

December 18, 2024

The Honorable Jerome Powell  
Chair  
Board of Governors of the Federal Reserve  
System  
20th Street and Constitution Avenue NW  
Washington, DC 20551

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

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

Dear Chair Powell, Vice Chair Barr, and Acting Comptroller Hsu:

The Federal Reserve (Fed) and the Office of the Comptroller of the Currency (OCC) are yet again asleep at the wheel on a presidential order to strengthen our economy. In this case, your agencies are failing to do their parts to prevent dangerous and anticompetitive bank mergers.

The Fed has made zero progress on the president's 2021 Executive Order to strengthen the framework regulators use to evaluate bank mergers, and the OCC's updated guidance falls woefully short of the presidential order.<sup>1</sup> Indeed, your recalcitrance has become so extreme that earlier this year, the Department of Justice (DOJ) announced that it was withdrawing from a set of nearly 30-year-old Bank Merger Guidelines on its own, without the Fed or OCC, and clarified that it intends to apply the comprehensive 2023 Merger Guidelines to bank merger analyses going forward.<sup>2</sup> Similarly, the Federal Deposit Insurance Corporation (FDIC) acted on its own to strengthen its merger guidelines in April and finalized those updates in September.<sup>3</sup> It is reasonable to infer that the DOJ was forced to move forward separately due to the Fed's refusal to fully engage in negotiations to update those guidelines.

The Fed and the OCC's failures to act to meaningfully strengthen our nation's bank merger review framework threaten the stability of our economy and the livelihoods of working families. In

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<sup>1</sup> Executive Order No. 14036, 86 Fed. Reg. 36987, (July 9, 2021).

<sup>2</sup> Department of Justice, "Justice Department Withdraws from 1995 Bank Merger Guidelines," press release, September 17, 2024, <https://www.justice.gov/opa/pr/justice-department-withdraws-1995-bank-merger-guidelines>.

<sup>3</sup> Federal Deposit Insurance Corporation, "FDIC Board of Directors Approves Final Statement of Policy on Bank Merger Transactions," press release, September 17, 2024, <https://www.fdic.gov/news/press-releases/2024/fdic-board-directors-approves-final-statement-policy-bank-merger>.

particular, using a set of weak, decades-old rules to evaluate the massive Capital One-Discover deal, which was announced in February and would combine two of the nation’s largest credit card companies, would amount to regulatory malfeasance.<sup>4</sup> I write to urge you to apply the same rigorous scrutiny as the FDIC would apply—using its new merger policy statement—to the Capital One-Discover deal,<sup>5</sup> and evaluate the deal using the DOJ’s competitive factors report—as informed by the 2024 Banking Addendum to the 2023 Merger Guidelines.<sup>6</sup>

### **President Biden’s Executive Order on Promoting Competition**

In 2021, President Biden issued an Executive Order on Promoting Competition, which called on the DOJ, the FDIC, the OCC, and the Fed to “update guidelines on banking mergers to provide more robust scrutiny of mergers.”<sup>7</sup> The old Bank Merger Guidelines, issued almost three decades ago in 1995, are severely out of date. As Assistant Attorney General Kanter has emphasized, “[t]he world today — including the banking system — is radically different than it was in 1995.”<sup>8</sup>

In December 2023, the DOJ and Federal Trade Commission (FTC) released updated comprehensive merger guidelines,<sup>9</sup> which are rooted in antitrust law and binding Supreme Court precedent, align with the congressional intent of our antitrust laws, and are necessary at a time of excessive consolidation and inequality.<sup>10</sup> The FDIC recently voted to adopt strong, final guidelines for evaluating bank deals, which “will continue to be informed by the DOJ’s approach to evaluating competitive effects” factoring in a merger’s impact on competition, financial stability, and the communities and customers served by the merging banks.<sup>11</sup> But the OCC and Fed have not taken similarly strong action; the OCC recently adopted a rule to update its bank merger policies, but these updates primarily enhance the transparency of the OCC’s review—rather than update it to meet the complexity of modern banks.<sup>12</sup>

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<sup>4</sup> NPR, “Two major credit card companies, Capital One and Discover Financial, may join forces,” Scott Horsley, February 20, 2024, <https://www.npr.org/2024/02/20/1232763331/two-major-credit-card-companies-capital-one-and-discover-financial-may-join-forc>.

<sup>5</sup> 12 CFR 303.

<sup>6</sup> Department of Justice, “2024 Banking Addendum to 2023 Merger Guidelines,” <https://www.justice.gov/atr/media/1368576/dl>.

<sup>7</sup> Executive Order No. 14036, 86 Fed. Reg. 36987, (July 9, 2021).

<sup>8</sup> Department of Justice, “Assistant Attorney General Jonathan Kanter Delivers Keynote Address at the Brookings Institution’s Center on Regulation and Markets Event ‘Promoting Competition in Banking,’” June 20, 2023, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution>.

<sup>9</sup> Department of Justice, “Justice Department and Federal Trade Commission Release 2023 Merger Guidelines,” press release, December 18, 2023, <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-2023-merger-guidelines>.

<sup>10</sup> Letter from Senator Elizabeth Warren to FTC Chair Lina Khan, FTC Commissioner Rebecca Slaughter, FTC Commissioner Alvaro Bedoya and Assistant Attorney General Jonathan Kanter, September 18, 2024, <https://www.warren.senate.gov/imo/media/doc/2023.09.18%20Letter%20FTC%20and%20DOJ%20re%20Merger%20Guidelines.pdf>.

<sup>11</sup> Federal Deposit Insurance Corporation, “FDIC Board of Directors Approves Final Statement of Policy on Bank Merger Transactions,” press release, September 17, 2024, <https://www.fdic.gov/news/press-releases/2024/fdic-board-directors-approves-final-statement-policy-bank-merger>.

<sup>12</sup> Office of the Comptroller of the Currency, “OCC Approves Final Rule and Policy Statement on Bank Mergers,” press release, September 17, 2024, <https://www.occ.gov/news-issuances/news-releases/2024/nr-occ-2024-101.html>.

In a May 2024 hearing before the Senate Banking Committee, Senator Warren questioned Acting Comptroller Hsu about the lack of consideration of competitive effects in the OCC’s rulemaking, asking: “Will you strengthen your proposal so that it actually addresses competition the way that the FDIC’s proposal does?” He responded: “We are working with both the FDIC, the Fed, and the DOJ on exactly that and we continue to work on that—we are committed to that.”<sup>13</sup> That appears to have been a gross misrepresentation, as the final rule the OCC announced on September 17, 2024 does not address the agency’s consideration of competitive consequences of a merger,<sup>14</sup> even though the Bank Merger Act specifically prohibits the OCC from approving any mergers “whose effect in any section of the country may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint of trade,” absent clear public interest benefits.<sup>15</sup> Even more egregiously, the Fed is 3 years behind on President Biden’s request for updated merger guidelines and has yet to act.<sup>16</sup> In the meantime, the Fed has approved some pretty bad mergers including Silicon Valley Bank’s merger with Boston Private stating that, “this transaction would not appear to result in meaningfully greater or more concentrated risks to the stability of the U.S. banking or financial system.”<sup>17</sup>

### **The Capital One-Discover Acquisition Requires Close Scrutiny**

I wrote in February that Capital One’s acquisition of Discover “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.”<sup>18</sup> This deal would create the nation’s sixth biggest bank with approximately \$624 billion in assets and make Capital One the nation’s largest credit card issuer, with over \$200 billion in outstanding credit card loans.<sup>19</sup> This tie-up of a massive bank and a massive credit card issuer is extraordinarily complex with both horizontal and vertical implications, as it would join a major credit card lender with a payment platform. The Fed and OCC must not give this acquisition a rubber-stamped approval.

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<sup>13</sup> Office of Senator Elizabeth Warren, “ICYMI: At Hearing, Warren Secures Commitments from Fed, FDIC, OCC to Push Forward on Executive Compensation Limitations, Bank Merger Guidance, and Bank Capital Requirements,” May 17, 2024, <https://www.warren.senate.gov/newsroom/press-releases/icymi-at-hearing-warren-secures-commitments-from-fed-fdic-occ-to-push-forward-on-executive-compensation-limitations-bank-merger-guidance-and-bank-capital-requirements>.

<sup>14</sup> Office of the Comptroller of the Currency, “OCC Approves Final Rule and Policy Statement on Bank Mergers,” press release, September 17, 2024, <https://www.occ.gov/news-issuances/news-releases/2024/nr-occ-2024-101.html>.

<sup>15</sup> 12 USC 1828 (c)(5).

<sup>16</sup> Banking Dive, “DOJ joins OCC, FDIC in updating bank merger guidelines,” Caitlin Mullen, September 18, 2024, <https://www.bankingdive.com/news/doj-occ-fdic-updated-bank-merger-guidelines/727377/>.

<sup>17</sup> Federal Reserve, Order approving the Merger of Bank Holding Companies, the Merger of Banks and the Establishment of Branches, Order No. 2021-08, June 10, 2021, <https://www.federalreserve.gov/newsevents/pressreleases/files/orders20210610a1.pdf>.

<sup>18</sup> Letter from Senator Elizabeth Warren to the Federal Reserve Vice Chair Michael Barr Federal Reserve System and OCC Acting Comptroller Michael Hsu, February 25, 2024, <https://www.warren.senate.gov/imo/media/doc/2024.02.25%20Capital%20One%20Letter1.pdf>.

<sup>19</sup> 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/>; 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>; Federal Reserve Statistical Release, “Large Commercial Banks,” June 30, 2024, <https://www.federalreserve.gov/releases/lbr/current/>.

First, this acquisition raises significant concerns regarding whether it meets the convenience and needs of the community to be served. Regulators have traditionally evaluated a bank's ability to meet the convenience and needs of the community based on its Community Reinvestment Act (CRA) rating, however, as I recently highlighted, the current CRA is outdated and not sufficient in assessing whether banks are meeting their lending and community investment obligations.<sup>20</sup> The FDIC's recent guidelines clarify that a proposed merger should enable the new institution to "better meet" the needs of its community.<sup>21</sup> Capital One's history demonstrates that this acquisition clearly would not improve the company's ability to meet the needs of its community.

As highlighted in my previous letter, Capital One failed to meet its community investment commitments during its acquisition of ING in 2011, including failing to provide \$28.5 billion promised for low and moderate income home mortgages and home equity lending.<sup>22</sup> Capital One also has a history of laying off employees following previous mergers and acquisitions: it closed 71 percent of bank branches acquired in deals with Hibernia National Bank, North Fork Bancorp, and Chevy Chase Bank, including more than half of the bank branches in predominantly Black and Latine zip codes.<sup>23</sup> Capital One's CEO, Richard Fairbank, has even stated that "over the years, [Capital One] sort of leaned into the closing of branches."<sup>24</sup>

Second, Capital One's litany of historic and continuing compliance violations raises additional concerns. As stated previously,<sup>25</sup> Capital One has accumulated nearly one billion dollars in fines since 2000 for a range of illegal corporate behavior: ripping off consumers, discriminatory job postings, and violations of anti-money laundering requirements.<sup>26</sup> Thousands of customers have filed complaints with the Consumer Financial Protection Bureau (CFPB) for Capital One's aggressive debt collection practices, and the Los Angeles County District Attorney fined Capital One \$2 million for harassing debt collection calls.<sup>27</sup> Both Capital One and Discover have also paid

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<sup>20</sup> Letter from National Community Reinvestment Coalition, October 16, 2020, <https://ncrc.org/wp-content/uploads/2020/10/Final-NCRC-Comment-on-DOJ-merger-review-guidelines.pdf>; Letter from Senator Elizabeth Warren and Representative Maxine Waters to the President and CEO of the US Chamber of Commerce Suzanne Clark and the President and CEO of the American Bankers Association Rob Nichols, September 15, 2024, [https://www.warren.senate.gov/imo/media/doc/warren\\_letter\\_to\\_aba\\_chamber\\_re\\_cra.pdf](https://www.warren.senate.gov/imo/media/doc/warren_letter_to_aba_chamber_re_cra.pdf).

<sup>21</sup> 12 CFR 303.

<sup>22</sup> Bloomberg, "Capital One's \$9 Billion ING Direct Deal Is Approved by Fed," Dakin Campbell, February 15, 2012, <http://www.bloomberg.com/news/articles/2012-02-14/capital-one-s-9-billion-acquisition-of-ing-direct-usa-wins-fed-s-approval>; Letter from Senator Elizabeth Warren to Federal Reserve Vice Chair Barr and OCC Acting Comptroller Michael Hs, November 20, 2024, [https://www.warren.senate.gov/imo/media/doc/letter\\_to\\_fed\\_and\\_occ\\_re\\_capital\\_one\\_consumer\\_abuses.pdf](https://www.warren.senate.gov/imo/media/doc/letter_to_fed_and_occ_re_capital_one_consumer_abuses.pdf).

<sup>23</sup> Americans for Financial Reform Education Fund, "Bank Merger Act Requires Rejection of Capital One-Discover Merger," May 2024, p. 6, <https://ourfinancialsecurity.org/wp-content/uploads/2024/05/AFREF-Capital-One-Discover-Bank-Merger-Act-Comment-5-2024.pdf> (emphasis added).

<sup>24</sup> Washington Business Journal, "Greater Washington's bank branch count hits 23-year low even as deposits surge." Tristan Navera, September 14, 2021, <https://www.bizjournals.com/washington/news/2021/09/14/washingtons-bank-branch-count-hits-a-23-year-low.html>.

<sup>25</sup> Letter from Senator Elizabeth Warren to OCC Acting Comptroller Hsu and Federal Reserve Vice Chair Barr, February 25, 2024, <https://www.warren.senate.gov/imo/media/doc/2024.02.25%20Capital%20One%20Letter1.pdf>.

<sup>26</sup> Forbes, "Capital One Should Not Rush to Acquire Discover," Mayra Rodriguez Valladares, February 22, 2024, <https://www.forbes.com/sites/mayrarodriguezvalladares/2024/02/22/capital-one-should-not-rush-to-acquire-discover/?sh=7249a6cb5a91>.

<sup>27</sup> Letter from Senators Elizabeth Warren and Sherrod Brown to Capital One Chairman and CEO Richard Fairbank, June 25, 2020,

finances of \$225 million and \$200 million respectively to settle deceptive credit card marketing cases.<sup>28</sup> These repeat violations showcase Capital One's inability to comply with federal regulations at its current size.

Further, the deal presents increased risks for consumers, as it could enable Capital One to raise its credit card interest rates and fees. Capital One already charges 2 percentage points more in interest than Discover and has interest rates over 30% on certain cards.<sup>29</sup> Capital One and Discover have been targeting the same customers, meaning that a combination of the two will eliminate one more option for consumers in an already consolidated market.<sup>30</sup> This new merged company would become the biggest credit card lender and have the market power to raise prices on all their consumers.<sup>31</sup> A survey by the CFPB confirmed that the bigger credit card lenders usually charge higher interest rates and higher fees due to their market power.<sup>32</sup>

Third, in evaluating a proposed acquisition, the OCC and Fed must consider risks to financial stability. The FDIC's recent guidelines clarify that in order to approve a potential acquisition or merger, "the FDIC expects that the resulting [entity] ... will not materially increase the risk to the stability of the U.S. banking or financial system."<sup>33</sup> Banks that grow quickly through acquisitions are more likely to fail, and deregulation of bank merger policies have "increased the chances of a large shock."<sup>34</sup> Additionally, Capital One and Discover's credit card portfolios would create a bank with huge credit concentration risk.<sup>35</sup> In 2023, the credit card delinquency rate at the 100

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<https://www.warren.senate.gov/imo/media/doc/2020.06.24%20Letter%20to%20Capital%20One%20re.%20debt%20collection.docx.pdf>; Los Angeles County District Attorney's Office, "Capital One to Pay \$2 Million to Settle Debt Collection Lawsuit," press release, December 15, 2022, <http://da.lacounty.gov/media/news/capital-one-pay-2-million-settle-debt-collection-lawsuit>.

<sup>28</sup> Americans for Financial Reform, "Top 10 Reasons to Block the Capital One-Discover Merger," July 19, 2024, <https://ourfinancialsecurity.org/2024/07/blog-top-10-reasons-to-block-the-capital-one-discover-merger/>; Consumer Financial Protection Bureau, "Federal Deposit Insurance Corporation and Consumer Financial Protection Bureau Order Discover to Pay \$200 Million Consumer Refund for Deceptive Marketing," September 24, 2012, <https://www.consumerfinance.gov/about-us/newsroom/discover-consent-order/>.

<sup>29</sup> Americans for Financial Reform Education Fund, "The Anticompetitive Effects of the Proposed Capital One-Discover Merger," April 2024, p. 10, <https://ourfinancialsecurity.org/wp-content/uploads/2024/09/AFREF-Cap-One-Discover-Competition-comment-4-2024.pdf>.

<sup>30</sup> Forbes, "A Capital One-Discover Merger Could Raise Credit Card Interest Rates," Elena Botella, March 16, 2024, <https://www.forbes.com/sites/elenabotella/2024/03/16/a-capital-onediscover-merger-could-raise-card-interest-rates/>.

<sup>31</sup> Associated Press, "Americans' reliance on credit cards is the key to Capital One's bid for Discover," Ken Sweet, February 20, 2024, <https://apnews.com/article/capital-one-discover-american-debt-credit-cards-76598912b86a2dad0c39ab3229f2fe9>.

<sup>32</sup> Consumer Financial Protection Bureau, "Credit card data: Small issuers offer lower rates," February 16, 2024, <https://www.consumerfinance.gov/data-research/credit-card-data/terms-credit-card-plans-survey/>.

<sup>33</sup> 12 CFR 303.

<sup>34</sup> Harvard Law School, "The Costs and Benefits of Banking Deregulation," Jeffery Y. Zhang, April 25, 2017, p. 38, [http://www.law.harvard.edu/programs/olin\\_center/fellows\\_papers/pdf/Zhang\\_69.pdf](http://www.law.harvard.edu/programs/olin_center/fellows_papers/pdf/Zhang_69.pdf); Journal of Banking & Finance, "Systemic risk and bank consolidation: International evidence," Gregor N.F. Weib, Sascha Neumann, and Deneza Bostandzic, March 2014, <https://www.sciencedirect.com/science/article/abs/pii/S0378426613004536>.

<sup>35</sup> Federal Deposit Insurance Corporation, "Capital One, National Association Financial & Regulatory Reporting - FDIC Cert No. 4297," December 31, 2023, <https://banks.data.fdic.gov/bankfind-suite/financialreporting/details/4297?establishedEndRange=4%2F18%2F2024&establishedStartRange=01%2F01%2F1792&inactiveEndRange=4%2F18%2F2024&inactiveStartRange=01%2F01%2F1970&incomeBasis=YTD&institutionType=banks&limitEstablishedDate=false&limitInactiveDate=false&reportPeriod=20231231&reportType=assets-liabilities-and-capital&unitType=%24>; Federal Deposit Insurance Corporation, "Discover Bank Financial &



largest banks was 2.97 percent while Capital One and Discover had delinquency rates of 4.61 percent and 3.87 percent respectively; these banks had a combined delinquent credit card loan amount of \$11.4 billion.<sup>36</sup> Credit card loans would account for approximately 40% of the combined banks total assets.<sup>37</sup>

The FDIC's final merger policy statement rightly asserts that additional scrutiny will apply to transactions resulting from institutions with "\$100 billion or more in total consolidated assets."<sup>38</sup> The Fed should similarly view this deal with heightened scrutiny, particularly given the likelihood that it will exacerbate the "too big to fail" problem. This bank would be larger than the combined size of the three banks that crashed last spring, with a whopping \$624 billion in assets.<sup>39</sup> The federal government provides direct and implicit subsidies to chartered banks, allowing them to borrow from the Fed at highly discounted rates that are much cheaper than those available to other firms.<sup>40</sup> In the event of a potential bank failure, the federal government would have to act given this combined bank's size and interconnectedness and the magnitude of the resulting economic disruption to its customers and the economy at large.<sup>41</sup> This is clearly a risk to financial stability that the Fed and OCC must carefully consider.

Lastly, the Fed and the OCC must take into account the anticompetitive effects of the acquisition. The OCC's updated bank merger guidelines<sup>42</sup> fall particularly short in their lack of meaningful accommodation of the competitive effects of a potential transaction. The OCC's proposed rule is

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Regulatory Reporting - FDIC Cert No. 5649," December 31, 2023, <https://banks.data.fdic.gov/bankfind-suite/financialreporting/details/5649?establishedEndRange=4%2F18%2F2024&establishedStartRange=01%2F01%2F1792&inactiveEndRange=4%2F18%2F2024&inactiveStartRange=01%2F01%2F1970&incomeBasis=YTD&institutionType=banks&limitEstablishedDate=false&limitInactiveDate=false&reportPeriod=20231231&reportType=assets-liabilities-and-capital&unitType=%24>.

<sup>36</sup> Capital One Financial Corp., SEC Form 10-K, 2023, p. 95, <https://investor.capitalone.com/static-files/838514f1-27c3-41c6-ba7e-cb3b91247078>; Discover, SEC Form 10-K, 2023, p. 67,

<https://www.sec.gov/ixviewer/ix.html?doc=/Archives/edgar/data/0001393612/000139361224000010/dfs-20231231.htm>; Federal Reserve System, "Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks," updated August 19, 2021, <https://www.federalreserve.gov/releases/chargeoff/deltop100sa.htm>; Americans for Financial Reform Education Fund, "Bank Merger Act Requires Rejection of Capital One-Discover Merger," May 2024, p. 23, <https://ourfinancialsecurity.org/wp-content/uploads/2024/05/AFREF-Capital-One-Discover-Bank-Merger-Act-Comment-5-2024.pdf>.

<sup>37</sup> Americans for Financial Reform, "Analysis: Antitrust and Banking Agencies Must Block Capital One-Discover Merger," 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>.

<sup>38</sup> 12 CFR 303.

<sup>39</sup> Federal Reserve, "Large Commercial Banks: Insured U.S. Chartered Commercial Banks That Have Consolidated Assets of \$300 Million or More, Ranked by Consolidated Assets," June 30, 2024, <https://www.federalreserve.gov/releases/lbr/current/>.

<sup>40</sup> Princeton University Press, "The Bankers' New Clothes: What's Wrong with Banking and What to Do about It - New and Expanded Edition," Anat Admati and Martin Hellwig, 2024, pp. 137-140, <https://press.princeton.edu/books/paperback/9780691251707/the-bankers-new-clothes>.

<sup>41</sup> Letter from Americans for Financial Reform to the Office of the Comptroller of the Currency and the Federal Reserve, May 30, 2024, <https://ourfinancialsecurity.org/wp-content/uploads/2024/05/AFREF-Capital-One-Discover-Bank-Merger-Act-Comment-5-2024.pdf>; Federal Reserve Bank of San Francisco, "Banking Consolidation," Simon Kwan, June 18, 2004, p. 2, <https://www.frbsf.org/wp-content/uploads/el2004-15.pdf>.

<sup>42</sup> Office of the Comptroller of the Currency, "Business Combinations Under the Bank Merger Act: Final Rule," September 17, 2024, <https://www.occ.gov/news-issuances/bulletins/2024/bulletin-2024-28.html>.

silent on this factor and refers back to the 1995 Bank Merger Guidelines, which are outdated and wholly insufficient in today's economy as an evaluation metric. As described by University of Michigan academic and bank merger scholar Jeremy Kress: "a narrow, deposit-based HHI analysis alone may not accurately reflect how banks actually compete or how a proposed deal might threaten that competition. Continued reliance on the outdated 1995 Bank Merger Guidelines therefore increases the risk that the OCC will approve mergers that impair competition in ways that are unobservable by looking at deposit-based HHIs alone."<sup>43</sup>

This proposed acquisition would create the nation's biggest credit card lender and increase consolidation in an already significantly concentrated market. Not only would this be horizontal combination among the two credit card rivals; this would also be a vertical integration of Capital One's debit and credit cards with Discover's payment processing network. The multiple businesses comprising each company mean that this acquisition has characteristics of a complex merger involving a multi-sided platform, which, as the 2023 Merger Guidelines recognize, "can exacerbate or accelerate competition problems."<sup>44</sup> Approving a deal this complex and with such serious competition and consolidation risks could lead to catastrophic outcomes for our financial system and consumers and would set a dangerous precedent.

### Conclusion

Four regulators have jurisdiction over bank mergers. Two of these, the DOJ and the FDIC, have appropriately updated decades-old guidelines for how to measure and assess the risks of mergers. But your agencies have not, leaving you unable to adequately protect consumers, competition, and the stability of the banking and financial system. This regulatory gap looms large as your agencies assess the massive Capital One-Discover deal.

You must act quickly to address these shortfalls. To protect consumers and our financial stability, I urge the Fed and the OCC to update and strengthen your bank merger policy guidelines and use these new guidelines to closely scrutinize the Capital One-Discover deal. If you apply these principles, it is clear that the merger must be denied.

Thank you for your consideration.

Sincerely,



Elizabeth Warren  
United States Senator

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<sup>43</sup> Letter from Jeremy Kress to the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation, June 13, 2024, [https://downloads.regulations.gov/OCC-2023-0017-0026/attachment\\_1.pdf](https://downloads.regulations.gov/OCC-2023-0017-0026/attachment_1.pdf).

<sup>44</sup> Department of Justice, "2023 Merger Guidelines," December 18, 2023, p. 3, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.