Congress of the United States
Washington, DC 20515

February 25, 2024

The Honorable Michael Barr
Vice Chair for Supervision
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

Acting Comptroller Michael Hsu
Office of the Comptroller of the Currency
400 7th Street SW
Washington, DC 20219

Dear Acting Comptroller Hsu and Vice Chair Barr:

We write with deep concern about Capital One's plan to acquire Discover Financial Services (Discover), a deal that would combine two of the largest credit card issuers in the United States[1] into a "colossus"[2] that would "leav[e] the industry with fewer competitors overall and eas[e] pressure on companies to attract customers with favorable terms."[3]

Under federal law, the Office of the Comptroller of the Currency (OCC) and the Federal Reserve (Fed) are charged with reviewing and approving mergers and acquisitions among the banks they oversee, in conjunction with the Department of Justice (DOJ).[4]

With nearly $500 billion in assets, Capital One is currently the nation's ninth-largest bank.[5] By acquiring Discover, Capital One would add a network of 305 million cardholders to its base of more than 100 million customers, consolidating the credit card market and limiting customer

[1]Capital One, "Capital One to Acquire Discover," https://investor.capitalone.com/news-releases/news-release-details/capital-one-acquire-discover.
[2] The New York Times, "Capital One to Acquire Discover, Creating a Consumer Lending Colossus," Lauren Hirsch and Emma Goldberg, February 19, 2024, https://www.nytimes.com/2024/02/19/business/capital-one-discover-merger.html.
[3] ABC News, "What a possible Capital One and Discover merger means for consumers," Max Zahn, February 20, 2024, https://abcnews.go.com/Business/capital-discover-merger-means-consumers/story?id=107361677.
[4] Bank Merger Act of 1960, Pub. L. No. 86-463, 74 Stat. 129; Bank Holding Company Act of 1956, Pub. L. No. 84511, 70 Stat. 133; Federal Deposit Insurance Act of 1960, Pub. L. No. 86-463, 74 Stat. 129.
[5] Federal Reserve Statistical Release, "INSURED U.S.-CHARTERED COMMERCIAL BANKS THAT HAVE CONSOLIDATED ASSETS of $300 MILLION or MORE, RANKED by CONSOLIDATED ASSETS," December 31, 2023, https://www.federalreserve.gov/releases/lbr/current/.

choice.[6] This merger would make Capital One the nation's sixth-largest bank,[7] and largest credit card issuer, with over $200 billion in outstanding credit card loans.[8]

This merger is bad for consumers. The banking and credit card industries are already highly concentrated: today, the six largest bank holding companies control more assets than all other bank holding companies combined.[9] Consolidation in the banking sector causes "higher prices and more fees, lower deposit rates, less access to credit, bank branch closures, and job cuts."[10] In addition to harming consumers and small businesses, bank consolidation poses increased systemic risk in the financial system, "reducing the number of smaller banks and creating even more too big to fail banks."[11]

This merger announcement comes less than a week after the Consumer Financial Protection Bureau (CFPB) issued a new report revealing the impact of credit card industry consolidation on consumers. According to the report, large banks charge higher interest rates than small credit card issuers, with "[n]early half of the largest credit card issuers" — including Capital One — "offering cards with a maximum purchase APR over 30%."[12] The CFPB also found that large credit card issuers charge average fees that are 70% higher than those charged by small institutions.[13] These higher rates and fees can cost consumers hundreds of dollars annually.[14]

Capital One has a concerning history of mistreating consumers. In 2012, the CFPB ordered the bank to refund $140 million to 2 million consumers with low credit scores and low credit limits who were misled into paying for costly add-on products.[15] In 2019, Capital One's shoddy risk-management practices resulted in a hacker gaining access to more than 100 million credit card

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[6] The New York Times, "Capital One to Acquire Discover, Creating a Consumer Lending Colossus," Lauren Hirsch and Emma Goldberg, February 19, 2024, https://www.nytimes.com/2024/02/19/business/capital-one-discover-merger.html.

[7] Reuters, "Capital One to buy Discover Financial in $35.3 billion all-stock deal," Anirban Sen and Michelle Price, February 20, 2024, https://www.reuters.com/markets/deals/capital-one-considers-acquisition-discover-financial-bloomberg-says-2024-02-19/. /

[8] The New York Times, "What to Know About Capital One's Proposed Acquisition of Discover," Santul Nerkar and Emily Flitter, February 20, 2024, https://www.nytimes.com/2024/02/20/business/capital-one-discover-what-to-know.html#:~:text=The%20deal%2C%20valued%20at%20more,customer%20base%20of%20100%20million.

[9] Duke Law Journal, "Reviving Bank Antitrust," Jeremy C. Kress, December 2022, p. 522, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4140&context=dlj.

[10] American Economic Liberties Project, "Revitalizing Bank Merger Enforcement to Restore Competition and Fairness in Banking," Shahid Naeem, June 2023, http://www.economicliberties.us/wpcontent/uploads/2023/06/062023_AELP_BankMerger_Brief_R2.pdf. Letter

[11] Letter from Senator Elizabeth Warren to Financial Regulators, June 27, 2023 https://www.warren.senate.gov/imo/media/doc/2023.06.27%20Letter%20to%20Regulators%20re%20Bank%20Merger%20Reviews.pdf.

[12] Consumer Financial Protection Bureau, "Credit card data: Small issuers offer lower rates," February 16, 2024, https://www.consumerfinance.gov/data-research/research-reports/credit-card-data-small-issuers-offer-lower-rates/#4.

[13] *Id.*

[14] *Id.*

[15] Consumer Finance Protection Bureau, "CFPB Probe into Capital One Credit Card Marketing Results in $140 million Consumer Refund, July 18, 2012, https://www.consumerfinance.gov/about-us/newsroom/cfpb-capital-one-probe/.

applications and customer accounts.[16] Discover's record of compliance failures also raises concerns. In October 2023, it reached a sweeping consent order with the FDIC that required further action to address "'violations of, and consumer harm related to' various consumer financial laws."[17]

Last month, the OCC issued a proposed policy statement "to provide transparency around the features of merger applications and indicators that are consistent with and inconsistent with approval."[18] Acting Comptroller Hsu indicated that "merger applications exist along a spectrum. Some have significant deficiencies. Others are straightforward because the acquiring bank is a model of safety and soundness and has earned the trust of the community and its supervisors. The majority lie somewhere in between and require varying degrees of scrutiny and multiple rounds of inquiry."[19] This merger, on its face, has significant deficiencies.

In a speech last year, moreover, Acting Comptroller Hsu warned that "I have seen up close what happens when large banks become unmanageable and need government support to avoid disorderly failure. The negative impacts of [too-big-to-manage] and too-big-to-fail on households and communities, on the banking system and economy, and on trust are immeasurable and can take years to mend."[20]

But OCC's actions fly in the face of these concerns. The agency approved almost every merger application it received in the last three years: 43 mergers in 2021, 30 in 2022, and 23 in 2023.[21] This included the approval of JP Morgan Chase's purchase of First Republic, which increased the size of America's largest bank by $200 billion.[22] Troublingly, the OCC's proposed policy statement essentially codifies the OCC's current, permissive approach to bank mergers—the same standard operating procedure that for decades has failed to protect consumer and the

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

[17] Law360, "FDIC Orders Discover To Boost Compliance, Spares It Penalty," October 2, 2023, https://www.law360.com/articles/1728373/fdic-orders-discover-to-boost-compliance-spares-it-penalty.

[18] Office of the Comptroller of the Currency, Acting Comptroller Discusses Bank Mergers, January 29, 2024, https://www.ots.treas.gov/news-issuances/news-releases/2024/nr-occ-2024-6.html#:~:text=policy%20and%20decisions.-,Mr.,with%20and%20inconsistent%20with%20approval.

[19] Acting Comptroller of the Currency Michael Hsu Remarks at University of Michigan School of Business, "What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced," January 29, 2024, p. 12, https://www.ots.treas.gov/news-issuances/speeches/2024/pub-speech-2024-6.pdf.

[20] Acting Comptroller of the Currency Michael Hsu Remarks at Brookings,"Detecting, Preventing, and Addressing Too Big To Manage," January 17, 2023, https://www.occ.gov/news-issuances/speeches/2023/pub-speech-2023-7.pdf.

[21] Office of the Comptroller of the Currency, "2021 Annual Report," p. 24, https://www.occ.gov/publications-and-resources/publications/annual-report/files/2021-annual-report.pdf; Office of the Comptroller of the Currency, "2022 Annual Report," p. 32 https://www.occ.gov/publications-and-resources/publications/annual-report/files/2022-annual-report.pdf; Office of the Comptroller of the Currency, "2023 Annual Report," p. 37 https://www.occ.gov/publications-and-resources/publications/annual-report/files/2023-annual-report.pdf.

[22] Wall Street Journal, "Why Washington Let JPMorgan Buy First Republic," Ben Eisen and Andrew Ackerman, May 2, 2023, https://www.wsj.com/articles/how-washington-got-on-board-with-a-big-bank-deal-for-first-republic609188a; JP MorganChase, Press Release, JPMorgan Chase acquires substantial majority of assets and assumes certain liabilities of First Republic Bank, May 1, 2023, https://www.jpmorganchase.com/ir/news/2023/jpmc-acquires-substantial-majority-of-assets-and-assumes-certain-liabilities-of-first-republic-bank.

financial system. It is critical that the OCC strengthen its proposed policy statement to ensure that future mergers do not harm consumers and the broader economy.

President Biden has made fighting concentration in the banking sector and other industries a key priority of his administration. In his 2021 Executive Order on Competition, he specifically directed financial regulators and the Attorney General to "update guidelines on banking mergers to provide more robust scrutiny of mergers" and strengthen bank merger oversight "to ensure Americans have choices among financial institutions and to guard against excessive market power."[23]

This acquisition will be one of the most important tests of the efforts to prevent harmful bank consolidation since the release of President Biden's Executive Order. To protect consumers and financial stability, we urge you to block this merger and strengthen your proposed policy statement to prevent harmful deals in the future.

cc:
Consumer Financial Protection Bureau
U.S. Department of Justice

Sincerely,

Elizabeth Warren
United States Senator

Alexandria Ocasio-Cortez
Member of Congress

Katie Porter
Member of Congress

James P. McGovern
Member of Congress

[23] White House, "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/.

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