Bank Merger Act Requires Rejection of Capital One-Discover Merger

May 2024

AFR EF Americans for Financial Reform Education Fund

Americans for Financial Reform Education Fund (AFREF) is a nonpartisan, nonprofit coalition of more than 200 civil rights, community-based, consumer, labor, business, investor, faith-based and civic groups, along with individual experts. Our mission is to fight to create a financial system that deconstructs systemic racism and inequality and promotes a just and sustainable economy. Learn more at www.ourfinancialsecurity.org.

I. Introduction

The proposed Capital One Financial Corporation acquisition of Discover Financial Services would substantially erode competition and disadvantage consumers and merchants. The size and complexity of the transaction would create a combined company that raises antitrust concerns that justify enjoining this merger.[1] But the transaction also fails to meet critical considerations under the Bank Merger Act and Bank Holding Company Act that direct banking regulators to reject mergers that fail to further the convenience and needs of communities, have sufficient managerial resources and solid financial future prospects, or that pose risks to the stability of the banking or financial system.

The $35.3 billion Capital One Financial Corporation (Capital One)-Discover Financial Services (Discover) merger would be a significant banking and financial services combination.[2] It would create the nation's biggest credit card lender, one of the biggest banks, and a powerful vertically integrated payments network combined with a branch bank and credit card issuer. It would create the sixth largest banking company in the country by assets with $624 billion in consolidated domestic assets by combining the ninth place Capital One Financial Corporation (Capital One) with the 27th largest Discover Financial Services (Discover).[3] The merger will affect millions of households with deposit accounts or credit cards, including 300 million Discover cardholders and 100 million Capital One cardholders.[4]

Both parties are large banks with important retail banking business lines. The merged firm would be the fifth largest bank holding company by deposits with nearly $470 billion in deposits (currently Capital One ranks 8th with $367.8 billion in deposits and Discover ranks 26th with $101.2 billion in deposits).[5] Discover is a digital national direct savings bank that competes with the nation's largest banks and it has been accelerating its banking growth.[6] Discover's digital banking includes credit card lending, online banking, personal loans, and mortgage lending.[7] Capital One also operates as a full-service digital bank but it also has 259 branches in 21 of the 25 largest metropolitan areas, 80,000 fee-free ATMS, and 16,000 cash deposit

---

[1] Americans for Financial Reform Education Fund (AFREF) filed a separate brief on the significant harms to competition posed by the proposed merger. AFREF. "The Anticompetitive Effects of the Capital One-Discover Merger." April 2024.
[2] Capital One. [Press release]. (Capital One press release). "Capital One to acquire Discover." February 19, 2024.
[3] Federal Reserve Board (FRB). "Insured U.S.-Chartered Commercial Banks That Have Consolidated Assets of $300 Million Or More, Ranked by Consolidated Assets." December 31, 2023.
[4] Hirsch, Lauren and Emma Goldberg. "Capital One to acquire Discover, creating a consumer lending colossus." *New York Times*. February 19, 2024; Capital One Financial Corporation and Discover Financial Services. (Capital One-Discover Investor Presentation), Investor Presentation. February 20, 2024 at 9.
[5] The combination would be sixth largest in terms of consolidated domestic assets. Federal Deposit Insurance Corporation (FDIC). Summaries of Deposits—Market Share Reports. Holding Companies with Subsidiaries. December 31, 2023.
[6] Capital One press release. 2024.
[7] Son, Hugh. "Here's why Capital One is buying Discover in biggest proposed merger of 2024." *CNBC*. February 21, 2024; Capital One-Discover Investor Presentation. 2024 at 6.

locations.[8] Capital One offers deposits (checking and savings), credit cards, small business loans, and automobile loans.[9]

Banking regulators must evaluate bank merger applications not only to prevent anticompetitive mergers but also to carefully assess whether the combination will satisfy the public interest because of the unique economic role of chartered banks. Banks play a critical function in the monetary system, in providing credit to households and businesses, and in providing a utility-like service to retail customers connecting households to the financial system. Federal banking laws recognize this uniqueness by chartering banking institutions, delineating permissible banking activities, supervising the safety and soundness of banks, and requiring banks to serve the credit needs of all communities, including lower-income areas and communities of color, under the Community Reinvestment Act.

Moreover, the federal government provides direct and implicit subsidies to chartered banks that justify increased merger scrutiny. Federal deposit insurance subsidizes the banking industry from the costs of risk-taking, stabilizes the banking industry, and provides confidence and a sense of security for depositors.[10] Merger-driven consolidation grants larger banks other financial subsidy benefits, such as paying less for funds.[11] Banks are able to borrow from the Federal Reserve at highly-discounted rates that can be at or below 1 percent that are far cheaper than the credit terms other firms can access and this borrowing also receives significant tax subsidies that encourages excess borrowing and leverage that can further incentivize risk-taking.[12]

Banks that are perceived to be so large, interconnected, or complex that the government would act to prevent their failure and the resulting economic disruption to their customers, creditors, shareholders, and the economy. Before the financial crisis, the Federal Reserve Bank of San Francisco warned that that merging megabanks could "earn a 'too-big-to-fail' subsidy due to the market's perception of a de facto government backing of a megabank in times of crisis."[13] The federal backstop of the financial industry included $900 billion in direct support and rescue financing as well as $1.3 trillion in Federal Reserve purchases of corporate debts and bonds.[14] The explicit and implicit government subsidies create a moral hazard for banks that encourages greater risk-taking that could imperil the institution because of the

[8] Capital One press release. 2024.
[9] Huffman, Lee. (Huffman). "Capital One Deal for Discover Could affect what's in your wallet." *US News and World Report.* February 20, 2024.
[10] Ellis, Diane. FDIC. "Deposit Insurance Funding: Assuring Confidence." November 2013.
[11] Kim, JinAh and Katja Seim. University of Pennsylvania. Wharton School of Business. "Effects of Bank mergers on risk leading up to the 2007-2008 financial crisis." 2016 at 7.
[12] Admati, Anat and Martin Hellwig. (Admati and Hellwig). *The Bankers' New Clothes: What's Wrong with Banking and What to Do About It*. Princeton University Press: Princeton, New Jersey. 2024 at 137 to 140.
[13] Kwan, Simon. (Kwan). Federal Reserve Bank of San Francisco. "Banking Consolidation." *FRBSF Economic Letter.* No. 2004-15. June 18, 2004 at 2
[14] Admati and Hellwig. 2024 at 137.

knowledge that the federal government will backstop depositors and prevent too-big-to-fail institutions from failure.[15]

Federal banking laws recognize the important public interest in seriously evaluating bank merger applications. The Bank Merger Act and the Bank Holding Company Act direct banking regulators to reject mergers that are anticompetitive or that fail to meet three critical considerations: serving the convenience and needs of the community, adequate managerial resources and future prospects, or excessive risk to financial stability. The statute reads:

> In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, and the risk to the stability of the United States banking or financial system.[16]

The banking regulators must independently assess the three public interest considerations under the Bank Merger Act and Bank Holding Company Act. The "convenience and needs" consideration incorporates the provision of quality and equitable banking services to consumers, lending records to lower-income and Black and Latine households and communities and other communities of color, and performance and prospective performance under the Community Reinvestment Act. The "managerial resources and future prospects" consideration encompasses compliance with supervisory regulations, including consumer protection and safety and soundness regulations. The "future prospects" element includes not only whether the applicants and combination would be well capitalized but also whether the combination can pose risks to the future viability of the merged institution. The "financial stability" consideration includes an evaluation of whether the merged bank poses a greater concentration of risk that could be transmitted to the banking or financial system in times of economic stress.

Banking regulators should reject proposed bank mergers that raise significant concerns under any one of these considerations. Senator A. Willis Robertson (Virginia), Chairman of the Senate Committee on Banking and Currency and sponsor of the Bank Holding Company Act amendments that aligned its language with the Bank Merger Act, stated that adverse findings on any of the constituent statutory considerations would provide ample authorization to deny bank mergers:

> Of course, if there are no substantial anticompetitive effects and no tendency to create a monopoly and no suggestion of restraint of trade, the banking agency will proceed to consider the merger on the basis of the financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served.

[15] Moch, Nils. "The contribution of large banking institutions to systemic risk: What do we know? A literature review." *Review of Economics*. Vol. 69, No. 3. 2018 at 232.
[16] 12 USC §1828(c)(5)(B); 12 USC §1842(c)(2) and (7).

> The banking agency may approve the merger it thinks the merger will be beneficial from these points of view, or it can turn the merger down if it thinks the merger undesirable or objectionable in any respects from these points of view.[17]

The Congressional intent of the statutory considerations under both the Bank Merger Act and the Bank Holding Company Act is for the banking agencies to consider each of the constituent elements — convenience and needs, managerial resources and future prospects, and financial stability — independently and that the agencies should deny merger applications that fail "in any respects" to achieve these public interest objectives.

The proposed Capital One-Discover merger fails to meet the convenience and needs, managerial resources and future prospects, and financial stability conditions. The transaction creates significant harms to competition that justify enjoining the merger on antitrust grounds, but the banking regulators also should reject the proposed acquisition for failing to meet the conditions under the Bank Merger Act and Bank Holding Company Act.

II. Merger would harm the convenience and needs of consumers and communities

The proposed merger will not meet the statutory convenience and needs condition. The banks' credit card offerings target lower-income, Black, and Latine consumers, have been marketed deceptively, and use aggressive and unlawful collection practices. And Capital One has pursued a strategy of branch closures that has reduced its total branches by more than two-thirds and had disproportionate impact on lower-income, Black, and Latine communities.

The Bank Merger Act and the Bank Holding Act both require mergers to meet the convenience and needs of the community. The banking regulators have not given this consideration the weight that it deserves. Banks are institutions deeply rooted in the economic fabric of communities and the banking regulators should make a meaningful assessment of the merging parties past records and prospective plans to meet the convenience and needs of communities and consumers. In practice, the regulators have primarily considered the Community Reinvestment Act (CRA) performance ratings.[18] CRA ratings are a poor metric for the convenience and needs

[17] Congressional Record. Vol. 112, Part 2. February 9, 1966 at 2656.

[18] Compliance with the Community Reinvestment Act is covered in a different section of the Bank Holding Company Act than the convenience and needs test. 12 USC §1842(d)(3). Nonetheless, the regulations governing the convenience and needs provision of the statute states that the Federal Reserve Board "considers the following factors … the convenience and needs of the communities to be served, including the record of performance under the Community Reinvestment Act." 12 CFR §255.13(b)(3). The proposed Office of the Comptroller of the Currency (OCC) revision of its merger policy statement would discourage approving transactions if the parties had one of the two lowest CRA ratings. OCC. Notice of Proposed Rulemaking on Business Combinations Under the Bank Merger Act. 89 Fed. Reg. 30. February 13, 2024 at 10016.

consideration because nearly all banks have "satisfactory" or "outstanding ratings," making this approach totally inadequate and one that virtually all banks would satisfy.[19]

Congress intended the evaluation of the convenience and needs consideration to assess whether the merger would enhance the quality of banking services offered to consumers and communities, not merely continue the banks' current business-as-usual practices. Representative Thomas Ashley stated that proposed bank mergers "must be shown to be sufficiently beneficial in meeting the convenience and needs of the community to be served that, on balance, it may properly be regarded as in the public interest."[20]

Banking regulators need to carefully consider the convenience and needs of communities because bank mergers historically have raised prices and reduced the quality of banking services. Bank mergers have driven higher bank fees and higher costs to maintain accounts, which has an especially harmful impact on lower-income households.[21] Merging banks reduce the volume, increase the cost, and lower the access to affordable mortgage credit and these detrimental effects are more pronounced for families of color, lower-income families, lower-income areas, and communities of color.[22] Bank consolidation can reduce small business lending and have a disproportionately negative impact on the ability of businesses owned by people of color and women as well as all very small businesses to access credit.[23]

The banking regulators should assess the convenience and needs consideration to determine whether the proposed Capital One-Discover merger will improve the

[19] Since 2019, more than 98 percent of the 1,062 OCC-regulated institutions have satisfactory or outstanding CRA ratings, only one has had a substantial non-compliance rating and 17 have needs to improve ratings that combined amount to 1.7 percent of OCC-regulated banks. AFREF analysis of OCC CRA Performance Evaluations. 2019-2023. Accessed April 2024.

[20] United States v. Third Nat'l Bank in Nashville. 390 U.S. 171, 184 (1968).

[21] Bord, Vitay M. Harvard University. "Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors." December 1, 2018; Kahn, Charles, George Pennacchi, and Ben Spranzetti. "Bank consolidation and the dynamics of consumer loan interest rates." *Journal of Business*. Vol. 78, No. 1. 2005; Carletti, Elena, Philipp Hartmann, and Giancarlo Spagnolo. (Carletti, Hartmann, and Spagnolo). "Implications of the bank merger wave for competition and stability." *Risk Measurement and Systemic Risk, Proceedings of the Third Joint Central Bank Research Conference*. January 2002; Weinberg, Matthew. University of Georgia, Center for Economic Policy Studies. "The Price Effects of Horizontal Merges: A Survey." CEPS Working Paper No. 140. January 2007.

[22] Ratnadiwakara, Dimuthu and Vijay Yerramilli. Louisiana State University and University of Houston. "Effect of Bank Mergers on the Price and Availability of Mortgage Credit." September 2020; Gam, Yong Kyu and Yunqi Zhang. Southwestern University of Finance and Economics and Nankai University. "Dismembered Giants: Bank Divestitures, Local Lending, and Housing Markets." 55th American Real Estate and Urban Economics Association. San Diego. January 3-5, 2019; Scharfstein, David and Adi Sunderam. Harvard University and National Bureau of Economic Research. "Concentration in Mortgage Lending, Refinancing Activity, and Mortgage Rates." NBER Working Paper No. 19156. June 2013.

[23] Samolyk, Katherine and Christopher A. Richardson. FDIC. Working Paper 2003-02. "Bank consolidation and small business lending within local markets." April 2003; Carletti, Hartmann, and Spagnolo. 2002; Nguyen, Hoai-Luu. Massachusetts Institute of Technology. "Do Bank Branches Still Matter? The Effect of Closing on Local Economic Outcomes." December 2014; Minton, Bernadette A., Alvaro G. Taboada, and Rohan Williamson. Ohio State University, Mississippi State University, and Georgetown University. "Bank Mergers and Small Business Lending: Implications for Community Development." Paper presented at Financial Management Association 2019 Conference, New Orleans. October 23 to 26, 2019.

quality and price of banking service offerings to consumers and communities, especially for lower-income, Black, and Latine consumers and communities. Capital One and Discover have records of deceptive marketing, aggressive marketing, and unlawful collection practices for its credit cards, which disproportionately harms lower-income, Black, and Latine consumers with lower credit scores. Capital One has closed 71 percent of the bank branches it acquired in mergers with Hibernia National Bank, North Fork Bancorp, and Chevy Chase Bank. The strategic shift away from retail branches has harmed communities — especially lower-income, Black, and Latine areas — that have lost access to retail banking services. It also stopped making home purchase and home improvement loans in 2017, sharply contracting the services that were offered by the banks it had acquired.[24]

The regulators should consider other impacts the merger is likely to have on communities. For example, the proposed OCC merger policy statement appropriately includes prospective job losses in its convenience and needs evaluation.[25] The proposed merger is likely to reduce jobs, as has happened when Capital One acquired another monoline credit card bank. After Capital One acquired HSBC in 2012, it fired 880 workers one day after hosting a merger welcome party, eliminating the biggest employer in Salinas, California.[26] It laid off another 79 workers at an HSBC facility in Tigard, Oregon.[27] It continued to shed jobs from HSBC operations for years, including eliminating 750 jobs in Sioux Falls, South Dakota in 2015.[28]

The proposed merger is likely to include significant layoffs as Capital One eliminates duplicative credit card underwriting, servicing, and marketing operations. Capital One estimated that the merger would generate $1.4 billion in operating and marketing synergies,[29] which really means eliminating redundant operations and jobs. These job losses are likely to be focused in the greater Chicago area, where Discover is headquartered. Discover operates 24-hour customer service call centers based in the United States.[30] Capital One already eliminated 400 call center workers in 2017 at its own call center in the Chicago area.[31] The *Chicago Tribune* noted that the region could lose a "hefty number of good-paying jobs," including at the recently opened call center in Chicago's South Side that employed hundreds of local workers in the lower-income, predominantly Black area.[32]

---

[24] Saxena, Aparajita. "Capital One exits mortgage loans business, cuts 1,100 jobs." *Reuters*. November 8, 2017.
[25] 89 Fed. Reg. 30. February 13, 2024 at 10018.
[26] Larson, Amy. "Capital One throws welcome party day before Salinas layoffs announced." *KSBW-TV Channel 8 Action News* (Monterrey, California). May 3, 2012.
[27] Njus, Elliot. "Capital One to lay off 79 at former HSBC in Tigard." *Portland Oregonian*. May 4, 2012.
[28] Schwan, Jodi and Steve Young. "Capital One leaving Sioux Falls; 750 losing jobs." *Sioux Falls Argus Leader*. July 23, 2015;
[29] Capital One-Discover Investor Presentation. 2024 at 5.
[30] Discover Financial Services. (Discover SEC Form 10-K). U.S. Securities and Exchange Commission. Form 10-K. 2023 at 7.
[31] Marotti, Ally. "Capital One eliminates 400 call center jobs from Rolling Meadows office." *Chicago Tribune*. August 10, 2017.
[32] Editorial. "Sale of Discover is another blow to Chicagoland's business community." *Chicago Tribune*. February 20, 2024.

A. High-priced credit card products, misleading marketing, and collections do not meet the convenience and needs of consumers and communities

Capital One's credit card products and practices disadvantage consumers — especially lower-income, Black, and Latine consumers — and do not meet the convenience and needs of the community of credit cardholders it serves. The proposed acquisition will likely raise interest rates on the 50 million Discover credit cardholders who will be moved to Capital One's higher interest rates. The impacts are likely to be most damaging for the large number of cardholders with near-prime and subprime credit scores that pay more in fees and interest rates and are disproportionately Black and Latine. Capital One's pattern of predatory marketing and collection practices have compromised the household finances of credit card borrowers.

The banking regulators evaluate the products and practices that banks offer under the convenience and needs consideration of the Bank Merger Act. The Federal Reserve considered Capital One's credit card marketing and lending practices in previous acquisitions. The OCC Bank Merger Act regulations include relevant factors in the convenience and needs consideration including the applicants' willingness to "provide expanded or less costly services."[33] The proposed OCC bank merger policy statement includes increasing costs of banking services and credit availability in the convenience and needs consideration.[34]

Banking regulators should carefully evaluate Capital One's record of serving its credit card customers because credit cards are the primary product that the bank offers and Capital One's credit card products and practices reflect its commitment to the convenience and needs of the communities it serves. Capital One has a long record of consumer dissatisfaction with its credit card offerings. Consumers complain about Capital One more than about any other credit card lender. Capital One has one of the highest levels of credit card complaints at the CFPB. Capital One credit cards received the largest number of consumer complaints in the first two years of the CFPB complaint database from 2011 to 2013, representing more than one-fifth of all consumer complaints about credit cards.[35] In the past decade between 2014 and 2023, the CFPB recorded over 36,700 complaints about Capital One's credit cards or prepaid cards.[36] The number of complaints exceeds those for all other major issuers except Citibank (with over 38,000 credit card complaints) and is the highest number of complaints per $1 billion in outstanding credit card debt with nearly 250 complaints per $1 billion in credit card loans (see Figure 1.[37]

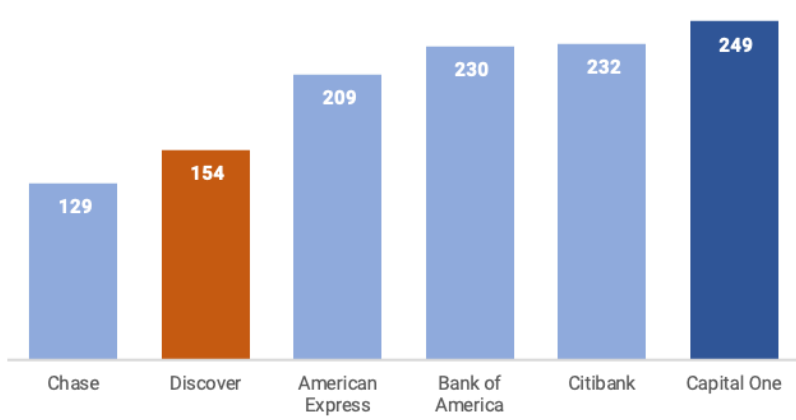
---

[33] 12 CFR §5.33(e)(ii)(C).
[34] 89 Fed. Reg. 30. February 13, 2024 at 10018.
[35] Ellis, Blake. "Most complained-about credit card companies." *CNN.* January 14, 2014.
[36] AFREF analysis of CFPB complaint database between January 1, 2014 and January 1, 2024. Complaint categories "credit card" and "credit card or prepaid card." Company searches were narrowed by using quotations, i.e. "Capital One." CFPB. Consumer Complaints Database. Accessed April 2023.
[37] Outstanding loans from SEC filings and FDIC Call Reports. JPMorgan Chase & Co. SEC Form 10-K. 2023 at 70Citigroup, Inc. SEC Form 10-K. 2023 at 214 and 216; Capital One Financial Corp. SEC Form 10-K. 2023 at 90;

Consumers use credit cards to make secure, convenient purchases that are effectively short-term loans and many families use credit cards to finance larger purchases or as loans during financial emergencies, such as car repair needs. Many transactions require a credit card, such as car rentals, airplane tickets, or hotel reservations. But opaque terms and high costs from multiple kinds of fees and interest charges can burden lower-income consumers. The Consumer Financial Protection Bureau reported that consumers were charged $25 billion in fees and $105 billion in interest on credit cards in 2022 (largely before recent interest rate increases).[38]

High interest rates and fees can burden families and lead to larger outstanding credit card debts that are hard to repay and compromise household economic stability. Half of cardholders carry an outstanding balance from month to month, and these borrowers are carrying these revolving debts longer and are struggling to repay them.[39] Black and Latine consumers are far more likely to carry an outstanding balance as compared to white consumers (78 percent, 62 percent, and 42 percent respectively).[40] Households in the lowest three income deciles had credit card debt that exceeded 70 percent of their incomes — households in the lowest income decile had credit card debt that was more than 90 percent of their monthly income in 2022.[41] Credit card debts can undermine household finances. High levels of credit card debt are

Fig. 1: Credit card complaints per $1 billion in outstanding credit card loans



Soure: AFREF analysis of CFPB complaint database

Discover Financial Services. SEC Form 10-K. 2023 at 64; Bank of America Corporation. SEC Form 10-K. 2023 at 58; American Express National Bank. FDIC Call Report Cert. No. 27471. 2023

[38] Consumer Financial Protection Bureau (CFPB). [Press release]. "CFPB Report Finds Credit Card Companies Charged Consumers Record-High $130 Billion in Interest and Fees in 2022." October 25, 2023.

[39] Cerullo, Megan. "Americans owe a record $1.1 trillion in credit card debt, straining budgets." *CBS News*. February 6, 2024.

[40] FRB. "Report on the Economic Well Being of U.S. Households 2022." May 2023 at Table 22.

[41] Chiang, Yu-Ting and Mick Dueholm. Federal Reserve Bank of St. Louis. "Which U.S. Households Have Credit Card Debt?" May 20, 2024.

associated with an increase in insolvency and household bankruptcy filings.[42] The rising credit card debt in 2023 reflects that "lower income families in the U.S. are facing additional financial strain," according to Citibank's global economist.[43]

Credit card debt burdens disproportionately harm Black and Latine families and communities. Although it is harder for Black and Latine consumers to be approved for credit cards, they are more likely to carry outstanding balances, are more likely to use a large share of their credit limit, and be severely delinquent on their debt. Black and Latine cardholders were far more likely to carry outstanding credit card debt than white cardholders (73 percent, 64 percent, and 44 percent, respectively) and the outstanding balance represented a far greater share of their available resources in transaction accounts (86 percent, 97 percent, and 39 percent, respectively).[44]

These are community-wide impacts that undermine the economic vitality of Black and Latine neighborhoods. A 2023 GAO study found that credit card accounts in predominantly Black and Latine zip codes paid higher interest rates and had lower credit limits even when controlling for credit scores and incomes in the zip code and whether the cardholders carried a balance.[45] In 2023, the Federal Reserve Bank of Philadelphia reported that borrowers in Black and Latine communities are more likely to use over 75 percent of their credit limit than borrowers in white communities (41 percent, 34 percent, and 21 percent, respectively) and more likely to be severely delinquent (25 percent, 16 percent, and 9 percent, respectively).[46] The higher delinquency and credit utilization levels in turn have significant negative impacts on credit scores, creating a vicious cycle of higher credit card burdens disproportionately harming the credit scores of Black and Latine consumers.

Merger would enable Capital One to raise interest rates and fees: Capital One has some of the highest interest rate credit cards and the proposed merger would give the combined company the market power to raise credit card prices further. In 2023, the CFPB found that Capital One was among the biggest credit card issuers with interest rates over 30 percent on some card products.[47] Currently, Capital One charges about 2 percentage points higher interest rates than Discover charges for consumers with similar credit scores (see Figure 2).[48] Capital One's application does not state how it would treat Discover cardholders after the merger, but it would have the ability and incentive to increase the interest rates on the 50 million Discover

---

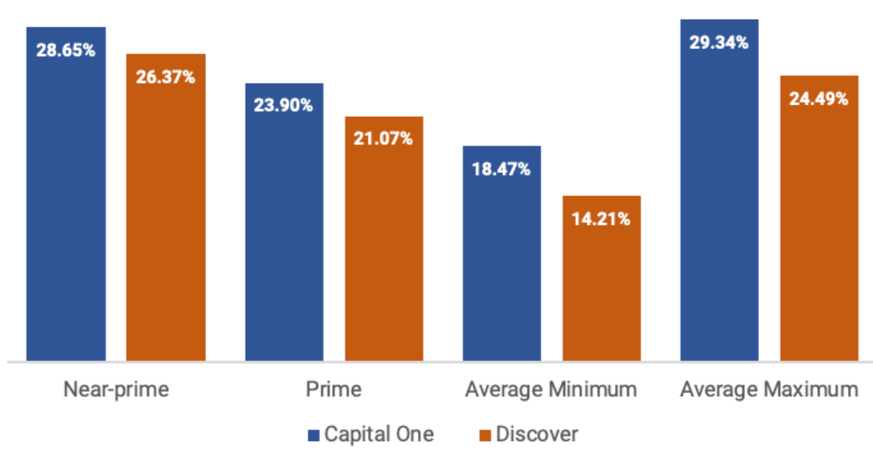
[42] Xiao, J.J. and R. Yao. "Good debt, bad debt: Family debt portfolios and financial burdens." *International Journal of Bank Marketing*. Vol. 40, No. 4. 2022; Evans, David and Jonathan Bauchet. "Bankruptcy determinants among U.S. households during the peak of the Great Recession." *Consumer Interests Journal*. Vol. 63. 2017.
[43] Gandel, Stephen and Patrick Mathurin. "How credit card debt has become a burden for Americans — and Joe Biden." *Financial Times*. March 20, 2024.
[44] Tescher, Jennifer and Corey Stone. Brookings Institution. "Revolving Debt's Challenge to Financial Health and One Way to Help." June 7, 2022.
[45] Government Accountability Office (GAO). "Credit Cards: Pandemic Assistance Likely Helped Reduce Balances, and Credit Terms Varied Among Demographic Groups." GAO-23-105269. September 2023 at 26.
[46] Federal Reserve Bank of Philadelphia. Consumer Credit Explorer. 2023.
[47] CFPB. "Credit Card Data: Small Issuers Offer Lower Rates." February 16, 2024.
[48] AFREF analysis of average interest rates of all general-purpose credit cards. CFPB. (CFBP Credit Card Survey) "Terms of Credit Card Plans Survey Results." November 2023.

cardholders. Capital One could raise the interest rates on subsequent purchases (but not on existing outstanding debts) in a forward repricing scheme to move Discover customers to Capital One's higher prevailing interest rates.[49] Discover credit cardholders could face a nearly 9 percent price hike for cardholders with near-prime credit scores and a 13 percent increase for those with prime scores.

The merged firm would have the market power to raise prices (fees and interest rates) on all consumers. The combined Capital One-Discover would become the biggest credit card lender with 22 percent of outstanding credit card debt.[50] The merger would create a more concentrated market where the top four firms would hold nearly two-thirds (64.5 percent) of outstanding credit card debt, making it easier for dominant issuers to pursue coordinated pricing strategies to raise prices and capture excess profits. A 2020 National Bureau of Economic Research paper found that the limited competition allowed credit card lenders to charge interest rates that are far above the costs of funds that amounted to a markup of over 44 percent.[51] The CFPB found that the lack of credit card interest rate competition contributed to the widening spread between credit card interest rates and the prime rate that rose by 2 percentage points from 2015 to 2022).[52]

Consumers could not easily avoid price hikes because it is difficult or impossible for consumers to switch cards. More than half (56 percent) of credit card applications are rejected; more than four-fifths (83 percent) of applications by consumers with subprime credit scores are rejected.[53] Lower income consumers aer less likely to get

Fig. 2: Comparison of Capital One and Discover APR
(average purchase APR)



Source: AFREF analysis of CFPB data

[49] Botella, Elena. "A Capital One-Discover merger could raise credit card interest rates." *Forbes*. March 16, 2024.
[50] Market share for total loans calculated from total outstanding credit card loans from Federal Reserve Bank of New York. Center for Microeconomic Data. Household Debt and Credit Report. Q4 2023; Capital One Financial Corp. SEC Form 10-K. 2023 at 90 and 94; Discover SEC Form 10-K. 2023 at 64 and 102.
[51] Herkenhoff and Raveendranathan. 2021 at 14 to 15.
[52] CFPB Consumer Credit Card Market. 2023 at 54.
[53] *Ibid.* at 80.

approved for credit cards and more likely to receive lower credit limits and higher interest rates.[54]

Merger disadvantages non-prime cardholders, disproportionately harming Black and Latine consumers: Capital One and Discover are major credit card lenders to consumers with non-prime credit, with a combined $67 billion in loans to consumers with non-prime credit scores in 2023 representing 32 percent and 20 percent of their outstanding credit card loans, respectively.[55] The proposed merger would create the largest non-prime credit card lender that would hold nearly one-third (30.6 percent) of the outstanding credit card loans to consumers with non-prime credit scores.[56] Consumers with non-prime credit scores — who are disproportionately Black and Latine — have fewer credit card options, have more difficulty securing credit cards, are more susceptible to receiving higher fees and penalty interest rates, and are more likely to be financially burdened by credit card debt. The merger would concentrate market power in the non-prime credit card market and the top four firms would hold 72 percent of the outstanding non-prime credit card debt and have a negative impact on economically vulnerable consumers.

Capital One targets non-prime borrowers and routinely increases the credit cap of cardholders with subprime credit scores without their permission, effectively encouraging borrowers that had neared their credit limit to take on additional debt.[57] Capital One uses advanced data analytics and statistical modeling that combined credit and demographic data to pitch a specific credit card product at a specific price and credit limit.[58] The company performs over 80,000 big data marketing experiments annually.[59] Understanding and predicting customers' willingness to pay (that is: what are the limits in credit lines, terms, interest rates, and fees a borrower would accept) allows Capital One to impose higher prices on consumers who are price takers.[60] A *Quarterly Journal of Economics* paper found that "Increases in credit limits generate an immediate and significant rise in debt."[61]

---

[54] Raveendranathan, Gajendran. McMaster University. "Revolving Credit Lines and Targeted Search." February 24, 2020.
[55] Capital One SEC Form 10-K. 2023 at 94, 90, 91, Discover SEC Form 10-K. 2023 at 64 and 102.
[56] AFREF estimate based on issuers' disclosure of higher-risk loans (typically reported as under 660 credit score, although some report under 680 or under 650). Capital One Financial Corp. SEC Form 10-K. 2023 at 90 and 94 (<660); Discover Financial Services. SEC Form 10-K. 2023 at 64 and 102 (<660). Analysis of 30 largest credit card lenders (see AFREF. "The Anticompetitive Effects of the Capital One-Discover Merger." April 2024 at Appendix). Eighteen of the 30 issuers reported non-prime lending breakdown on their SEC reports. The 19 percent non-prime lending share total credit card lending from these 18 lenders was applied to the total FRB NY Household Debt and Credit Report outstanding credit card debt to determine market shares.
[57] Botella, Elana. "I worked at Capital One for five years. this is how we justified piling debt on poor customers." *The New Republic*. October 2, 2019.
[58] Buvat, Jerome and Subrahmanyam KVJ. (Buvat and KVG). Capgemini Consulting. "Doing Business, the Digital Way: How Capital One Fundamentally Disrupted the Financial Services Industry." 2014 at 3.
[59] *Ibid.* at 2.
[60] Kechelek, Douglas M. "Data mining and antitrust." *Harvard Journal of Law & Technology*. Vol. 22, No. 2. Spring 2009 at 518 to 522
[61] Gross, David B. and Nicholas S. Souleles. "Do liquidity constraints and interest rates matter for consumer behavior? Evidence from credit card data." *Quarterly Journal of Economics*. Vol. 117, Iss. 1. February 2002.

Concentrated credit card lending markets especially disadvantage lower-income and disproportionately Black and Latine consumers because of the stark credit score disparities that determine their access and terms for credit card loans. Black and Latine consumers who have credit scores tend to have lower average credit scores than white consumers (8 percent and 5 percent lower, respectively).[62] A 2022 Urban Institute study found that there were far more people with subprime credit scores in Black, indigenous, and Latine communities than in white communities (41 percent, 43 percent, 29 percent, and 17 percent, respectively).[63] These consumers are more likely to carry balances and make smaller monthly payments that add to their household debt. About 80 percent of cardholders with non-prime credit scores revolve (carry outstanding debt) and pay off less than 15 percent of their balances every month.[64]

Capital One has a pattern of deceptive and abusive credit card marketing: Capital One has been the subject of multiple investigations, settlements, and consent decrees over its credit card marketing practices for more than a decade. In the previous Capital One mergers with Hibernia, North Fork, and ING, federal regulators have acknowledged the bank's problematic pattern of deceptive marketing but nonetheless approved the mergers.[65] In 2012, the Federal Reserve required Capital One to submit and implement a plan to strengthen consumer compliance as a condition of approving the ING acquisition.[66] Since 2006 Capital One has paid $225 million and Discover has paid $200 million to settle deceptive credit card marketing cases.

- ***2006 Minnesota $750,000 consent decree for deceptive marketing:*** Capital One entered a consent decree with Minnesota and paid a $749,999 fine and agreed to suspend certain advertising promotions for 18 months.[67]

- ***2012 Capital One paid $13.5 to settle West Virginia deceptive adverting case:*** Capital One paid $13.5 million in 2012 to settle the West Virginia lawsuit in which the state attorney general alleged that Capital One deceptively advertised credit cards but offered such low limits and such high fees that consumers effectively did not receive access to credit.[68]

---

[62] Sandberg, Erica. "How race affects your credit score." *US News and World Report.* August 9, 2022.
[63] Urban Institute. "Credit Health During the COVID-19 Pandemic." March 8, 2022.
[64] CFPB. "The Consumer Credit Card Market." October 2023 at 44 and 38.
[65] Federal Reserve System (FRS). (FRS Capital One-Hibernia order). "Capital One Financial Corporation: Order Approving the Merger of Bank Holding Companies." August 16, 2005 at 6; FRS. (FRS Capital One-North Fork order). "Capital One Financial Corporation: Order Approving the Merger of Bank Holding Companies." November 8, 2006 at note 13 at 6; FRS. (FRS Capital One-ING order). Capital One Financial Corporation. Order Approving the Acquisition of a Savings Association and Nonbanking Subsidiaries. FRB Order No. 2012-2. February 14, 2012 at 12 to 13.
[66] FRS Capital One-ING order 2012 at 13.
[67] FRS Capital One-Hibernia order 2005 at 6; FRS Capital One-North Fork order 2006 at note 13 at 6;
[68] "AG reaches $13.5 million settlement with Capital One." *Charleston Gazette.* January 17, 2012.

- ***2012 CFPB issues first fine — $210 million — to Capital One for deceptive credit card marketing:*** Capital One agreed to pay $210 million to settle a CFPB enforcement case for deceptively pushing or enrolling customers without their consent in expensive and unnecessary services, like credit monitoring, when they applied for credit cards.[69] Consumers with lower credit scores were misled into believing the add-on products could improve their credit scores.[70] CFPB director Richard Cordray stated that "customers were pressured or misled into buying credit card products they didn't understand, didn't want, or in some cases, couldn't even use."[71]

- ***2012 Discover pays CFPB $200 million to settle misleading marketing charges:*** In 2012, Discover agreed to pay $200 million to settle charges stemming from its misleading marketing of credit card add-on products — such as payment protection and credit score tracking — that misled consumers about the costs of these products, enrolled consumers without their consent, and misled consumers about eligibility restrictions.[72]

- ***2015 Capital One pays $740,000 to settle Missouri deceptive marketing case:*** Capital One paid a $740,000 fine to Missouri in 2015 for selling credit protection plans that purportedly allowed cardholders that became unemployed or disabled to suspend payments without penalty, but most who tried to claim were told they were ineligible.[73]

Capital One's persistent pattern of aggressive debt collection: Capital One has a history of aggressive credit card debt collection practices, including paying settlements to resolve allegations of unlawful debt collection. Capital One aggressively and often illegally pursued customers for credit card debt. A 2015 *ProPubica* analysis found that "no lender sues more of its customers than Capital One" (Discover ranked number 2) and during the 2008 recession Capital One brought more than half a million suits against its customers annually.[74] These debt judgments were nearly twice as likely to be obtained in predominantly Black neighborhoods as in white neighborhoods, a larger disparity than other major credit card lenders.[75] Five years later, *ProPublica* found that Capital One was still aggressively pursuing cardholders. In 2019, Capital One recovered $1.4 billion that had already been charged-off by pursuing cardholders in civil courts, hundreds of millions of dollars more than any other credit card issuer, even the larger Chase.[76]

---

[69] Douglas, Danielle. "Capital One to pay $210 million for deceptive credit card practices." *Washington Post.* July 13, 2012.
[70] Fox, Emily Jane. "Capital One to pay $210 million in fines, consumer refunds." *CNN.* July 18, 2012.
[71] "Capital One fined for misleading millions of consumers." *BBC.* July 18, 2012.
[72] CFPB and FDIC. [Press release]. "Federal Deposit Insurance Corporation and Consumer Financial Protection Bureau order Discover to pay $200 million consumer refund for deceptive marketing." September 24, 2012.
[73] "Discover, Capital One and HSBC will pay $2.2M over protection plans." *Pymnts.* January 21, 2015.
[74] Kiel, Paul. "At Capital One, easy credit and abundant lawsuits." *ProPublica.* December 28, 2015.
[75] *Ibid.*
[76] Kiel, Paul and Jeff Ernsthausen. "Capital One and other debt collectors are still coming for millions of Americans." *ProPublica.* June 8, 2020.

Capital One has paid more than $87 million to settle several cases that alleged it had unlawfully pursued or collected debts that were discharged in bankruptcy, foreclosed or repossessed vehicles from servicemembers in violation of the Servicemembers Civil Relief Act, or used aggressive collection practices that violated state and federal laws. The Federal Reserve was aware of at least one of these unfair debt collection problems and stated that the regulator would "use the supervisory and examination process to ensure the effectiveness of [Capital One's] debt collection practices and programs" as part of the 2012 order approving the ING merger,[77] but other cases emerged after that merger was approved.

- ***2008 Capital One $2.3 million settlement for unlawful pursuit of debts discharged in bankruptcy:*** In 2008, Capital One settled a case with the Department of Justice's U.S. Trustee Program for allegedly collecting credit card debts from 5,600 people whose debts had been discharged in violation of bankruptcy law.[78] The Justice Department mandated post-settlement audit found that Capital One had actually pursued collections and collected $2.35 million from 15,500 people who had discharged their debts in bankruptcy.[79]

- ***2012 Department of Justice $12 million settlement with Capital One over unlawful pursuit of servicemembers:*** In 2012, Capital One paid $12 million to settle a lawsuit with the Justice Department over its violation of the Servicemembers Civil Relief Act dating back to 2006 by initiating wrongful foreclosures, improper auto repossessions, wrongful court judgments on debt, and improperly denying requests for interest rate reductions.[80]

- ***2015 Capital One pays $73 million to settle California debt collection case:*** In 2015, Capital One agreed to pay $73 million to settle charges that it illegally used automated dialers for debt collection without consumers prior consent in violation of the Telephone Consumer Protection Act.[81] The same year, Southern California's Debt Collection Task Force found that Capital One had been excessively and unreasonably harassing consumers with debt collection calls in violation of state law and the Federal Debt Protection Act.[82] Capital One paid $2 million to settle the charges and was ordered to implement and maintain

[77] FRS Capital One-ING order 2012 at note 32 at 13.
[78] GAO. "Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology." GAO-09-748. September 2009 at 33.
[79] U.S. Department of Justice (DOJ). Executive Office for United States Trustees. [Press release]. "U.S. Trustee program announces successful conclusion of nationwide settlement with Capital One bank." June 5, 2013.
[80] DOJ. [Press release]. "Justice Department reaches $12 million settlement to resolve violations of the Servicemembers Civil Relief Act by Capital One." July 26, 2012.
[81] *In re: Capital One Telephone Consumer Protection Act Litigation*. No. 1:2012cv10064 - Document 329 3-5, 43 (N.D. Ill. 2015).
[82] Los Angeles District Attorney's Office. [Press Release]. "Capital One to Pay $2 Million to Settle Debt Collection Lawsuit." December 15, 2022.

procedures to prevent incorrect collection efforts, limit the number of collection calls, and honor consumer requests to end collection calls.[83]

B. Capital One has closed large numbers of branches, reducing access to branch banking services

Capital One has severely reduced the geographic footprint of its retail branches over the past fifteen years, reducing depositors' access to retail banking services. Capital One has acquired the retail branch banking businesses of Hibernia National Bank (Louisiana and Texas), North Fork Bank (New York, New Jersey, and Connecticut), and Chevy Chase Bank (Maryland, Virginia, and Washington, DC). But since 2009, Capital One has reduced its branch network by 71 percent and now has 700 fewer branches.[84]

Shuttering banks is part of Capital One's business strategy. CEO Fairbank stated that "over the years, [Capital One] sort of leaned into the closing of branches" to focus on its national digital banking."[85] In 2023, 60 percent of Capital One's deposits were reported in Delaware, where its digital banking business is headquartered (although its Delaware "branch" does not offer retail branch banking).

The Bank Merger Act's convenience and needs assessment includes the merging parties' records on maintaining, expanding, or closing retail branches.[86] This assessment should be especially skeptical of reductions of branching services in lower-income, Black, and Latine communities that have inequitable access to banking services because there are fewer banks in these geographies. Nearly 6 million U.S. households are unbanked and Black and Latine families are four times more likely to be unbanked than white families (8 percent, 8 percent, and 2 percent, respectively).[87]

Capital One's wave of branch closures came after it committed to maintaining a geographic presence in connection with prior merger approvals. The Federal Reserve noted in approving the 2006 Hibernia merger that "Capital One has indicated that it intends [...] to expand the services and products offered to customers in the communities served by Capital One and Hibernia National Bank."[88] Since 2009, Capital One has closed 267 branches in Louisiana and Texas, a 72 percent drop. Texan depositors saw an acute drop in many areas. The number of branches dropped more than 80 percent in Austin, Beaumont, and Tyler and Capital One

---

[83] County of Santa Clara Office of the District Attorney. [Press Release]. "Capital One to pay $2 million to settle suit for harassing calls." December 15, 2022; *State of California v. Capital One N.A.* 8, 5. (CA 2022).

[84] AFREF analysis of FDIC data on Capital One branches from December 31, 2009 and December 31, 2023. FDIC. BankFind Suite: Summary of Deposits—Branch Office Deposits. Accessed March 2024.

[85] Navera, Tristan. "Greater Washington's bank branch count hits 23-year low even as deposits surge." *Washington Business Journal*. September 14, 2021.

[86] OCC. Comptroller's Licensing Manual: Business Combinations. January 2021 at 7.

[87] FDIC. "2021 FDIC National Survey of Unbanked and Underbanked Households." October 2022 at 1 and 2.

[88] FRS Capital One-Hibernia order 2005 at 8

closed all branches in greater Brownsville, Corpus Christi, Longview, McAllen, San Antonio, and Victoria.[89]

The Federal Reserve made a similar assessment in the Capital One-North Fork merger. In 2006, the Federal Reserve noted in approving the Capital One-North Fork merger that "Capital One represented its national presence and managerial resources will enhance the ability of North Fork Bank and Superior Savings to serve their customers and broaden their geographic reach and that the branch networks of NF Bank and Superior Savings will allow Capital One to offer a broader variety of products and services to its customers."[90] Capital One did not broaden the geographic reach of North Fork, it narrowed it, shuttering 265 North Fork branches (72 percent of branches in Connecticut, New Jersey, and New York) between 2009 and 2023.[91]

Capital One's wave of branch closures affected all customers and depositors, but the elimination of branches especially affected access to banking services in lower-income, Black, and Latine communities.[92] The number of branches in low-income areas (zip codes where the median household income was below half the metropolitan area median household income) dropped by half, from 19 in 2009 to 9 in 2023. There are now only 9 branches (3.2 percent of all branches) in low-income areas and no branches in low-income areas in Texas or Virginia.

The number of branches in predominantly Black and Latine zip codes dropped by more than half (63 percent and 58 percent, respectively). This is especially concerning because Capital One operates in communities with high percentages of Black and Latine residents, including Louisiana, Texas, the New York City metropolitan area, and greater Washington, DC. By 2023, Capital One had 19 branches (6.7 percent) in predominantly Latine zip codes, and 27 branches (9.5 percent) in predominantly Black zip codes. This dramatic contraction that disproportionately harmed communities of color effectively shunted Black and Latine customers to digital banking by eliminating full-service retail branches. In 2018, the Houston NAACP and the League of United Latin American Citizens sued Capital One for allegedly steering Black and Latine customers to debit card banking through affinity marketing while denying them access to other banking products by closing branches in communities of color in violation of the Fair Housing Act, Equal Credit Opportunity Act, and Community Reinvestment Act.[93]

The elimination of these branches demonstrates Capital One's minimal interest in meeting the convenience and needs of the community. Despite Capital One's statements in connection with merger applications and approvals that it would

---

[89] The number of branches declined 72 percent in the Dallas and 65 percent in the Houston metropolitan area.
[90] FRS Capital One-North Fork order 2006 at 20.
[91] AFREF analysis of FDIC data on Capital One branches from December 31, 2009 and December 31, 2023. FDIC. BankFind Suite: Summary of Deposits—Branch Office Deposits. Accessed March 2024.
[92] AFREF analysis of branch data and Census Bureau ZCTA zip code demographic data from the American Community Survey (for median household income) and Decennial 2020 Census (for race).
[93] Alix, Laura. "Capital One marketing oversold, underdelivered to minorities, lawsuit says." *American Banker*. March 1, 2018.

maintain its geographic footprint, the OCC approved the closure of the Capital One branches, effectively endorsing Capital One's rapid reduction in meeting the convenience and needs of the community.[94] Depositors and customer may have lost access to a local bank branch altogether or faced greater travel time and inconvenience. Capital One's strategy of closing branches demonstrates not only that it has little interest in serving the convenience and needs of the communities where it is chartered and takes deposits but also that it may not follow through on the other commitments it may make to secure the approval of mergers.

III. Merger would not fulfill managerial resources consideration because of spotty records of regulatory compliance

The proposed merger would combine two banks with persistent and significant problems with regulatory compliance and, as a result, warrants rejection under the managerial resources consideration. Capital One continues to have a checkered record of regulatory compliance with significant shortcomings — money laundering, exposing customers to a privacy breach, spotty consumer compliance — despite its commitments and expressed intent in prior merger approval orders. Discover recently entered into a major consent decree with the FDIC to address safety and soundness and consumer protection compliance issues that have festered for years.

The Bank Merger Act and Bank Holding Company Act statutes and regulations require agencies to consider the "financial and managerial resources" of the merging banks.[95] These statutory and regulatory provisions require banking regulators to evaluate not only the financial condition of the merging parties but also the history of regulatory compliance with banking laws and the assessment of banks' records from other publicly reported information.[96] The OCC merger application evaluation includes the applicants' conformity with law, regulation, and supervisory policies.[97] The OCC Licensing Manual on mergers includes an assessment of the "compliance records of all merging institutions, including their record of compliance" as well as "present concerns relating to unfair, deceptive, or abusive acts or practices, fair lending, or other discriminatory or illegal practices."[98] The statutes also specifically direct regulators to consider compliance with the Community Reinvestment Act and effectiveness addressing money laundering.[99]

---

[94] Banks must receive approval for branch closing and the banking regulators are required to consult with community leaders if a local resident raises concerns about the impact of the closure on the availability of local banking services under 12 USC §1831r-1. It is unclear what the OCC might have done in any of the Capital One branch closures, but the closure approvals are listed on the OCC's Corporate Applications Search portal. The OCC approved 120 branch closures between 2006 (when Hibernia and North Fork were acquired) and 2014, five years after Chevy Chase was acquired.

[95] 12 USC §1828(c)(5)(B); 12 USC §1842(c)(2); 12 CFR §5.33(e)(1)(ii)(B); and 12 CFR §225.13(b)(1).

[96] 12 CFR §225.13(b)(2); FRS Capital One-ING order 2012 at 10 and 12.

[97] 12 CFR §5.33(e)(i).

[98] OCC. Comptroller's Licensing Manual: Business Combinations. January 2021 at 3.

[99] 12 USC §1842(d)(3); 12 CFR §5.33(e)(1)(iii); 12 USC §1828(c)(11); and 12USC1842(c)(6); and 12 CFR §5.33(e)(1)(ii)(D).

Over the past two decades, the Federal Reserve approved Capital One mergers with Hibernia National Bank, North Fork Bancorp, Chevy Chase Bank, and ING while also noting ongoing regulatory compliance issues. The Federal Reserve nonetheless approved these transactions, sometimes with directives to improve internal policies, practices, and governance to improve the institution's compliance with banking and consumer protection rules. But Capital One's compliance has not dramatically improved, and perhaps the fact that earlier problems had not hindered its acquisitions has been a contributing factor to its continued compliance shortcomings. The 2006 order approving the North Fork merger notes that the Federal Reserve was "concerned" that the Home Mortgage Disclosure Act data showed patterns of racial disparities in mortgage lending and pricing, but that the banks had "taken steps to help ensure compliance with fair lending laws and other consumer protection laws."[100] In 2012, the Federal Reserve order approving the acquisition of ING noted that Capital One's spotty compliance record suggested that the bank's "processes and procedures for enterprise-wide compliance transaction testing could be improved" and conditioned approval of the merger on Capital One implementing a plan to improve compliance.[101]

Both Capital One and Discover have had ongoing and serious regulatory compliance issues and at least two were settled only months before the proposed merger was announced, possibly suggesting that the companies were willing to make short-term commitments to remedy their shortcomings to pave the way for a profitable transaction. Last month Discover paid nearly $1 million settle a lawsuit brought by Mexican American Legal Defense and Educational Fund that contended that Deferred Action for Childhood Arrivals (DACA) recipients were unlawfully denied student, personal, and home equity loans because of their immigration status.[102] The regulatory issues have included the multiple issues with credit card marketing, lending, and collections, described above, but also have included:

- **Capital One data breach exposed personal information of 100 million people:** Capital One governance lapses led to one of the biggest data breaches in history. In 2019, Capital One exposed its customers to one of the largest bank cyber-breaches in history. The breach exposed the personal data of 100 million credit cardholders and credit card applicants, including 140,000 Social Security numbers, 80,000 bank account numbers, birth dates, addresses, phone numbers, transactions, and credit scores and balances.[103] A 2022 study by Massachusetts Institute of Technology researchers found that although Capital One was viewed as among the "most cloud-savvy enterprises at the time of the breach," a series of "control failures at various levels" allowed the cyber attacker to exploit well-

[100] FRS Capital One-North Fork order 2006 at 18 and 19.
[101] FRS Capital One-ING order 2012 at 14.
[102] Mexican American Legal Defense and Educational Fund. [Press release]. "Discover agrees to settle class action lending discrimination suit brough by DACA recipients." March 11, 2024.
[103] Flitter, Emily and Karen Weise. "Capital One data breach compromises data of over 100 million." *New York Times*. July 29, 2019; Avery, Dan. (Avery). "Capital One $190 million data breach settlement: Today is the last day to claim money." *CNET*. September 30, 2022.

known vulnerabilities and decrypt the cardholders data.[104] The Office of the Comptroller of the Currency found that Capital One had insufficient security provisions for its cloud storage and the bank agreed to pay $80 million to settle the federal claims.[105] Capital One also agreed to a rigorous Federal Reserve consent order to improve internal governance and risk-management.[106] Capital One agreed to pay $190 million to settle a class action suit by cardholders that contended that the bank "knew of the particular security vulnerabilities that permitted the data breach" but did not fix them.[107] In 2023, the Federal Reserve released Capital One from its consent order that required stronger privacy protection measures,[108] seven months before it announced the Discover merger.

- **Capital One's problems complying with anti-money laundering laws:** Capital One has repeatedly had shortcomings in ensuring compliance with anti-money laundering laws that are designed to prevent criminal proceeds and terrorism financing from flowing through banks and businesses and to prevent criminals from continuing to profit from illegal activity. In 2015, the OCC filed a consent order against Capital One, charging that the bank "had failed to adopt and implement a compliance program" that met the requirements under the Anti-Money Laundering and Bank Secrecy Act.[109] The order noted that the bank's internal controls were insufficient to prevent money-laundering through the bank and that it could not even effectively test for compliance with anti-money laundering rules.[110] The OCC stated that Capital One failed to uncover and record suspicious activities, implement bank-wide anti-money laundering risk assessments, execute its customer due diligence processes, and monitor transaction and quality assurance programs for its remote deposit capture services.[111] Capital One was required to pay $100 million in civil monetary penalties in 2018.[112] Three years later, Treasury's FinCEN fined Capital One an additional $390 million for "willful and negligent violations of the Bank Secrecy Act" that allowed millions of dollars of "proceeds connected to organized crime, tax evasion, fraud, and other financial crimes laundered through the bank into the U.S. financial system."[113] Capital One settled the charge by agreeing to pay a reduced $290 million in fines after regulators released new evidence

[104] Khan, Shaharya et al. "A systemic analysis of the Capital One data breach: Critical lessons learned." *ACM Transactions on Privacy and Security*. Vol. 26, No. 1. November 2022.
[105] Flitter, Emily. "Capital One will pay $89 million over hack." *New York Times*. August 6, 2020.
[106] In the matter of Capital One Financial Corporation. FRS. Cease and Desist Order Issued Upon Consent Pursuant to the Federal Deposit Insurance Act, as Amended. Docket N. 20-014-B-HC. August 20, 2020.
[107] Avery 2022.
[108] Pape, Carter. "Federal Reserve ends consent order regarding 2019 Capital One breach." *American Banker*. July 11, 2023.
[109] OCC. Department of the Treasury. (OCC-Treasury consent order). Consent Order – Capital One, N.A. Docket No. AA-EC-2018-62. October 23, 2018 at 2-4.
[110] OCC-Treasury consent order 2018 at 2-4.
[111] Lang, Hannah. "Capital One hit with $100M fine over AML deficiencies." *American Banker*. October 23, 2018.
[112] *Ibid.*
[113] U.S. Treasury. Financial Crimes Enforcement Network. [Press release]. "FinCEN announces $390,000,000 enforcement action against Capital One, National Association for violations of the Bank Secrecy Act." January 15, 2021.

documenting the bank's admission that it failed to report suspicious activity, despite knowing about criminal charges against specific customers.[114]

- **Discover 2023 FDIC consent decree addresses a host of long-standing consumer compliance and safety and soundness issues:** In 2023, Discover entered into a consent decree with the FDIC to address safety and soundness issues related to persistent failures to implement effective policies and procedures to ensure compliance with consumer protection laws and regulations as well as violations of the FTC Act, Truth-in-Lending Act, Servicemembers Civil relief Act, and Electronic Records and Signatures in Commerce Act.[115] The consent order terminated an ongoing probe of Discover Bank and did not impose any financial penalty, but Discover committed to "improve its consumer compliance management system and enhance related corporate governance and enterprise risk management practices."[116] This consent order was signed five months before the Capital One takeover was announced.

  The consent decree was rooted in persistent problems with compliance controls at Discover. CFPB had pursued Discover's repeated unfair treatment of its student loan borrowers for years. In 2015, CFPB fined Discover $18.5 million for illegal student loan servicing practices including illegal debt collection techniques, overstating the minimum payment amounts, and failing to provide information necessary to receive tax benefits.[117] In 2020, CFPB fined Discover $35 million for withdrawing 17,000 accounts without authorization, canceling 14,000 payments without notification, misrepresenting minimum payments for over 100,000 borrowers, and misrepresenting the amount of interest paid by 8,000 borrowers.[118] As the consent decree was being negotiated in 2023, Discover acknowledged that it had improperly charged merchants and merchant banks excessive fees dating back to 2007 and that it was setting aside at least $375 million to repay merchants for excessive payments.[119] The FDIC included the merchant misclassification complaint in the consent decree.[120]

The serious and ongoing regulatory compliance failures at Capital One and Discover demonstrate governance failures that do not fulfill the managerial resources consideration in the Bank Merger Act and the Bank Holding Company Act. It appears that the merging parties sought to close regulatory matters — the breach for

[114] Wack, Kevin. "Capital One fined $290M for 'willful' anti-money-laundering failures." *American Banker*. January 15, 2021.
[115] FDIC. In the Matter of Discover Bank. FDIC Consent Order No. FDIC-23-0014b. September 25, 2023.
[116] Mullen, Caitlin. "Discover, FDIC reach consent agreement." *Payments Dive*. October 2, 2023.
[117] CFPB. [Press release]. "CFPB orders Discover Bank to pay $1.5 million for illegal student loan servicing practices." July 22, 2015.
[118] CFPB. [Press Release]. "Consumer Financial Protection Bureau Settles with Student Loan Servicers Discover Bank, The Student Loan Corporation, and Discover Products, Inc. for Violating a Bureau Consent Order and Other Unlawful Practices." December 22, 2020.
[119] Fitzgerald, Kate. "Discover admits it overcharged merchants for 16 years." *American Banker*. July 20, 2023; Mullen, Caitlin. "Discover discloses SEC probe." *Payments Dive*. October 27, 2023.
[120] Foley, John. "Discover dabbles with two types of delinquency." *Reuters*. July 21, 2023.

Capital One and the consent order for Discover — to pave the way for the proposed merger.

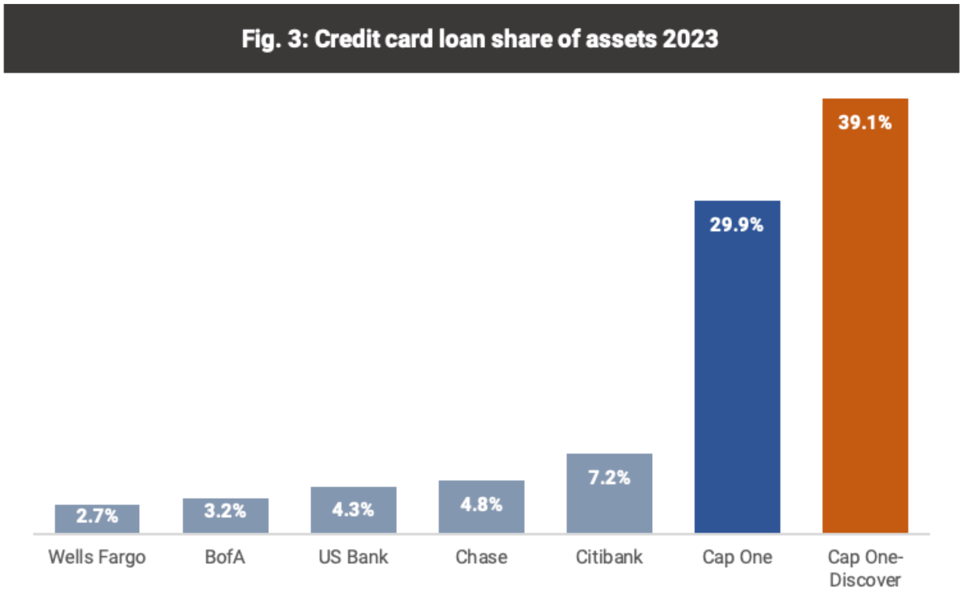
These regulatory shortcomings also demonstrate the bank's failure to keep the commitments it made in prior merger approvals. The Federal Reserve regulations implementing the Bank Holding Company Act includes a consideration of "the record of the applicant and its affiliates of fulfilling any commitments to, and any conditions imposed by, the Board in connection with prior applications" as part of its assessment of "managerial resources."[121] Capital One's regulatory compliance record has not improved after the Federal Reserve approved four bank mergers between 2006 and 2012 (Hibernia, North Fork, Chevy Chase, and ING). Capital One did not follow through on its commitment to maintain it geographic presence after taking over Hibernia and North Fork, instead it shuttered the majority of the branches acquired in those transactions. Capital One's ongoing and significant regulatory compliance lapses on money laundering and privacy protection demonstrate an unwillingness or inability to follow through on the commitments it made to secure approval for prior mergers. The banking regulators should be extremely skeptical of any regulatory compliance assurances Capital One might make in trying to finalize the Discover merger.

IV. Merger concentrates credit card risk and could compromise future prospects of combined bank as a result

The proposed merger would undermine the future prospects of the combined firm by creating a substantially larger bank that would be heavily lopsided in credit card loan assets, leaving the firm vulnerable to financial distress in the event of a broad economic downturn. Credit card loans would make up nearly 40 percent of the assets of the combined firm; an outsize portion of those loans are to borrowers with near-prime and subprime credit scores that may be even more susceptible to delinquency and default.

The Bank Merger Act and the Bank Holding Company Act both require banking regulators to consider the "future prospects of the existing and proposed institutions."[122] This statutory requirement directs agencies to evaluate the resiliency of the combined firm, including under economic stress. The OCC's licensing manual on mergers states that the agency "closely scrutinizes combinations that raise issues about management's ability to address increased risk to bank earnings and capital," including from credit risk.[123] FDIC Chairman Marty Gruenberg stated that "The evaluation of future prospects assesses whether the resulting insured depository institution will be able to operate in a safe and sound manner and maintain an

[121] 12 CFR §225.13(b)(2).
[122] 12 USC §1828(c)(5)(B); the Bank Holding Company Act 12 USC §1842(c)(2) has nearly identical language, "future prospects of the company or companies."
[123] OCC. Comptroller's Licensing Manual: Business Combinations. January 2021 at 6.



acceptable risk profile on a sustained basis following consummation of the merger."[124] The OCC states that it "does not approve a combination that would result in [...] poor earnings prospects."[125]

The merger essentially adds Discover's monoline credit card bank to Capital One's business which already reliant on credit cards. The transaction would make Capital One even more heavily tilted towards credit card assets and earnings. Capital One is already very dependent on credit card earnings. Credit card net interest income represents about 80 percent of Capital One's total net revenue.[126] A macroeconomic shock that impacted its borrowers' ability to repay their loans would significantly erode revenues and economic viability.

The merger would also significantly increase concentrated risks from credit card loans in the combined bank. At the end of 2023, credit card loans made up 29.9 percent of Capital One's assets and 68.3 percent of Discover's assets.[127] The merger would add $102 billion credit card loans to Capital One's $142 billion, a 72 percent increase, and these outstanding credit card loans would make up 39 percent of the combined firm's assets. This level of credit card concentration is far in excess of other major credit card lenders, according to Capital One's own application (see Figure 3).[128] The Federal Reserve recognized the additional risk posed by absorbing a monoline credit card bank in the 2012 ING acquisition and directed Capital One to

[124] Gruenberg, Martin J. Chairman, FDIC. "Statement by Martin J. Greunberg, Chairman, FDIC, on proposed statement of policy on bank transactions." March 21, 2024.
[125] 89 Fed. Reg. 30. February 13, 2024 at 10017.
[126] Capital One Financial Corp. SEC Form 10-K 2023 at 50 and 56.
[127] Capital One, National Association. FDIC Cert. No. 4297. Call Report. December 31, 2023; Discover Bank. FDIC Cert. No 5649. Call Report. December 31, 2023.
[128] Capital One, NA. Application to the Office of the Comptroller of the Currency for prior approval to merge with Discover Bank. Public Exhibits Volume. March 20, 2024. Exhibit A. Form of Bank. Merger Agreement. February 19, 2024 at Exhibit 21. Memorandum on Competitive Considerations at Annex 3 (419 in the application).

"enhance its risk-management systems and policies to account for the size, complexity, and diversification of the business lines that would result from the acquisition."[129]

Capital One and Discover have a higher-than-average credit card delinquency and charge off rates compared to other big banks. At the end of 2023, 4.61 percent of Capital One's and 3.87 percent of Discover's credit card loans were delinquent 30-days or more, compared to the 2.97 percent credit card delinquency rate at the 100 largest banks.[130] The combined banks held $11.4 billion in delinquent credit card loans, an amount comparable to the $12.2 billion *total* outstanding credit card loans held by PNC and Truist *combined*.[131] The merging banks are also charging off an increasing share of non-performing credit card loans. In 2023, Capital One's credit card charge off rate was 4.57 percent (more than double the 1.90 percent in 2020 and higher than the average 3.96 percent for the top 100 banks) and Discover's charge off rate was 3.90 percent (almost double the 2.09 percent in 2020).[132] Capital One and Discover both have a larger pool of lower-income and middle-income consumers that are struggling to maintain payments on their credit card debts.[133]

The concentration of credit card loans with higher delinquency rates and higher charge off rates could present a risk to continued earnings and profitability. Total household credit card debt has reached a high of over $1.1 trillion at the end of 2023 and more consumers are falling behind as prices and interest rates have both risen.[134] Average credit card debt rose from $6,320 in 2022 to $7,930 in 2023, but the average payments on that debt dropped from $430 to $360 in 2023, meaning credit card borrowers are falling further behind.[135] The share of consumers that are seriously delinquent on their credit card debts was higher in 2023 than during the 2008-2009 financial crisis.[136] Mark Zandi of Moody's Analytics stated that "the increase in credit card debt and delinquencies reflects in part the increased financial stress on lower-income households."[137]

---

[129] FRS Capital One-ING order 2012 at 13.

[130] Capital One Financial Corp. SEC Form 10-K 2023 at 95; Discover SEC Form 10-K 2023 at 67; FRB. "Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks." February 23, 2024.

[131] Capital One. FDIC Cert. No. 4297. Call Report. December 31, 2023; Discover Bank. FDIC Cert. No 5649. Call Report. December 31, 2023; PNC Financial Services Group. SEC 10-K. Year End 2023 at 112; Truist Financial Corporation. SEC 10-K. Year end 2023 at 114.

[132] Capital One Financial Corp. SEC Form 10-K 2023 at 64; Discover SEC Form 10-K 2023 at 66; FRB. "Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks." February 23, 2024.

[133] Sweet, Ken. "Some Americans have become saddled with credit card debt as rent and everyday prices remain high." *Associated Press*. February 5, 2024.

[134] Zahn, Max. "Credit card debt has reached a record high. Here's what it means for the economy." *ABC News*. November 8, 2023.

[135] New York Life. [Press release]. "New York Life Wealth Watch 2024 outlook: Financial confidence grows, while credit card debt looms." January 23, 2024.

[136] Sánchez, Juan M. and Masataka Mori. Federal Reserve Bank of St. Louis. "Share of Americans in financial distress reaches high levels." December 26, 2023.

[137] Zahn, Max. "Credit card debt has reached a record high. Here's what it means for the economy." *ABC News*. November 8, 2023.

Rising credit card delinquencies and charge offs can affect the stability of banks under severe economic stresses, which would be especially acute for a combined Capital One-Discover that would have a high concentration of credit card loans. The Federal Reserve's 2023 stress test report found that under a severely adverse scenario, credit card portfolio losses could reach 17.4 percent because of the sensitivity of these loans to macroeconomic shocks and unemployment rates.[138] The negative impacts are even higher for banks with higher concentrations of vulnerable credit card assets, like Capital One *before* the proposed merger. The Federal Reserve estimates that under a severe adverse scenario, Capital One could see credit card portfolio loan balances decline by 22.2 percent, which would amount to a $54 billion loss for the combined credit card outstanding loan balances of Capital One and Discover.[139] The rise in losses and decline in revenues could negatively impact the future prospects of Capital One-Discover more significantly than for Capital One alone because of the higher concentration of credit card assets. The negative impact on the future prospects of the combined firm could ultimately pose risks to the broader economy and banking system.

V. Merger would increase risks to stability of economy and banking system

The proposed Capital One-Discover merger would increase risks to the stability of the economy and banking system and contravene the Bank Merger Act and Bank Holding Company Act. Following the 2008 financial crisis, Congress added financial stability considerations to the Bank Merger Act and Bank Holding Company Act that required regulators to consider a merger's potential risk to the stability of the financial and banking system.[140] The proposed merger would increase the risk to the financial system by creating a significantly larger institution with a. high concentration of risky credit card assets that could threaten the viability of the merged firm and that could ultimately spread to other firms in the event of macroeconomic stress. Moreover, Capital One-Discover's critical functions of credit card lending and debit network services could not easily be absorbed by other firms, increasing the likelihood of contagion that could pose risks to the banking and financial systems.

The statutes prohibit banking agencies from approving mergers that do not meet the financial stability consideration. The Bank Merger Act states that "in every case, the responsible agency shall take into consideration [...] the risk to the stability of the United States banking or financial system."[141] The Bank Holding Company Act is more explicit on the financial stability consideration, stating that "in every case, the Board shall take into consideration the extent to which a proposed acquisition, merger, or consolidation would result in greater or more concentrated risks to the

[138] FRB. "2023 Federal Reserve Stress Test Results." June 2023 at 18
[139] *Ibid.* a 19.
[140] Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. 111-113 §604(d) and (f). July 21, 2010.
[141] 12 USC 1828(c)(5)(B).

stability of the United States banking or financial system."[142] The proposed merger does not meet this consideration that Congress added in 2010 because the mergers of the prior fifteen years contributed to the financial crisis by accumulating risks in larger, more complex institutions that were then more easily propagated across the financial system. The proposed merger would pose an unlawful risk to the stability of the banking or financial system.

A. Mergers can exacerbate risks to the financial system and economy

Bank mergers can contribute to the fragility of the financial system. Banking regulators recognize that mergers can pose risks to the stability of banking system and the economy by increasing bank size, accumulating concentrated asset risk, increasing institutional complexity, and magnifying other dimensions of risk that can easily propagate a financial contagion that can cascade across the financial system and the economy. The Congress amended the Bank Merger Act and Bank Holding Company Act to include a systemic risk consideration in merger review because the wave of bank mergers after 1995 contributed to the scale and depth of the financial crisis as some banks that grew from mergers collapsed.[143] This lesson was learned at great economic cost, and these costs disproportionately harmed lower-income, Black, and Latine households and communities.

These results were not unforeseen. In 2004, the Federal Reserve Bank of San Francisco warned that mergers that lead to "the creation of megabanks also heightens concerns about systemic risk. When banking activities are concentrated in a few very large banking companies, shocks to these individual companies could have repercussions to the financial system and the real economy."[144] A 2003 International Monetary Fund paper analyzed the 1990s banking mergers and found that larger financial firms took on more risk than smaller firms and that "the moral hazard induced incentives appear to have outweighed the risk reductions potentially available through scale or scope economies."[145]

These risks were magnified for the acquisitive banks that grew through mergers to become too-big-to-fail. Too-big-to-fail institutions can be deemed to be "so large and interconnected with other financial institutions or so important in one or more financial markets that their failure would have caused losses and failures to spread to other institutions," according to the Financial Crisis Inquiry Commission.[146] When too-big-to-fail banks face economic stresses, the government has a substantial incentive to intervene and prevent their failure to prevent economic fallout.[147] The

[142] 12 USC §1842(c)(7).
[143] The number and size of bank mergers accelerated after the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and the 1995 bank merger guidelines went into effect that facilitated interstate mergers and the merger approval process.
[144] Kwan 2004 at 3.
[145] De Nicoló, Gianni. International Monetary Fund. "Bank Consolidation, Internationalization, and Conglomeration: Trends and Implications for Financial Risk." IMF Working Paper WP/03/158. July 2003 at 5.
[146] Financial Crisis Inquiry Commission. "The Financial Crisis Inquiry Report." January 2011 at 386.
[147] AFREF. Letter to the Financial Stability Oversight Council. May 13, 2019 at 6.

implicit too-big-to-fail rescue subsidy increases the fragility of the system because it shields very large banks from the negative consequences of their risk-taking and creates an incentive to take greater risks than they otherwise would.[148] The implicit subsidy also confers an anticompetitive advantage on too-big-to-fail banks that can pursue outsized risks and profits as compared to their smaller rivals.

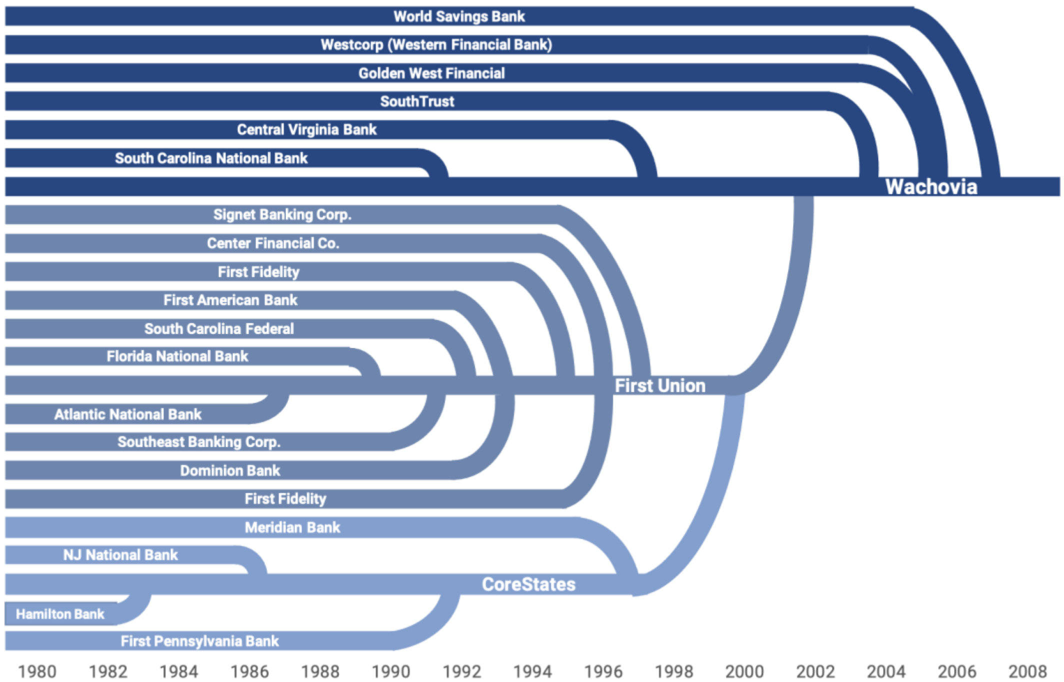
The bigger banks that rapidly grew through acquisitions, like Wachovia and Washington Mutual (WaMu), were more likely to fail during the financial crisis than other banks.[149] First Union ballooned in size from a medium-sized North Carolina bank to one of the biggest institutions in the country through more than 90 acquisitions from 1985 to 2000 (see Figure 4).[150] First Union's 1995 takeover of First Fidelity and 1998 acquisition of CoreStates were each in their time the biggest bank merger in history.[151] In 2001, First Union bought Wachovia (and kept the Wachovia name) before buying SouthTrust in 2004 and Golden West Financial in 2006.[152] In late 2007, Wachovia reported steep losses in subprime mortgage backed securities and its subprime mortgage portfolio, but it still bought World Savings Bank and its large pool of subprime payment-option adjustable rate mortgages in 2008.[153] The OCC approved the World Savings acquisition with a single 120-word paragraph describing the agencies evaluation of the Bank Merger Act requirements and stated "The OCC considered the financial and managerial resources of the banks, their future prospects, and the convenience and needs of the communities to be served [...] and found them consistent with approval."[154]

By mid 2008, Wachovia was the third largest bank in the country by deposits, but its concentrated pool of crumbling subprime mortgage assets — fueled by its acquisitions — were dragging down the bank.[155] The day after WaMu failed (also because of a concentration in high-risk subprime mortgage assets), Wachovia told its regulators it could not pay its creditors and the federal regulators invoked a systemic risk exemption for the first time in history to backstop not just insured depositors but also Wachovia debtholders and shareholders. This too-big-to-fail federal intervention was averted when Wells Fargo agreed to purchase Wachovia without FDIC assistance,

---

[148] Omarova, Saule T. Cornell University Law School. "The 'Too Big To Fail' Problem" *Minnesota Law Review*. Vol. 103. January 2019.
[149] Kim and Seim 2016 at 2.
[150] Cowley, Stacey. "Edward E. Crutchfield, 82, dies; Banker's deals reshaped the industry." *New York Times*. January 25, 2024.
[151] Knight, Jerry. "First Union to buy First Fidelity of N.J." *Washington Post*. June 19, 1995; "First Union merger is final." *CNN*. April 28, 1998.
[152] Singletary, Michelle. "Acquisition will make Wachovia top Va. Bank." *Washington Post*. June 25, 1997; Day, Kathleen. "First Union to acquire Wachovia." *Washington Post*. April 17, 2001; "Wachovia buys SouthTrust." *CNN*. June 21, 2004; "Wachovia acquires Golden West Financial." *NBC News*. May 8, 2006
[153] White, Ben. "Wachovia subprime valuation falls." *Financial Times*. November 8, 2007; "Wachovia finally completes acquisition of World Savings." *Sarasota Herald-Tribune*. February 18, 2008; Craver, Richard. "Wachovia collapse: 10 years later." *Winston-Salem Journal*. October 6, 2018.
[154] OCC. Re: Application by Wachovia Bank, NA, to Acquire the Branches of World Savings Bank, FSB. Conditional Approval No. 826. December 2007 at 8.
[155] FDIC. Summary of Deposits—Market Share Reports. June 30, 2008; Stempel, Jonathan. "Wachovia has $23.9 billion loss on writeoff, mortgages." *Reuters*. October 22, 2008.

Fig. 4: First Union-Wachovia selected mergers 1980-2008



but it demonstrated how merger-driven fragility could create systemic risks that force the government to "take action to avert systemic problems in the banking industry."[156]

After the crisis, multiple academic studies identified bank mergers as a substantial cause of the financial meltdown. A 2016 University of Pennsylvania paper found that the bank mergers and rising concentration led to higher leverage levels and lower levels of capitalization.[157] A 2017 Harvard University paper noted that deregulation that led to accelerated bank mergers and consolidation increased interconnectedness that "increased the chances of a large shock occurring."[158] A 2014 *Journal of Banking & Finance* study of 440 bank acquisitions between 1991 and 2009 found that "mergers coincide with statistically and economically significant increase in the contribution of the acquirer to the systemic risk of the financial sector."[159]

B. Proposed merger would amplify risks to financial stability

The proposed Capital One-Discover merger would create a firm that would increase risks to the stability of the financial and banking system. The considerable concentration in credit card loan assets would create a combined firm that is more susceptible to macroeconomic stresses that could undermine the stability of the firm (described above). The size of the combined firm increases the chances that an

[156] FDIC. "Crisis and Response: An FDIC History, 2008—2013." 2017 at xx to xxi
[157] Kim and Seim 2016 at 14.
[158] Zhang, Jeffery Y. Harvard University. John M. Olin Center for Law, Economics, and Business. Discussion Paper No. 69. "The Costs and Benefits of Banking Deregulation." April 25, 2017 at 38.
[159] Weiss, Gregor N.F., Sascha Neumann, and Denefa Bostandzic. "Systemic risk and bank consolidation: International evidence." *Journal of Banking & Finance*. Vol. 40. 2014 at 166.

economic stress that compromises the viability of the firm could create a financial contagion that could be transmitted to other similarly situated banks, as happened in the 2023 banking crisis and during the 2008 financial crisis with much smaller troubled banks. Additionally, if a combined Capital One-Discover were to become distressed, its withdrawal from credit card lending and debit payment network would compromise the provision of these critical functions because it would be difficult to find substitutes for such a large share of the market.

Banks considerably smaller than merged Capital One-Discover have precipitated broader failures: The proposed merger would create a much larger bank whose financial distress or failure could precipitate a contagion that could compromise the viability of other banking institutions. The OCC merger licensing manual recognizes that a merger can "result in a material increase in risks to financial system stability due to an increase in size" that "in the event of financial distress of the combined entity, would cause significant risks to other institutions."[160]

The combined Capital One-Discover would become the sixth largest bank with $624 billion in consolidated domestic assets.[161] A 2018 Federal Reserve paper found that stress at banks with over $250 billion in assets has a statistically significant effect on the real economy.[162] A 2018 *Review of Economics* assessment of academic literature after the financial crisis concluded that "bank size is a key predictor for systemic risk and that the largest banks disproportionately contribute to overall risk."[163] The combined institution would be considerably larger than other failed institutions that grew from mergers and whose failures contributed to the collapse of other banks.

The 2023 failure of Silicon Valley Bank (SVB) contributed to the failures at Signature Bank and First Republic Bank as contagion spread and instigated deposit runs.[164] All three institutions were far smaller than the combined Capital One-Discover would be — SVB and First Republic had about $200 billion in assets, about one-third the size of the proposed merger.[165] SVB had grown through a significant merger in 2021 when it acquired Boston Private Bank & Trust, accelerating its rapid growth; it failed than two years after the Federal Reserve approved the merger.[166] As Federal Reserve Vice-Chair Michael Barr noted, "A firm's distress may have systemic consequences through contagion — where concerns about one firm spread to other firms — even if

[160] OCC. Comptroller's Licensing Manual: Business Combinations. January 2021 at 8.
[161] FRB. "Insured U.S.-Chartered Commercial Banks That Have Consolidated Assets of $300 Million Or More, Ranked by Consolidated Assets." December 31, 2023.
[162] Lorenc, Amy G. and Jeffery Y. Zhang. Federal Reserve Board. "The Differential Impact of Bank Size on Systemic Risk." Finance and Economics Discussion Series No. 2018-066. 2018.
[163] Moch, Nils. "The contribution of large banking institutions to systemic risk: What do we know? A literature review." *Review of Economics*. Vol. 69, No. 3. 2018 at 231.
[164] "Why First Republic Failed. Are other banks to follow?" *Associated Press*. May 1, 2023; Lopez, German. "Another bank failure." *New York Times*. May 2, 2023.
[165] Russel, Kari and Christine Zhang. (Russel and Zhang). "3 failed banks this year were bigger than 25 that crumbled in 2008." *New York Times*. May 1, 2023.
[166] FRS. SVB Financial Group Order Approving the Merger of Bank Holding Companies, the Merger of Banks, and the Establishment of Branches. FRB Order No. 2021-08. June 10, 2021; FRB. Review of the Federal Reserve's Supervision and Regulation of Silicon Valley Bank. April 2023

the firm is not extremely large, highly connected to other financial counterparties, or involved in critical financial services."[167]

Merger increases failure risk that could impair critical functions that threaten financial stability: The Capital One-Discover merger could heighten the risk to financial stability if it became unable to provide its critical functions to customers and the economy under financial stress. As the Federal Reserve noted in the order approving the Capital One-ING acquisition, mergers can threaten financial stability "if the failure of the resulting firm, or its inability to conduct regular-course-of-business transactions, would likely impair financial intermediation or financial market functioning so as to inflict material damage on the broader economy."[168]

The scale of Capital One's role in credit card lending and debit payments would be hard for other financial firms to easily replace as substitute providers in the event of economic stress that could impair the economy. The OCC merger licensing manual states that a merger that reduces "the availability of substitute providers for the services" of critical functions can pose a risk to financial stability that could be unlawful under the Bank Merger Act.[169]

The merged firm would control a substantial volume and share of critical functions to the financial system that would be too large to easily replace with substitutes. In the Capital One-ING order, the Federal Reserve stated that the merger would be unlikely to cause significant disruptions to credit card loans because Capital One would be the fourth biggest lender with 11 percent market share and be far smaller than the top three issuers.[170] The Capital One-Discover merger is far larger. Capital One-Discover would be the largest credit card lender with $250 billion (22 percent) of outstanding credit card loans and $380 billion (20 percent) of e-commerce debit transactions from 4,100 bank debit card issuers.[171] There are probably not firms or even combinations of firms that could easily absorb these critical functions. It would be difficult to service a quarter trillion dollars in credit card loans or provide debit transaction payments service for 4,100 banks. In the event of a severe stress or shock, there could be substantial disruption in service for hundreds of millions of customers — both the estimated 300-plus million cardholders of Discover and Capital One but also depositors at the banks that rely on the Discover Pulse debit network.

[167] Russel and Zhang 2023.
[168] FRS Capital One-ING order 2012 at 28.
[169] OCC. Comptroller's Licensing Manual: Business Combinations. January 2021 at 8.
[170] FRS Capital One-ING order 2012 at 33.
[171] Market share for total loans calculated from total outstanding credit card loans from Federal Reserve Bank of New York. Center for Microeconomic Data. Household Debt and Credit Report. Q4 2023; Capital One Financial Corp. SEC Form 10-K. 2023 at 90 and 94; Discover Financial Services. SEC Form 10-K. 2023 at 64 and 102; AFREF debit calculation based on Discover's Pulse network share of card-not-present transactions, which is likely an underestimate because it does not account for Discover's signature debit transactions. FRB Payments Study. 2023 at Table 1; Redbridge. "Are Visa's debit routing practices making PIN and PINless debit transactions better or worse for merchants?" November 11, 2021; Discover SEC Form 10-K. 2023 at 4.

VI. Conclusion

The proposed Capital One-Discover merger would have anti-competitive impacts that would harm consumers and communities. It also fails to meet the further requirements and conditions of the Bank Merger Act and Bank Holding Company Act regarding convenience and needs of communities, managerial resources and future prospects, or financial stability.

In addition, the Federal Reserve appropriately evaluates "the record of the applicant and its affiliates of fulfilling any commitments to, and any conditions imposed by, the Board in connection with prior applications" when it considers subsequent transactions.[172] Capital One has a demonstrated record of failing to fulfill the commitments it made to secure previous merger approvals. It severely shrank its geographic footprint by closing more than two-thirds its branches after committing to maintain its services in the Hibernia and North Fork mergers. The Federal Reserve Board required Capital One to implement a plan the Board approved to redress regulatory compliance shortcomings as a condition of approving the ING merger approval, but Capital One has continued to have a checkered compliance and consumer protection record with a massive data breach and flawed anti-money laundering guardrails.

The Federal Reserve and OCC should deny the Capital One-Discover merger application because it fails to meet the statutory and regulatory requirements under the Bank Merger Act and Bank Holding Company Act.

[172] 12 CFR §225.13(b)(2).