Comptroller of the Currency
Administrator of National Banks

Washington, DC 20219

Corporate Decision #2011-08
June 2011

April 19, 2011

Ms. Lisa Goodglick, Esq.
Associate General Counsel
Capital One, N.A.
1680 Capital One Drive
McLean, Virginia 22102

Re: Capital One, N.A., McLean, VA; Non-controlling Investment
CAIS No.: 2010-NE-08-034

Dear Ms. Goodglick:

The Office of the Comptroller of the Currency ("OCC") hereby approves the application submitted by Capital One, N.A., McLean, VA ("Bank"), to make a non-controlling investment in Enhanced Capital New Market Development Fund IV, LLC ("Enhanced IV"), New Orleans, Louisiana, a Louisiana limited liability company, through its wholly-owned subsidiary, COCRF Investor I, LLC ("COCRF"), a Delaware limited liability company.[1]

Discussion

The Bank owns 99.99% of Enhanced IV, which was established to make loans that qualify for new market tax credits. Enhanced Community Development, LLC, New Orleans, Louisiana ("Managing Member" or "MM"), owns the remaining 0.01% and is the managing member of Enhanced IV. The Bank maintains that its interest in Enhanced IV is not controlling as defined under Part 5, despite its 99.99% ownership interest. For the reasons discussed below, we concur that the Bank does not control Enhanced IV and the Bank's interest in Enhanced IV may be deemed a non-controlling investment pursuant to 12 C.F.R. Part 5.

Legal Standard and Analysis

The term non-controlling interest is not defined under 12 C.F.R. Part 5. To determine whether this investment is non-controlling, the OCC looks to the parameters of "control" as set forth for the establishment and operation of bank operating subsidiaries under 12 C.F.R. § 5.34. If the

[1] Since COCRF is wholly-owned by the Bank, for purposes of clarity and simplicity, this letter will hereinafter refer to both COCRF and the Bank as "the Bank." The Bank originally filed an after-the-fact notice under 12 C.F.R. § 5.36(e), but because of the percentage ownership interest in the entity, the OCC required an application to determine whether the investment should be considered to be a non-controlling investment or an operating subsidiary.

enterprise is not a qualifying subsidiary under Section 5.34, then it may qualify as a non-controlling investment, should it also meet the remaining standards for a non-controlling investment under 12 C.F.R. § 5.36.

In Section 5.34, control over an enterprise is discussed in reference to whether an entity is a qualifying subsidiary, and the operating subsidiary after-the-fact notice and application procedures. If a national bank does not have "control" under the after-the-fact notice test,[2] a national bank still might exercise "control" under the more general standard set forth in 12 C.F.R. § 5.34(e)(2)(i).[3]

The "control" test used to determine whether a national bank's investment in an entity satisfies the standards for an after-the-fact operating subsidiary notice provides that the bank must demonstrate that it:

> (i) Has the ability to control the management and operations of the subsidiary by holding voting interests sufficient to select the number of directors needed to control the subsidiary's board and to select and terminate senior management;
>
> (ii) Holds more than 50 percent of the voting, or equivalent, interests in the subsidiary; and
>
> (iii) Is required to consolidate its financial statements with those of the subsidiary under GAAP.[4]

The Bank's 99.99% ownership interest in Enhanced IV constitutes "more than 50 percent of the voting interests in the subsidiary," and the Bank consolidates its financial statements with those of the subsidiary pursuant to GAAP. Whether the Bank exercises "control" over the operation of Enhanced IV remains as the determining factor as to whether Enhanced IV is an operating subsidiary or a non-controlling investment. A discussion of the Bank's ability to control Enhanced IV under the operating subsidiary after-the-fact notice test and the more general application test follows.

Control pursuant to 12 C.F.R. § 5.34(e)(5)(i)(A)(3)

Under the after-the-fact notice "control" test, focus is placed on whether the Bank has the ability to control the management and operations of the entity by: 1) holding voting interests sufficient

[2] 12 C.F.R. § 5.34(e)(5)(i)(A)(*3*).

[3] This requires that the bank have "the ability to control the management and operations of the subsidiary" in addition to requirements concerning the voting interest that the bank has in a subsidiary, and that the subsidiary be consolidated with the bank under Generally Accepted Accounting Principles ("GAAP").

[4] 12 C.F.R. § 5.34(e)(5)(i)(A)(*3*).

to select the number of directors needed to control the board, and 2) having the ability to select and terminate senior management.

We conclude that the Bank does not have "control" over the management and operations of Enhanced IV as determined under the standard for after-the-fact notice. The Bank does not have the ability to select the number of directors needed to control Enhanced IV's board; only the Managing Member has the ability and discretion to select and terminate the Board of Managers after consultation with the Bank. Moreover, the Bank is not the Managing Member nor can it remove the MM without specific cause.[5] According to Enhanced IV's Operating Agreement, "all management powers over the business and affairs of the LLC shall be vested in the Managing Member, which shall act and discharge its capacity as Managing Member through a Board of Managers, which the Managing Member…appoints to act on its behalf."[6] Additionally, the Operating Agreement provides that the Board of Managers shall be selected by, and removed at the discretion of, the Managing Member after consultation with the Bank.[7] Consequently, the Bank may not select or remove any members of the Board of Managers. Lastly, the Operating Agreement provides that the Managing Member has authority over the management and operations and control of the affairs of the LLC and has the right to transact business in the name of the LLC and to act for, or on behalf of, and to bind the LLC.

As stated, the Bank cannot remove the MM without specific cause, as delineated in the Operating Agreement. Under the Operating Agreement, "cause" includes, among other actions or omissions, fraud, gross negligence, willful misconduct, or wrongful taking; breach of the operating agreement; and bankruptcy of the Managing Member or the LLC. If the MM is removed, the Bank is charged with electing a new Managing Member within ninety days."[8] Until the Bank finds a replacement, it has all of the rights and responsibilities of the Managing Member under the LLC Agreement.[9]

The MM may also engage, elect or appoint any officers of Enhanced IV after it has received the Bank's prior approval.[10] While the MM has the power to engage, elect, appoint, or terminate Enhanced IV's officers, it may not exercise such power without the Bank's consent. However, the Bank does not have any authority to engage, elect or appoint any officers with or without

[5] Enhanced Capital New Market Development Fund IV, LLC, a Louisiana limited liability company, First Amended and Restated Operating Agreement, COCRF Inv. I, LLC. – Enhanced Community Development, LLC, Jul. 16, 2010, section 9.04 [hereinafter Operating Agreement].

[6] *Id.* at 3.01(b).

[7] *Id.* at 3.01(c). In fact, bank counsel represents that the four current members of the Board of Managers are not affiliated in any way with the Bank or its operating subsidiary, COCRF.

[8] *Id.* at 9.04(c).

[9] *Id.* at 9.04(b). As will be noted subsequently, the occurrence of such an event could change the relationship of the Bank to Enhanced IV under OCC regulations.

[10] *Id.* at 3.03(k).

anyone's consent. The Operating Agreement also provides that the MM "shall have the power and duty to exercise a controlling influence over the management policies and investment decisions of the LLC in connection with the fulfillment of the purposes of the LLC…."[11]

Consequently, under the after-the-fact-notice "control" test, the Bank does not "control" the management and operations of Enhanced IV. As a result, a discussion as to whether the Bank demonstrates "control" over Enhanced IV under the more general standard (the "general standard") found in 12 C.F.R. § 5.34(e)(2)(i)(A)[12] follows.

Control pursuant to 12 C.F.R. §§ 5.34(e)(2)(i)(A) and 5.34(e)(5)(ii)(B)

Part 5 operating subsidiary requirements regarding control, ownership interest and GAAP consolidation were established to help "ensure that in all circumstances a parent bank has true operating control over an entity" that is considered to be an operating subsidiary of a national bank.[13] Thus, where the after-the-fact notice "control" test to establish an operating subsidiary is not met, a bank might still have control if it nevertheless has the ability to control the management and operations of the subsidiary.[14] If the Bank does not have control over the management and operations of Enhanced IV, then Enhanced IV could not be deemed to be an operating subsidiary and whether the Bank could hold such interest would be determined under the standards of 12 C.F.R. § 5.36(e), which addresses the authority of national banks to hold non-controlling interests in various types of entities.

In applying the general standard, we note several instances where the Bank can act unilaterally, such as divesting of its investment in Enhanced IV should it ever engage in any impermissible activities, and removing the Managing Member for explicitly delineated reasons. However, the Bank is not permitted under the Operating Agreement to make any unilateral decisions for Enhanced IV, unless an event, action, or inaction by the MM triggers cause for the Bank to act as such. These triggers are limited to matters such as a bankruptcy filing by the MM, fraud, or not ensuring maintenance of Enhanced IV's Community Development Entity ("CDE") status. Moreover, as noted, the Bank's ability to replace the MM is constrained. The Managing Member cannot be replaced "at will" by the Bank, but only in the event of the occurrence of any of a variety of reasons specified in the Operating Agreement.[15]

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[11] *Id.* at 3.03.

[12] *See also* § 5.34(e)(5)(ii)(B).

[13] *See* 73 *Federal Register* 22216, 22220 (April 24, 2008) (preamble to final regulation). As the OCC stated, the standards established in that rulemaking "clarify that the requirement that a national bank control its operating subsidiary encompasses the bank's control of the business activities of the subsidiary . . . ." *Id.* at p. 22219.

[14] 12 C.F.R. §§ 5.34(e)(2)(i)(A) and 5.34(e)(5)(ii)(B).

[15] Operating Agreement, section 9.04(c).

While the Managing Member can take certain actions without the Bank's approval,[16] as mentioned earlier, there are certain actions that the Managing Member can take only with the consent of the Bank. These include, among others:

- Approval of all investments and their terms and conditions;
- Borrowing money for the business of the LLC and prepaying, refinancing, amending or otherwise modifying any debt;
- Causing the dissolution or merger of the LLC; and
- Entering into any contract between the LLC, and the Managing Member or any affiliate of the Managing Member, or with any person if the obligations of the LLC exceed $50,000.

However, the requirement that the Managing Member consult with or seek the consent of the Bank with regard to a variety of matters, which might be considered to be "negative control" by the Bank, does not demonstrate that the Bank "controls" Enhanced IV for the purposes of the 12 C.F.R. Part 34. Prior to the adoption of the OCC's revised operating subsidiary regulation in 2008,[17] when "control" alone could be the key factor in determining whether an entity was an operating subsidiary, in certain instances the OCC had taken the position that a 10% stakeholder "controlled" an entity if it could veto the proposed actions of the majority.[18] The revised regulation, however, was intended to require a stronger, active showing of "control" (in addition to looking at percentage ownership and accounting treatment) by the parent bank. Such "negative control," in which the Bank is dependent on the discretionary actions of others, does not satisfy those standards.

For the reasons delineated above, the Bank does not have control over the management and operations of Enhanced IV and the Bank's interest in Enhanced IV may be deemed a non-controlling investment pursuant to 12 C.F.R. Part 5, provided it satisfies the standards set forth in 12 C.F.R. § 5.36(e).

Compliance with 12 C.F.R. § 5.36(e)

[16] Such actions include: exercising responsibility for business development, raising capital, underwriting, portfolio monitoring, reporting and compliance; purchasing and maintaining insurance; establishing, maintaining and closing accounts with banks or brokers and drawing checks or other orders for the payment of money or disposition of assets on behalf of the LLC; approving the form and content of all reports, records, statements, certifications, documents, and filings, made or required to be made by the LLC; and maintaining Enhanced IV's status as a qualified community development entity under New Market Tax Credit (NMTC) requirements, Section 45D of the Internal Revenue Code of 1986 and the Department of Treasury's regulations and guidance.

[17] 73 *Federal Register* 22216.

[18] *See, e.g.*, Conditional Approval 646 (June 28, 2004).

A national bank may make a non-controlling investment, directly or through its operating subsidiary by filing a written notice pursuant to 12 C.F.R. § 5.36(e). The written notice must:

1. Describe the structure of the investment and the activity or activities conducted by the enterprise in which the bank is investing;

2. State which paragraphs of § 5.34(e)(5)(v) describe the activity or activities, or state that, and describe how, the activity is substantively the same as that contained in published OCC precedent approving a non-controlling investment by a national bank or its operating subsidiary, state that the activity will be conducted in accordance with the same terms and conditions applicable to the activity covered by the precedent, and provide the citation to the applicable precedent;

3. Certify that the bank is well managed and well capitalized at the time of the investment;

4. Describe how the bank has the ability to prevent the enterprise from engaging in activities that are not set forth in §5.34(e)(5)(v) or not contained in published OCC precedent approving a non-controlling investment by a national bank or its operating subsidiary, or how the bank otherwise has the ability to withdraw its investment;

5. Describe how the investment is convenient and useful to the bank in carrying out its business and not a mere passive investment unrelated to the bank's banking business;

6. Certify that the bank's loss exposure is limited as a legal matter and that the bank does not have unlimited liability for the obligations of the enterprise; and

7. Certify that the enterprise in which the bank is investing agrees to be subject to OCC supervision and examination, subject to the limitations and requirements of section 45 of the Federal Deposit Insurance Act (12 U.S.C. 1831v) and section 115 of the Gramm-Leach-Bliley Act (12 U.S.C. 1820a).

The Bank has complied with the first three requirements under 12 C.F.R. § 5.36(e). Enhanced IV is a CDE that makes loans that qualify for NMTC. The activities of Enhanced IV are legally permissible under 12 U.S.C. § 24(Seventh) as part of or incidental to the business of banking. National banks have express authority to make loans.[19] Additionally, OCC precedent has previously permitted a national bank's non-controlling equity investment in a limited liability company that made loans that qualify for the NMTC.[20] Moreover, the applicant is well-managed and well capitalized.

The activities of Enhanced IV are set forth in its Operating Agreement. Moreover, the Operating Agreement limits the Managing Member's activities to those permissible to a national bank and

[19] 12 U.S.C. § 24(Seventh); *See also* 12 C.F.R. § 5.34(e)(5)(v)(C).

[20] *See* Interpretive Letter No. 996 (July 6, 2004).

permits the Bank to divest of its investment in Enhanced IV should it ever engage in any impermissible activities.[21] The Bank has represented that it will divest of its interest in Enhanced IV if it were to engage in activities impermissible for a national bank. Accordingly, the fourth requirement is satisfied.

With regard to the fifth requirement, the Bank has stated that Enhanced IV will enhance the safe and sound operation of its existing lending services and will provide a foundation on which to develop expanded lending to qualified active low-income community businesses. These benefits are convenient and useful to the Bank in carrying out its business.[22]

Regarding the Bank's loss exposure and liability limitation requirements pursuant to 5.34(e)(6), the notice provided to the OCC certifies that the Bank's loss exposure and its liability in connection with the investment are limited. The LLC Operating Agreement specifically limits a member's liability[23] and no member is required to make additional capital contributions to Enhanced IV.[24] Thus, the Bank's loss exposure for the liabilities of Enhanced IV is limited. Further, Enhanced IV is a Louisiana limited liability company. As a legal matter, the members of a Louisiana limited liability company are not liable for the obligations or liabilities of the limited liability company solely by reason of being a member or manager of the company.[25]

Finally, the Bank has certified that Enhanced IV subjects itself to OCC supervision and examination.[26]

Accordingly, based upon the representations made on behalf of the Bank, we conclude that the Bank's investment in Enhanced IV satisfies the legal standards that the OCC has established for non-controlling investments, as set forth in 12 C.F.R. § 5.36(e).

Conclusion

For the reasons discussed above, the Bank's investment in Enhanced IV is a legally permissible non-controlling investment pursuant to 12 U.S.C. § 24(Seventh) and 12 C.F.R. § 5.36. This approval is granted after a thorough evaluation of the application, other materials supplied, and other information available to the OCC, including representations made in the application and during the application process.

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[21] *See* Operating Agreement, section 3.14(c).

[22] After-the-fact notice from Andres L. Navarrete, Senior Vice President and Chief Counsel – Regulatory, to Steven Maggio, Director for District Licensing, dated July 30, 2010, page 3.

[23] *See* Operating Agreement, section 4.01.

[24] *Id.* at 7.02.

[25] *See* La. R.S. 12:1320 (2010).

[26] Operating Agreement, section 3.14(d).

Accordingly, the Bank may retain the investment pursuant to the authority of 12 U.S.C. § 24(Seventh) and 12 C.F.R. § 5.36. If, however, the facts and circumstances related to the Bank's investment in Enhanced IV change, including, but not limited to, the removal of the Managing Member for any reason, or if the Bank (or COCRF), as a matter of practice, controls Enhanced IV, the status of Enhanced IV as a non-controlling investment by the Bank could change.

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

If you have any questions, please contact Senior Licensing Analyst Yoo Jin Na at (202) 874-4604 or YooJin.Na@occ.treas.gov, or Senior Attorney Ancris Ramdhanie at (212) 790-4039.

Sincerely,

Stephen A. Lybarger

Stephen A. Lybarger
Deputy Comptroller for Licensing