

Mr. Jerome Powell
Chair
Board of Governors
Federal Reserve System
20th Street & Constitution Avenue, NW
Washington, DC 20551

Mr. Michael Hsu
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
407 7th Street, NW
Washington, DC 20219

Mr. Jonathan Kanter
Assistant Attorney General, Antitrust Division
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

March 21, 2024

In re: procedural requests for considering proposed Capital One-Discover Merger

Dear Chair Powell, Acting Comptroller Hsu, and Assistant Attorney General Kanter:

We urge the Board of Governors of the Federal Reserve System (Federal Reserve), Office of the Comptroller of the Currency (OCC), and the Department of Justice to move quickly to commence a full and transparent review of the proposed Capital One Financial Corporation acquisition of Discover Financial Services that provides ample opportunity for the public to engage and comment on the proposed merger.

The proposed merger warrants careful consideration. It is a substantial transaction would create the sixth largest bank with \$625 billion in assets and the nation's largest credit card lender. It is a complex combination of banking business lines with a global payments processing network. The proposed merger would substantially increase the combined firm's horizontal and vertical market power and ability to use that market power to disadvantage depositors, customers, merchants, and communities. The proposed merger presents multiple, significant concerns under federal antitrust and banking statutes that justify a careful and thorough review by banking and antitrust agencies.

The banking regulators and Department of Justice should publicly commit to a thorough and deliberative process including prohibiting expedited review of the proposed merger, extending the public comment period, holding public hearings, disclose the content of any pre-filing meetings with the merging parties to the public, conducting the competitive factors report under the 2023 Merger Guidelines, and making the competitive factors report available to the public. These procedural recommendations are consistent with existing statutes and regulations and would enhance transparency and public accountability for the consideration of this proposed merger.

The Federal Reserve and the OCC should prohibit streamlined application or expedited review for the proposed merger: Although neither the Bank Merger Act nor the Bank Holding Company Act explicitly provide for expedited or streamlined merger reviews, the Federal Reserve and Comptroller have regulations allowing expedited merger review.¹ The OCC has proposed the

¹ 12 CFR §225.14 allows the Federal Reserve to approve certain transactions between well-capitalized, well-managed institutions within 5-days of the close of the comment period. 12 CFR §5.33(i) and (j) allows the OCC to accept streamlined applications and expedite the review by automatically approving transactions 15-days after the close of the comment period if the OCC takes no

long-overdue elimination of the streamlined application and expedited review regulatory provisions (the comment period has not closed).² The Comptroller and the Federal Reserve should notify Capital One that the transaction is not eligible for expedited review.

The Federal Reserve and the OCC should extend the public comment period to at least sixty days: The banking agencies should exercise their authority to extend the public comment period to at least 60 days to allow interested customers, depositors, members of the public, and organizations to present their concerns to the Federal Reserve and the OCC. In general, the banking regulators accept public comments related to proposed mergers for 30-days after the merging parties publish a merger transaction notice.³ The OCC and the Federal Reserve have the authority to extend the comment period for at least 60 days to provide additional time to develop relevant factual information necessary for the agencies to consider the proposed merger.⁴ The proposed merger is a significant horizontal merger of banking organizations and a vertical merger between a bank and payment processing network that presents unique anticompetitive considerations and potentially negative impacts on depositors and customers. The Federal Reserve and the Comptroller of the Currency should publicly announce (including in the Federal Register notice of the proposed merger) that the public comment period will be at least 60 days or through the last day of hearings, if there are hearings, whichever is longer.

The Federal Reserve and the OCC should hold a public hearing on the proposed merger: The Federal Reserve and Comptroller should hold in person, public hearings where Capital One branches and Discover offices are located and in their largest lending markets. The Federal Reserve and the OCC have the authority to hold public hearings and previously have done so on proposed merger transactions.⁵ The proposed merger will affect depositors and credit card customers who should have the opportunity to voice their concerns about how the proposed merger could affect their finances and families in a more accessible format than the written comment process.

The Federal Reserve and the OCC should disclose any pre-filing discussions with the merging parties: The Federal Reserve and the OCC encourage merging banks to communicate their merger plans in advance of filing a merger application. The OCC's licensing manual on business combinations states that it "expects applicants considering transactions that raise novel, precedential, complex, or significant legal or supervisory issues to contact the licensing staff" before announcing merger agreements and the OCC requires pre-filing conference calls or meetings.⁶ The Federal Reserve and the OCC should disclose to the public the content of pre-filing communications with Capital One or Discover, including any non-proprietary materials and notes.

The Department of Justice should fully evaluate the proposed merger under the 2023 merger guidelines: The complex dimensions of the proposed merger underscore the shortcomings of the

action. The proposed Capital One-Discover transaction appears to exceed the size threshold of the Federal Reserve expedited review regulations, but the transaction would qualify for the OCC's streamlined application and expedited review process that limit transactions to those with targets that have assets of less than 50 percent of the acquirer's assets.

² Office of the Comptroller of the Currency (OCC). [Business Combinations under the Bank Merger Act Notice of Proposed Rulemaking](#). 89 Fed. Reg. 30. February 13, 2024 at 10010 et seq.

³ 12 USC §1828(c)(3), 12 CFR §5.8, 12 CFR §262.3(b)(1)(ii) govern the publication of merger transaction notices. The Federal Reserve merger application process provides for public comment period of "at least 30 days" after a filer publishes a notice. The OCC comment period is "in general, unless otherwise stated" 30-days after the merger transaction notice is published (12 CFR §5.10(b)(1)).

⁴ 12 CFR §5.10(b)(2)(ii) and 12 CFR §225.16(c)(2).

⁵ 12 USC §1842(b)(1), 12 CFR §263.2(e) and 12 CFR §5.11(a).

⁶ OCC. [Comptroller's Licensing Manual: Business Combinations](#). January 2021 at 27.

1995 Bank Merger Guidelines that were implemented and designed primarily to address interstate banking that was approved under the Riegle-Neal Interstate Banking Act.⁷ The Department of Justice has solicited public comments to modernize the bank merger guidelines,⁸ but the guidelines have yet to be updated. The 1995 merger guidelines' narrow focus on insured deposits is ill-suited to address the proposed merger. The Department of Justice should evaluate the proposed merger and produce the competitive factors report under the 2023 Merger Guidelines which provide the framework for a sufficiently rigorous assessment of a merger of this complexity, including the vertical network elements.⁹ The regulations implementing the Bank Merger Act permit the Department to do so.

The Department of Justice should make the competitive factors report available to the public: The Bank Merger Act requires banking regulators to request the Department of Justice to produce a competitive factors report to be shared with the agencies in consideration of the merger.¹⁰ The statute does not prohibit the Department from making the competitive factors report available to the public. The Department of Justice should release the competitive factors report to the public to promote transparency and accountability in the consideration of the proposed merger and its impact on depositors, customers, and communities.

The proposed merger represents the exact kind of transaction involving “novel, precedent-setting, or highly complex or sensitive issues” that the Comptroller has noted requires careful deliberation.¹¹ We urge the Federal Reserve, Comptroller, and Department of Justice to commit to a more transparent process that enables the public to fully participate in the consideration of this important merger review.

Sincerely,

Accountable.US
AK PIRG
American Economic Liberties Project
Americans for Financial Reform Education Fund
Better Markets
Center for LGBTQ Economic Advancement &
Research (CLEAR)
Center for NYC Neighborhoods, Inc.
Committee for Better Banks
Consumer Federation of America
Consumer Reports
Demand Progress Education Fund
Empire Justice Center
The Greenlining Institute
Institute for Agriculture and Trade Policy
Integrated Community Solutions, Inc.
Main Street Alliance

Maine People's Alliance
Metropolitan Interfaith Council on Affordable Housing
(MICAH)
National Community Reinvestment Coalition
THE ONE LESS FOUNDATION
Open Markets Institute
Public Citizen
P Street
Regenerating Paradise
Revolving Door Project
Rise Economy (formerly California Reinvestment
Coalition)
Society of Native Nations
Take on Wall Street
20/20 Vision
U.S. PIRG

⁷ U.S. Department of Justice. [Bank Merger Competitive Review—Introduction and Overview](#). 1995; Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. [Pub.L. 103-328](#). September 29, 1994.

⁸ U.S. Department of Justice. [Press release]. “[Antitrust Division seeks additional public comments on Bank Merger Competitive Analysis](#).” December 17, 2021.

⁹ U.S. Department of Justice and Federal Trade Commission. [Merger Guidelines](#). December 18, 2023.

¹⁰ 12 USC §1828(c)(4).

¹¹ OCC. [Comptroller's Licensing Manual: Business Combinations](#). January 2021 at 31.