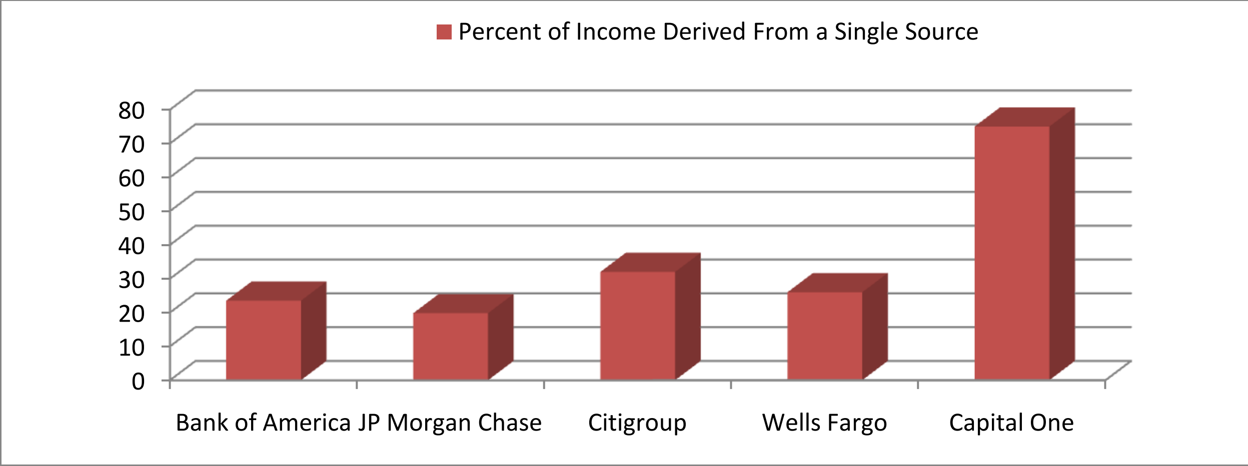
Credit-card monolines are notorious for their high rates of failure in economic downturns—Providian, Nextcard, Metris, and Advanta Bank are just a few. And, despite Capital One's claims to the contrary, the vulnerability of its business model has proven no different than other monolines during the current economic crisis—save one fact. **Capital One is already accruing the benefits of being a too-big-to-fail bank.**

Capital One suggests that, "[t]hroughout the economic downturn, Capital One delivered solid results through conservative balance sheet management and sound underwriting standards."[36] Perhaps, the bank forgot—or chooses not to remember—its actual financial record during the Great Recession. Instead of the picture painted by its depiction, the data shows that Capital One's net income for 2008 was a negative $46 million.[37] In fact, Capital One was only able to deliver a positive net income statement after it received a $3.55 billion cash infusion. That cash infusion, which served as Capital One's lifeline, came courtesy of American taxpayers from the Treasury Department's Troubled Asset Relief Program. [38]

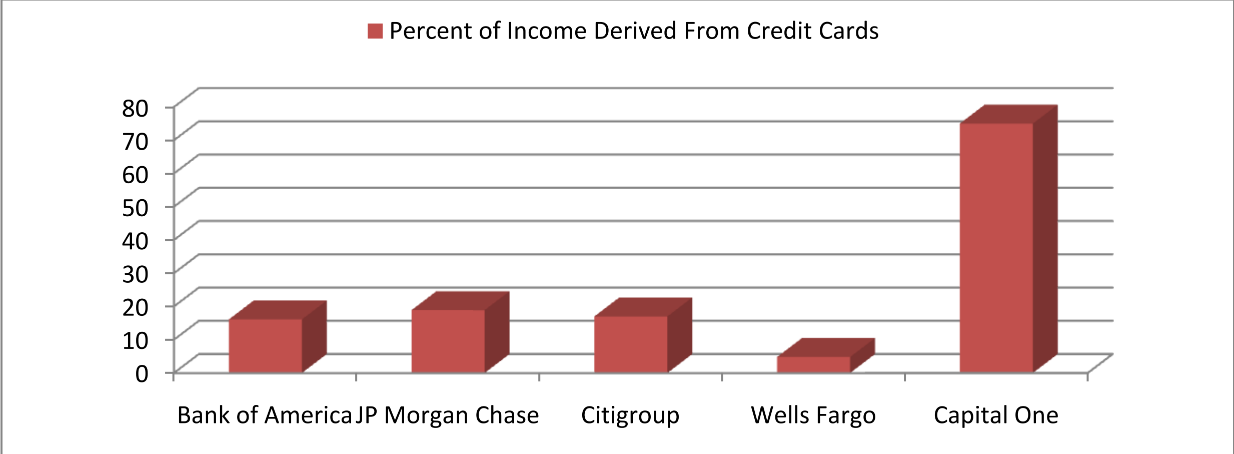
One year later, in 2009, Capital One's true profitability fared no better. A study examining the percentage of the largest banks' profits as a result of the too-big-to-fail subsidy reveals a sobering reality about the entity. More so than **any other** large banking institution, Capital One's 2009 profitability was the most dependent on government subsidy. [39] As much as 166.1 percent, or as little as 30.6 percent, of Capital One's 2009 profits can be traced solely to the market advantage it receives due to the protection of the government's backing.[40] Thus, "conservative balance sheet management and sound underwriting standards" have not been the secret to Capital One's resurgence. The real secret to Capital One's recipe for profitability in the recession is a heavy reliance on government subsidy. No wonder Capital One is now asking the Board to allow it to become even bigger. The success of Capital One's business approach depends upon increasing its ability to privatize profits by socializing its risk.

c. No other large bank is as poorly diversified as Capital One.

In addition to its high dependence on government subsidy to achieve profitability, no other bank in the top five comes anywhere close to Capital One's excessive reliance on credit cards or any other single product for that matter. The nation's four largest banks have diversified income bases. While Capital One derives 75 percent of its income from a single source, the other largest banking institutions purposely limit their income from a single-source to a range of 19 to 32 percent: [41]



Those numbers are even more pronounced when you look only at credit cards. Capital One's credit-card portfolio accounts for 75 percent of its income.[42] By comparison, the nation's four largest banks limit their income from credit cards to **less than** 19 percent: [43]



The stark contrast between Capital One's lack of diversification and the diversification of the nation's existing four largest banks suggests that Capital One's efforts to gain entry into the five largest banks category is premature. First, the bank should be required to demonstrate an ability to diversify its profit base in order to prove that it can be stable at a much larger size.

d. **Capital One's purchase of ING Direct will not help diversify the bank, but it will help expand its credit-card portfolio**

The Board has every reason to expect that Capital One will continue to reject diversification in favor of its high-risk, credit-card strategy. That expectation is justified on two grounds:

- ***Capital One's Acquisition History.*** After Capital One acquired other traditional banks, it shut down those institutions' mortgage and small business lending activities; and
- ***Capital One's Statements***. Capital One has already told its investors that it plans to convert ING Direct's assets into more credit cards and auto loans.

After buying North Fork Bancorp, Capital One shut down the entity's GreenPoint Mortgage division in less than a year. Three years later, Capital One had reduced prime, conventional mortgage lending by 95 percent. A similar pattern appears by examining small business lending. Between 2006 and 2010, Capital One reduced its level of Small Business Administration (SBA)-backed lending from $228 million to $551,000—an astonishing 99.7 percent drop.

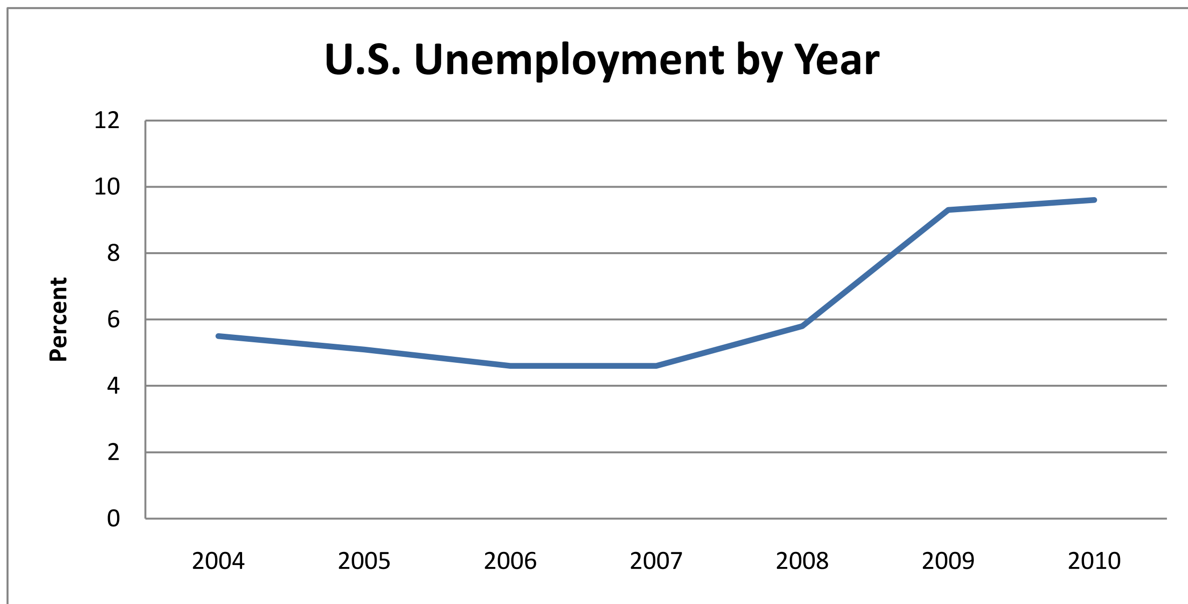
Capital One admits that it is preying upon traditional consumer banks to fund the expansion of its credit cards business. Less than a month before filing its application, Capital One told investors that it would "fund [its purchase of] HSBC credit card loans primarily with cash and the proceeds from the balance sheet repositioning related to the pending ING Direct acquisition."[44] Richard Fairbank, Chairman and CEO of Capital One, has stated that the long-term goal of its purchase of ING Direct and HSBC's card portfolio is not to diversify the company's business strategy, but to "enhance our credit card franchise and accelerate our achievement of a leadership position in retail card partnerships."[45] Thus, contrary to Capital One's assertion that this transaction will decrease the risk profile of both institutions, the reality

is that Capital One intends to turn safe deposits into riskier credit-card debt in order to generate higher profit returns.

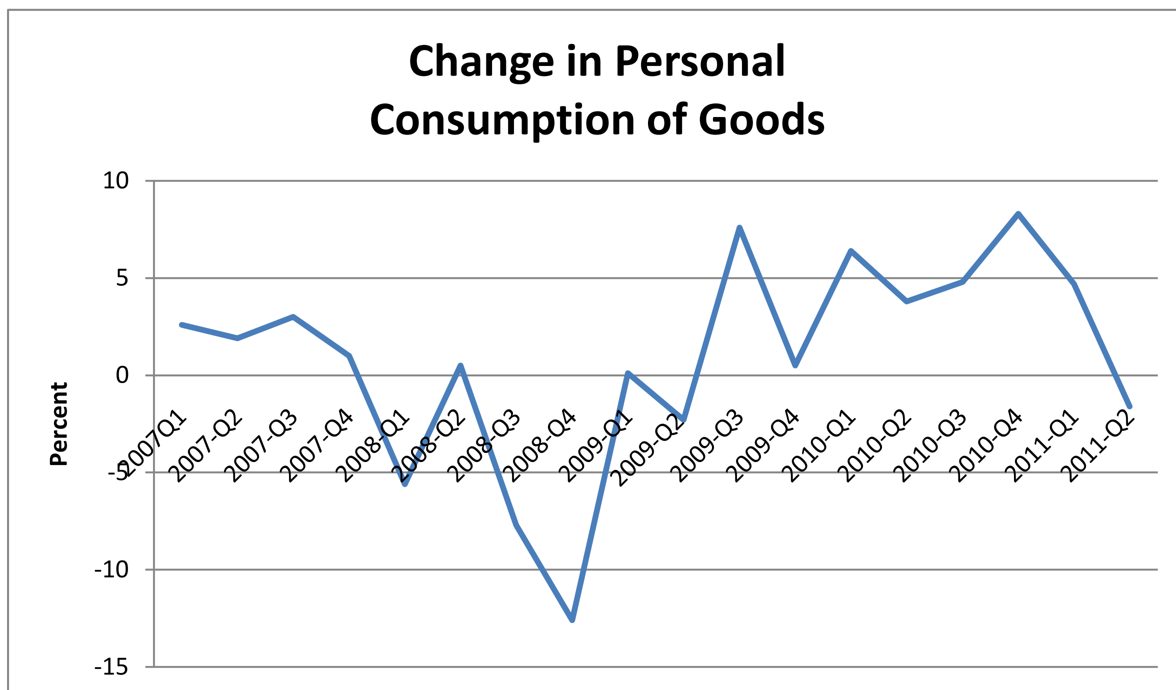
e. Changing economic realities weigh against the long-term viability of Capital One's business model.

Capital One is betting that demand for consumer credit will increase. But weak economic growth, high unemployment, high savings rates, and a decreased appetite for new debt are all factors that weigh against the bank's long-term prospects for success. These trends point to only weaker demand for Capital One's credit card products and increased defaults, putting Capital One's business model at serious risk.

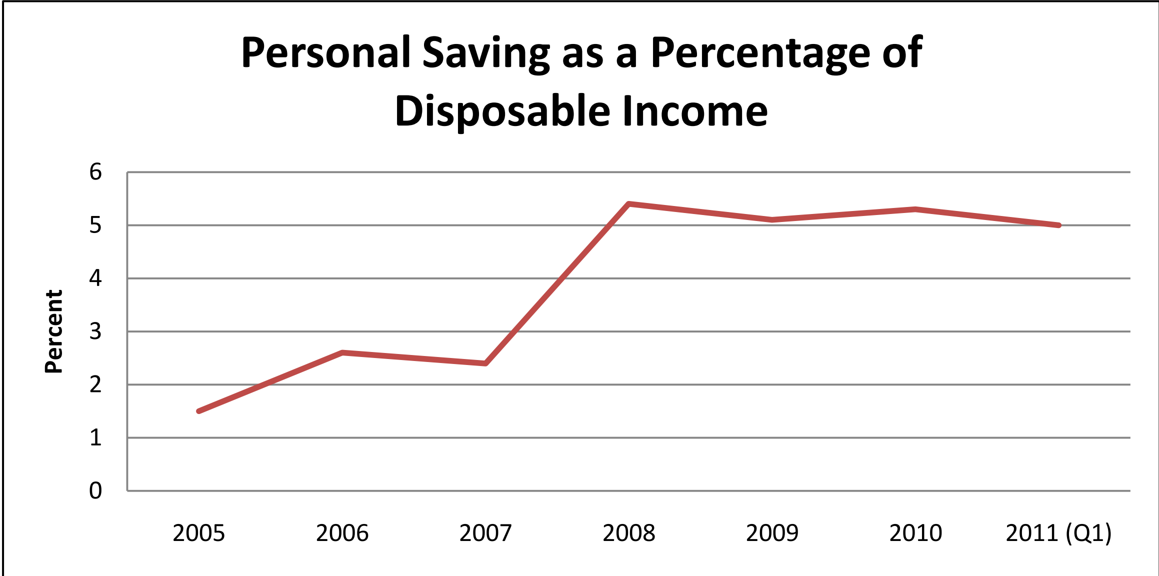
Consumption is down and unemployment is high. The ability of Capital One to expand its primary product lines depends upon increased demand for consumption by American consumers. Yet, economists and analysts agree that the American economy is unlikely to see substantial growth in the near future. According to the Bureau of Labor Statistics, the national unemployment rate has increased consistently since 2007 and has remained persistently high: [46]



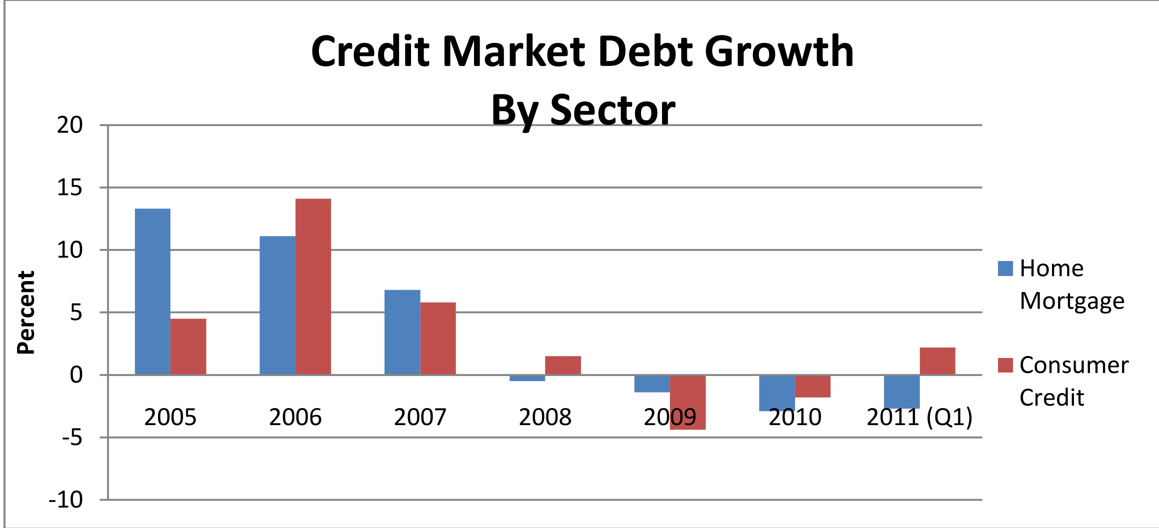
Those troubling unemployment numbers have had a severe impact on the American GDP and, in turn, consumer consumption. Since the outbreak of the economic crisis four years ago, Americans are consuming less and less. Following the recent recession, consumption rates fell sharply, hitting a low point in late 2008 and early 2009. Since that time, consistent consumption growth has been both elusive and weak. Even more alarming is a recent decline in the first two quarters of 2011 and the fact that economists predict that these figures are likely to decline even further this year: [47]



Savings are up. Americans are also saving more. Personal savings rates have increased five-fold from 1.5 percent in 2005 to more than 5 percent in 2011 and are unlikely to change given our nation's high and persistent unemployment rates: [48]



Americans are not only consuming less and saving more, but they are borrowing less as well. The weakness in credit markets is clear and directly contradicts Capital One's claim that it will experience sustainable growth. The reality is that American families have less appetite for taking on new consumer debt and are doing their best to get rid of their existing debt. While home mortgages and consumer credit are the two largest sources of debt for American households, both have experienced **extremely sharp declines** in debt growth: [49]



Capital One is betting taxpayers that its monoline business strategy is sound and that it will not cause the bank to fail. Yet, every important economic indicator shows that Capital One's bet is one that the American public cannot afford. Americans are consuming less, increasing their savings, deleveraging their existing debt, and taking on less and less new liability. Even worse, the current economic environment of weak growth and high unemployment means that a wave of defaults is not only possible, but increasingly likely. Given Capital One's excessive reliance on credit-card and auto loan consumption, such a disruption could cause the bank significant trouble. Ultimately, allowing Capital One to grow larger is a recipe for increased instability and risk because the long-term economic prospects for Capital One's business model are dim.

4. In light of Capital One's announcement that it will use ING Direct's deposits to buy HSBC's credit-card portfolio, the Board's risk analysis must consider the increased concentration of the credit-card industry that will occur as a result of approving this acquisition.

The question of whether to approve or deny Capital One's acquisition of HSBC's credit-card portfolio is not an issue for the Board's consideration. The Board, however, does possess the exclusive authority and responsibility to weigh the extent to which Capital One's acquisition will increase risks to the stability of the U.S. financial system. Accordingly, the risk associated with how Capital One will deploy ING's assets is properly within the Board's jurisdiction and, as a result, it must comprehensively review the anticompetitive considerations posed by Capital One's plan.

While ING Direct does not issue credit cards, ING's deposits will support the expansion of Capital One's credit card operation—especially after Capital One purchases HSBC's credit card portfolio. Concentration levels in the credit card industry will increase significantly after Capital One's acquisition of ING Direct and HSBC. According to the CNBC website, HSBC is

the sixth largest credit card issuer in the world with $58.5 billion in outstanding loans. Capital One is the fifth largest credit card issuer in the world with $68 billion in outstanding credit.[50] After the acquisition of HSBC, Capital One would be the third largest credit card lender in the United States.

In the United States, CNBC reports that HSBC has two percent of the market, while Capital One has seven percent of the market. After the acquisitions of ING Direct and HSBC, Capital One will have about nine percent of the United States market in credit cards.

Capital One's application presents an analysis of concentration levels that diverts attention away from the real impact of this acquisition. When considering credit card markets, the proposed ING Direct and HSBC acquisitions will likely result in a Capital One market share approaching or exceeding nine percent. In the case of deposits, Section 3 of the Bank Holding Company Act prohibits acquisitions when the merging institutions have a national deposit share that exceeds ten percent. Since Capital One's credit card share approaches the legal limit for deposits, the Board needs to carefully assess the impact on competition of the proposed acquisition.

A recent survey conducted in the spring of 2011 by Bankrate.com suggests that Capital One's fees are already on the high end even before its proposed acquisitions. The Capital One Classic Platinum credit card has an annual fee of $39 and an over limit fee of $29. The Capital One Standard Platinum Card has an annual fee and an over limit fee of $29. In contrast, American Express' Blue and Clear cards, Citibank's Platinum Select, Discover More, and Wells Fargo's Platinum cards have no fees for either charge.[51]

A NCRC survey of major competitors also reveals higher Capital One fees and annual percentage rates. For example, Capital One's Cash Rewards card for those with average credit

has an annual fee of $39 while JP Morgan Chase's Slate Visa card for those with average credit has no annual fee. Likewise, Bank of America's Basic Visa Card, Citibank's Simplicity Card and U.S. Bank's Platinum cards have no annual fees. For borrowers rebuilding credit, Capital One's Secured Mastercard has a relatively high annual percentage rate (APR) of 22.9 percent. In contrast, Bank of America's Visa Fully Secured Credit Card has an APR of 20.2 percent, U.S. Bank's Secured Visa Card has an APR of 20.99 percent, and Wells Fargo's Secured Credit Card has an APR of 18.99 percent.[52] Since Capital One had relatively high fees even before its planned acquisitions, their fees will probably become even more usurious after their acquisitions as they take advantage of their new dominant position in the credit card market.

This increased usuriousness raises risk implications for the entire financial market. Rising interest rates and fees also have the potential to increase a bank's defaults. Granting Capital One an increased and dominant market share encourages the institution to raise its fees and interest rates in an effort to obtain more profits in a business line that constitutes 75 percent of the bank's net income. The resulting probability of higher defaults, by itself, suggests that Capital One's ability to use ING Direct's deposits to expand its credit-card portfolio increases the degree of risk to the entire U.S. banking system.

Capital One's post-acquisition size, interconnectivity, financial activities, and monoline business model—when combined with the nation's economic trends and the anticompetitive implications of this deal for the credit-card market—prove that the Board's approval of this application will result in considerably greater risks to, and the increased concentration of those risks in, the U.S. banking and financial system. There can be little dispute that the effect of that finding is significantly adverse.

Capital One's Public Benefits Do Not Outweigh The Adverse Effects.

Capital One's proposal to acquire ING Direct will cause a material growth in systemic risk to the American financial system. But, that fact, by itself, does not require the Board to deny approval of the transaction. Instead, Section 4(j)(2)(A) of the Bank Holding Company Act of 1956 suggests that the burden shifts to Capital One to prove that the public benefits of this transaction outweigh the potential harm.[53] If it is unable to do so, the Board is required either to deny Capital One's application or to condition its approval on a forward commitment by Capital One that provides sufficient public benefits to outweigh the possible adverse effects. [54]

In its initial application and at each public meeting, Capital One claimed that the public benefits of its proposal are sufficient to outweigh any possible adverse effects. So far, Capital One has specifically identified **four** public benefits:

(1) The creation of 3,600 jobs;

(2) More products, services, and ATMs for ING Direct customers;

(3) Increased community lending and investment and a stronger commitment to meeting the CRA needs of low and moderate-income communities; and

(4) A forward commitment of $180 billion.

Yet, each one of Capital One's public benefit claims wilt upon close inspection,

1. Capital One's job creation claims do not amount to a clearly significant public benefit.

Capital One suggests that job creation is a major public benefit of this acquisition. Specifically, the bank points to its recent announcement that it will add 3,600 new jobs by the end of the year and another 500 in Delaware by 2013. Unfortunately, Capital One's announcement only tells half of the story.

All told, Capital One has shed more than 6,600 jobs in its previous acquisitions.[55] That means that the bank has already laid off 83 percent more workers than it promises to hire now. [56] To compound the problem, Capital One has sent mixed messages regarding the future of ING Direct employees. Capital One has already promised to cut $90 million from ING Direct's yearly budget, primarily through consolidating call centers and layoffs. Thus, it is impossible to determine whether Capital One's current employment gains amount to any real increase in employment opportunities stemming from this acquisition.[57]

Capital One also promises to create 500 new jobs in Delaware by 2013. But, this is also only half of the truth. Though Capital One is creating these jobs, it is the people of Delaware who are *paying* for them. The state is giving Capital One $7.1 million—or a $14,000-per-job, taxpayer-funded subsidy—for each job it "creates." Capital One should not be able to assert job creation as a public benefit when it is the public, and not Capital One, that is paying for the benefit.

In addition, there is no guarantee that any of these jobs will be permanent. If Capital One's track record is any indication, Capital One will lay off these employees once the taxpayer-funded subsidies stop flowing.[58] That is exactly what the bank did in Florida. After reaching the end of its tax subsidy, Capital One closed its call centers and laid off 1,900 employees. Those jobs were moved overseas to India. Thus, without any assurance that these jobs will be permanent, Capital One's history suggests that its claims related to job creation lack credibility and certainly do not amount to a clearly significant public benefit.

2. Capital One's claim to provide more product and services does not amount to a clearly significant public benefit.

More products and more ATMs are not "clearly significant" benefits to society. This is especially true because all of the products that Capital One identifies are already available to

ING Direct customers. You do not have to approve this deal in order to give ING Direct customers access to fixed-rate mortgages or small business loans. All of those products are already available to ING Direct's customers—even from Capital One. Moreover, since Capital One does not offer mortgages or small business loans outside of its retail footprint, it is unclear how the bank intends to fulfill its pledge to provide these products to most of ING Direct's national customer base—who are mostly located outside of Capital One's existing footprint.

3. Poor records in meeting the convenience and needs of the communities it serves disproves Capital One's current public benefit claim.

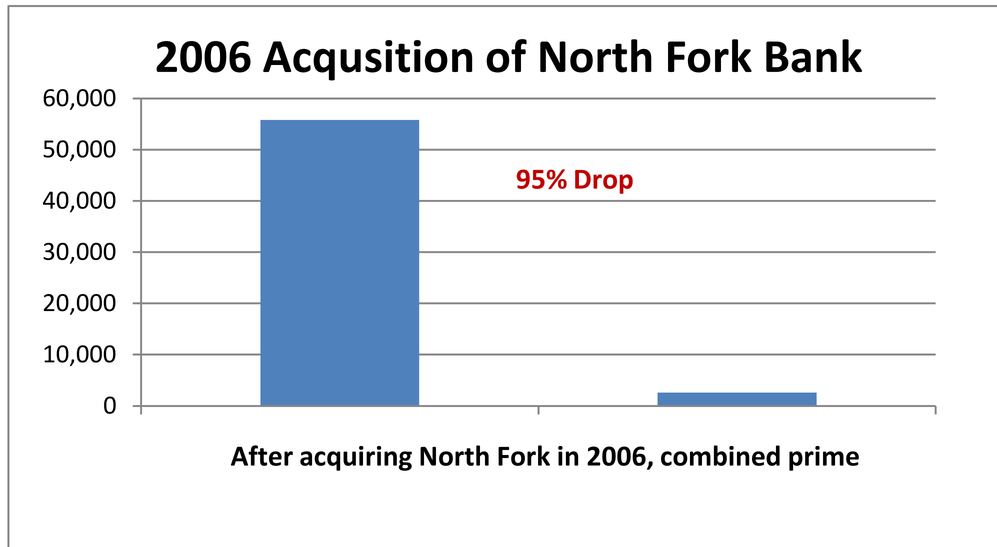
Capital One and ING have already failed to serve the convenience and needs of communities. Thus, Capital One's suggestion to offer more of the same can hardly be considered a clearly significant public benefit. Capital One has dramatically decreased its affordable lending after previous acquisitions. ING Direct has been unable to use its business model as an internet bank to effectively serve minority and low- and moderate-income borrowers. Part of the failure of the institutions to adequately serve convenience and needs is attributable to low standards of performance expected of Capital One and ING by previous CRA exams.

Capital One's declining commitment to meeting convenience and needs is revealed by NCRC's extensive analysis of Home Mortgage Disclosure Act (HMDA), CRA small business loan data, and FDIC data on bank branches.

a. Capital One's home mortgage lending has plummeted.

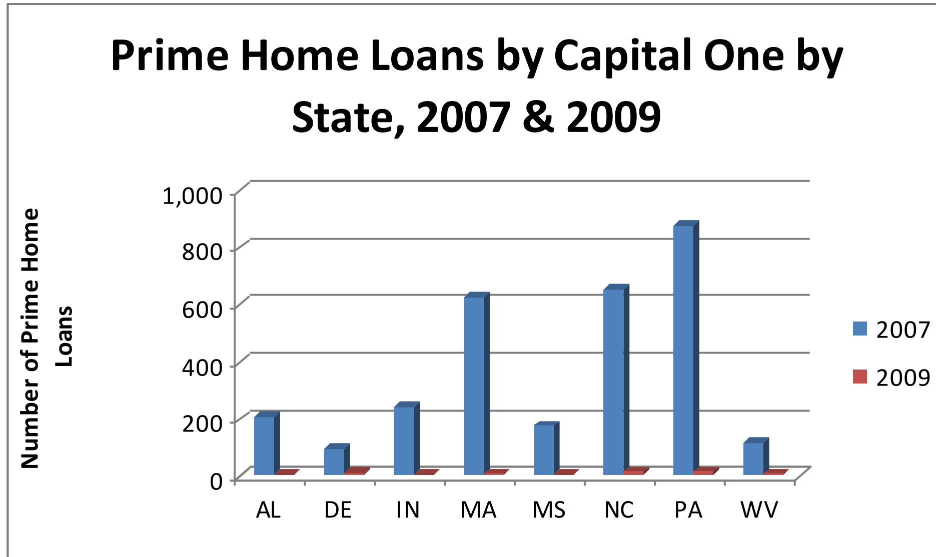
In late 2006, Capital One acquired the New York-based lender, North Fork, which issued 55,793 prime, conventional loans that year. After acquiring North Fork, Capital One had dramatically reduced lending to 2,614 loans nationwide in 2009, which is a 95 percent decrease

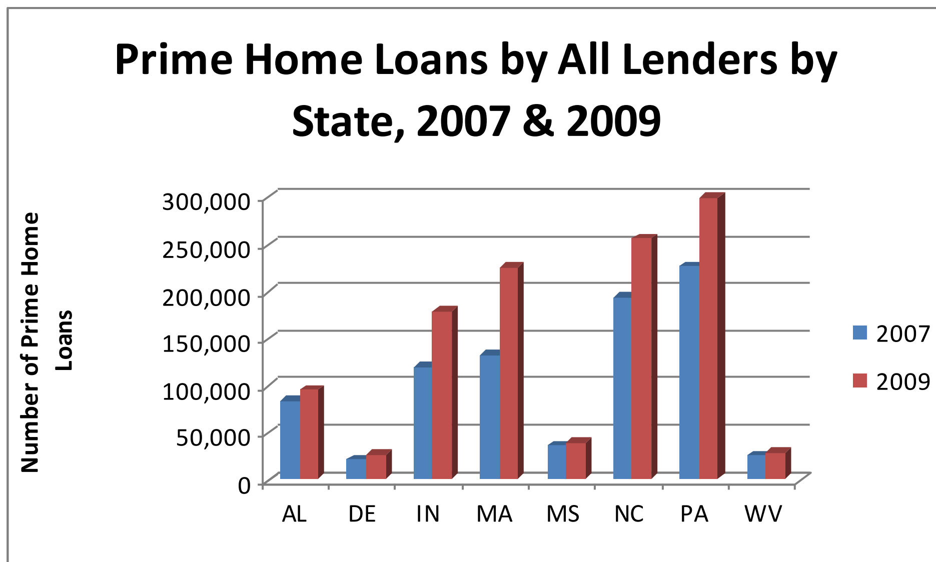
from North Fork's 2006 level. Loan levels also declined for all other lenders but only by 14 percent from 2006 to 2009.



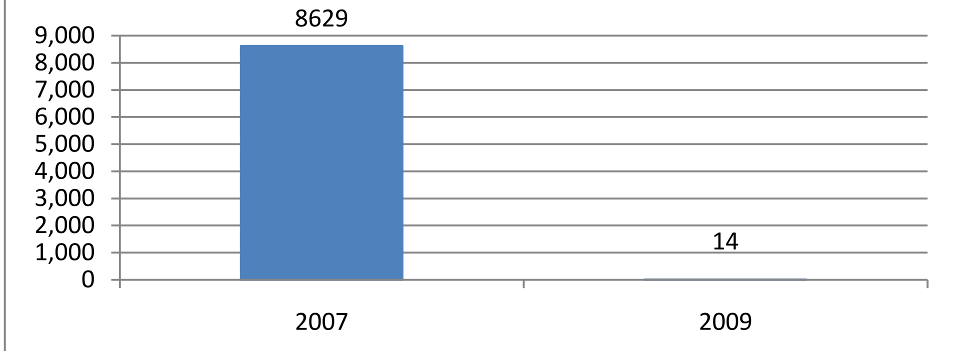
Capital One's lending to Hispanics plummeted. In 2006, North Fork made 26 percent of its home loans to Hispanics. By 2009, Capital One issued just 5 percent of its loans to Hispanics. Likewise, North Fork made 12 percent of its loans in minority neighborhoods (more than 80 percent of residents are minority) but Capital One issued just 7 percent of its loans in minority neighborhoods by 2009.

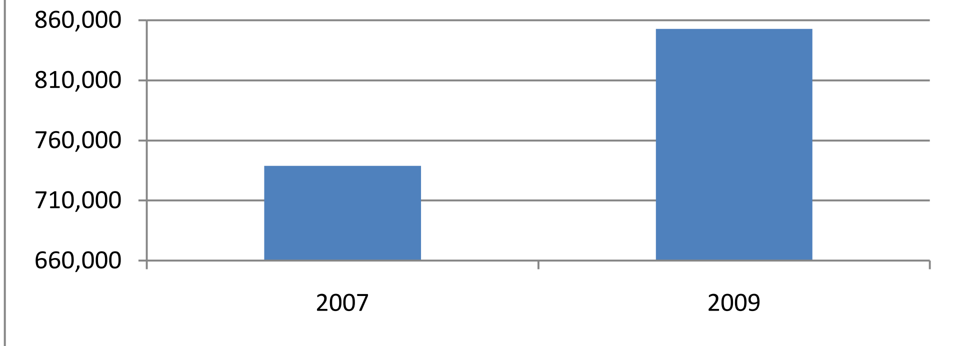
Across the country, Capital One has dramatically decreased its prime lending. For example, in Pennsylvania, Capital One's lending plunged from 874 loans in 2007 to 10 in 2009. In North Carolina, Capital One's lending dropped from 649 loans in 2007 to 11 in 2009. In contrast, all lenders, as a group, significantly increased their prime lending in those states. The difference is stark as shown immediately below in these graphs.

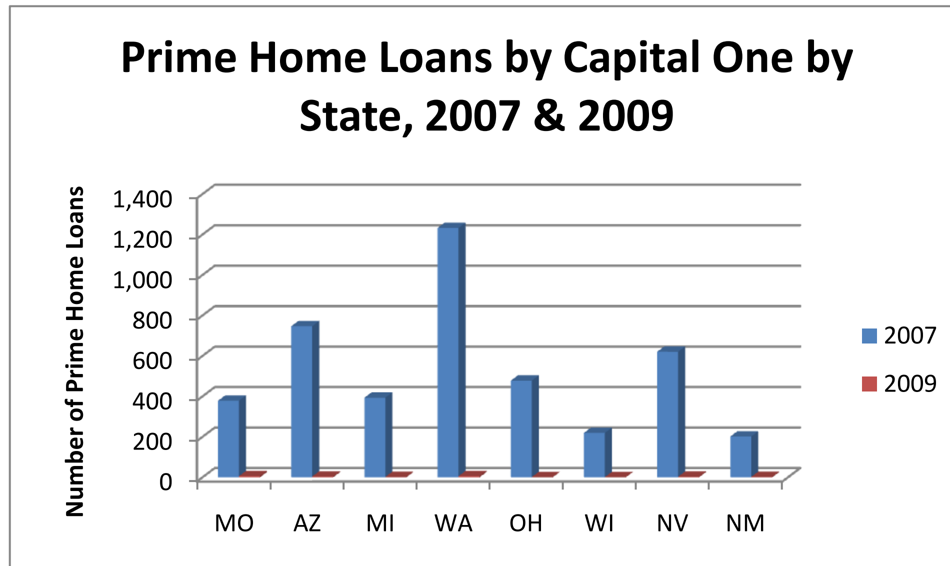


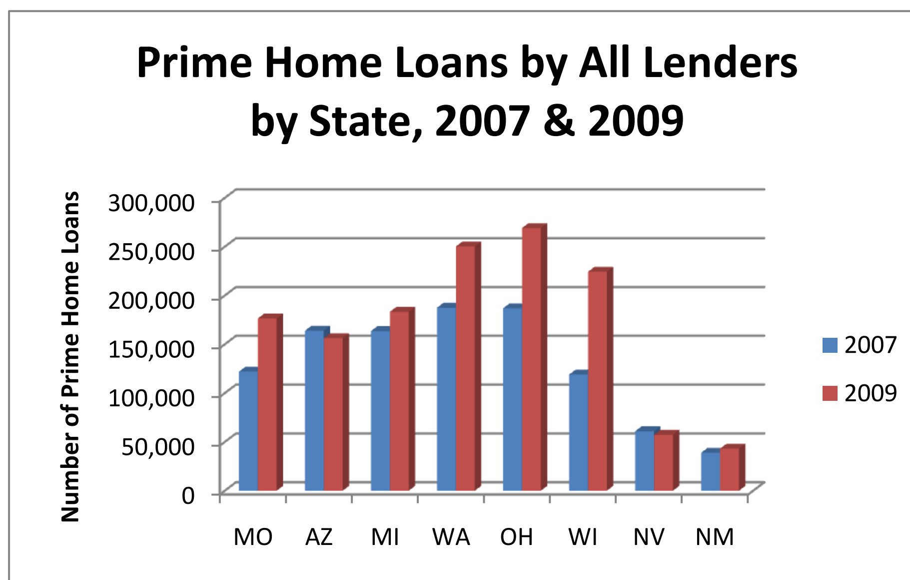


In the Midwest and Western parts of the United States, the difference is also dramatic. In California, Capital One decreased its prime home lending from 8,629 loans in 2007 to 14 loans in 2009. In Washington state, lending levels went from 1,233 to six; in Arizona, lending levels went from 747 to four; in Ohio, from 478 to one; and in Michigan, 394 to two.

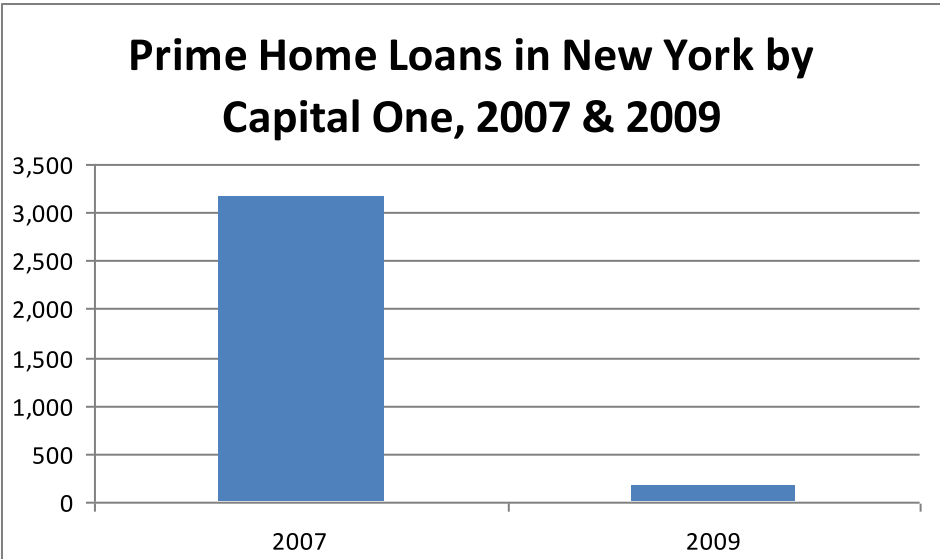

Prime Home Loans in California by Capital One, 2007 & 2009
8629
14
9,000
8,000
7,000
6,000
5,000
4,000
3,000
2,000
1,000
0
2007
2009

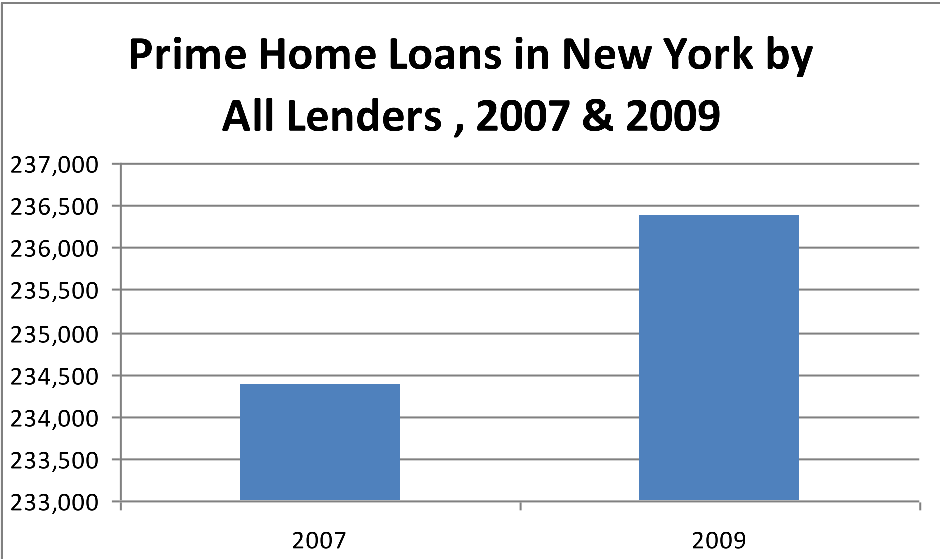

Prime Home Loans in California by All Lenders , 2007 & 2009
860,000
810,000
760,000
710,000
660,000
2007
2009





Capital One claims that it is focusing home lending in states in which it has its branches. However, the data from New York does not support this claim. Capital One decreased its prime lending from 3,168 in 2007 to 172 loans in 2009 in the Empire state. In contrast, all lenders, as a group, increased their lending during this time period in the state of New York.





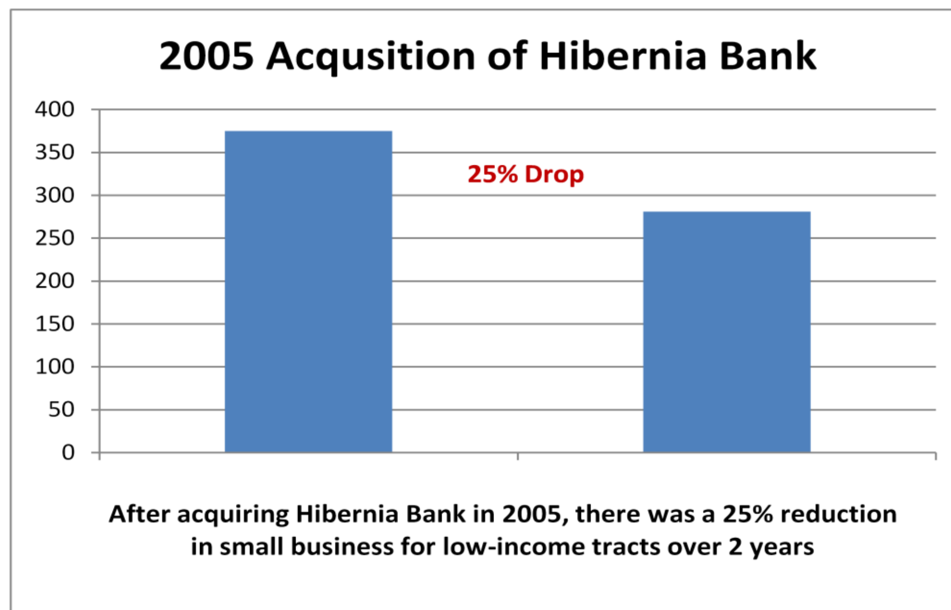
The considerable decline in affordable home lending continued through 2010. In 2009, Capital One and Chevy Chase combined issued 10,798 conventional, Federal Housing Administration (FHA), and Veterans Administration (VA) first and second lien loans. In 2010, Capital One issued just 7,815 loans for a decrease of 28 percent. FHA and VA first lien lending declined even more by 44 percent from 1,562 to 869 loans.[59] In contrast, all lenders, as a group

had smaller decreases: a 12.8 percent decrease for conventional and government-insured loans combined and a 21 percent decline for FHA and VA first lien lending.

b. Capital One substitutes traditional small business lending for high-cost credit cards.

Capital One has dramatically decreased its lending to the smallest businesses with revenues of less than $1 million. In 2006, North Fork issued 63 percent of its business loans to the smallest businesses with revenues under $1 million. By 2008, Capital One made only 38 percent of their loans to these businesses; and by 2010, the portion plummeted to just 17 percent (this is considering lending across the entire country).

After an earlier acquisition of Hibernia in 2005, Capital One's small business lending also declined significantly in low-income neighborhoods. From 2005 through 2007, Capital One's small business lending in low-income tracts decreased 25 percent while small business lending in all tracts decreased only 6 percent.



Capital One has decreased its non-credit card small business lending dramatically over the years. In 2006, the combined non-credit card lending of Capital One and North Fork was 28,268 loans across the country. By 2010, Capital One offered just 14,911 loans, which was a 47 percent drop from the 2006 total.

Non-credit card small business lending also declined after Capital One's acquisition of Chevy Chase Bank, FSB. In 2009, the combined non-credit card lending of Capital One and Chevy Chase was 18,065 loans. By 2010, the non-credit card business lending of Capital One had declined 17 percent to 14,911 loans. All banks, as a group, also decreased small business lending between 2009 and 2010, but by less (a 9 percent drop) than Capital One. Capital One is decreasing its emphasis on non-credit card small business lending after it acquires banks.

In contrast to its non-credit card small business lending, Capital One is significantly increasing its credit card lending from 138,958 loans in 2009 to 172,163 loans in 2010 for a 24 percent increase over the two years. Capital One represents in its September 17 letter to the Board that it increased its lending from 2007 through 2010, but the letter does not separate out credit card from non-credit card small business lending.[60] In fact, Capital One is continuing its pattern of reducing the more affordable non-credit card lending in favor of high-cost credit card lending.[61]

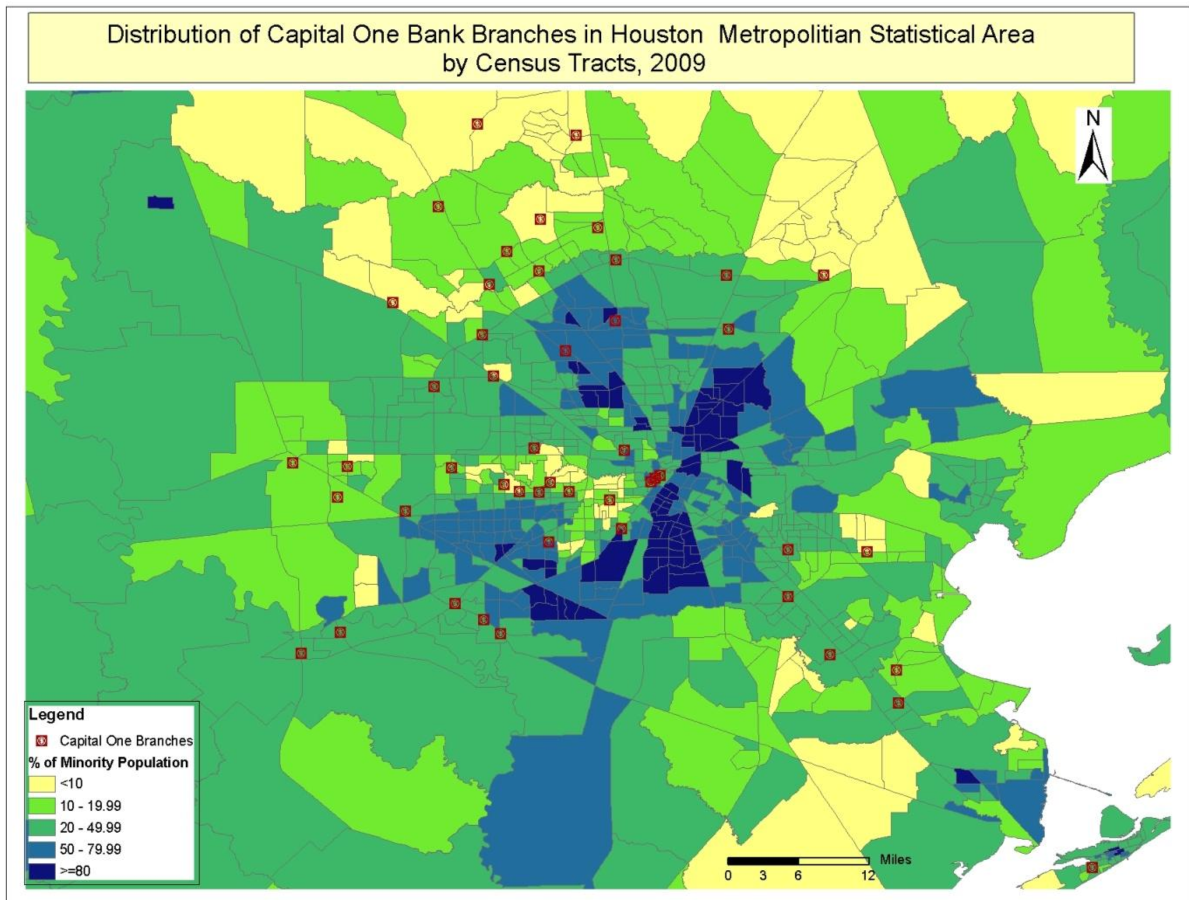
The annual percentage rate is higher on credit card lending than non-credit card lending. Also, the non-credit card small business lending can accommodate higher loan amounts while the credit card lending is generally restricted to under $10,000, which can only satisfy a limited amount of credit needs. For example, a business could use credit cards to smooth out cash flows and alleviate short term liquidity problems but could not purchase any significant amount of plant and equipment via a credit card loan.

Finally, Capital One has dramatically reduced its level of Small Business Administration (SBA)-backed lending from $228 million in 2006 to $551,000 in 2010. SBA guaranteed loans are used by underserved small businesses including women- and minority-owned businesses.

c. Contrary to Capital One's claims of providing access to low and moderate-income communities, its branch expansion has only surged in affluent neighborhoods.

After its acquisition of Hibernia, Capital One NA received a Low Satisfactory on the service test of its 2007 CRA exam. In particular, its branching distribution was poor. It had no branches in low-income tracts in Baton Rouge or New Orleans. It had no branches in low-income tracts in the Dallas-Fort Worth assessment area and only 3 branches in moderate-income tracts or 9 percent of its branches although 27 percent of the population resides in moderate-income tracts. Likewise, in Houston, there were no branches in low-income tracts and only 3 (or 7 percent) of its branches in moderate-income tracts although 31 percent of the population resides in moderate-income tracts.

In 2009 and 2010, Capital One still had no branches in low-income tracts in Baton Rouge or New Orleans. And in 2009 and 2010, Capital One still lagged behind other banks in low- and moderate-income tracts in Houston and Dallas. As the map immediately below shows, Capital One's Houston branch locations are disproportionately in the suburbs and predominately white communities:



After its acquisitions, Capital One increases bank branches to a much greater extent in white and affluent neighborhoods than in minority and low and moderate-income neighborhoods. Using the number of Hibernia branches in 2005 as the base, NCRC calculates that Capital One increased the number of branches by 9 in white neighborhoods (less than 10 percent minority). In minority neighborhoods (80 to 100 percent minority), Capital One increased the number of branches by only three across the country through 2007. The number of branches in white neighborhoods increased 3 times greater than the number of branches in minority neighborhoods from 2005 through 2007.

Capital One increased the number of branches in low-income neighborhoods by one but increased the number of branches in upper-income neighborhoods by 37 from 2005 through

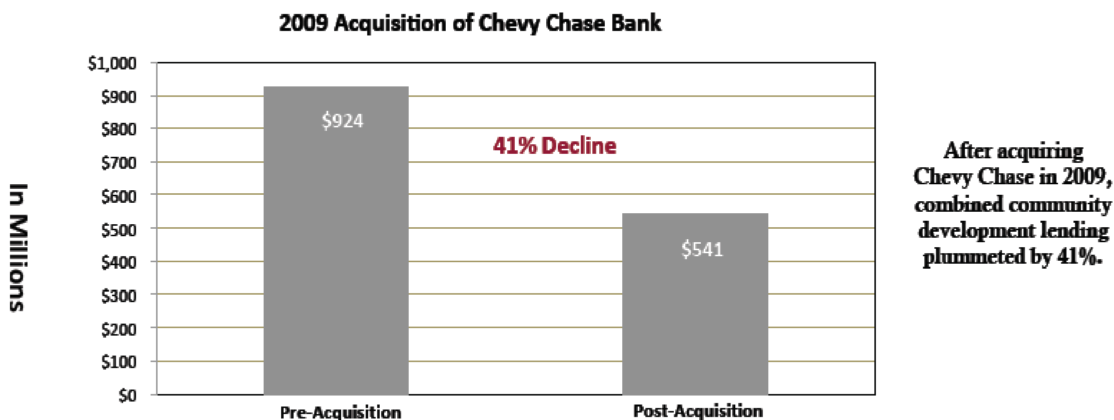
2007. The number of branches increased 37 times greater in upper-income than low-income neighborhoods from 2005 through 2007 across the country.

Similarly, after the North Fork merger, the number of branches grew to a much greater extent in affluent neighborhoods. Using the North Fork branches as a base in 2006, NCRC calculates that Capital One increased bank branches in low-income, moderate-income, middle-income, and upper-income neighborhoods by 22, 100, 263, and 233 branches, respectively, from 2006 through 2010. In other words, branches increased four times more in middle- and upper-income neighborhoods (growth of 496 branches) as opposed to low- and moderate-income neighborhoods (growth of 122 branches) across the country. Capital One claims it "aggressively expanded branch locations in low- and moderate-income areas following its previous bank acquisitions," according to its September 17 letter to the Board.[62] Yet, the data suggests that Capital One is more aggressive in opening branches in affluent and predominantly white communities after previous bank acquisitions.

d. Capital One's claims of increased community development financing are unfounded.

Capital One's community development lending declined 41 percent from $924 million in 2008 to $541 million in 2009. The community development lending-to-asset ratio declined from about one half of one percent in 2008 to one third of one percent in 2009 (This figure includes Chevy Chase, FSB, which Capital One acquired in February 2009).

**As Capital One's Assets Grow with Each Acquisition,
the Corporation's Commitment to the Community Shrinks**



Capital One's community development lending increased from $541 million in 2009 to $1.1 billion in 2010. Yet, the $1.1 billion in 2010 is basically a recovery of lost ground since community development lending was $923 million in 2008. According to John Finneran, Capital One's General Counsel, the bank's community development financing has grown nine times larger since its acquisition of Chevy Chase. The publicly available community development lending data casts serious doubt on this assertion. While Capital One's community development lending grew two times larger from 2009 through 2010, it had decreased by a factor of two from 2008 through 2009. Not only is the trend of roughly no increase from 2008 through 2010 inconsistent with Mr. Finneran's statement, the statement is even more incredulous since the public does not have readily available data on community development investing—making it impossible to assess the accuracy of his statement.

e. ING's CRA and fair lending record is subpar.

ING Direct is also a lender that is not focused on low and moderate-income populations. ING Direct consumers cannot even access its deposit products if the consumer does not conduct the transaction electronically. ING Direct's most recent CRA exam states that:

> *"[s]ince there are no branches, transactions are primarily conducted over the Internet. The bank's deposit products are targeted to customers desiring relatively high interest rates and who do not require services provided by the typical retail banking institution. Also, loan payments must be paid electronically to avoid fees, and customers with demand deposit accounts must conduct all transactions electronically; paper checks are not provided."*

It is safe to say that fewer low-income consumers than upper-income consumers will use the internet for their banking.

ING Direct's lending to underserved populations is also lackluster. For example, at its home in Wilmington, Delaware, ING Direct made just 5.5 percent of its prime home loans to African-Americans, while all lenders—as a group—issued 11 percent in 2009. Likewise, ING Direct issued 19 percent of its loans to low- and moderate-income borrowers, while all lenders, as a group, made 35.6 percent.

In the hearing location of the Washington, D.C. metropolitan area, ING Direct's performance is poor. In 2009, ING Direct issued six percent of its prime, conventional loans to low- and moderate-income (LMI) borrowers while, all lenders as a group made almost thirty percent of their loans to LMI borrowers. Likewise, ING Direct and all lenders, as a group, made 4.8 and 15.7 percent of their loans, respectively, to African-Americans. Finally, ING Direct made less than 1 percent of its loans to Hispanics in contrast to all lenders which issued 4.4 percent of their loans to Hispanics.

In the Chicago metropolitan area, ING Direct issued only 3.4 percent of its loans to LMI borrowers, while all lenders, as a group, made 23.7 percent of their loans to this borrower group during 2009. Similarly, ING Direct offered less than 1 percent of its loans to African-Americans, in contrast to all lenders, which made 5.6 percent of their loans to African-Americans. Finally, ING Direct and all lenders, as a group, made 1.7 percent and 6.7 percent of their loans, respectively, to Hispanics.

f. Capital One has a history of discrimination, abusive lending, and outright refusing to serve.

Capital One has retreated from FHA lending. Not only has Capital One displayed a decreased commitment to community reinvestment, the lender also engages in discriminatory behavior. In particular, Capital One had a discriminatory policy regarding Federal Housing Administration (FHA) lending. The Department of Housing and Urban Development (HUD) allows lending institutions to make FHA loans with 3.5 percent down payments to borrowers with FICO scores of 580 and above. Capital One adopted a policy of not lending to borrowers with FICO scores below 620. While significant numbers of minority borrowers have good credit, a disproportionate percentage have FICO scores between 580 and 620.

NCRC alleged in a complaint to HUD that Capital One's policy discriminated against minorities in violation of the fair lending laws and had no business justification since FHA loans are government-backed posing little risk to lending institutions. Capital One, in response to NCRC's complaint, has stated that it has reversed its policy and will start making FHA loans to borrowers with FICO scores of 580 and above in March 2012. This is too little, too late since Capital One will reverse its policy almost one year after NCRC's complaint. Moreover, Capital One was an approved Ginnie Mae lender in August of 2010 so it does not make sense that Capital One needs until March 2012 to establish an FHA lending capacity.

NCRC's analysis of loans in the LPS[63] database reveals that FHA disproportionately serves borrowers with credit scores between 580 and 620. According to the LPS dataset for home purchase loans originated in 2008 to owner-occupants, 18.4 percent and 11.7 percent of the borrowers of FHA and VA loans, respectively, had FICO scores between 580 and 620. In contrast, only 1.5 percent of the conventional loans were offered to borrowers with FICO scores between 580 and 620, see Table 1.

Table 1: Loan Type

Credit Score 580-620	**Percent**	**Number***
FHA Residential Loans	18.5%	49,715
VA Loans	11.7%	6,102
Conventional Loans w/o PMI	1.54%	4,101
Conventional Loans w/ PMI	1.45%	2,629

(*Number is count of loans received by borrowers with FICO scores between 580 and 620.)

Since FHA has a market niche for borrowers with FICO scores between 580 and 620, a disparate impact occurs if financial institutions do not adopt HUD's policy of offering FHA loans to borrowers with credit scores of 580 and above. LPS data also shows that a disproportionate portion of consumers residing in predominantly minority zip codes have FICO scores between 580 and 620. While approximately 8 percent of consumers in zip codes with at least 80 percent of white residents have FICO scores between 580 and 620, more than 17 percent and 9 percent of consumers in zip codes with at least 50 percent African Americans and Hispanics, respectively, have FICO scores in that range, as illustrated in Chart 1.

The disparity is larger when considering only borrowers of FHA loans originated during 2008. About 28 percent of borrowers in predominantly African-American zip codes have FICO scores between 580 and 620 compared to just 18 percent of borrowers in white zip codes (see Chart 2).

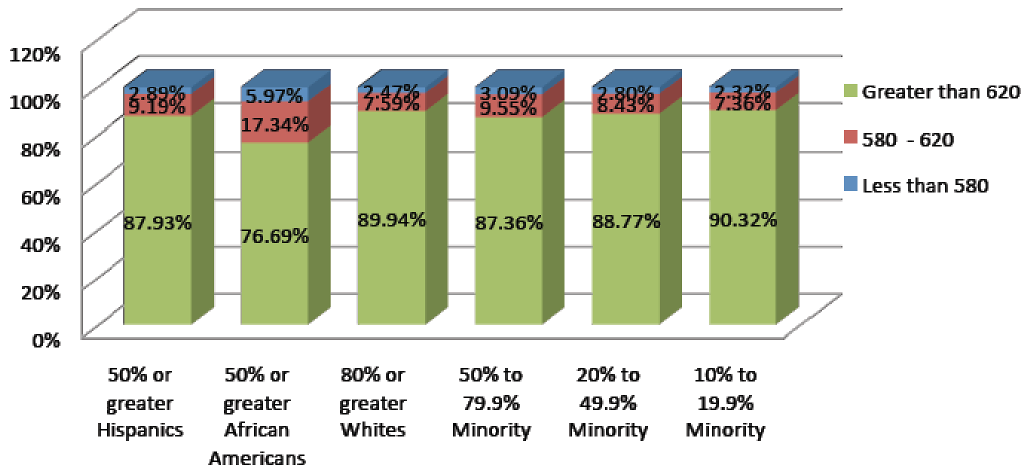


Chart 1: Distribution of all home loans within credit score ranges by zip code racial composition
120%
100%
80%
60%
40%
20%
0%
2.89%
9.19%
87.93%
5.97%
17.34%
76.69%
2.47%
7.59%
89.94%
3.09%
9.55%
87.36%
2.80%
8.43%
88.77%
2.32%
7.36%
90.32%
Greater than 620
580 - 620
Less than 580
50% or greater Hispanics
50% or greater African Americans
80% or greater Whites
50% to 79.9% Minority
20% to 49.9% Minority
10% to 19.9% Minority

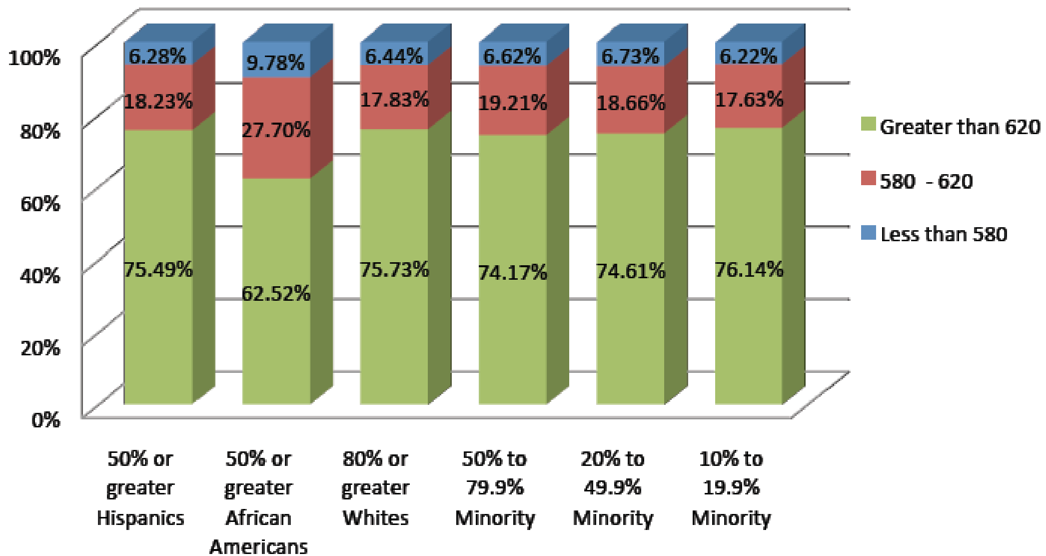


Chart 2: Distribution of FHA residential loans within credit score ranges by zip code racial composition
100%
80%
60%
40%
20%
0%
6.28%
18.23%
75.49%
9.78%
27.70%
62.52%
6.44%
17.83%
75.73%
6.62%
19.21%
74.17%
6.73%
18.66%
74.61%
6.22%
17.63%
76.14%
Greater than 620
580 - 620
Less than 580
50% or greater Hispanics
50% or greater African Americans
80% or greater Whites
50% to 79.9% Minority
20% to 49.9% Minority
10% to 19.9% Minority

If Capital One is serious about rectifying its discriminatory behavior, it would make a commitment to substantially increase FHA lending, which is one of the too few product choices available to underserved communities during the present credit crunch. Recent data suggests that Capital One's commitment to reverse its FHA policy by March 2012 will not amount to any significant increase in access to loans for traditionally underserved communities. In fact, Capital One's FHA lending declined 67 percent from 1,550 in 2008 to 510 loans in 2009. In sharp contrast, all lenders, as a group, increased their FHA lending by 61 percent from 2008 to 2009. From 2009 to 2010, Capital One's FHA lending further declined by 47 percent.[64] Finally, the acquisition of ING Direct will not assist Capital One increase FHA lending since ING Direct does not make FHA loans.

Capital One's participation in HAMP and the Hardest Hit Fund is not in good faith. Capital One refused to participate in the Hardest Hit Fund (HHF) operated by the District of Columbia Housing Finance Agency and the federal Home Affordable Modification Program (HAMP). Both programs promote modifications of loans in delinquency or facing imminent delinquency, thus averting foreclosure. HHF focuses on unemployed borrowers. In a complaint filed with HUD and the District of Columbia's Office of Human Rights, NCRC alleges that Capital One's refusal to participate in these programs violate federal and the District's anti-discrimination laws. Moreover, a client of NCRC's has a loan owned by Freddie Mac and serviced by Capital One. Freddie Mac has instructed its servicers, including Capital One, to participate in HHF and HAMP.

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 had 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**.**

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…."[65]

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. Capital One represents that it has reversed its FHA policy and will now participate in HAMP and District of Columbia's Hardest Hit Fund. But those policy changes occurred only after NCRC filed complaints and after Capital One submitted its application to the Board. As such, these changes do not represent good faith reforms but is only expedient behavior designed to secure approval of its application to increase its market share. Before the Board approves the application, Capital One needs to commit to

substantially more fair lending reforms as part of a pledge and accept a conditional acquisition approval.

Abusive credit-card lending and multiple lawsuits contradict other Capital One claims. Capital One is replacing the affordable lending of the banks it acquired and using its new deposits to make high-cost and deceptive credit card lending. Capital One's non-credit card business lending, its prime conventional home lending, and FHA lending has plummeted at the same time that the bank has increased its problematic credit card lending practices.

In its September 17 letter to the Board, Capital One maintains that it has "faced few material credit card litigation matters in recent years." The bank boasts about its exemplary and responsible lending practices and states that it has defended itself against "a modest number of other…lawsuits."[66] Yet, the record clearly indicates otherwise. As described in more detail below, the bank has been sued and investigated by three State Attorneys General. In addition, a British regulatory agency sued Capital One for unfair and deceptive credit card practices.

According to a Business Week article,[67] Capital One has engaged in a practice of issuing multiple cards to borrowers that feature high-interest rates and late fees. When borrowers fall behind, Capital One offers them additional cards, which the borrowers accept out of desperation only to fall into more debt. Law Professor Ronald Mann maintains that this strategy generates so much revenue from late and over-the-limit fees that it more than compensates for the increased number of card holders falling into bankruptcy. Peers of Capital One, such as JP Morgan Chase and Citigroup, state that they do not offer multiple cards to customers.[68]

At the public meeting in San Francisco, witnesses asserted that Capital One continues to offer low-limit credit cards in which limits are easily breeched. Capital One then issues late fees

and entices borrowers with additional cards. It appears that Capital One continues to engage in these abusive practices, despite their assertions of responsible credit-card lending.

Capital One's credit-card practices have been investigated by the Attorneys General of West Virginia, Minnesota, and California. West Virginia Attorney General Darrell V. McGraw specifically sought to obtain documents related to Capital One's practice of issuing multiple credit cards. In early 2010, he filed a complaint against Capital One Bank, USA N.A. alleging that Capital One engaged in credit-card practices that allow consumers to continue to spend beyond their credit card limit without instituting automatic denials of credit and then charging over-the-limit fees and late fees, in violation of the West Virginia Consumer Credit and Protection Act. Also, Minnesota's Attorney General Mike Hatch has sued Capital One for bait and switch tactics under which low initial rates are increased significantly for late payments and other consumer actions that are not explained clearly in Capital One's advertisements or direct mail solicitations.[69]

Capital One's deceptive practices are not confined to the United States. A few years ago, the British agency, the Financial Services Authority, sued Capital One for not adequately explaining policy exclusions for payment protection insurance (PPI) that pays credit card bills for customers who experience illness or unemployment.[70]

Consistent with deceptive practices, Capital One's charge-off rates are among the highest in the credit card industry. A charge-off means a company has recognized that it cannot recover losses incurred by delinquencies. As of June 2011, Capital One had a charge-off rate of 3.9 percent of its total credit card loans and HSBC had a charge-off rate of 5.1 percent (Capital One's charge off rates would only climb higher should they succeed in acquiring the credit card

operations of HSBC). In contrast, American Express and JP Morgan Chase have charge-off rates under 3 percent.

After a credit-card borrower has entered default, Capital One's debt collection practices are irresponsible according to the Neighborhood Economic Development Advocacy Project (NEDAP), a New York-based NCRC member. NEDAP states that Capital One files one out of every five debt collection lawsuits in New York City. The defendants are denied due process and are not even aware that a lawsuit has commenced against them in many cases. In addition, the affidavits are legally insufficient and appear to be robo-signed. The Capital One representatives in these cases do not explain how they know the borrower owes debt. And they do not explain their relationship to Capital One.[71] Clearly, fairness and justice cannot be meted out in these proceedings when the plaintiff behaves in this deceitful manner.

Ironically, Capital One contends that it cannot control the quality of nationwide home lending while at the same time asserting that its nationwide credit card lending is responsible. In its September 17 letter to the Board, Capital One admits it is reducing its home lending beyond its bank branches because it feels it has less control and oversight over such lending. Capital One's letter states that it shut down the out-of-footprint (areas beyond branches) mortgage lending activities of two of its prior acquisitions (North Fork and Chevy Chase) because out-of-footprint:

> *"practices by some institutions precipitated many of the most notable struggles in the financial crisis…As a result of this strategy, Capital One's current mortgage origination activity is modest in scale and more analogous to the type of localized, community-based mortgage lending that many consumer groups, economists…advocate."*[72]

This logic suggests that somehow, nationwide credit card lending beyond branch networks can be executed responsibly while mortgage lending beyond branches cannot. This false dichotomy simply justifies a retreat from home lending in favor of an aggressive expansion of credit card lending. Lending beyond bank branches can be conducted safely and soundly if a lender has appropriate controls over loan officers and other non-branch channels and understands the product that they are offering. Capital One's record, however, demonstrates that it does not have sufficient quality control over its credit card lending beyond bank branches.

Capital One has an abusive overdraft fee policy. According to the Center for Responsible Lending, Capital One continues to charge high overdraft fees on debit cards, although a number of its peers such as Bank of America have discontinued this practice.[73] Moreover, Capital One processes charges in order from largest to smallest in an effort to maximize overdraft fee revenue. The FDIC has recognized that these overdraft policies result in "serious financial harm for customers with low or fixed incomes."

Alternatives to high overdraft fees are employed by Capital One's competitors. A checking account can be linked to a savings account or a line of credit that can accommodate an overdraw of a checking account. Posed to become the fifth largest depositor in the country if the proposed acquisition is executed, Capital One will command more influence in the marketplace. It must be the leader in providing responsible deposit products, not a perpetrator of abusive and equity draining deposit products.

g. Capital One has benefitted from poor CRA oversight.

Regulatory agencies have enabled Capital One's abusive practices through their lax CRA and fair lending enforcement. Though Capital One makes loans across the country, the most recent CRA exams scrutinize and rate performance in only a small number of geographical areas

where Capital One makes loans. Moreover, the most recent CRA exams for both Capital One and ING Direct have inadequate fair lending reviews that fail to either investigate or reveal to the public exactly which types of lending were investigated for abusive, illegal, and discriminatory activity.

For example, a 2005 Office of Thrift Supervision CRA exam designated the Washington, D.C. area as the only official area that counted on the exam and the loans in the Washington DC area were just one percent of Capital One's total loans.[74] Likewise, a 2007 Office of Comptroller exam discussed performance in 21 geographical areas but ratings for only four (New Orleans, Baton Rouge, Dallas, and Houston) counted in any significant manner (the four areas were "full scope" assessment areas while the other ones were "limited scope").[75] The same woeful coverage of loans occurred on the most recent ING Direct exam. The Office of Thrift Supervision's 2008 CRA exam of ING Bank, FSB had only one assessment area, which was the Philadelphia, Wilmington, Camden metropolitan area. This one assessment area, which is the only area that officially counted on the exam, constituted only about 5 percent of the loans from 2005 through 2007.

When only a small number of geographical areas are covered and/or weighed heavily in the final rating on CRA exams, lending institutions will relax their efforts at serving low- and moderate-income populations in a responsible manner in the several areas not on the exams. Such is the case with Capital One and ING Direct. Also, since the exams are several years out-of-date, they have also not held Capital One accountable for the significant declines in lending associated with its previous acquisitions.

In addition to inadequate geographical coverage, the previous CRA exams cannot be relied upon to assess whether fair lending violations occurred or whether Capital One or ING

Direct engaged in unfair, deceptive, or unsafe lending practices. The Board's previous exam of Capital One's credit-card bank astonishingly did not assess the terms and conditions of the bank's credit-card lending although serious questions and lawsuits have been raised about Capital One's credit-card lending.[76]

ING Direct's CRA exam states that it offers only adjustable rate loans but does not adequately assess whether the loans were made responsibly. According to the exam, "[t]he residential first mortgage products are competitively priced and closing fees are less than most financial institutions. ING Direct does not offer 30-year fixed rate mortgage loans; the vast majority of originations were adjustable rate mortgages. The website and disclosures summarize the risks and rewards regarding adjustable rate products."[77] This is the most detail the exam offers about the adjustable rate products; the reader is left to wonder whether the OTS did any type of investigation to see if the borrowers could afford to repay the adjustable rate products. The exam does not discuss whether the loan terms and conditions included option adjustable rate mortgage loans (ARMs), whether the interest rates increased significantly after a certain time period, and whether the loans were underwritten at the maximum possible rate or the teaser rate. From the exam's bare bones description, it appears that the review was only cursory. Moreover, the exam covered the time period of the riskiest lending leading up to the foreclosure crisis.

The lack of detail about investigations regarding fair lending, unfair and deceptive acts and practices, and safety and soundness in the CRA exams must be addressed by the Board's review of Capital One's application. To date, the publicly available information does not assure the public that the lending practices of these two large institutions are responsible and non-discriminatory.

4. Capital One's pledge does not add up to a clearly significant public benefit.

Capital One's porous pledge cannot compensate for the lackluster CRA oversight over the last several years. On the morning of the Board's first public hearing on Capital One's proposed acquisition of ING Direct, Capital One issued a $180 billion lending and investing pledge over ten years. Capital One's pledge states that "Capital One is dedicated to providing access to fair and transparent, high-quality products and services for the benefits of our customers." Despite these lofty goals, the actual pledge is not transparent nor will it ensure access to safe and sound credit on a fair and equal basis.

a. Capital One's pledge appears to offer the same questionable banking products at levels that, in some cases, fall below its pre-acquisition lending levels.

Far from representing a public benefit, the pledge suggests that Capital One will continue its monoline and risky model of offering subprime automobile loans and credit cards. Almost 60 percent of the pledge dollars or $104 billion of the $180 billion is devoted to automobile loans, credit cards, and other consumer loans. Further, the pledge does not describe how the bank will ensure that these credit cards and lending products will be free of abusive and deceptive practices. In addition, the pledge lacks a discussion of how much of the credit card and automobile lending will be subprime and how these subprime products will not merely increase consumer indebtedness.

NCRC's Analysis of Capital One's Pledge

Lending Pledge	Annualized Pledge	2009 data
Home mortgages & home equity lending	$2,850,000,000	$933,521,000
Small business (non-credit card lending)		$2,067,305,000
Small business (credit card lending)		$1,132,705,000
All small business lending	$2,250,000,000	$3,200,010,000

The small business portion of the pledge similarly suffers from a lack of transparency, making it difficult to determine if the pledge represents an increase in lending (see above table). In 2009, Capital One offered non-credit card small business loans with an average loan amount of about $114,000 via its Capital One Bank, NA affiliate. Capital One offered credit card small business loans of about $8,000 on average through its Capital One Bank, USA, NA affiliate. In 2009, Capital One Bank, NA offered 17,569 non-credit card loans with a total dollar amount of over $2 billion. Capital One Bank, USA, NA made 138,958 credit card small business loans of about $1.1 billion. In contrast, Capital One's annualized small business pledge is $2.25 billion.

Considering just Capital One's non-credit card small business loans, the 2009 lending level falls short by about $250 million when comparing the annualized pledge amount (of $2.25 billion) to the 2009 lending amount (of $2 billion). Yet, when adding the credit card small business lending, Capital One's 2009 non-credit card and credit card lending would exceed its annualized pledge of $2.25 billion. The difficulty, however, in assessing whether the pledge represents an increase or a decrease in lending is not knowing whether the credit card small business lending is part of the small business subtotal or the credit card subtotal of the pledge.

Moreover, Capital One has not honestly discussed the advantages and disadvantages for its small business customers in terms of affordability and sustainability of acquiring a non-credit

card small business loan or a credit card small business loan. Therefore, the public is at a loss to ascertain whether these lofty dollar goals amount to significant increases in responsible credit. Another difficulty with the small business loan pledge is the lack of a sub-total for low-income tracts, moderate-income tracts, or to small businesses with revenues under $1 million. It is impossible to know, therefore, whether Capital One will cherry pick and focus on small businesses in middle- and upper-income tracts in fulfilling its pledge.

The home loan pledge is completely opaque. On an annualized basis, Capital One pledges $2.8 billion in home mortgages and home equity lending. Using the Home Mortgage Disclosure Act (HMDA) data, the combined 2009 lending of Capital One, ING Direct, and Chevy Chase Bank and BF Saul Mortgage Company (which were still separate reporters in 2009) equaled about $933 million to low- and moderate-income borrowers and neighborhoods, far short of its pledge amount. The HMDA data does not include information about home equity lending so that it is not possible to know whether the home equity lending will fill the considerable gap between the HMDA reportable loans and the $2.8 billion pledge. Further, Capital One does not discuss loan terms and conditions or how many of the loans will be prime, high-cost, Federal Housing Administration (FHA) and Veterans Administration (VA) loans. Based on 2009 HMDA price reporting information, 3 percent of the combined HMDA lending of Capital One, ING, and Chevy Chase to low-income borrowers was high-cost whereas 1 percent of the loans to upper-income borrowers was high-cost. The Capital One pledge does not have any information about how it will safeguard against steering high-cost loans to minorities or low- and moderate-income borrowers.

The affordable housing development and commercial revitalization pledge of $25 billion over ten years appears to be unrealistic. According to Capital One’s August 15 letter to the

Board, Capital One is making about $1 billion of community development loans and investments on an annual basis.[78] It would have to significantly increase this level by 2.5 times to meet its annualized pledge goal. The pledge document does not describe how Capital One will do this nor provides any break-outs of community development financing for affordable housing or small business development.

Like the pledge regarding community development financing, the philanthropy subtotal does not seem genuine in terms of being realistically attainable. The National Committee for Responsive Philanthropy calculates that the annual philanthropy pledge of Capital One is $45 million per year, or nine times Capital One's annual grant average of less than $5 million per year.

In the Chicago meeting, Board staff asked Capital One's officials questions about whether Capital One could provide more detail concerning its pledge. The Board staff asked whether the agreement contained specific commitments by geographical areas or whether Capital One could discuss how many of its small business loans were non-credit or credit card loans. The Capital One officials replied that they did not have information at the hearing about the split between credit card and non-credit card loans and they assured the Board that it does not steer small business applicants into credit card loans. Capital One staff also stated that they could not provide any specific geographical targets because of the difficulties of forecasting loan growth by geographical area.

Yet, it is precisely the answers to these questions that provide clues as to how real the pledge is. Capital One certainly could use publicly available data to determine the geographical areas where it has a considerable number of loans and then could report to the public whether it will maintain or increase lending in its current markets like New York, Louisiana, and Texas. It

could report in a thoughtful manner if it is considering targeting particularly underserved areas of the country or underserved populations with its pledge. Finally, there is no excuse why Capital One could not have thoughtfully responded about its distribution of credit card and non-credit card small business lending and whether the same or a different distribution would be advantageous to borrowers from an affordability perspective.

If this Capital One pledge was real, the pledge would describe in detail the distribution of safe and sound loans to minority and low- and moderate-income borrowers and communities. Capital One would offer measures of performance for assessing the rigor of the pledge such as whether its market share in low- and moderate-income communities would equal or exceed its market share in middle- and upper-income communities as a result of the pledge. Capital One would forthrightly discuss the advantages and disadvantages of credit card and non-credit card loans and discuss how its proposed mix of products results in public benefits in terms of affordability and responding to the plethora of needs for short-term and long-term credit. Finally in response to serious allegations of discrimination and outright refusal to serve, the pledge would discuss in detail how it would assure fair lending compliance.

Monitoring mechanisms are not developed by the pledge. At the Chicago Board meeting, Capital One officials stated that they would measure performance, report on its own evaluation, and that the bank would deliver on its pledge. This is not good enough. Previous commitments have involved community group representatives meeting twice or three times a year with bank officials to review data and performance. The review committees identify progress and shortcomings and discuss developing mechanisms such as increased marketing or community-bank partnerships for overcoming the shortcomings. The lack of formalized community

involvement in the pledge suggests that the pledge will be more of a public relations exercise than a legitimate dialogue and effort to meet community needs in a safe and sound manner.

b. A real commitment that would benefit the public must require Capital One's adherence to its terms as a condition of the acquisition's approval.

As its stands, Capital One's application and its subsequent letters to the Board involve a commitment to public benefits that falls woefully short and is overwhelmed by the increased systemic risks to the entire financial system posed by this application. In light of its history of dramatically decreasing affordable lending after acquisitions, the dollar amounts in the pledge must be regarded with healthy skepticism.

In order to meaningfully boost public benefits, the Board would require Capital One to bolster its pledge and show subgoals to minority and low- and moderate-income borrowers and communities. Geographical targets would be added for the states, metropolitan areas, and rural communities in which Capital One has branches and makes a significant amount of home, small business, and credit card lending. Meaningful measures of performance such as market share ratios discussed above would be part of a substantial pledge. Ironclad procedures to ensure loans are affordable and free of abuses and discrimination would be described in a real commitment. Significant new affordable home and small business lending programs and counseling initiatives with quantifiable targets would be likewise described in the pledge.

Capital One's two page pledge is devoid of the elements of a substantive and verifiable compact with communities. The Board must use its conditional approval authority to require Capital One to engage community organizations and Board staff to develop a pledge and plan that ensures public benefits outweigh increased systemic risks. In fact, a substantial pledge that requires Capital One to diversify its lending and offer a mix of home, small business, credit card,

and community development lending will respond to credit needs and lessen systemic risk. A real pledge requires Capital One to move away from its risky monoline business model.

The Board can build on precedents in conditional merger approvals to require that Capital One's acquisition confers public benefits including significant increases in responsible lending. One such precedent involved Citigroup. In early July 2001, the Board approved Citigroup's acquisition of European American Bank, but made the approval conditional on Citigroup implementing various reforms that it had promised during numerous meetings and discussions with community groups. The reforms included discontinuing terms and conditions such as negative amortization that can become abusive on high cost loans. In addition, Citigroup pledged that it would institute a "referral-up" program by the end of 2001 across the country. Under this program, if a borrower applied at a Citigroup subprime affiliate, but the borrower qualified for a prime loan, then Citigroup would refer the borrower to a prime affiliate. "Referral up" has certain parallels to credit card lending. Capital One, for example, could be required to refer qualified credit card customers for small business loans. In addition, Capital One could be required to institute referral up procedures for applicants of subprime credit cards who qualify for prime cards.

The Board's approval of Citigroup's application was "specifically conditioned on compliance by Citigroup with all the representations and commitments made in connection with the application…These representations, commitments, and conditions are deemed to be conditions imposed in writing by the Board in connection with its findings and decision, and, as such, may be enforced in proceedings under applicable law." In order to monitor compliance with its conditional approval order, the Board required Citigroup to submit quarterly reports on the status of all major litigation involving any of its affiliates engaged in subprime lending to the

Board for a period of two years, or longer if the Board determines is necessary. Likewise, the Board could require Capital One to submit quarterly reports on the status of credit card litigation and the progress in meeting any conditions in a conditional merger approval.[79]

The Office of Thrift Supervision's approval of the Glendale application is an example of required improvements in an institution's lending record. In April of 1998, the Office of Thrift Supervision (OTS) issued a conditional approval of Glendale's acquisition of Cenfed (both thrifts were located on the West Coast). NCRC member, the Greenlining Institute had protested the merger application and had asked for a conditional approval based upon measurable improvements in the thrift's CRA record. The OTS agreed, noting that the home lending record of Glendale to low- and moderate-income borrowers was "marginally satisfactory" and "significantly below" aggregate "averages" in its markets.

Accordingly, the OTS required the thrift to increase its lending to low- and moderate-income borrowers and communities to "at least the latest available HMDA aggregate averages in its assessment areas." Likewise, Glendale had to implement a plan for increasing lending to minority borrowers and neighborhoods. Every quarter, Glendale had to issue a status report to the OTS and place a copy of this report in the CRA public file, which is available to any member of the general public to inspect.[80]

A third precedent involves the Office of the Comptroller Currency's preliminary conditional approval in February 2003 of Charles Schwab Bank's application to commence operations. Charles Schwab Bank, NA would have only one office and one assessment area of Reno, Nevada but would be offering deposit and lending products across the country to new and existing Schwab customers of their brokerage services. The OCC required Charles Schwab Bank to submit a CRA plan providing lending targets for low- and moderate-income borrowers and

census tracts. The OCC states that while current CRA regulations only require designation of Reno, Nevada as an assessment area, "the OCC has an interest in the full scope of the bank's CRA related activities, and will be requiring the bank to provide additional information on CRA qualifying loans, investments, and services provided by the bank outside of its assessment area." In the approval order, the OCC required Charles Schwab Bank, NA to report annually on the number of community development loans and investments and home, small business, and consumer loans in its top ten metropolitan areas.[81] The data on lending would include the income and race of the borrowers. NCRC would add to this precedent that Capital One should also be required to report lending and investing activity in its major rural markets as well as metropolitan areas.

Capital One's General Counsel states that the Board should not enact CRA modernization via a merger approval order. Yet, a conditional merger approval order could build on precedents described above and would not entail any "modernization" of CRA. The current regulation allows banks and CRA examiners to consider activity outside of assessment areas as long as the bank adequately meets needs inside its assessment areas.[82] In fact, Capital One's previous CRA exam of its thrift and ING's exam does consider lending in supplemental areas outside of CRA assessment areas. A rigorous conditional merger approval order would be entirely appropriate and consistent with past regulatory practice. It is not only appropriate but must be executed if the public benefit is to exceed the increase in systemic risk posed by this proposed acquisition.

In their review of Board approval orders from the past decades, Jessee and Seelig, two staff economists with the New York Federal Reserve Bank, write that "increases in the supply and availability, as well as reductions in cost, of consumer credit…have been often cited frequently as significant public benefits in approvals of acquisitions (by the FRB)."[83] Since their

insightful review, communities have too often experienced a significant reduction in lending and banking services after acquisitions. If the acquisitions are to confer public benefits in meeting the convenience and needs of communities, it would seem that the lending and bank service capacity of the two merging institutions should at least be maintained and, better yet, enhanced. In addition, an approval of an acquisition should not decrease the level of competition, which would lead to increased fees and prices, nor should it not condone or enable discriminatory or unfair and deceptive acts and practices. Public benefits are conferred only if competition is preserved and institutions seeking approval of their expansion plans are responsible and non-discriminatory lenders.

The facts presented above clearly indicate that Capital One has been decreasing its lending, investing, and bank services in communities after its previous acquisitions. It has engaged in anti-competitive credit card pricing, unfair and deceptive credit card practices, and has engaged in lending discrimination that has deprived minority and low- and moderate-income communities of FHA loans and other needed products. In the midst of a foreclosure crisis, Capital One flatly refused to participate in federal programs designed to rescue responsible homeowners from foreclosure.

CONCLUSION

NCRC believes that, unless the Board issues a substantive conditional approval that ensures legitimate and mandatory public benefits, Capital One's application to buy ING Direct must be rejected. In its current state, the proposed acquisition is devoid of significant public benefits that would exceed the increased risk to the stability of the American financial system. A

few thousand jobs, which may not materialize, more ATMs, and more credit cards and auto loans, simply cannot outweigh the serious increased risk posed by allowing Capital One to grow. 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.

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[1] 12 U.S.C. 1843(j)(2)(A)

[2] *Id.*

[3] *First Lincolnwood Corp. v. Board of Governors of Federal Reserve System*, 560 F.2d 258, 261 (7th Cir. 1977)

[4] Pub L 111-203, H.R. 4173, § 604(e).

[5] Capital One Application to Acquire ING at 28.

[6] Nicole Gelinas. "Too Big Not To Fail." *National Affairs* (2:Winter 2010), available at http://www.nationalaffairs.com/publications/detail/too-big-not-to-fail (last visited Oct. 12, 2011).

[7] United States. Fed. Deposit Ins. Corp. *Continental Illinois and "Too-big-to-fail."* An Examination of the Banking Crises of the 1980s and Early 1990s, at 235 (1:1997), available at http://www.fdic.gov/bank/historical/history/235_258.pdf (last visited Oct. 12, 2011).

[8] United States. Fed. Deposit Ins. Corp. "When Regulation Was Too Successful—The Sixth Decade of Deposit Insurance: A History of the Troubles of the U.S. Banking Industry in the 1980s and Early 1990s.*" History of the Eighties—Lessons for the Future, vol. 1, An Examination of the Banking Crisis of the 1980s and Early 1990s, at* 236, available at http://www.fdic.gov/bank/historical/history/vol1.html (last visited Oct. 12, 2011).

[9] *See* Bd. of Governors of Fed. Reserve Sys. "The Supervisory Capital Assessment Program: Design and Implementation," at 1, (2009), available at http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20090424a1.pdf (last visited Oct. 12, 2011).

[10] Ann Graham. "Bringing to Heel the Elephants in the Economy: The Case for Ending 'Too-big-to-fail,'" *8 Pierce L.R. 117*, at 124 (2010).

[11] Daniel K. Tarullo. "Regulating Systemically Important Financial Firms." Peter G. Peterson Institute for International Economics. Jun. 3, 2011. Public Address, *available at* http://www/federalreserve.goc/newsevents/speech/tarullo20110603a.pdf (last visited Oct. 12, 2011).

[12] *Id.*

[13] Capital One Application at 31.

[14] Capital One 2008 Form 10-K filed with the Securities and Exchange Commission at 22, available at http://library.corporate-ir.net/library/70/706/70667/items/328609/32BC3C5B-A838-4B64-8FD9-C34539E7C8CF_AnnualReport_2008_Final.pdf (last visited Oct. 12, 2011) and Capital One 2009 10-K filed with the Securities and Exchange Commission at 21, available at http://phx.corporate-

ir.net/External.File?item=UGFyZW50SUQ9MzczNTg2fENoaWxkSUQ9MzcxNDA4fFR5cGU9MQ==&t=1 (last visited Oct. 12, 2011).

[15] ING Groep N.V. 2010 Form 20-F filed with the Securities and Exchange Commission at 13, available at http://www.ing.com/Our-Company/About-us/Annual-Reports.htm (last visited Oct. 12, 2011).

[16] *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir.1996) (citation omitted.); *see also* Fed.R.Evid. 201; *In re White Electronic Designs Corp. Sec. Lit.*, 416 F.Supp.2d 754, 760 (D.Ariz.2006) ("[J]udicial notice is appropriate for SEC filings, press releases, and accounting rules as they are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned" (internal quotations and citations omitted)).

[17] ING Groep N.V. 2010 Form 20-F at 13.

[18] John Finneran. "Testimony of John G. Finneran, Jr., General Counsel and Corporate Secretary, Capital One Financial Corporation before the Federal Reserve System on the Notice to Acquire ING Bank, FSB and its subsidiaries," at 1 (Oct. 5, 2011), available at http://www.capitalone.com/media/doc/global/finneran-san-francisco.pdf?linkid=WWW_Z_HOME_A0_TSTMNY_C1_05_T_Z (last visited Oct. 12, 2011).

[19] *Id.* at 2.

[20] John Finneran. "Testimony of John G. Finneran, Jr., General Counsel and Corporate Secretary, Capital One Financial Corporation before the Federal Reserve System on the Notice to Acquire ING Bank, FSB and its subsidiaries," at 5 (Sept. 20, 2011), available at http://www.capitalone.com/media/doc/global/finneran-testimony.pdf?linkid=WWW_Z_HOME_A0_TSTMNY_C1_01_T_FNTST (last visited Oct. 12, 2011).

[21] Capital One June 30, 2011 Form 10-Q filed with the Securities and Exchange Commission at 116, available at http://www.sec.gov/Archives/edgar/data/927628/000119312511212562/d10q.htm (last visited Oct. 12, 2011).

[22] *Id.* at Exhibit 31.1, available at http://www.sec.gov/Archives/edgar/data/927628/000119312511212562/dex311.htm (last visited Oct. 12, 2011); *Id.* at Exhibit 31.2, available at http://www.sec.gov/Archives/edgar/data/927628/000119312511212562/dex312.htm (last visited Oct. 12, 2011).

[23] Capital One June 30, 2011 Form 10-Q at 52.

[24] *Id*. at 113-114.

[25] *Id*. at 114.

[26] See, e.g., Kathy Chu and Byron Acohido. "Why Banks are Boosting Credit Card Interest Rates and Fees." USA Today. Nov. 4, 2008. Web, available at http://www.usatoday.com/money/industries/banking/2008-11-09-bank-credit-card-interest-rates_N.htm (last visited Oct. 12, 2011) (quoting - Rep. Carolyn Maloney, "Securitization is an important economic tool, but when we saw the subprime (mortgage) meltdown occur, we started really looking at credit cards as the next crisis."), quoting Former FDIC Chair Sheila Bair " We're finding in retrospect that being able to securitize debt … weakens underwriting discipline. Whether it's credit cards or mortgages, this dynamic needs to be dealt with."); See Margo Anderson, Federal Reserve Bank of Boston. "From Subprime Mortgages to Subprime

Credit Cards," at 22 (Fall 2008) ("In the wake of the subprime housing crisis, there are indications that subprime credit cards may be the next turbulent sector.")

Kathy Chu and Byron Acohido. "Why Banks are Boosting Credit Card Interest Rates and Fees." USA Today. Nov. 4, 2008. Web, available at http://www.usatoday.com/money/industries/banking/2008-11-09-bank-credit-card-interest-rates_N.htm (last visited Oct. 12, 2011).

[27] *Id.*

[28] United States. Fed. Deposit Ins. Corp. "Credit Card Securitization Manual." (2007), available at http://www.fdic.gov/regulations/examinations/credit_card_securitization/ch1.html (last visited Oct. 12, 2011).

[29] *Id.*

[30] *See*, *e.g*., John Finneran. "Testimony of John G. Finneran, Jr., General Counsel and Corporate Secretary, Capital One Financial Corporation before the Federal Reserve System on the Notice to Acquire ING Bank, FSB and its subsidiaries," at 1 (Oct. 5, 2011), available at http://www.capitalone.com/media/doc/global/finneran-san-francisco.pdf?linkid=WWW_Z_HOME_A0_TSTMNY_C1_05_T_Z (last visited Oct. 12, 2011) ("After the acquisition, Capital One will remain a traditional consumer and commercial bank").

[31] "Consumer Bank" Business Dictionary, available at http://www.businessdictionary.com/definition/consumer-bank.html (last visited Oct. 12, 2011).

[32] Capital One 2010 10-K Statement filed with the Securities and Exchange Commission at 22-23.

[33] *Id.*

[34] John Finneran. "Testimony of John G. Finneran, Jr., General Counsel and Corporate Secretary, Capital One Financial Corporation before the Federal Reserve System on the Notice to Acquire ING Bank, FSB and its subsidiaries," at 3 (Oct. 5, 2011), available at http://www.capitalone.com/media/doc/global/finneran-san-francisco.pdf?linkid=WWW_Z_HOME_A0_TSTMNY_C1_05_T_Z (last visited Oct. 12, 2011).

[35] Liz Moyer, "A Hot Time in Banking." *Forbes.com. Forbes Financial Services*. March 14, 2006 ("the McLean, Va., company's business will evolve from 90% card-dependent to a more evenly balanced 55%-45%, with banking still--though just barely--in the minority, including deposit gathering, mortgage lending, small business banking and other consumer and commercial services."), available at http://www.forbes.com/2006/03/13/credit-cards-banks-cx_lm_0314northfork.html (last visited Oct. 12, 2011).

[36] John Finneran. "Testimony of John G. Finneran, Jr., General Counsel and Corporate Secretary, Capital One Financial Corporation before the Federal Reserve System on the Notice to Acquire ING Bank, FSB and its subsidiaries," at 3 (Sept. 27, 2011), available at http://www.capitalone.com/media/doc/global/finneran-testimony-chicago.pdf?linkid=WWW_Z_HOME_A0_TSTMNY_C1_03_T_Z (last visited Oct. 12, 2011).

[37] Capital One 2008 Form 10-K filed with the Securities and Exchange Commission at 23

[38] *Id.*

[39] Dean Baker and Travis MacArthur. "The Value of the Too-big-to-fail Big Bank Subsidy." Center for Economic and Policy Research, Sept. 2009).

[40] *Id.*

[41] Bank of America 2010 Annual Report; JP Morgan Chase 2010 Annual Report; Citigroup 2010 Annual Report; Wells Fargo 2010 Annual Report.

[42] Capital One 2008 Form 10-K filed with the Securities and Exchange Commission at 23.

[43] Bank of America 2010 Annual Report; JP Morgan Chase 2010 Annual Report; Citigroup 2010 Annual Report; Wells Fargo 2010 Annual Report.

[44] Capital One, "Capital One to Acquire HSBC Domestic Credit Card Business for Premium of Approximately $2.6 Billion." Press Release (Aug. 10, 2011), available at http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDM2OTg5fENoaWxkSUQ9NDU3NTUyfFR5cGU9MQ==&t=1 (last visited Oct. 12, 2011).

[45] *Id.*

[46] United States. Dep't of Labor. "Household Data Annual Averages Table 1: Employment Status of Civilian Non-Institutional Population, 1940 to Date," Bureau of Labor Statistics, available at http://www.bls.gov/cps/cpsaat1.pdf (last visited Oct. 12, 2011).

[47] *Id.*

[48] *Id.*

[49] United States. U.S. Federal Reserve., "Flow of Funds Account of the United States: Flows and Outstandings." Z.1 Statistical Release (Second Quarter 2011), available at http://www.federalreserve.gov/releases/z1/Current/z1.pdf (last visited Oct. 12, 2011).

[50] "Worst Top 10 Credit Card Issuers." American Greed. CNBC, available at http://www.cnbc.com/id/36471668/World_s_Top_10_Credit_Card_Issuers?slide=11 (last visited Oct. 12, 2011).

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[52] Bank of America, U.S. Bank, and Wells Fargo websites (last visited Oct. 4, 2011).

[53] 12 U.S.C. 1843(j)(2)(A).

[54] *Id*. and 12 U.S.C. 1843(j)(2)(C).

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[56] *Id*. at 21.

[57] Joseph DiStephano. "Capital One Plans $90M Cost Cuts at ING Direct." *Philly.com. Philadelphia Inquirer.* June 17, 2011, available at http://www.philly.com/philly/business/Capital-One-will-cut-90-million-in-costs-from-ING-Direct.html (last visited Oct. 12, 2011).

[58] Anil Hira. "Outsourcing America: What's Behind Our National Crisis and How We Can Reclaim American Jobs." (2005), available at http://books.google.com/books?id=VrWDmbCFSrwC&pg=PA48&lpg=PA48&dq=capital+one+florida+outsource&

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[59] United States. Federal Financial Institutions Examination Council. A1W tables for Capital One NA in 2010 and Capital One NA, Capital One Home Loans, LLC, Chevy Chase Bank, FSB, and B.F. Saul Mortgage Company in 2009.

[60] Capital One's Letter to the Federal Reserve Board (Sept. 17, 2011), at 15.

[61] Capital One issues its non-credit card small business loans through Capital One, NA. Capital One issues its credit card small business loans through Capital One, USA, NA. The average loan amount for Capital One, NA is $114,000. In contrast, the average loan amount for Capital One, USA, NA is $8,000. Before the formation of Capital One, USA, NA, Capital One issued credit card loans through Capital One, FSB.

[62] September 17 letter to the Federal Reserve Board, page 19.

[63] LPS or Lender Processing Services is compiled from 16 mortgage servicing firms, including nine of the top ten servicers in the United States. The data does not capture all loans issued in the United States but is a large sample which is widely used in research. For additional discussion of the LPS dataset, see Dan Immergluck, Intrametropolitan Patterns of Foreclosed Homes: Zip-Code Level Distributions of Real-Estate-Owned (REO) Properties during the U.S. Mortgage Crisis, published by the Federal Reserve Bank of Atlanta, Community Affairs Discussion Paper, No. 01-09, April 21, 2009.

[64] The percentage change from 2009 through 2010 was computed using table A1W from the FFIEC website and included Chevy Chase and B.F. Saul in the 2009 FHA first lien lending totals for Capital One. This 2009 through 2010 comparison used specifications different than the 2008 and 2009 comparison, but the results are similar.

[65] 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).

[66] September 17 letter to the Federal Reserve Board, page 30.

[67] Robert Berner, *Cap One's Credit Trap*, Businessweek, http://www.businessweek.com/print/magazine/content/06_45/b4008048.htm?chan=gl

[68] Robert Berner, *Cap One's Credit Trap*, Businessweek, http://www.businessweek.com/print/magazine/content/06_45/b4008048.htm?chan=gl

[69] Bob Sullivan, Capital One Sued Over Marketing Practices, Minnesota AG Says "Fixed Rate" Ads are Misleading, MSNBC.com, http://www.msnbc.msn.com/id/6781155/ns/business-personal_finance/t/capital-one-sued-over-marketing-practices/#.TontL3NbPGA

[70] BBC News, Capital One Fined Over PPI Sales, http://news.bbc.co.uk/2/hi/business/6364269.stm

[71] NEDAP testimony at Federal Reserve hearing in Washington, DC.

[72] September 17th letter to the Federal Reserve Board, page 12.

[73] Center for Responsible Lending testimony at Federal Reserve hearing in Washington DC.

[74] OTS CRA exam of Capital One, FSB, July 2005, Docket # 13181, http://www.ots.treas.gov/?p=InstitutionSearch&iid=13181

[75] OCC CRA exam of Capital One, NA, Charter #13688, April 2007, http://www.occ.gov/static/cra/craeval/Jul08/13688.pdf

[76] Federal Reserve Bank of Richmond CRA exam of Capital One Bank, September 2007, Docket 2253891. http://www.federalreserve.gov/apps/crape/BankRating.aspx

[77] OTS CRA exam of ING Bank, fsb, August 2008, Docket # 16782, http://www.ots.treas.gov/?p=InstitutionSearch&iid=16782

[78] August 15 letter to the Federal Reserve Board, page 6.

[79] Federal Reserve Order approving Citigroup's acquisition of European American Bank, July 2, 2001, http://www.federalreserve.gov/boarddocs/press/bhc/2001/20010702/attachment.pdf

[80] Office of Thrift Supervision, Approval of Acquisition and Merger, Oder No. 98-42, April 20, 1998, http://files.ots.treas.gov/68042.pdf

[81] OCC Decision on the Application to Charter Charles Schwab Bank, NA, February 4, 2003, http://www.occ.gov/static/interpretations-and-precedents/feb03/ca577.pdf

[82] See CRA Q&A Section __ .22(b)(2) & (3)—4 at 66 Fed. Reg. 36,633 (July 12, 2001), consideration will be given for loans to LMI individuals outside an institution's assessment area(s), provided the institution has adequately addressed the needs of borrowers within its assessment area(s).

[83] Michael A. Jessee and Steven A. Seelig, Federal Reserve Bank of New York, Monthly Review, June 1974.