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RE: Applications by Capital One, National Association to acquire Discover Bank, and for Capital One Financial Corporation, McLean, Virginia to acquire Discover Financial Services, Riverwoods, Illinois

Dear Directors Almonte and Hassell,

The National Community Reinvestment Coalition (NCRC) and our undersigned member organizations and partners request that the Office of the Comptroller of the Currency (OCC) and the Federal Reserve deny Capital One's application to acquire Discover Financial Services and Discover Bank. If approved, this merger would further consolidate the credit card industry, reduce options for customers with lower credit scores, and give Capital One the ability and incentive to raise debit interchange fees. Capital One would also become the sixth largest US bank by assets, greatly increasing risk for the entire financial system in the event of an economic downturn given their vulnerable and limited business model. Capital One's business practices and merger history also call into question how this merger would serve the public's convenience and needs.

NCRC is a network of organizations and individuals dedicated to creating a nation that not only promises but delivers opportunities for all Americans to build wealth and live well. We work with community leaders, policymakers and institutions to advance solutions and build the will to solve America's persistent racial and socio-economic wealth, income and opportunity divides, and to make a Just Economy a national priority and a local reality.

We have organized this comment letter using factors established by the Bank Merger Act, often referred to as the four prongs of merger review.[1] The following is an outline that shows that none

[1]Licensing Manual: Business Combinations | OCC (treas.gov); cited by Acting Comptroller of the Currency Michael J. Hsu Remarks at Brookings "Bank Mergers and Industry Resiliency" May 9, 2022. Page 2. https://www.occ.gov/news-issuances/speeches/2022/pub-speech-2022-49.pdf

of these factors supports approval, with more detail provided in the rest of the comment.

- **The effect of the proposed business combination on competition ("competition prong");**
  - Credit Cards - The US credit card market is already highly concentrated, with indicators of a lack of price competition among the largest credit card companies. Capital One in particular is already one of the most expensive options for customers of all credit types. Analysis of this merger should also focus on how this will affect competition in the non-prime credit card market, as these borrowers have fewer options, and preliminary analysis suggests that combining Capital One and Discover's market share of outstanding non-prime credit card debt results in a presumption that this is an anti-competitive merger.
  - Debit Cards and Interchange Fees - Capital One wants this merger because it would exempt them from regulatory caps on fees charged to merchants when they use debit cards to make purchases. If approved, Capital One would have the ability, and incentive, to raise fees.
  - Unlikely to Compete with Visa and Mastercard - Previous credit card mergers have not resulted in benefits to consumers. In addition, this merger may actually increase Visa's dominance of the credit card market and start a wave of payment network mergers.
- **The financial and managerial resources and future prospects of the existing or proposed institutions ("safety and soundness prong");**
  - Financial Resources - Capital One's concentration in non-prime credit card and auto lending, combined with rising delinquency rates in both these sectors, raise serious concerns about Capital One's ability to withstand an economic downturn.
  - Managerial Resources - Capital One's repeat violations of antitrust, banking, consumer, and discrimination laws indicate significant compliance deficiencies and suggest that Capital One is already too-big-to-manage at its current size, and may even be too-big-to-care about complying with federal and state laws.
- **The probable effects of the business combination on the convenience and needs of the community served ("convenience and needs prong");**
  - Capital One says it will implement a community benefits plan, but they have not lived up to similar claims in the past. In 2012 Capital One made a $180 billion commitment related to their merger with ING Direct that included a $28.5 billion commitment to mortgage lending. However, Capital One did not deliver on this commitment and exited mortgage lending in 2017. Banks cannot continue to meet the convenience and needs prong of merger review with empty promises that are not monitored or enforced after the merger is completed. Capital One's predatory business practices also cast doubt on their ability to serve the needs of borrowers with lower credit scores.

- **The risk to the stability of the U.S. banking and financial system ("financial stability prong")**
    - Combining Capital One and Discover's non-prime credit card portfolios would create a bank with unacceptable credit concentration risk. Adding in Capital One's auto lending, the proposed merger would mean the nation's 6th largest bank has a concentration of loans to a single group of borrowers, is overexposed and unlikely to be able to withstand an economic downturn. If Capital One were to fail, only a few of our largest banks would have the capability of acquiring them, which would significantly increase consolidation of the US banking system.

COMPETITION

Credit Cards

The US credit card market is already highly concentrated, with indicators of a lack of price competition among the largest credit card companies. Capital One in particular is already one of the most expensive options for customers of all credit types. Analysis of this merger should also focus on how this merger would affect competition in the credit card market for borrowers with non-prime credit scores, as these borrowers have fewer options, and preliminary analysis suggests that combining Capital One and Discover's market share of outstanding non-prime credit card *debt results in a presumption that this is an anti-competitive merger.*

This merger would make Capital One the largest credit card issuer in the US with a 20% share of outstanding credit card debt, 23% more than JPMorgan Chase the current largest credit card debt holder.[2] The US credit card market is already highly concentrated. The Consumer Financial Protection Bureau (CFPB) reports that the top ten issuers in terms of outstanding credit card debt represent 83% of credit card loans in 2022, and that no single issuer outside the top 15 represented more than 1% of total credit card loans.[3] Outstanding balances is the ideal way to measure concentration in the credit card industry, not purchasing volume, as interest income on balances accounts for nearly 80% of credit card profitability.[4] This is well known by Capital One as regulatory filings reveal that interest charged to cardholders on outstanding balances accounts

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[2] "A Capital One-Discover Merger Could Raise Credit Card Interest Rates." Forbes. March 16, 2024. https://www.forbes.com/sites/elenabotella/2024/03/16/a-capital-onediscover-merger-could-raise-card-interest-rates/?sh=105599af1513 and "Capital One Plots Largest Credit Card Acquisition Ever. Will Regulators Play Ball?" Investor's Business Daily. February 20, 2024. https://www.investors.com/news/capital-one-plots-largest-credit-card-acquisition-ever-will-regulators-play-ball/

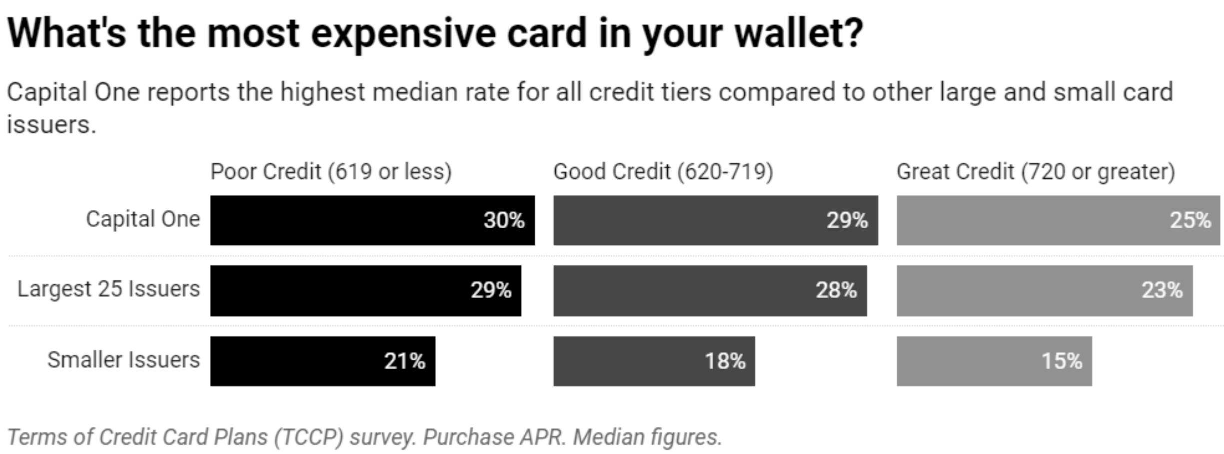
[3] 2023 Consumer Credit Card Market Report. CFPB. Page 18. https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf

[4] "Credit Card Profitability." FEDS Notes. September 9, 2022. https://www.federalreserve.gov/econres/notes/feds-notes/credit-card-profitability-20220909.html

for more than half of Capital One's total net revenue.[5]

The largest credit card companies continue to set interest rates far above the cost of offering credit, with an average APR margin of 15.4 percentage points above the prime rate in 2022, indicative of a lack of price competition among the largest companies.[6] This coincides with US credit card debt surpassing $1 trillion for the first time in 2022 and with one in ten credit card users finding themselves trapped in a vicious cycle of "persistent debt" by being charged more in interest and fees each year than they pay toward the principal debt.[7]

Capital One in particular stands out as a higher priced option for all consumers. We compared Capital One's median purchase APR by credit tiers on their general purpose credit cards to the median purchase APR of small credit card issuers identified by the CFPB.



The chart above shows that Capital One's median APR is 43% higher than small issuers for customers in the lowest credit tier, as well as 67% higher for customers in the highest credit tier.[8] If approved, Capital One would be able to raise Discover's existing customer's interest rates to match Capital One's higher interest rates for all new purchases.[9]

A 2021 Executive Order called on the federal banking regulators to revitalize merger

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[5] "Capital One-Discover: A Competition Policy and Regulatory Deep Dive." American Economic Liberties Project. March 21, 2024. https://www.economicliberties.us/our-work/capital-one-discover-a-competition-policy-and-regulatory-deep-dive/ In 2023, Capital One earned $19.7 billion in net interest income from credit cards out of a total of $36.8 billion in net revenue. See: Capital One Financial Corp, Form 10-K For the Year Ended December 31, 2023, SEC filing, Feb. 24, 2023, https://ir-capitalone.gcs-web.com/static-files/994c8bec-608e-49d1-8ae2-a039bc43ba54.

[6] "CFPB Report Finds Credit Card Companies Charged Consumers Record-High $130 Billion in Interest and Fees in 2022." https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-finds-credit-card-companies-charged-consumers-record-high-130-billion-in-interest-and-fees-in-2022/

[7] Ibid.

[8] NCRC Analysis. https://www.datawrapper.de/_/wKPZ4/ and "Credit card data: Small issuers offer lower rates." CFPB. February 16, 2024. https://www.consumerfinance.gov/data-research/research-reports/credit-card-data-small-issuers-offer-lower-rates/

[9] "A Capital One-Discover Merger Could Raise Credit Card Interest Rates." Forbes. March 16, 2024. https://www.forbes.com/sites/elenabotella/2024/03/16/a-capital-onediscover-merger-could-raise-card-interest-rates/?sh=105599af1513

oversight in order to "ensure Americans have choices among financial institutions and to guard against excessive market power."[10] Multiple Senators have also requested that regulators update the bank merger review process to improve analysis of competitive factors as well as impact on financial stability.[11] Former Federal Reserve Board member Daniel Tarullo recently noted that competition can vary across forms of lending, and that customers with less access comprise "sub-markets" that could be negatively impacted by mergers.[12] Tarullo was speaking there about online access, but customers with non-prime credit scores also have less access to traditional credit cards, often forcing them into more expensive credit card products that make it harder for them to rebuild their credit score.

Capital One and Discover both prioritize borrowers with credit scores in the 600s. [13] From 2019 to 2023, Capital One sent more direct mail offers to households with credit scores between 621 and 660 than any other issuer, and Discover was the only other mainstream credit card issuer to send a significant number of direct mail offers to this same market segment.[14] Capital One is already the largest non-prime credit card lender in the US, and adding Discover's $20 billion to their portfolio would give them more than double the outstanding non-prime credit card balances of JPMorgan Chase and Citigroup, the next largest non-prime lenders.[15] This raises significant concerns about how this merger would reduce options for financially vulnerable customers and reduce the already limited competition on pricing for non-prime credit cards. A preliminary analysis based on information from regulatory filings suggests that applying the Herfindahl-Hirschman Index (HHI) to the market share of outstanding non-prime credit card balances results in a presumption that this is an illegally anti-competitive merger.[16]

[10] "Executive Order on Promoting Competition in the American Economy." July 9, 2021. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

[11] "In The Wake of Recent Bank Failures, Brown, Colleagues Urge Federal Reserve to Overhaul Big Bank Merger Policy." United States Senate Committee on Banking, Housing, and Urban Affairs. August 9, 2023. https://www.banking.senate.gov/newsroom/majority/wake-recent-bank-failures-brown-colleagues-urge-federal-reserve-overhaul-big-bank-merger-policy

[12] "Regulators should rethink the way they assess bank mergers." Brookings. March 16, 2022. https://www.brookings.edu/articles/regulators-should-rethink-the-way-they-assess-bank-mergers/

[13] "The Proposed Merger of Capital One and Discover Deserves Rigorous Scrutiny." The Sling. March 4, 2024. https://www.thesling.org/the-proposed-merger-of-capital-one-and-discover-deserves-rigorous-scrutiny/

[14] "A Capital One-Discover Merger Could Raise Credit Card Interest Rates." Forbes. March 16, 2024. https://www.forbes.com/sites/elenabotella/2024/03/16/a-capital-onediscover-merger-could-raise-card-interest-rates/?sh=105599af1513

[15] Capital One-Discover: A Competition Policy and Regulatory Deep Dive." American Economic Liberties Project. March 21, 2024. https://www.economicliberties.us/our-work/capital-one-discover-a-competition-policy-and-regulatory-deep-dive/

[16] Analysis conducted by Americans for Financial Reform. Total outstanding general purpose credit card loans from Federal Reserve Bank of New York. Center for Microeconomic Data. Household Debt and Credit Report. Q4 2023. Issuer loans based on credit card loans carried as assets on Securities and Exchange Commission filings or FDIC call reports. Non-prime market based on issuers' disclosure of higher-risk loans (typically reported as under 660 credit score, although some report under 680 or under 650). Eighteen of the 30 issuers reported non-prime lending breakdown

Credit card outstanding loan market shares and concentration levels 2023 and post-merger		
	Non-Prime Credit Card Loans	
Issuer	Market Share	Rank
JPMorgan Chase	13.4%	3
Citibank	15.3%	2
Capital One	21.5%	1
Discover	9.1%	5
Bank of America	7.7%	6
American Express	0.0%	10
Synchrony	12.3%	4
Wells Fargo	4.6%	8
Barclays	2.8%	9
Navy Federal Credit Union	5.7%	7
Capital One + Discover	*30.6%*	
HHI Pre-merger	1,236	
HHI Post-merger	1,626	
HHI Δ	390	
Source: 2023 Securities and Exchange Commission filings, FDIC call reports, and Federal Reserve Bank of New York household debt data.		

The Department of Justice (DOJ) and the Federal Trade Commission (FTC) use HHI to evaluate the competitive effect of transactions. DOJ and FTC guidelines state that deals that result in a single firm with market share above 30%, combined with an HHI increase of over 100 points, results in a presumption that the merger would substantially reduce competition or create a monopoly.[17]The chart above shows that this merger results in Capital One having a market share of 30.6%, and that the HHI increased by nearly 400 points. This analysis is preliminary but

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on their SEC reports and the total reported non-prime lending from these 18 firms was divided into their total lending to determine an average of 19 percent of credit card loans to consumers with non-prime credit scores; this average was applied to the total credit card loans of issuers that did not report breakdowns and the FRB NY total loans to get individual issuer non-prime credit card lending and market size.

"The Department of Justice and the Federal Trade Commission generally measure concentration levels using the Herfindahl-Hirschman Index ("HHI"). The HHI is defined as the sum of the squares of the market shares; it is small when there are many small firms and grows larger as the market becomes more concentrated." Merger Guidelines U.S. Department of Justice and the Federal Trade Commission. Page 5. https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf

[17] Merger Guidelines U.S. Department of Justice and the Federal Trade Commission. Pages 5-6. https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf

includes the 30 largest credit card lenders and national data found in 10-K filings. We encourage the DOJ to conduct a full HHI analysis of the market share of non-prime credit cards based on outstanding loan balances, and to complement this with state and MSA level market analyses if possible.

Capital One claims in their merger application that the credit card issuing market is "intensely competitive and dynamic - in part due to the ease with which issuers and consumers can switch among products and services."[18] This ignores the fact that a significant percentage of Capital One and Discover's customers have lower credit scores that limit their options, with borrowers with credit scores 660 or below comprising 32% of Capital One's credit card portfolio in 2023 and 20% of Discover's.[19] Capital One contradicts their assertion that all customers can easily switch over their credit cards in their recently released community benefits plan that notes that "many other financial institutions, including large, midsize, and small banks and credit unions" do not offer products for subprime and LMI customers.[20] For example, over half of general purpose credit card applications from customers with credit scores ranging from 620 to 659 get rejected, as well as 83% of applications from customers with credit scores from 580 to 619.[21] Also, the option to transfer credit card balances to less expensive credit cards is typically only available to borrowers with high credit scores.[22] Furthermore, many large issuers make it difficult for consumers to shop around and compare credit cards by not clearly providing the interest rate that borrowers will pay.[23] Consumers also often encounter manipulated results when using online-comparison shopping tools that inappropriately favor products from lenders that offer kickback payments to the website.[24] This merger must be denied in order to preserve options for customers with non-prime credit scores.

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[18] Capital One – Discover OCC Merger Application. Preliminary Statement. Page 3.

[19] Capital One 2023 10-K Filing. Page 94. cof-20231231 (sec.gov) and Discover 2023 10-K Filing. Page 102. dfs-20231231 (sec.gov)

[20] Capital One Community Benefits Plan. Page 7. https://www.capitalonediscover.com/media/p53nsb3p/capital_one_community_benefits_plan_overview.pdf

[21] 2023 Consumer Credit Card Market Report. CFPB. Pages 12 and 81. https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf

[22] Ibid. Page 117.

[23] "CFPB Enhances Tool to Promote Competition and Comparison Shopping in Credit Card Market." March 21, 2023. https://www.consumerfinance.gov/about-us/newsroom/cfpb-enhances-tool-to-promote-competition-comparison-shopping-credit-card-market/

[24] "CFPB Issues Guidance to Rein in Rigged Comparison-Shopping Results for Credit Cards and Other Financial Products." February 29, 2024. https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-rein-in-rigged-comparison-shopping-results-for-credit-cards-and-other-financial-products/

Debit Cards and Interchange Fees

This merger is attractive to Capital One because it would exempt them from regulatory caps on fees charged to merchants when they use debit cards to make purchases. If approved, Capital One would have the ability and incentive to raise fees on merchants.

Speaking on an investor call after the announcement of Capital One's intention to buy Discover, Capital One's CEO Richard Fairbank commented that "a network is a very, very rare asset. There are very few of them and it's just – I don't think people are going to be building any of these anytime soon because it's such a chicken-and-egg problem to ever get one started."[25] Fairbank went on to describe Discover's network as a "holy grail" that Capital One has long sought in order to "deal directly with merchants."[26] Discover's network is highly coveted because having their own network would exempt Capital One from the Durbin Amendment that caps interchange fees on debit cards, the price that merchants pay to banks when customers use debit cards issued by their bank.

DOJ's Antitrust Division and the FTC recently released updated guidelines related to their analysis of whether proposed mergers would result in anti-competitive effects. The American Economic Liberties Project notes how this merger would draw scrutiny across several of these updated guidelines, and also that the DOJ and FTC list "a merger that would enable firms to avoid a regulatory constraint because that constraint was applicable to only one of the merging firms" as an example of mergers that have weakened competition in the past.[27] This merger obviously falls into this category. Not only would Capital One have the ability to raise debit card interchange fees, they would also have a strong incentive to do so. One of the most effective ways for Capital One to encourage banks to move debit cards to their network would be by offering a higher share of interchange fees, which encourages Capital One to increase interchange fees overall.[28] Capital One would also be able to leverage access to its extensive card network to force businesses to accept higher interchange fees. One financial services analyst estimated that Capital One's debit interchange fee increases could cost American businesses and consumers around $800 million a

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[25] Transcript of Capital One Financial Corporation and Discover Financial Services Investor Call. February 20, 2024. https://www.sec.gov/Archives/edgar/data/927628/000119312524040125/d797639d425.htm

[26] Ibid.

[27] Capital One's acquisition is likely to draw scrutiny across several guidelines. The transaction takes place in concentrated markets (Guideline 1), which may be "trending towards consolidation" (Guideline 7). The acquisition may threaten to eliminate substantial competition between firms (Guideline 2), and it involves a multi-sided platform whose control may entrench the acquiring firm's market power in an adjacent market position (Guideline 9). "Capital One-Discover: A Competition Policy and Regulatory Deep Dive." American Economic Liberties Project. March 21, 2024. https://www.economicliberties.us/our-work/capital-one-discover-a-competition-policy-and-regulatory-deep-dive/ and "Merger Guidelines U.S. Department of Justice and the Federal Trade Commission." December 18, 2023. Page 30. https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf

[28] "Will the Capital One, Discover merger impact the Credit Card Competition Act?" Bankrate. March 1, 2024. https://www.bankrate.com/finance/credit-cards/capital-one-discover-merger-ccca-impact/

year.[29]

Unlikely to Compete with Visa and Mastercard

Previous credit card mergers have not resulted in benefits to consumers. In addition, this merger may actually increase Visa's dominance of the credit card market and potentially start a wave of payment network mergers.

Capital One claims in their merger application that this deal will "facilitate more robust competition against Visa and Mastercard" and the combination of Capital One and Discover "presents the most viable chance to deconcentrate and increase competition among payments networks."[30] Speaking at a recent event, CFPB Director Rohit Chopra and Assistant Attorney General for the DOJ's Antitrust Division Jonathan Kanter expressed skepticism about the counter intuitive idea that further consolidation will increase competition. Chopra referred to this as the "three is better than four argument" and that he is not aware of "many examples of this ever really working."[31] Instead, Chopra noted that

> *"The credit card market has seen a small set of players really dominate the market, and when we look backward, we see there is a big delta between larger and smaller issuers in terms of rates and fees that they charge, and that suggests that some of the prior mergers in the industry didn't necessarily translate into benefits."*[32]

Kanter also added that, "the remedy for lack of competition in a market isn't less competition."[33]

There is reason to be skeptical of Capital One's claims that this merger will help them compete with Visa and Mastercard. Capital One does not need to acquire Discover in order to move its cards to their network, which discredits Capital One's argument that this merger is needed to increase competition among payment networks. Furthermore, if Capital One were to move all of its cards currently on the Visa and Mastercard network over to an acquired Discover network, the effect will be far more pronounced on Mastercard than Visa. Mastercard would lose twice the cards as Visa and is already the smaller of the two, so instead of Capital One competing against a Visa-Mastercard duopoly, they could actually further cement Visa's advantage.[34] Also, there is a possibility that if approved this merger could spur a wave of payment network mergers as Mastercard and American Express would likely cite approval as precedent and argue they need to

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[29] "By shifting its debit volume to Discover's network, Capital One can charge merchants higher fees, which could lead to around $800 million of pre-tax earnings upside based on estimated debit volumes of $90 billion." See: Marc Rubenstein, "The Third Network," Net Interest, Feb 23, 2024, https://www.netinterest.co/p/the-third-network.

[30] Capital One – Discover OCC Merger Application. Preliminary Statement. Pages 3 and 83.

[31] "CFPB Head Sees Flaws In Capital One-Discover Deal Rationale." Law360. March 21, 2024. https://www.law360.com/articles/1816330/cfpb-head-sees-flaws-in-capital-one-discover-deal-rationale

[32] Ibid.

[33] Ibid.

[34] "The Proposed Merger of Capital One and Discover Deserves Rigorous Scrutiny." The Sling. March 4, 2024. https://www.thesling.org/the-proposed-merger-of-capital-one-and-discover-deserves-rigorous-scrutiny/

acquire payment networks such as PayPal or Klarna as well in order to compete with Visa and Capital One/Discover.[35]

SAFETY AND SOUNDNESS

Financial Resources

Capital One's concentration in non-prime credit card and auto lending, combined with rising delinquency rates in both these sectors, raise serious concerns about Capital One's ability to withstand an economic downturn.

As already mentioned, interest charged to cardholders on outstanding balances accounts for more than half of Capital One's total net revenue.[36] Adding Discover's outstanding credit card loans to Capital One's assets would result in an over 70% increase of Capital One's outstanding credit card loans, and leave Capital One with credit card loans accounting for nearly 40% of total assets.[37] Auto lending also accounts for practically all of Capital One's consumer banking at 98% of consumer banking loans held for investment, and with 47% of Capital One's auto loan customers having credit scores of 660 or below at origination.[38]

Credit card and auto loan delinquency rates continue to rise above pre-pandemic levels. The share of newly delinquent credit card borrowers in the lowest income areas in the third quarter of 2023 was nearly double the rate from the first quarter of 2015, and in 2023 subprime auto loan delinquency rates reached their highest level since 1996.[39] Capital One and Discover's credit card delinquency rates at the end of January 2024 are the highest among the six major credit card issuers, with Capital One also having the highest charge off rate with net charge offs increasing by 77% from 2022 to 2023.[40] Delinquency rates could rise even further as student loan payments

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[35] Ibid.

[36] "Capital One-Discover: A Competition Policy and Regulatory Deep Dive." American Economic Liberties Project. March 21, 2024. https://www.economicliberties.us/our-work/capital-one-discover-a-competition-policy-and-regulatory-deep-dive/ In 2023, Capital One earned $19.7 billion in net interest income from credit cards out of a total of $36.8 billion in net revenue. See: Capital One Financial Corp, Form 10-K For the Year Ended December 31, 2023, SEC filing, Feb. 24, 2023, https://ir-capitalone.gcs-web.com/static-files/994c8bec-608e-49d1-8ae2-a039bc43ba54.

[37] Ibid. and "Analysis: Antitrust and Banking Agencies Must Block Capital One-Discover Merger." Americans for Financial Reform. March 14, 2024. https://ourfinancialsecurity.org/2024/03/report-antitrust-and-banking-agencies-must-block-capital-one-discover-merger/#:~:text=The%20merger%20would%20increase%20Capital,provisions%20for%20credit%20card%20losses.

[38] Capital One 2023 10-K Filing. Pages 68 and 94. cof-20231231 (sec.gov)

[39] "Credit Card and Auto Loan Delinquencies Continue Rising; Notably Among Younger Borrowers." Federal Reserve Bank of New York. February 6, 2024. https://www.newyorkfed.org/newsevents/news/research/2024/20240206 and "Credit Card Delinquencies Continue to Rise—Who Is Missing Payments?" Liberty Street Economics. Federal Reserve Bank of New York. November 7, 2023. https://libertystreeteconomics.newyorkfed.org/2023/11/credit-card-delinquencies-continue-to-rise-who-is-missing-payments/ and "Delinquency rates at highest level in almost 30 years." Bankrate. November 29, 2023. https://www.bankrate.com/loans/auto-loans/subprime-auto-loan-delinquencies-surge/

[40] "Credit card delinquency, net loss rates return to pre-pandemic levels." S&P Global. February 29, 2024. https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/credit-card-delinquency-net-

resume, as newly delinquent rates are rising fastest for credit card borrowers that also have student debt, with the highest newly delinquent rate among credit card borrowers with both student and auto debt.[41]

Managerial Resources

Capital One's repeat violations of antitrust, banking, consumer, and discrimination laws indicate significant compliance deficiencies and suggest that Capital One is already too-big-to-manage at its current size, and may even be too-big-to-care about following federal and state laws.

Capital One has racked up over $963 million in fines since 2000 for illegal corporate behavior that runs the gamut from improper anti-money laundering procedures, consumer protection, privacy, wage and hour violations, to discriminatory job postings.[42] These include repeat antitrust violations by Capital One CEO Richard Fairbank for failing to disclose his acquisition of Capital One stock.[43] The Hart-Scott-Rodino Act (HSR) requires companies and individuals to report large transactions over a certain threshold to the FTC and DOJ so that the federal agencies can investigate the deals before they close.[44] Fairbank violated the HSR in 1999 and 2004, but the FTC chose not to pursue fines for those violations after Fairbank alleged it was inadvertent and pledged to implement a system to ensure HSR compliance going forward. However, this turned out to be an empty promise as Fairbank violated the HSR again in 2018.[45]

Other recent fines and enforcement actions against Capital One include:

2022

- $2 million settlement with the Los Angeles County District Attorney for making calls with unreasonably excessive frequency and persisting in calling wrong numbers in an effort to collect their debts, both in violation of California's Rosenthal Act and the Federal Debt Collection Practices Act.[46]

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loss-rates-return-to-pre-pandemic-levels-80618274 and "Capital One Charge-Offs Jump on Auto, Credit Card Write-Downs." Bloomberg. January 25, 2024. https://www.bnnbloomberg.ca/capital-one-charge-offs-jump-on-auto-credit-card-write-downs-1.2026732

[41] "Credit Card Delinquencies Continue to Rise—Who Is Missing Payments?" Liberty Street Economics. Federal Reserve Bank of New York. November 7, 2023. https://libertystreeteconomics.newyorkfed.org/2023/11/credit-card-delinquencies-continue-to-rise-who-is-missing-payments/

[42] "Capital One Should Not Rush To Acquire Discover." Forbes. February 22, 2024. https://www.forbes.com/sites/mayrarodriguezvalladares/2024/02/22/capital-one-should-not-rush-to-acquire-discover/?sh=7249a6cb5a91 and "Justice Department Secures Settlements with CarMax, Axis Analytics, Capital One Bank and Walmart for Posting Discriminatory Job Advertisements on College Recruiting Platforms." Department of Justice. Office of Public Affairs. September 21, 2022. https://www.justice.gov/opa/pr/justice-department-secures-settlements-carmax-axis-analytics-capital-one-bank-and-walmart

[43] "FTC Fines Capital One CEO Richard Fairbank for Repeatedly Violating Antitrust Laws." Federal Trade Commission. September 2, 2021. https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-fines-capital-one-ceo-richard-fairbank-repeatedly-violating-antitrust-laws

[44] Ibid.

[45] Ibid.

[46] "Capital One to Pay $2 Million to Settle Debt Collection Lawsuit." Los Angeles County District Attorney's Office.

- $49,728 fine from the DOJ for posting job opportunities with unlawful citizenship status restrictions on college job recruiting platforms in violation of the Immigration and Nationality Act's anti-discrimination provision. DOJ determined that Capital One's advertisements deterred qualified students from applying for jobs because of their citizenship status, and in many cases the citizenship status restrictions also blocked students from applying or even meeting with company recruiters.[47]

2021

- $390 million civil money penalty assessed by the Financial Crimes Enforcement Network (FinCEN) for violations of the Bank Secrecy Act. Capital One admitted to willfully failing to implement and maintain an effective anti-money laundering program that resulted "in millions of dollars in suspicious transactions to go unreported in a timely and accurate manner, including proceeds connected to organized crime, tax evasion, fraud, and other financial crimes laundered through the bank into the U.S. financial system." FinCEN Director Kenneth A. Blanco noted that "Capital One's egregious failures allowed known criminals to use and abuse our nation's financial system unchecked, fostering criminal activity and allowing it to continue and flourish at the expense of victims and other citizens."[48]

2020

- $80 million civil money penalty assessed by the OCC for failing to establish effective risk assessment processes prior to migrating its information technology to the cloud operating environment, including failures to address issues identified by Capital One's own internal audits.[49] This followed "one of the biggest data breaches ever" when a hacker in 2019 accessed over 100 million Capital One accounts and credit card applications.[50]

Each of the settlements and enforcement actions discussed above occurred after Capital One's acquisition of ING Direct in 2012. That merger approval was conditioned on Capital One improving risk management and compliance functions.[51] Capital One's history of illegal corporate behavior since 2012 shows that Capital One has failed to live up to these conditions.

December 15, 2022. http://da.lacounty.gov/media/news/capital-one-pay-2-million-settle-debt-collection-lawsuit

[47] "Justice Department Secures Settlements with CarMax, Axis Analytics, Capital One Bank and Walmart for Posting Discriminatory Job Advertisements on College Recruiting Platforms." Department of Justice. Office of Public Affairs. September 21, 2022. https://www.justice.gov/opa/pr/justice-department-secures-settlements-carmax-axis-analytics-capital-one-bank-and-walmart

[48] "FinCEN Announces $390,000,000 Enforcement Action Against Capital One, National Association for Violations of the Bank Secrecy Act." Financial Crimes Enforcement Network. January 15, 2021. https://www.fincen.gov/news/news-releases/fincen-announces-390000000-enforcement-action-against-capital-one-national

[49] OCC Consent Order. Docket Number AA-EC-20-51. August 6, 2020. Page 2. https://www.occ.gov/static/enforcement-actions/ea2020-036.pdf

[50] "A hacker gained access to 100 million Capital One credit card applications and accounts." CNN Business. July 30, 2019. https://www.cnn.com/2019/07/29/business/capital-one-data-breach/index.html

[51] Capital One – ING Direct Federal Reserve Merger Approval Order. February 14, 2012. Pages 12-14. https://www.federalreserve.gov/newsevents/pressreleases/files/order20120214.pdf

CONVENIENCE AND NEEDS

Capital One says it will implement a community benefits plan, but they have not lived up to similar claims in the past. In 2012 Capital One made a $180 billion commitment related to their merger with ING Direct that included a $28.5 billion commitment to mortgage lending. However, Capital One did not deliver on this commitment and exited mortgage lending in 2017. Banks cannot continue to meet the convenience and needs prong of merger review with empty promises that are not monitored or enforced after the merger is completed. Capital One's predatory business practices also cast doubt on their ability to serve the needs of borrowers with lower credit scores.

Capital One's previous merger history casts doubt on Capital One's intent to actually implement a community benefits plan. In 2011 Capital One announced an "$180 billion community investment commitment over the next ten years" related to their merger with ING Direct which included $28.5 billion for "low and moderate income home mortgages and home equity lending."[52] Capital One makes no mention of this $180 billion commitment or its results in their merger application. Instead of delivering on this commitment, Capital One chose to exit home mortgage lending halfway through the ten-year commitment in 2017 and only lent $11.3 billion in mortgage lending to borrowers with LMI or in LMI census tracts from 2012 through 2022, less than half of the total mortgage commitment.[53] Furthermore, based on the community development loan and investment information included in the merger application, Capital One's overall community development financing goal of $44 billion over the next five years is basically a pledge to maintain the same level of community development financing that Capital One and Discover were already doing. The merger application reports that Capital One and Discover lent or invested around $35 billion in CRA-eligible community development from 2020 through 2023, for an average of $8.8 billion a year. A five-year baseline of this level of activity comes out to $43.9 billion, making the overall goal of $44 billion an increase of just .3%.[54]

It is difficult to imagine how Capital One could come up with a plan that would make them a positive contributor to credit needs. Capital One's business practices are incompatible with wealth building for borrowers with lower credit scores. As discussed above in the section on

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[52] Transcript of Federal Reserve Board Public Meeting Regarding Notice by Capital One to Acquire ING Direct. September 20, 2011. Pages 29-30. https://www.federalreserve.gov/foia/files/Capital_One-ING_Meeting_Transcript_09-20-2011.pdf

[53] Capital One – Discover OCC Merger Application. Preliminary Statement. Page 64. And NCRC analysis of Capital One's Home Mortgage Disclosure Act Data from 2012-2022 that included income data on the borrower with loans without income data excluded. Multifamily loans excluded as they appear to be included in a separate commitment for "affordable housing development and commercial revitalization for 25 billion." In addition to not being mentioned in the merger application, unable to find any information from Capital One on the results of this commitment online.

[54] Capital One and Discover's 2020-2023 community development loans and investments can be found on pages 58, 66, and 76 of the Capital One – Discover OCC Merger Application. Preliminary Statement.

competition, Capital One is one of the most expensive credit card lenders in the country, and they specifically target non-prime borrowers who are more likely to carry outstanding balances over from month to month and generate more interest payments to Capital One.[55] There is nothing wrong with prioritizing borrowers with lower credit scores, but given Capital One's significantly higher interest rates than smaller issuers, it appears that Capital One's customers would be much better served taking their business elsewhere. Capital One's practice of raising credit lines on non-prime borrowers as they approach their limit is certainly a contributing factor to the rise in persistent credit card debt, with Capital One receiving more than $800 annually in interest payments alone from many of their customers.[56] It has also been reported that in at least one instance Capital One used $100 credit card line increases to borrowers living in LMI census tracts that would not have ordinarily qualified in order to artificially inflate its CRA performance.[57]

Capital One is also an industry leader in filing debt collection civil suits, recovering more from previously charged off card accounts than much larger banks including JPMorgan Chase.[58] Debt collection lawsuits have grown to dominate state civil courts, with data from nine states indicating that debt collection lawsuits have risen to nearly 1 in 2 civil court cases in 2021, compared to 1 in 4 in 2013 and 1 in 9 in 1993.[59] Debt collection lawsuits are highly predatory with customers sued rarely having legal representation, or not even being aware of the lawsuit as more than 70% of debt collection lawsuits result in default judgments where the defendant does not show up to court or respond to the suit.[60] These cases often result in heavy fines for defendants as courts routinely order customers to pay accrued interest as well as court fees that together often exceed the amount owed, and can also result in garnished wages.[61] Garnished wages are more

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[55] Balance carrying behavior by cardholders is highly correlated with credit score. 2023 Consumer Credit Card Market Report. CFPB. Page 44. https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf

[56] "I Worked at Capital One for Five Years. This Is How We Justified Piling Debt on Poor Customers." The New Republic. October 2, 2019. https://newrepublic.com/article/155212/worked-capital-one-five-years-justified-piling-debt-poor-customers

[57] *Delinquent: Inside America's Debt Machine.* Elena Botella. October 11, 2022. University of California Press. Pages 34-36.

[58] Aggressive debt collection is key to Capital One's profitability. Last year, the same year the company reported $5.5 billion in net income, it recovered $1.4 billion from its card accounts that had been previously charged-off, or recognized as losses. It was a haul hundreds of millions of dollars beyond any other card issuer, even much larger ones like JPMorgan Chase. "Capital One and Other Debt Collectors Are Still Coming for Millions of Americans." ProPublica. June 8, 2020. https://www.propublica.org/article/capital-one-and-other-debt-collectors-are-still-coming-for-millions-of-americans

[59] "Debt Collection Cases Continued to Dominate Civil Dockets During Pandemic." Pew Charitable Trusts. September 18, 2023. https://www.pewtrusts.org/en/research-and-analysis/articles/2023/09/18/debt-collection-cases-continued-to-dominate-civil-dockets-during-pandemic

[60] "How Debt Collectors Are Transforming the Business of State Courts." Pew Charitable Trusts. May 6, 2020. https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts

[61] Ibid.

common with customers earning less than $40,000 a year as well as predominantly Black communities, and they often create financial emergencies where customers are forced to let other bills go unpaid, further trapping them in a vicious cycle of debt.[62] Capital One's significant role in filing debt collection lawsuits, combined with their higher interest rates and practice of raising credit lines on non-prime borrowers as they approach their limit, raises a serious compliance question as lenders are required to consider a customer's ability to meet minimum payments before originating credit lines or increasing them.[63]

Capital One cites increased reward opportunities as an example of how this merger will improve services for customers.[64] When considering the benefits of increased reward opportunities, it is important to keep in mind who gains the most from reward programs. A recent Federal Reserve paper found that credit card rewards are unequally distributed across geographies and "transfer income from less to more educated, from poorer to richer, and from high- to low minority areas, thereby widening existing spatial disparities."[65] Borrowers in the highest credit score tiers account for about 80% of reward redemptions despite only accounting for 67% of general purpose rewards cards at mass market issuers, with below-prime customers only accounting for 6% of reward redemptions.[66] Reward credit cards may also induce consumers with lower credit scores to over borrow on their credit cards.[67] This could be the result of rewards obscuring the true cost of borrowing as the cost of revolving debt often outweighs the value of redeemed rewards, particularly for customers with lower credit scores facing higher interest and fees.[68] The potential for rewards programs to both transfer wealth away from poorer and more diverse communities, as well as encourage higher debt levels for those with lower credit scores, should limit any positive consideration of rewards programs as evidence of how this merger would serve the public's convenience and needs.

Lastly, Capital One and Discover both currently employ a significant number of employees in Delaware, with Capital One accounting for 2,000 and Discover accounting for 1,100.[69] Capital

[62] "Capital One and Other Debt Collectors Are Still Coming for Millions of Americans." ProPublica. June 8, 2020. https://www.propublica.org/article/capital-one-and-other-debt-collectors-are-still-coming-for-millions-of-americans
[63] 12 CFR Part 1026 (Regulation Z). § 1026.51 Ability to Pay. CFPB. https://www.consumerfinance.gov/rules-policy/regulations/1026/51/
[64] Capital One – Discover OCC Merger Application. Preliminary Statement. Page 18.
[65] Agarwal, Sumit, Andrea Presbitero, Andre F. Silva, and Carlo Wix (2023). "Who Pays For Your Rewards? Redistribution in the Credit Card Market," Finance and Economics Discussion Series 2023-007. Washington: Board of Governors of the Federal Reserve System, https://doi.org/10.17016/FEDS.2023.007. Page 7.
[66] 2023 Consumer Credit Card Market Report. CFPB. Page 101. https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf
[67] Agarwal, Sumit, Andrea Presbitero, Andre F. Silva, and Carlo Wix (2023). "Who Pays For Your Rewards? Redistribution in the Credit Card Market," Finance and Economics Discussion Series 2023-007. Washington: Board of Governors of the Federal Reserve System, https://doi.org/10.17016/FEDS.2023.007.
[68] 2023 Consumer Credit Card Market Report. CFPB. Page 101. https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf
[69] In news reports from 2019 and 2021, Capital One reported 2,000 employees in Delaware. The News Journal.

One makes a vague and noncommittal mention of "maintaining a strong presence" in Delaware, as well as Chicagoland.[70] In order to accurately review this merger's impact on convenience and needs, Capital One should make clear their long term employment plans as it relates to Delaware in light of the significant overlap.

FINANCIAL STABILITY

Combining the Capital One and Discover non-prime credit card portfolios would create a bank with unacceptable credit concentration risk. Adding in Capital One's auto lending, the proposed merger would mean the nation's 6th largest bank has a concentration of loans to a single group of borrowers, is overexposed and unlikely to be able to withstand an economic downturn. If Capital One were to fail, only a few of our largest banks would have the capability of acquiring them, which would significantly increase consolidation of the US banking system.

If approved, Capital One would hold approximately $640 billion in assets, making them the sixth largest bank in the United States, and with more assets than the combined assets of the six US banks that failed in 2023.[71] As discussed above in the section on financial resources, Capital One's assets are highly concentrated in the non-prime credit card and auto lending sectors which both have rising delinquency rates, and acquiring Discover increases this asset concentration further. In the event of an economic downturn, Capital One would be more vulnerable than similar sized banks due to this asset concentration in non-prime credit cards and auto loans.

The size of an expanded Capital One also increases the likelihood that only an institution that has already reached globally systemically important bank status (GSIB), or too-big-to-fail in other words, would be able to absorb Capital One in the event of a bank failure.[72] We saw examples of this in 2023 and 2008 when JPMorgan Chase acquired First Republic and Washington Mutual

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Delaware Online. March 25, 2024. and "MBNA veteran Rhodes named new Discover CEO." Delaware Business Times. December 12, 2023. https://delawarebusinesstimes.com/news/rhodes-discover-ceo/#:~:text=Today%2C%20the%20credit%20giant%20currently,at%20its%20sole%20Greenwood%20branch.

[70] Capital One – Discover OCC Merger Application. Preliminary Statement. Page 48.

[71] Capital One – Discover OCC Merger Application. Preliminary Statement. Page 3. And FDIC BankFind Suite – Top 100 Banks and Thrifts by Assets. Reporting Period 12/31/2023. https://banks.data.fdic.gov/bankfind-suite/financialreporting?commonSearch=top100&commonSearchesExpand=true&establishedEndRange=4%2F7%2F2024&establishedStartRange=01%2F01%2F1792&inactiveEndRange=4%2F7%2F2024&inactiveStartRange=01%2F01%2F1970&incomeBasis=YTD&institutionType=banks&limitEstablishedDate=false&limitInactiveDate=false&pageNumber=1&reportPeriod=20231231&resultLimit=25&sortField=ASSET&sortOrder=DESC&unitType=%24. Based on Call Report Data, Silicon Valley Bank ($209 billion), Signature Bank ($110.4 billion), First Republic Bank ($212.6 billion), Silvergate Bank ($11.4 billion), Citizens Bank – Sac City, IA ($59.7 million), and Heartland Tri-State Bank ($139.1 million) had combined assets of $543.6 billion as of year-end 2022. Federal Financial Institutions Examination Council Central Data Repository's Public Data Distribution. https://cdr.ffiec.gov/public/ManageFacsimiles.aspx#

[72] "Financial Stability and Large Bank Resolvability". Acting Comptroller of the Currency Michael J. Hsu Remarks Before the Wharton Financial Regulation Conference 2022. April 1, 2022. https://www.occ.gov/news-issuances/speeches/2022/pub-speech-2022-33.pdf

Bank respectively despite already being the nation's largest bank by assets, two banks with less than half the assets that Capital One would hold.[73] As Acting Comptroller Hsu has pointed out, these outcomes increase the systemic importance of GSIBs with minimal due diligence and analysis of integration challenges, and erodes public confidence in the government's ability to prevent banks from becoming too-big-to-fail.[74]

Conclusion

NCRC and the undersigned member organizations and partners request that the OCC and the Federal Reserve deny this merger application due to the significant concerns discussed above. We believe that the myriad of issues associated with this merger are too severe to effectively address through conditional approvals or the implementation of a flawed community benefits plan given Capital One's business practices and history.

Thank you for considering our views on this important matter. If you have any questions, please contact Kevin Hill, Senior Policy Advisor, at khill@ncrc.org or myself at jvantol@ncrc.org.

Sincerely,

Jesse Van Tol
President and CEO

CC

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Undersigned Member Organizations and Partners

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[73] Ibid. and "Late-Night Negotiating Frenzy Left First Republic in JPMorgan's Control." New York Times. May 1, 2023. https://www.nytimes.com/2023/05/01/business/first-republic-jpmorgan-fdic.html. First Republic Bank had $212.6 billion in assets as of year-end 2022. Federal Financial Institutions Examination Council Central Data Repository's Public Data Distribution. https://cdr.ffiec.gov/public/ManageFacsimiles.aspx#
[74] Ibid. Pages 4 and 6.

20/20 Vision

Accountable.US

AHCOPA

Alabama State Conference of NAACP

American Economic Liberties Project

Americans for Financial Reform Education Fund

Amplify Equity

Atlanta Neighborhood Development Partnership

Birmingham Business Resource Center

Bridging Communities, Inc.

Building Alabama Reinvestment

California Coalition for Rural Housing

CASA of Oregon

CCEDA

Ceiba

Center for Economic and Social Justice

Central Baptist Community Development Corporation

Centre for Homeownership & Economic Development Corporation

Centro Cultural

Chattanooga Neighborhood Enterprise

Chicanos Por La Causa, Inc

Clover New Orleans

CNHED

Columbus Compact dba Columbus Empowerment Corp.

Community Alliance of Tenants

Community First Fund

Community Growth Fund

Community Reinvestment Alliance of Florida

Consumer Federation of America

Co-op Dayton

Cornerstone Renter Equity

Data You Can Use

Dundalk Renaissance

Eastside Community Network

Economic Development Connections

Esperanza Community Housing

Fahe

Fair Finance Watch

Fair Housing Center of Northern Alabama

Fair Housing Resource Center, Inc.

Famicos Foundation

Georgia Advancing Communities Together, Inc.

Greater Cincinnati Microenterprise Initiative Inc

Grow America

Habitat for Humanity of the Greater La Crosse Region

Harlingen Community Development Corporation

Home Ownership Center of Greater Cincinnati

Housing Opportunities Made Equal of Greater Cincinnati

Housing Oregon

HousingWorksRI

Inner City Health

Johnson Consulting Group

Jovis

JustDane

Latino Leadership Council

Lifted Cares

LK Hynson Consultants

Local Enterprise Assistance Fund (LEAF)

Local First Arizona

Logan Heights Community Development Corporation

Main Street Alliance

Manna, Inc.

Metro North Community Development Inc.

Metropolitan Milwaukee Fair Housing Council

Milwaukee Christian Center

Neighborhood Development Collaborative

New Jersey Citizen Action

New Urban Development, LLC

NEWCAP, Inc.

Northwest Center

Open Markets Institute

Ophelia Steen Family and Health Center

Oregon Consumer Justice

Our Casas Resident Council Inc.

PCR Business Finance

Philadelphia Association of Community Development Corporations

Piedmont Business Capital

Prosperity Indiana

R.A.A.! - Ready, Aim, Advocate! Committee

REBOUND, Inc.

Reinvestment Partners

Renaissance Entrepreneurship Center

Revolving Door Project

Rise Economy (formerly the California Reinvestment Coalition)

Rural Housing Coalition of New York

S J Adams Consulting

Santa Fe Habitat for Humanity

SC Uplift Community Outreach

Seniors Success Center

South Bend Heritage Foundation

South Georgia Alliance 85

Southern Dallas Progress CDC

Southwest CDC

Southwest Georgia United

The Center for Public Skills Training

The Central Valley Urban Institute

The Freedom BLOC

The Greenlining Institute

The National Appraisal Bias Taskforce

Town of Apex

Tribal Homeownership Coalition of the Southwest

Ubuntu Institute of Learning

United Community Center, Inc.

United South Broadway Corporation

Universal Housing Solutions CDC

Urban Land Conservancy

Vermont Slauson Economic Development Corporation

Veterans Center

WINDS Green Accelerator Inc.

Wisconsin Preservation Fund, Inc

Women's Economic Ventures

Working In Neighborhoods