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United States Senate

COMMITTEE ON BANKING, HOUSING, AND
URBAN AFFAIRS

WASHINGTON, DC 20510-6075

May 13, 2025

The Honorable Abigail Slater
Assistant Attorney General, Antitrust Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Assistant Attorney General Slater:

I write to urge the Department of Justice (“DOJ”) to exercise its authority under Section 7 of the Clayton Act¹ to block Capital One Financial Corporation’s (“Capital One”) acquisition of Discover Financial Services (“Discover”). The deal appears to be an illegal transaction under federal antitrust law because it would substantially lessen competition in critical credit card markets, increasing prices and eroding service for hardworking Americans and small businesses. In your first antitrust address as Assistant Attorney General, you warned against consolidation that resulted in “too big to fail banks” and culminated with the 2008 financial crisis.² This transaction will reveal whether you back your words with action.

On April 18, 2025, the Federal Reserve Board (“Fed”) and the Office of the Comptroller of the Currency (“OCC”) approved Capital One’s acquisition of Discover.³ This deal will inflict significant harm on both consumers and merchants, especially low-income consumers and small businesses, and threaten the stability of the U.S. financial system. On May 1, I sent a letter to the Fed demanding that the agency stay and reconsider its decision, and adhere to the legal requirements of the Bank Holding Company Act and Administrative Procedure Act.⁴ Absent a rescission of the Fed’s approval order, the responsibility to prevent this dangerous transaction now falls to the DOJ.

¹ 15 U.S.C. § 18; 28 C.F.R. 0.40.

² Department of Justice, “Assistant Attorney General Gail Slater Delivers First Antitrust Address at University of Notre Dame Law School,” April 28, 2025, <https://www.justice.gov/opa/speech/assistant-attorney-general-gail-slater-delivers-first-antitrust-address-university-notre>.

³ Board of Governors of the Federal Reserve System, “Federal Reserve Board announces approval of application by Capital One Financial Corporation to merge with Discover Financial Services and issues a consent order with Discover,” press release, April 18, 2025, <https://www.federalreserve.gov/newsevents/pressreleases/orders20250418a.htm>; Office of the Comptroller of the Currency, “OCC Announces Conditional Approval of Capital One, National Association to Acquire Discover Bank,” April 18, 2025, <https://www.occ.gov/news-issuances/news-releases/2025/nr-occ-2025-36a.pdf>.

⁴ Letter from Elizabeth Warren to the Federal Reserve Board, May 1, 2025, <https://www.banking.senate.gov/imo/media/doc/Warren%20Waters%20letter%20to%20Misback%20on%20Capital%20One%20Merger.pdf>.

The DOJ may, at its discretion, sue to block the deal within 30 calendar days of the banking agencies' approval order.⁵ The DOJ does not need to have previously filed an adverse comment with regulators in its consultative role under the Bank Holding Company Act and Bank Merger Act to contest an approved merger under the Clayton Act. However, I am troubled to learn that, prior to approval of the deal by the banking agencies, the DOJ – despite reportedly finding competitive concerns with the deal – did not file an adverse comment.⁶ This \$35 billion transaction – which would create the sixth-largest bank in the United States⁷ with more than \$637 billion in combined assets⁸ – clearly warrants intervention from the DOJ. It would create the largest credit card issuer in the country, with more than \$250 billion in outstanding credit card loans⁹ and more than 180 million cards in circulation,¹⁰ which were used to make over \$800 billion in purchases in 2023.¹¹

Pursuant to the Bank Merger Act and Bank Holding Company Act, the Antitrust Division of the DOJ plays a consultative role to the banking agencies in bank mergers, as it conducts an independent competitive factors analysis of the transactions.¹² But the DOJ also retains its own authority to block anticompetitive bank mergers under the Clayton Act, even if such mergers are approved by the banking agencies. In December 2023, DOJ and the Federal Trade Commission finalized a much-needed update to the agencies' guidelines for merger enforcement.¹³ Following decades of lax antitrust enforcement, the 2023 Merger Guidelines return to the letter of the law and the intent of Congress,¹⁴ which enacted antitrust statutes like the Sherman Act and the Clayton Act to protect the public against the myriad harms created by excessive concentration of power in the hands of a few companies.¹⁵ Consistent with the statutory text, the 2023 Merger

⁵ 15 U.S.C. § 18a.

⁶ New York Times, “Capital One Deal for Discover Clears Justice Dept. Hurdle,” Lauren Hirsch and Danielle Kaye, April 3, 2025, <https://www.nytimes.com/2025/04/03/business/dealbook/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 Federal Financial Institutions Examination Council, “Large Holding Companies,” December 30, 2024, <https://www.ffiec.gov/npw/Institution/TopHoldings>.

⁹ Reuters, “New York probing legality of Capital One-Discover merger,” Jonathan Stempel, October 28, 2024, <https://www.reuters.com/markets/deals/new-york-probing-whether-capital-one-discover-merger-violates-antitrust-law-2024-10-23/>.

¹⁰ Forbes, “Credit Card Statistics And Trends,” Becky Pokora, March 28, 2024,

<https://www.forbes.com/advisor/credit-cards/credit-card-statistics/>; Nilson Report, “Discover Financial Services Results—2022,” January 2023, <https://nilsonreport.com/articles/discover-financial-services-results-2022/>.

¹¹ Capital One, Form 10-K, February 23, 2024, <https://ir-capitalone.gcs-web.com/static-files/838514f1-27c3-41c6-ba7e-cb3b91247078>; Discover, Form 10-K, February 23, 2024, <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001393612/f3103b18-c2f1-4357-aa14-331e3771515c.pdf>.

¹² 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/archives/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution>.

¹³ Department of Justice and Federal Trade Commission, “Merger Guidelines,” December 18, 2023, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

¹⁴ Letter from Senator Elizabeth Warren to FTC and DOJ regarding the agencies' draft merger guidelines, September 18, 2023, <https://www.warren.senate.gov/imo/media/doc/2023.09.18%20Letter%20FTC%20and%20DOJ%20re%20Merger%20Guidelines.pdf>.

¹⁵ Institute for Local Self Reliance, “Rolling Back Corporate Concentration: How New Federal Antimerger Guidelines Can Restore Competition and Build Local Power,” Stacy Mitchell and Ron Knox, June 2022, pp. 8-10,

Guidelines describe DOJ's approach towards enforcing antitrust laws to fight consolidation and protect competition and consumers. The guidelines, for example, clarify that a merger may violate antitrust law if it significantly increases consolidation in a highly concentrated market (Guideline 1), if it eliminates substantial competition between firms (Guideline 2), if it increases the of coordination among remaining firms in the market (Guideline 3), or when it involves a multi-sided platform (Guideline 9).¹⁶

Prior to the 2023 Merger Guidelines, DOJ had previously relied on outdated Bank Merger Guidelines issued almost 30 years ago for its bank merger reviews, and on September 17, 2024, DOJ clarified this coverage by issuing an addendum to the 2023 Merger Guidelines indicating that the guidelines "set forth a comprehensive approach to merger review in every industry, including banking."¹⁷ The new guidelines – like federal antitrust law generally – thus apply across industries and merger transactions, including the Capital One and Discover merger. In February 2025, the Antitrust Division clarified that the guidelines remain in effect, citing your written testimony, including your agreement with FTC Chair Ferguson that "current merger guidelines simply restates longstanding law."¹⁸

The 2023 Merger Guidelines, and the antitrust laws which they enforce, protect consumers across industries from the negative effects of consolidation and anticompetitive behavior. There are numerous characteristics of this merger that contradict the DOJ's guidelines and appear to violate the antitrust laws. I urge you to immediately sue to block this merger.

The Capital One-Discover Merger Will Increase Concentration and Lower Competition in Several Markets, Reduce Choices for Consumers, and Raise Costs

Substantial competition between the parties prior to the combination "ordinarily suggests that the merger may substantially lessen competition,"¹⁹ in violation of the Clayton Act.²⁰ As DOJ notes in Section 4.2 of the Merger Guidelines, "the Antitrust Division considers whether there is appreciable harm to identifiable and distinct groups of customers," such as "[s]mall businesses like non-profit organizations or local stores [who] may need specific kinds of credit products or institutional expertise," or "economically underserved individuals or customers with low credit scores [who may] have specialized demand."²¹

Capital One's size and complexity has given it significant power over consumers. Its acquisition of Discover would significantly increase this market power, particularly in certain highly

<https://cdn.ilsr.org/wp-content/uploads/2022/06/ILSR-New-Federal-Anti-Merger-Guidelines-Can-Restore-Competition.pdf>.

¹⁶ Department of Justice and Federal Trade Commission, "Merger Guidelines," December 18, 2023, pp. 2-3, 29, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

¹⁷ Department of Justice, "2024 Banking Addendum to 2023 Merger Guidelines," <https://www.justice.gov/atr/media/1368576/dl>.

¹⁸ Department of Justice, "Use of the 2023 Merger Guidelines," February 18, 2025, <https://www.justice.gov/atr/media/1389861/dl>.

¹⁹ Department of Justice and Federal Trade Commission, "Merger Guidelines," December 18, 2023, pp. 6-7, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

²⁰ 15 USC 13(a).

²¹ Department of Justice, "2024 Banking Addendum to 2023 Merger Guidelines," <https://www.justice.gov/atr/media/1368576/dl>.

concentrated markets. For example, nearly one third of Capital One’s outstanding credit card volume and 20 percent of Discover’s is to borrowers with non-prime credit scores, who are largely lower-income and disproportionately Black and Latino families.²² In this market, non-dominant Discover offers interest rates two percentage points lower than Capital One in order to attract customers.²³ In acquiring Discover, Capital One will have a more than 30 percent market share for customers with non-prime credit scores, increasing the consolidation level in this market, as measured by the Herfindahl-Hirschman Index (HHI), by approximately 400 points.²⁴ With respect to new-to-credit customers – people with no or limited credit history – the Fed’s analysis found “the post-merger HHI would increase by 766 points to 1971, as measured by number of accounts... Capital One would control 40 percent of this segment of general-purpose-credit-card issuance.”²⁵ A merger that creates a firm with a market share over 30 percent and increases HHI by more than 100 points is presumptively illegal under antitrust law.²⁶

In the subprime card loan market, where the two firms also compete, Capital One’s footprint would more than double the next-largest bank subprime lenders – JPMorgan Chase (\$30 billion) and Citigroup (\$33 billion) – following its acquisition of Discover.²⁷ Indeed, similar concerns were reportedly raised by the DOJ during its initial review of the deal in 2024.²⁸ The DOJ reportedly “told regulators that it was concerned, in part, about the deal’s impact on potential credit card users who had no credit”²⁹ and that “DOJ staff has determined that Capital One’s (COF) \$35.3 billion acquisition of Discover Financial (DFS) would harm competition in the subprime sector.”³⁰ The stakes are significant: less competition among those with lower credit scores could mean Capital One can raise credit card rates for vulnerable families with limited alternative options, which could be the difference between getting by month-to-month and entering a financial downward spiral.

²² Americans for Financial Reform Education Fund, “The Anticompetitive Effects of the Proposed Capital One-Discover Merger,” April 2024, pp. 15-16, <https://ourfinancialsecurity.org/wp-content/uploads/2024/09/AFREF-Capital-One-Discover-Competition-comment-4-2024.pdf>.

²³ *Id.*, p. 10; Consumer Financial Protection Bureau, “Terms of Credit Card Plans (TCCP) survey,” <https://www.consumerfinance.gov/data-research/credit-card-data/terms-credit-card-plans-survey/>; 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/>.

²⁴ Comment Letter from the National Community Reinvestment Coalition (and member organizations and partners) submitted in response to the Federal Reserve and Office of the Comptroller of the Currency’s review of Capital One’s proposed acquisition of Discover, July 18, 2024, p. 6, <https://ncrc.org/wp-content/uploads/2024/07/Capital-One-Discover-Bank-Merger-Comment-Letter-7.18.24.pdf>.

²⁵ Federal Reserve Board, Order No. 2025-10, April 18, 2025, p. 14, <https://www.federalreserve.gov/newsevents/pressreleases/files/orders20250418a2.pdf>.

²⁶ Department of Justice and Federal Trade Commission, “Merger Guidelines,” December 18, 2023, pp. 6, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

²⁷ Economic Liberties Project, “Capital One-Discover: A Competition Policy and Regulatory Deep Dive,” March 21, 2024, <https://www.economicliberties.us/our-work/capital-one-discover-a-competition-policy-and-regulatory-deep-dive/>.

²⁸ Bloomberg, “Capital One, Discover Fall on Reports of DOJ Antitrust Concerns,” Josh Sisco, Yiqin Shen, and Paige Smith, March 17, 2025, <https://www.bloomberg.com/news/articles/2025-03-17/capital-one-discover-fall-on-reports-of-doj-anti-trust-concerns>.

²⁹ New York Times, “Capital One Deal for Discover Clears Justice Dept. Hurdle,” Lauren Hirsch and Danielle Kaye, April 3, 2025, <https://www.nytimes.com/2025/04/03/business/dealbook/capital-one-discover-merger.html>.

³⁰ The Capitol Forum, “Capital One/Discover Financial: DOJ Staff Finds Deal Would Be Anticompetitive in Subprime Sector,” March 17, 2025, <https://thecapitolforum.com/capital-one-discover-financial-doj-staff-finds-deal-would-be-anticompetitive-in-subprime-sector/>.

Capital One and Discover also compete against one another in customer rewards. For example, CEO Richard Fairbank admitted that the Capital One QuickSilver card was a direct competitive response to the Discover It card in the “cashback” category.³¹ As Capital One absorbs a major competitor, fewer players in this market could drive down innovation in this space or diminish incentives for remaining firms to offer more generous rewards.

The Capital One-Discover Merger Will Not Solve the Payment Network Duopoly Problem

As the 2023 Merger Guidelines provide, deals “involving platforms can threaten competition, even when a platform merges with a firm that is neither a direct competitor nor in a traditional vertical relationship with the platform,” where a platform is a company that provides “different products or services to two or more different groups or ‘sides’ who may benefit from each other’s participation.”³² Platform acquisitions can demonstrate a “trend toward concentration,” which the Supreme Court has recognized as a factor for potential illegality under the Clayton Act.³³ Further, in enforcing antitrust law, agencies “will generally consider evidence about the degree of integration between firms in the relevant and related markets, as well as whether there is a trend toward further vertical integration.”³⁴ Vertical integration can cause a range of competition concerns, for example, by making it more difficult for competitors focusing on a single part of the business to enter the market.³⁵ Failure to properly evaluate the complex competitive effects of this deal may lead to serious harms to consumers and open the floodgates to additional mergers by already-consolidated companies.

DOJ has previously been skeptical of deals “that would enable firms to avoid a regulatory constraint because that constraint was applicable to only one of the merging firms.”³⁶ This appears to be precisely the case here. Capital One has announced its intention to convert its debit portfolio to Discover networks.³⁷ The reason is clear: Discover is not only a card issuer but also a card network, which means it is not subject to the limit on debit card interchange fees imposed by the Durbin Amendment to the Dodd Frank Act.³⁸ This means that, while Capital One cannot charge stores or service providers more than \$0.21 plus 5% of the sale price per swipe, Discover

³¹ “They created cashback before any of the rest of us thought of it. And in fact, not just were first, they built a big lead in that business and were the dominant brand in cashback probably for a good decade. We at some point said, gosh, we got to get in on some of that and came out with our Quicksilver card. But that came from our admiration of what they had built there,” Capital One, “Investor Presentation Call,” transcript, February 20, 2024, p. 10, <https://investor.capitalone.com/static-files/d7b64c07-9663-4b0a-b382-48792a04c148>.

³² Department of Justice and Federal Trade Commission, “Merger Guidelines,” December 18, 2023, p. 23, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

³³ Brown Shoe Co v. United States, 370 US 294, 332 (1962).

³⁴ Department of Justice and Federal Trade Commission, “Merger Guidelines,” December 18, 2023, p. 16, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

³⁵ Department of Justice and Federal Trade Commission, “Merger Guidelines,” December 18, 2023, p. 23, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

³⁶ Department of Justice and Federal Trade Commission, “Merger Guidelines,” December 18, 2023, p. 29, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

³⁷ Capital One, “Capital One Discover Investor Presentation,” February 20, 2024, p. 24, <https://investor.capitalone.com/static-files/cfa11729-0aec-43dc-b531-200e250c8413>.

³⁸ American Banker, “5 key drivers of the Capital One-Discover merger,” Kate Fitzgerald, February 20, 2023, <https://www.americanbanker.com/payments/list/5-key-drivers-of-the-capital-one-discover-merger>.

can set a higher fee.³⁹ And, in fact, they do: while Mastercard charged a fee of 0.91 percent of the average transaction value, Discover charged 1.26 percent.⁴⁰ Fairbank highlighted to investors that a network is a “very, very rare asset” and characterized owning a network as the “Holy Grail” because of how difficult it is to build new ones.⁴¹ And in case there was any doubt about whether Capital One plans to raise swipe fees, the company told its investors that converting its debit and some credit products to Discover networks would be worth an estimated \$1.2 billion.⁴² Under the deal, Capital One “could use its millions of customers to push higher fees onto merchants”⁴³ and consumers.⁴⁴

And even if Capital One presented verifiable claims that taking over Discover would allow it to compete with Visa and Mastercard in certain areas, which it has not, the claims would not dampen the significant competitive concerns with multiple other components of the companies’ complex businesses. Additionally, “a merger may substantially lessen competition when it meaningfully increases the risk of coordination among the remaining firms in a relevant market or makes existing coordination more stable or effective.”⁴⁵ Visa and Mastercard, which have enjoyed a duopoly, have a long history of alleged coordination, resulting in higher fees for customers and merchants. Capital One has stated that it will move some, but not all, of its credit card volume to the Discover network,⁴⁶ meaning it will be negotiating its interchange fees as a credit card issuer with Visa and Mastercard, while separately setting interchange fees on its own network. That is a recipe for coordination among the three networks. The solution to an anticompetitive market is not to anoint a new giant, but to fight to level the entire playing field, like the DOJ is doing with its lawsuit against Visa for monopolization.⁴⁷

In addition, DOJ should not “credit vague or speculative claims”⁴⁸ that a more powerful Capital One will somehow benefit consumers, including claims that are not verifiable or lack “reliable methodology and evidence not dependent on the subjective predictions of” Capital One and Discover.⁴⁹ The DOJ should be highly skeptical that the transaction would “produce substantial

³⁹ Federal Reserve, “Regulation II (Debit Card Interchange Fees and Routing),” October 25, 2023, <https://www.federalreserve.gov/paymentsystems/regii-average-interchange-fee.htm>.

⁴⁰ Federal Reserve, “Regulation II (Debit Card Interchange Fees and Routing),” October 25, 2023, <https://www.federalreserve.gov/paymentsystems/regii-average-interchange-fee.htm>.

⁴¹ Capital One, “Investor Presentation Call,” transcript, February 20, 2024, p. 10, <https://investor.capitalone.com/static-files/d7b64c07-9663-4b0a-b382-48792a04c148>.

⁴² Capital One, “Capital One Discover Investor Presentation,” February 20, 2024, p. 24 <https://investor.capitalone.com/static-files/cfa11729-0aec-43dc-b531-200e250c8413>.

⁴³ The American Prospect, “Capital One-Discover Merger Tests Bank Regulators’ Merger Approach,” David Dayen, February 22, 2024, <https://prospect.org/economy/2024-02-22-capital-one-discover-merger-tests-bank-regulators/>.

⁴⁴ Senator Elizabeth Warren in the Wall Street Journal, “Block Capital One’s Merger With Discover,” March 7, 2024, <https://www.wsj.com/articles/block-capital-ones-merger-with-discover-elizabeth-warren-1a83a50e>.

⁴⁵ Department of Justice and Federal Trade Commission, “Merger Guidelines,” December 18, 2023, p. 38, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

⁴⁶ Capital One, “Investor Presentation Call,” transcript, February 20, 2024, p. 10, <https://investor.capitalone.com/static-files/d7b64c07-9663-4b0a-b382-48792a04c148>.

⁴⁷ Department of Justice, “Justice Department Sues Visa for Monopolizing Debit Markets,” September 24, 2024, <https://www.justice.gov/opa/pr/justice-department-sues-visa-monopolizing-debit-markets>.

⁴⁸ Department of Justice and Federal Trade Commission, “Merger Guidelines,” December 18, 2023, p. 32, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

⁴⁹ Department of Justice and Federal Trade Commission, “Merger Guidelines,” December 18, 2023, p. 33, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

competitive benefits that could not be achieved” without it.⁵⁰ Ultimately, the law is clear: as the Supreme Court has held, “possible economies [from a transaction] cannot be used as a defense to illegality.”⁵¹

Conclusion

The combined Capital One will be able to wield its outsized power to raise rates on consumers and small businesses and shut out potential competitors. I urge the DOJ to immediately sue to block the acquisition under Section 7 of the Clayton Act. The DOJ must step in to stop this deal and preserve competition for American consumers and small businesses.

Sincerely,



Elizabeth Warren
Ranking Member
Committee on Banking,
Housing, and Urban Affairs

⁵⁰ Department of Justice and Federal Trade Commission, “Merger Guidelines,” December 18, 2023, p. 32, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

⁵¹ Department of Justice and Federal Trade Commission, “Merger Guidelines,” December 18, 2023, p.32, <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.