Conditional Approval #1337
May 2025

April 18, 2025

Richard K. Kim, Esq.
Partner, Corporate
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, New York 10019

Re: Application for the merger of Discover Bank, Greenwood, Delaware with and into Capital One, National Association, McLean, Virginia

OCC Control Number: 2024-Combination-336070 Charter Number: 13688

Dear Mr. Kim:

The Office of the Comptroller of the Currency (OCC) conditionally approves the application by Capital One, National Association, McLean, Virginia (CONA) to merge Discover Bank, Greenwood, Delaware, with and into CONA, with CONA as the Resulting Bank (Resulting Bank). This approval is granted based on a thorough review of all information available, including commitments and representations made in the application, the merger agreement, and by CONA's representatives.

I. Background and Transaction

CONA is a national bank with its headquarters in McLean, Virginia. CONA reported $487.2 billion in total assets as of December 31, 2024. CONA is a wholly owned subsidiary of Capital One Financial Corporation (COFC), a Delaware corporation and a financial holding company with its headquarters also in McLean, Virginia. CONA has branch offices across the United States, in Connecticut, the District of Columbia, Louisiana, Maryland, New Jersey, New York, Texas, and Virginia, as well as a branch in Canada.

Discover Bank is a Delaware state-chartered non-member bank with its headquarters in Greenwood, Delaware. Discover Bank reported $147.8 billion in total assets as of December 31, 2024. Discover Bank is a wholly owned subsidiary of Discover Financial Services (DFS), a Delaware corporation and a financial holding company with its headquarters in Riverwoods, Illinois. Discover Bank has no branch offices.

Subject to approval by the Board of Governors of the Federal Reserve System (FRB), COFC will acquire DFS. First, COFC will establish Vega Merger Sub, Inc., McLean, Virginia. Second, Vega Merger Sub., Inc. will merge with and into DFS, with DFS as the surviving corporation and a subsidiary of COFC. Third, and as part of a single, integrated transaction, DFS will merge with and into COFC, with COFC as the surviving corporation. Immediately following the holding company mergers, Discover Bank will merge with and into CONA, with CONA as the resulting institution (the Bank Merger).

CONA applied to the OCC on March 21, 2024, for approval of the Bank Merger as an affiliated corporate reorganization pursuant to section 4 of the National Bank Consolidation and Merger Act, 12 USC 215a-1, and section 18(c) of the Federal Deposit Insurance Act, 12 USC 1828(c) (the Bank Merger Act). In addition, CONA requested approval to retain certain Discover Bank subsidiaries and investments. CONA has submitted supplemental material with responses to various requests for additional information (collectively these materials constitute the Application). COFC submitted relevant applications to the FRB for the holding company-related transactions.

The OCC received 1,370 public comments on the Application. The OCC and the FRB conducted a Public Meeting with 147 members of the public testifying regarding the Bank Merger Application and COFC's applications to the FRB on July 19, 2024 (Public Meeting).

II. Legal Authority

The Bank Merger is legally authorized as an interstate merger transaction pursuant to 12 USC 215a-1 and section 44 of the Federal Deposit Insurance Act, 12 USC 1831u(a), as added by the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (the Riegle-Neal Act) and as required by 12 USC 215a-1(a), and the regulations of the OCC at 12 CFR 5.33. The Resulting Bank is authorized to retain and operate offices of both banks pursuant to section 5155(d) of the Revised Statutes, 12 USC 36(d), and 12 USC 1831u(d)(1). The OCC reviewed CONA's record of performance under the Community Reinvestment Act of 1977 (the CRA), as required by section 402(a)(2) of the CRA, 12 USC 2903(a)(2), and the regulations of the OCC at 12 CFR Part 25. The OCC considered all relevant legal and regulatory factors and found them consistent with approval.

The Bank Merger satisfies the procedural requirements of 12 USC 215a for the merger of a bank into a national bank. The Bank Merger is authorized as an interstate merger transaction involving a national bank and an out-of-state bank pursuant to 12 USC 215a-1(a) and 12 USC 1831u(a)(1). Such interstate merger transactions are subject to: (i) compliance with state-imposed age limits, if any, subject to the Riegle-Neal Act's limits; (ii) compliance with certain state filing requirements, to the extent the filing requirements are permitted by the Riegle-Neal Act; (iii) compliance with nationwide and state concentration limits; (iv) expanded community reinvestment compliance; and (v) adequacy of capital and management skills requirements. The OCC has considered these requirements and determined that the Bank Merger satisfies all applicable requirements in the Riegle-Neal Act.

The OCC has concluded that the Bank Merger is consistent with the Bank Merger Act pursuant to 12 USC 1828(c)(2)(A). The Bank Merger Act provides the following: (i) the OCC generally may not approve a merger that would substantially lessen competition; (ii) the OCC must consider the financial and managerial resources and future prospects of the existing and proposed institutions; (iii) the OCC must consider the convenience and needs of the community to be served; (iv) the OCC must consider the proposed merger's risk to the stability of the United States banking or financial system; and (v) the OCC must consider the effectiveness of any insured depository institution involved in the proposed merger transaction in combating money laundering activities.

The OCC has concluded that the Bank Merger is consistent with all of the Bank Merger Act factors.

- First, CONA and Discover Bank will be affiliated at the time of the Bank Merger. Mergers between banks and their affiliates are generally considered competitively neutral and, therefore, normally do not result in adverse competitive effects.
- Second, the OCC considered the financial and managerial resources of CONA, Discover Bank, and the Resulting Bank and their future prospects, and the OCC found them consistent with approval.
- Third, the OCC considered the convenience and needs of the community to be served by the Resulting Bank and found this factor consistent with approval.
- Fourth, the OCC considered CONA's and Discover Bank's records of combatting money laundering and found them consistent with approval.
- Fifth, the OCC considered the Bank Merger's risk to the stability of the United States banking or financial system and found it to be consistent with approval.

Under section 622 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 USC 1852, as implemented by Regulation XX, 12 CFR 251, an insured national bank generally may not merge with or acquire all or substantially all of the assets of another company, if the total consolidated liabilities of the acquiring institution upon consummation of the transaction would exceed 10 percent of the aggregate consolidated liabilities of all financial companies at the end of the preceding calendar year. The OCC has reviewed the Bank Merger in light of these provisions and determined that the Bank Merger is permissible.

The OCC also reviewed CONA's record of performance under the CRA as required by 12 USC 2903(a)(2) and 12 CFR Part 25. In CONA's most recent large bank CRA performance evaluation from the OCC, dated August 28, 2023, the OCC assigned CONA an overall CRA rating of Outstanding and found CONA's performance under each of the lending, investment, and service tests to be Outstanding. CONA's record of compliance with the CRA is consistent with approval of the Application.

A. Ancillary Requests

The Application also contains CONA's notices and requests related to the retention of branches, operating subsidiaries, securitization trusts, and public welfare funds and investments to be acquired as part of the Bank Merger.

In the Application, CONA requests OCC approval to retain Discover Bank's main office as a branch of the Resulting Bank. Such retention is authorized, upon application to, and with the prior approval of, the OCC pursuant to 12 USC 36(d), 12 USC 1831u(d)(1), 12 CFR 5.30(c)(2), and 12 CFR 5.33(e)(2). The OCC approves this request.

CONA requests, pursuant to 12 CFR 5.33(e)(3) and 12 CFR 5.34, OCC approval to acquire five Discover Bank operating subsidiaries as part of the Bank Merger: Discover Funding LLC; GTC Insurance Agency, Inc.; Discover Products, Inc.; Discover Properties LLC; and the Student Loan Corporation. In the Application, CONA indicates that none of Discover Bank's operating subsidiaries are nonconforming and that none of Discover Bank's operating subsidiaries are engaged in activities impermissible for a national bank. Based on the information in the Application, each of the Discover Bank operating subsidiaries is a qualifying subsidiary for purposes of 12 CFR 5.34. The OCC approves this request.

CONA requests OCC approval to acquire Discover Bank's four securitization trusts pursuant to 12 USC 24(Seventh) and 12 CFR 1.3(g): the Discover Card Execution Note Trust; the Discover Card Master Trust; the SLC Private Student Loan Trust 2006-A; and the SLC Private Student Loan Trust 2010-A. CONA notes that each trust is a wholly owned direct subsidiary of Discover Bank and will become a wholly owned direct subsidiary of CONA as part of the Bank Merger. The OCC approves this request.

CONA requests OCC approval to acquire and retain Discover Bank's outstanding public welfare funds and investments. These funds and investments cover various low-income housing tax credit, new market tax credit, venture, equity equivalent investment, community development loans, CRA mortgage-backed securities, and tax-exempt housing revenue bond activities of Discover Bank. CONA represents that these funds and investments are permissible for a national bank pursuant to either 12 USC 24(Seventh), 12 USC 24(Eleventh), and/or 12 CFR Part 24. The OCC approves this request with respect to any of these funds or investments permissible pursuant to 12 USC 24(Seventh). For any of these funds or investments permissible pursuant to 12 USC 24(Eleventh) and 12 CFR Part 24, CONA must submit required filings with the OCC as detailed at 12 CFR Part 24.

III. Public Comments

Public comments broadly focused on: the effect of the Bank Merger on competition, the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, and the risk to the stability of the United States banking or financial system.

Public comments generally focused on the following:

- The extent to which the Bank Merger will meaningfully increase concentration in consumer credit markets, especially in the markets for credit cards and subprime credit cards, as well as structural and business-specific factors that may exacerbate or mitigate this concentration and result in increased prices for consumers through the

Resulting Bank's market power, with a particular focus on low- and moderate-income (LMI) and subprime credit card consumers;

- The extent to which the Bank Merger would increase concentration in payments markets and structural and business-specific factors that may exacerbate or mitigate this concentration and result in increased prices for consumers and merchants;
- Concerns regarding CONA's business model, especially with regards to LMI and subprime credit consumers, including CONA's pricing of credit products, debt collection practices, credit limit practices, handling of consumer complaints, customer service record, and rewards programs;
- Concerns regarding CONA's and Discover Bank's past statutory and regulatory compliance issues, including with respect to anti-money laundering (AML), consumer protection, and discrimination laws and regulations; data security breaches; and CONA's ability to integrate Discover Bank within its risk management framework;
- Whether the Bank Merger would materially increase risk to the Resulting Bank's financial condition or to the stability of the United States banking or financial system, including in regard to the size of the Resulting Bank and its asset and borrower composition and concentrations;
- What effect the Bank Merger may have on the Resulting Bank's overall branch network and whether efficiency gains related to the Bank Merger may lead to layoffs in specific communities; and,
- CONA's community engagement and record of supporting community partners and the impact of the Bank Merger on Discover Bank's community development lending.

For additional information on the review of public comments please see the Appendix, below. The OCC considered the public comments and testimony as part of the record and under all relevant statutory factors.

IV. Condition

This approval is subject to the following condition.

- Within 120 days of consummation of the Bank Merger, CONA shall provide a plan for supervisory non-objection, which details effective and sustainable corrective action and timelines to address the underlying root causes of any outstanding enforcement actions against Discover Bank and plans for remediation of harm.

This condition of approval is a condition "imposed in writing by a Federal banking agency in connection with any action on any application, notice, or other request" within the meaning of Section 18 of the Federal Deposit Insurance Act, 12 USC 1818. This condition is enforceable pursuant to 12 USC 1818.

V. Consummation Requirements

You must advise OCC Licensing in writing at least ten (10) days in advance of the desired effective date for the Bank Merger so that Licensing may issue the necessary certification letter. The effective date must follow the United States Department of Justice's injunction period and any other required regulatory approval.

Licensing will issue a letter certifying consummation of the Bank Merger when we receive the following.

- A Secretary's Certificate for each institution, certifying that a majority of the board of directors approved the Bank Merger, if required.
- A Secretary's Certificate from each institution, certifying that the shareholder approvals have been obtained, if required.
- An executed merger agreement.
- Evidence of all required regulatory approvals not previously submitted.
- Documentation that all other conditions imposed by the OCC have been met.

If the Bank Merger is not consummated within six months from the approval date, the approval shall automatically terminate unless the OCC grants an extension of the time period.

This approval and the activities and communications by OCC employees in connection with the filing do not constitute a contract, express or implied, or any other obligation binding upon the OCC, the United States, any agency or entity of the United States, or any officer or employee of the United States, and do not affect the ability of the OCC to exercise its supervisory, regulatory, and examination authorities under applicable law and regulations. The foregoing may not be waived or modified by any employee or agent of the OCC or the United States.

The OCC's approval is based on the Bank's representations, submissions, and information available to the OCC as of this date. The OCC may modify, suspend, or rescind this approval if a material change in the information on which the OCC relied occurs prior to the date of the Bank Merger to which this decision pertains.

A separate letter is enclosed requesting your feedback on how we handled the referenced Application. We would appreciate your response so we may improve our service.

Please include the OCC control number on any correspondence related to this filing. If you have any questions, contact Director for Large Bank Licensing Jason Almonte at (917) 344-3405 or jason.almonte@occ.treas.gov or contact Jenny Small at (720) 475-7659 or jenny.small@occ.treas.gov.

Sincerely,

/s/

Stephen A. Lybarger
Deputy Comptroller

Enclosure: Survey Letter

Appendix: Discussion of Public Comments

The OCC received 1,370 written comments on the Bank Merger, as well as testimony from 147 members of the public at the Public Meeting. Of the comments, over 1,200 were form letters used by commenters largely (but not entirely) to voice opposition to the Bank Merger. Our review considered the full range of comments received, including the concerns raised in form letters. The OCC also considered comments received by the FRB on the applications before the FRB. This appendix uses the term "comments" and "commenters" to refer to all reviewed feedback from written commenters and those who testified at the Public Meeting. Concerns raised by commenters touched on a variety of the statutory factors the OCC is required to consider in acting upon a merger application. *See* 12 USC 1828(c)(5). The OCC carefully considered the concerns summarized in this Appendix in acting on the Application.

The OCC received a mix of comments supporting or opposing the Bank Merger. Additionally, some comments neither explicitly supported nor opposed the Bank Merger but asked the OCC to consider certain topics or condition the Bank Merger on certain terms. Comments broadly focused on the following statutory factors: the effect of the Bank Merger on competition, the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, and the risk to the stability of the United States banking or financial system.

Many of the specific concerns simultaneously touch on several of these statutory factors. As such, the following summary of the comments received is grouped topically, rather than strictly according to the statutory factors. These topics broadly include:

- The extent to which the Bank Merger will (1) meaningfully increase concentration in consumer credit markets, especially in the markets for credit cards and subprime credit cards, as well as structural and business-specific factors that may exacerbate or mitigate this concentration, and (2) result in increased prices for consumers, through the Resulting Bank's market power, with a particular focus on LMI and subprime credit card consumers;
- The extent to which the Bank Merger will (1) meaningfully increase concentration in payments markets, as well as structural and business-specific factors that may exacerbate or mitigate this concentration, and (2) result in increased prices for consumers (including Discover Bank's current customers) and merchants, through the Resulting Bank's and network's resulting market power, with a particular focus on the role of transaction fees and the interplay of regulations on debit card transaction fees related to three- and four-party systems;
- Concerns regarding CONA's business model, especially with regard to LMI and subprime credit consumers, including CONA's pricing of credit products, debt collection practices, credit limit practices, handling of consumer complaints, customer service record, and rewards programs;
- Concerns regarding CONA's and Discover Bank's past statutory and regulatory compliance issues, including with respect to AML, consumer protection, and

discrimination laws and regulations; data security breaches; and CONA's ability to integrate Discover Bank within its risk management framework;

- Whether the Bank Merger would materially increase risk to the Resulting Bank's financial condition or to the stability of the United States banking or financial system, including in regard to the size of the Resulting Bank and its asset and borrower composition and concentrations;
- What effect the Bank Merger may have on the Resulting Bank's overall branch network and whether efficiency gains related to the Bank Merger may lead to layoffs in specific communities;
- CONA's community engagement and record of supporting community partners, as well as the contents of and process by which CONA developed its community benefits plan (CBP), CONA's performance on a prior CBP developed as part of its previous merger with ING, and the impact of the Bank Merger on Discover Bank's community development lending.

Concentration in Credit Markets and Potential Price Effects Related to the Bank Merger

The OCC received mixed comments on the extent to which the Bank Merger would meaningfully increase concentration in consumer credit markets, especially in the markets for credit cards in general and subprime credit cards in particular, as well as structural and business-specific factors that may exacerbate or mitigate this concentration. Commenters also expressed views on whether the Bank Merger would cause the Resulting Bank to have sufficient market power to increase prices for consumers, with a particular focus on LMI and subprime credit card consumers.

Multiple commenters expressed concerns that large bank mergers have historically led to increased fees and other costs for consumers and reduced small business lending. In particular, many of these commenters focused on the credit card market, citing to various Consumer Financial Protection Bureau (CFPB) reports for the propositions that the credit card market is already highly concentrated in the top ten issuers and that large issuers both offered worse interest rates across credit scores and were more likely to charge annual fees than smaller issuers.

CONA's response challenged the CFPB's conclusions on concentration in the credit card market, and took issue with the CFPB's methodology, and thus its findings asserting that there are only marginal gaps between the largest and smallest issues when differences due to credit unions, program type and program credit risk profile are controlled for. Separately, CONA also stated that technological and product developments have added to competitive pressures in the credit card market (*e.g.*, buy now pay later offerings, peer-to-peer payment providers, and fintech-sponsored personal loans), and that there are relatively few barriers to entry, either for new issuers or established issuers offering new products. As such, CONA stated that, because many consumers have access to multiple payment options, CONA is increasingly competing not only at the point of card origination, but at the point of each transaction.

More specific to the Bank Merger, other commenters stated that the Resulting Bank would become the nation's largest credit card lender, and that the Bank Merger would substantially increase the concentration of credit card lending in the four largest issuers. Some commenters by contrast stated that CONA already has sufficient market power to affect prices, stating that its credit card rates are on average higher than Discover Bank's. Many commenters also focused more narrowly on the subprime credit card market as a distinct market, stating the Resulting Bank would hold a substantial portion of outstanding loans to borrowers with subprime scores, an amount materially larger than that of competitors. One commenter, for example, provided Herfindahl–Hirschman Index (HHI) calculations that they stated show that, in the subprime credit card loan market, the Bank Merger would exceed thresholds for further scrutiny established in guidelines published by the United States Department of Justice (DOJ) and Federal Trade Commission (FTC). Some commenters further stated that the subprime credit card market has structural features that would prevent the Resulting Bank's customers from moving to competitors, including the smaller number of products available to subprime consumers versus prime consumers, balance transfer fees, credit score inquiries and closed accounts leading to consumer credit score reductions, and the time needed for consumers to navigate these factors. These commenters further noted that the Bank Merger would remove Discover Bank as a key competitor in the subprime lending market. According to these commenters, these factors could provide the Resulting Bank with the market power to effectively raise prices for all their customers, but especially LMI and subprime borrowers and Discover Bank's current customers.

By contrast, some commenters stated that the Bank Merger could allow the Resulting Bank to compete more effectively against the largest banks and credit card issuers, which could drive innovation and reduce costs across the market. Some of these commenters also noted that the size of the credit card market is a countervailing, pro-competition factor to consider. For example, one commenter pointed to the thousands of depository institutions and credit card issuers nationwide and the relatively moderate share of purchases with credit cards issued by the largest issuers when compared to total credit card purchase volume. This commenter stated that their analysis shows that the increased market share of the Resulting Bank would not trigger thresholds inviting closer scrutiny under various federal bank merger guidelines. Finally, this commenter also noted challenges with viewing the subprime credit card market as a distinct, relevant market given changes in consumers' credit scores over time.

In response, CONA stated that the credit card market is intensely competitive and will remain so after the Bank Merger, citing to over 5,000 credit card issuers of all sizes and business models that compete on numerous terms and benefits, and a decline in market concentration over the past decade related to both credit card balances and purchase volumes. CONA represented that, as stated in the Application, the Bank Merger will not in fact exceed concentration thresholds set out in either of the 1995 bank merger guidelines or the 2023 DOJ and FTC merger guidelines.

CONA represented that the Bank Merger will allow it to increase access to credit, including for LMI consumers. CONA cited to several competitors and products focused on the subprime market (*e.g.*, secured credit cards, financial technologies (fintechs) using data to identify unmet credit needs) and the growth of non-credit card options that can provide access to subprime consumers (*e.g.*, debit cards, buy now pay later offerings). CONA also represented in the Application that several developments in the credit card market have greatly increased the ability of consumers to switch to other issuers (*e.g.*, online banking and online credit card applications,

applications based on "soft" credit inquiries that do not affect a consumer's credit rating, balance transfer allowances, and cards with no annual fees).

Finally, regarding credit card prices, CONA pointed to its history of not charging foreign transaction, overlimit, activity, inactivity, closed account, alerts, account opening, statement reprinting, paper statement, authorized user, or expedited payment fees. As discussed in greater detail below, CONA also represented that the integration with the affiliated payment network is expected to improve the Resulting Bank's product offerings and increase its competitive stance vis-à-vis larger bank competitors.

Concentration in Payments Markets and Potential Price Effects Related to the Bank Merger and the COFC-DFS Merger

The OCC received mixed comments on the extent to which the COFC-DFS merger would meaningfully increase concentration in the payments market industry, as well as structural and business-specific factors that may exacerbate or mitigate this concentration. Commenters also expressed views on whether the COFC-DFS merger could result in COFC having sufficient market power to increase networks fees, which would be borne by merchants, and indirectly by consumers, as well as whether and how the regulation of debit card interchange fees may allow or incentivize these fee increases. While the payments network portion of COFC's business following the merger will not reside within CONA or directly affect competition in the federal banking system, many of these commenters nonetheless expressed views that the payments network businesses would nonetheless implicate the statutory factors that the OCC must consider for the Bank Merger. Accordingly, we have considered these comments as well.

Some commenters voiced support for the Bank Merger on the grounds that COFC and the Resulting Bank may be able to compete more effectively with the largest players in the payments network industry, enhancing innovation, decreasing fees, and potentially generating cost-saving efficiencies that could be reinvested in efforts to increase financial access to LMI communities. Other commenters opposing the Bank Merger stated that the payments network industry is already highly concentrated and questioned COFC's and CONA's ability to make the affiliated payments network materially more competitive. These commenters stated that any changes in the market share of the largest payment networks would be based simply on CONA's strategic decision to transfer its debit card and (eventually) credit card business to the affiliated payments network, rather than reflecting increased competition or incentives to provide better services.

In response, CONA emphasized that COFC does not currently own or operate a payments network and that the COFC-DFS merger will lead to increased competition in the payments network industry. CONA cited to the current high level of concentration in the payments network industry, with the top three players representing 96 percent of U.S. credit card purchase volume. CONA represented that if the Bank Merger is approved, it plans to move all of its debit card and a meaningful amount of its credit card volumes to the affiliated payments network by 2027. CONA further represented that COFC will invest significantly in the affiliated payments network's merchant acceptance, brand awareness, technology, network integrity (including payment and fraud dispute resolution processes), and risk management and compliance capabilities.

Commenters opposing the Bank Merger stated that the COFC-DFS merger would provide COFC and the Resulting Bank the ability to raise network fees for debit and credit transactions on the affiliated payments network. These commenters stated that increased network fees would be borne by merchants (who would likely be unable to reject the Resulting Bank's cards given the bank's market position) and, indirectly, by consumers, as merchants pass on these costs via increased prices. Some commenters further stated that if COFC wanted to grow the affiliated payments network, it would need to attract business from other banks that issue their own cards, and that the most effective way to achieve this would be to offer higher-than-market interchange fees to these issuers, which again would be borne by merchants and, indirectly, consumers.

Some commenters further stated that COFC and the Resulting Bank would have an incentive to raise network fees on debit card purchases as a result of "circumventing" the Dodd-Frank Act's Durbin Amendment and the FRB's implementing regulations. *See* 15 USC 1693o-2 and 12 CFR Part 235 (Regulation II)). In particular, some commenters stated that transaction fees on Discover Bank's debit cards are higher than debit cards that run on four-party networks (those subject to regulatory caps on interchange fees). These commenters stated that the Resulting Bank would maintain these higher rates. Accordingly, these comments expressed concern that given CONA's migration of its debit card products to the affiliated payments network, a greater percentage of merchants' business would be subject to these higher transaction fees.

By contrast, commenters supporting the Bank Merger stated that the Durbin Amendment led banks to eliminate or reduce debit card rewards programs, and that by moving its debit card payments to a three-party system, the Resulting Bank would be better placed to invest its increased share of transaction fees into more competitive customer rewards and in maintaining free checking accounts for LMI customers. One commenter also claimed that any incentive to raise debit card transaction fees would be balanced by merchants' ability to not accept Resulting Bank's cards, which would make the business less attractive to consumers and lessen the COFC's and the Resulting Bank's ability to compete in the payments network industry.

CONA represented that COFC does not intend to increase any fees on the affiliated debit or credit payment networks as a result of the Bank Merger. It noted that, post-merger, the network will remain the smallest network for credit card transactions, and even though it intends to move all of CONA's debit card transaction volumes to the affiliated payments network, the Resulting Bank will account for only 6.5 percent of U.S. debit transaction volume, far behind the two largest payments networks, which combined accounted for 85 percent of 2023 debit purchase volumes. Regarding allegations that the COFC-DFS merger will allow the Resulting Bank to "circumvent" debit card interchange fee caps, CONA stated that this misrepresents the relevant law. CONA noted that in a three-party system, there is no "interchange" fee to regulate, as the network and the issuing bank are commonly held. CONA also stated that neither the volume of debit transactions on the affiliated payments network nor the Resulting Bank's share of the checking account market, from which debit card purchases derive, would provide COFC sufficient market power to force merchants to accept unreasonable increases in network fees. CONA further stated that because it would no longer need to pay a network fee to a third party, it would be able to lower its overall per-transaction costs, which it may invest in offerings such as access to no-fee, no-minimum-balance checking accounts or cash bonuses to new checking account customers.

<u>CONA's Business Model and Practices</u>

Several commenters expressed concern that the Bank Merger would disproportionately burden LMI and nonwhite communities. These commenters expressed concern regarding CONA's:

- high pricing of credit products compared to other lenders;
- aggressive debt collection practices, citing to reports that no lender sues more of its customers than CONA, that these suits are more likely to involve predominantly Black geographies, that CONA has recovered more in amounts that had already been charged-off than any other credit card lender, that CONA gives insufficient review of affidavits required in debt collection lawsuits, and that CONA has entered settlements in several private lawsuits and public enforcement actions regarding these practices;
- raising of credit caps unilaterally, which these commenters stated is a contributing factor to a rise in persistent credit card debt;
- handling of consumer complaints and customer service practices, including that CONA has one of the highest levels of credit card and other complaints based on a CFPB database; and
- rewards and their applicability to LMI borrowers.

Regarding its pricing practices, CONA noted that access to credit cards is an essential part of fully engaging with the broader financial services ecosystem and represented that it works with customers to help them build their credit safely. CONA noted that its business practices must be seen through the lens of its decision to serve LMI and subprime consumers that many other lenders are unable or unwilling to serve. CONA stated that these accounts require a greater level of scrutiny and resources to underwrite and manage. However, CONA represented that its credit products compare favorably to other lenders that serve these communities, citing to its lack of account opening fees, credit line increase fees, authorized user fees, monthly statement fees, replacement card fees, or foreign transaction fees. CONA further represented that it was the first of the largest retail banks to eliminate all overdraft and non-sufficient fund fees for consumer banking products.

Regarding concerns about its debt collection practices, CONA responded that comparing its volume of credit card complaints to other lenders is misleading owing to CONA's size and business model. Specifically, it cited its strategic decision to lend to a greater percentage of customers who may be facing financial challenges. CONA further stated that its ability to provide credit to those with no or less credit experience or who are rebuilding their credit depends on it being able to collect debts owed and minimize losses. However, CONA represented that it takes several steps throughout the credit lifecycle to help its customers manage their accounts. These include: using holistic upfront underwriting practices; offering subprime products with initially low lines of credit and limited fees; investing in technology that allows CONA to connect and work with struggling customers digitally; connecting distressed customers with external support, including credit counseling agencies and groups that help consumers rebuild their credit following a debt management plan; and offering financial literacy programs. Additionally, CONA represented that legal judgment volumes have fallen significantly since 2018 due to its revision of criteria for instituting debt collection civil suits. CONA further represented that its percentage of charge-offs that are sent to civil suit recoveries are below industry benchmarks.

Regarding its practice of unilaterally raising customers' credit limits, CONA stated that, rather than burdening customers, these practices can improve a customer's credit score by increasing their available credit and lowering their utilization rate. However, CONA stated that customers are able to decline these increases. CONA represented that its CBP includes a plan to provide a streamlined ability to opt out of proposed credit line increases.

Regarding customer complaints, CONA contested citations solely to the number of customer complaints, stating that this fails to take into account CONA's sizeable customer base and its focus on popular retail products like credit cards and auto loans, as compared to its competitors. Additionally, CONA represented that a meaningful portion of its CFPB-logged complaints are requests to remove accurate negative information from customers' credit reports, which CONA has only limited ability to honor under the law.

Regarding customer service, CONA stated that it ranks highly among banks in customer satisfaction, representing that it ranked highest in overall customer satisfaction in J.D. Power's 2024 U.S. National Banking Satisfaction Study. CONA represented that it has identified a broad set of similarities between its practices and Discover Bank's, and that, where it has identified differences that drive positive customer outcomes, it intends to preserve these features. As an example, CONA represented that it intends to invest in replicating Discover Bank's "Live Agent Chat" capabilities for all customers following the Bank Merger.

Finally, commenters had mixed views on the effect of the Bank Merger on CONA's current or potential rewards program offerings. Several commenters supported the Bank Merger on the basis that it could lead to improved rewards programs (including for Discover Bank customers). For example, one commenter expressed the view that CONA could use fees from expanding the affiliated payment network to offer enhanced rewards (potentially even on debit cards, for which most banks have eliminated rewards programs) and maintain free checking accounts for LMI consumers.

By contrast, other commenters expressed concern that the benefits of rewards programs are unequally distributed and tend to transfer wealth from consumers with lower credit scores to those with higher credit scores. These commenters voiced concern that this results in a transfer of wealth away from consumers with lower incomes or educational attainment or who live in higher minority geographies due to the relationship between credit score and demographic characteristics. These commenters cited statistics showing that higher credit score borrowers account for a disproportionately high percentage of credit card rewards redemptions, while subprime borrowers account for a disproportionately lower percentage. Further, these commenters stated that rewards programs can obscure the true cost of borrowing and encourage higher levels of unsustainable borrowing. Other commenters expressed concern that any enhanced rewards programs will be at the expense of merchants paying higher network fees, as discussed above.

In response, CONA cited data indicating that rewards card ownership has grown the fastest among the LMI customer segment since 2020, and that, as of 2023, rewards utilization is nearly identical between LMI and upper-income cardholders. CONA further cited to products it offers to new-to-credit and subprime customers that have cash-back rewards programs.

<u>Compliance with Laws and Regulations</u>

Multiple commenters pointed to a number of consent orders, enforcement actions, lawsuits, and other actions, by multiple regulators and private litigants, related to compliance violations by both CONA and Discover Bank over the past two decades. In particular, commenters cited to past actions related to AML, consumer protection, and discrimination laws, as well as to data security breach incidents. These commenters expressed concern that these actions demonstrate a pattern of willful behavior by CONA and Discover Bank and that CONA is likely to continue this behavior following the Bank Merger.

By contrast, some commenters stated that the Bank Merger will allow the Resulting Bank to invest more in stronger protections of customers' data. One commenter, for example, noted that integrating its operations into the affiliated payments network will reduce data fragmentation that can undermine fraud detection. However, some commenters negatively compared CONA's privacy practices and protections to Discover Bank's.

In response, CONA represented that it has committed significant investments to strengthen its risk management and compliance functions to address past compliance issues. It added that it is committed to investing continually in its compliance management capabilities and building its culture around compliance as a priority.

CONA also noted that because Discover Bank is a smaller bank than CONA, it is currently subject to a lower tier of prudential supervisory standards. However, as a result of the Bank Merger, Discover Bank's operations will be brought under CONA's existing enhanced supervisory standards. *See*, *e.g.*, 12 CFR Part 252 (enhanced prudential standards: Discover Bank is part of a "Category IV" banking organization, while CONA is part of a "Category III" banking organization, which is generally subject to a higher level of regulatory requirements). CONA represented that it plans to make significant investments to enhance the compliance and risk management infrastructure at Discover Bank in line with these enhanced standards.

Regarding comments specific to AML, information security, and fraud, CONA further represented that:

- its AML program is robust and administered in a safe and sustainable manner, utilizing technology investments in machine learning for transaction monitoring, next-generation customer risk rating processes, and modern investigator platforms;
- it has made extensive investments in risk management, cybersecurity, and resilience, including through talent acquisition and overhauling its control environment; and

- it has planned investments in improved fraud detection and prevention technologies, which it stated will lead to reduce transaction prices for issuers, consumers, and merchants.

CONA further stated that, as a three-party-system, it has an enhanced incentive to improve fraud detection and prevention since it bears a greater share of the cost of loss, as compared to the more dispersed liability in a four-party-system (due to the higher number of parties involved).

Financial Condition and Financial Stability

Several commenters expressed concern that the Bank Merger would create or otherwise exacerbate risk to the Resulting Bank's financial condition or to the financial stability of the U.S. These commenters highlighted three categories of concern.

- *Too Big to Fail*: Some commenters noted that following the Bank Merger, the Resulting Bank would be the largest credit card lender in the U.S., would be the sixth largest bank in terms of consolidated domestic assets, and would have the fifth largest bank holding company. These commenters voiced concern that the business and assets of such a large bank could not easily be transferred to other banks, and that the Resulting Bank would in essence be "too big to fail." Some commenters further supported the too big to fail argument by noting that the Resulting Bank would be significantly larger than the banks that were granted a systemic risk exception during the March 2023 regional bank failures. In contrast, other commenters noted that the Resulting Bank would hold only 3 percent of all domestic assets, which is small compared to other large U.S. banks.
- *Asset Quality and Concentration*: Several commenters pointed out that CONA is already heavily dependent on earnings related to its credit card products. According to these commenters, the proportion of the Resulting Bank's assets represented by credit card loans (as well as certain other similar ratios) would be meaningfully in excess of other major credit card lenders. These commenters stated that this concentration would expose the Resulting Bank to heightened risk in an economic downturn, which it could spread to other financial institutions given its size.
- *Borrower Risk Profile*: Some commenters further expressed concern that the Resulting Bank's credit card lending will be additionally concentrated in subprime loans, which tend to have a higher delinquency rate. These commenters stated that this risk profile could expose the Resulting Bank to heightened risk in an economic downturn, with some commenters stating that credit card delinquencies and charge offs have been rising industry-wide and more specifically that CONA and Discover Bank have higher-than-average credit card delinquency and charge-off rates compared to other large banks.

In response to the first category, CONA stated that several regulatory and supervisory metrics demonstrate that the Bank Merger will not meaningfully increase systemic risk. Specifically, CONA represented that the Resulting Bank's pro forma "Method 1 [global systemically important bank (GSIB)] score" as of December 31, 2023, would be in the low 30s, well below the score at which a bank is considered systemically important. *See* 12 CFR 217.402. CONA also represented that the Bank Merger will not lead to a meaningful increase in any of the five metrics the FRB uses to evaluate a bank holding company's systemic risk. Further, CONA noted that COFC's combined GSIB score would be dwarfed by the score of existing U.S. GSIBs and would be on the low end compared to many of its large domestic regional bank peers. Specifically, CONA noted COFC would (1) have a balance sheet well shy of the national deposit cap of 10 percent or the national liabilities cap of 10 percent; (2) offer retail and commercial deposit products, credit cards, payment services, consumer and commercial loan products, and treasury management services, each of which are non-specialized offerings for which there are numerous active competitors; (3) not have trading or business activities that significantly interconnect its business with other financial institutions; (4) have limited cross-jurisdictional activity; and (5) have neither a complex organizational structure nor significant holdings of illiquid assets. CONA further represented that it is already subject to enhanced capital and liquidity requirements, which it has historically satisfactorily met and will continue to meet, and that the assets of Discover Bank would be brought under this stricter regime as a result of the Bank Merger. *See*, *e.g.*, the capital adequacy and liquidity risk measurement standards set out in 12 CFR parts 3 and 50, respectively applicable to a "Category III national bank" such as CONA (12 CFR 3.2, 252.5(d))—Discover Bank, as a "Category IV" bank (12 CFR 252.5(e)), is not currently subject to these requirements).

Finally, CONA stated that its business model and supervisory regime differentiate it from the banks that contributed to the 2023 regional bank failures. Specifically, it cited to its diversified business model, high proportion of FDIC-insured deposits, and long history of operating within a banking organization subject to enhanced supervisory standards. *See*, *e.g.*, 12 CFR Part 252 (enhanced prudential standards).

Regarding the asset quality and concentration and borrower risk profile comments, CONA represented (in addition to the above factors) that its historic performance demonstrates the bank's and its business model's resilience, while differentiating the nature of its subprime loans from competitors. Specifically, CONA cites to its history successfully weathering past crises, including the 2007-08 financial crisis, COVID-19 pandemic, and 2023 regional banking failures, as well as the results of FRB stress tests. CONA also represented that Discover Bank has a lower proportion of subprime loans than CONA does, and the Bank Merger will thus decrease the Resulting Bank's current percentage of subprime loans. Finally, CONA reiterated its commitment to lending to the full spectrum of consumers, differentiating its subprime assets from those of many competitors. That is, CONA represented that its strategy is undergirded by policies and practices designed to govern subprime lending in a safe and sound manner; by contrast, it stated, many peers' subprime asset holdings are a result of credit deterioration.

<u>Branches and Employee Retention</u>

Commenters expressed concerns that CONA will close branches as a result of the Bank Merger, including in LMI communities and communities of color. In particular, commenters pointed to CONA's record of closing branches it acquired in past mergers, including branch closings following transactions with Hibernia National Bank, North Fork Bancorp, and Chevy Chase Bank, and highlighted branch closures in specific geographies, including Texas and Virginia. Commenters also stated that CONA's branch presence in low-income census tracts and geographies with predominantly Black and Hispanic populations has decreased since 2009. These commenters expressed concern that these closures have led to a loss of access to retail banking services that has harmed affected communities.

In response to commenters, CONA acknowledged branch closures in Louisiana, Texas, New Jersey, Connecticut, and New York since 2006, but stated that focusing solely on branch closures is misleading given consumer preferences and the significant shift over that period to mobile and other digital channels. Specifically, CONA stated that its branch strategy has focused on a blend of in-person and digital channels (including Capital One Cafés staffed by personnel who can assist with certain services), reductions in product fees, strategic partnerships to expand its national reach (*e.g.*, third-party ATM access, fee-free deposit capabilities through partnerships with national pharmacies), and financial literacy and awareness programs that help customers navigate the CONA's tools. CONA represented that this strategy has led to an increase in access to its banking products and services and an increase in deposits.

CONA also represented that its branch network in LMI areas has increased in every successive CRA examination period since 2010 and now outperforms most peers. CONA stated that it committed in its CBP to maintaining at least 30 percent of its retail locations (branches and cafés) in LMI neighborhoods, as well as to opening three new café locations in LMI areas. CONA's Application stated that there are no planned branch closures in connection with the Bank Merger. Discover Bank does not have an overlapping branch footprint with CONA, having only a main office in Greenwood, Delaware, which CONA committed in the Application to retaining as a branch. Finally, CONA represented that since its 2007-2010 CRA exam period, only 20 percent of branch closures have been in LMI areas.

Relatedly, commenters expressed concern that the Bank Merger would lead to significant layoffs, pointing to CONA's representations that the Bank Merger would result in significant operating and marketing synergies. In particular, several commenters highlighted certain communities where employees could be exposed to layoffs, including Illinois, Delaware, and Ohio. Commenters supported their concerns by citing to layoffs in California and North Dakota that occurred following CONA's 2012 acquisition of HSBC's credit card operations.

CONA acknowledged that it will need to examine the staffing requirements of the Resulting Bank should the Bank Merger be approved, and that CONA may seek to realize efficiencies where certain roles, functions, or costs are duplicative. However, in response to comments and community engagements, CONA also stated that as part of the CBP, it has committed to retain specific operations and employees in: Whitehall, Ohio; Chatham, Illinois; and Greenwood, Delaware. Moreover, CONA stated that it has committed to not laying off any of Discover Bank's front-line associates. CONA further represented that its workforce has consistently grown since 2005.

<u>CONA's Community Engagement and CBP and Discover Bank's Community Development Lending</u>

On July 17, 2024, CONA announced a CBP that commits $265 billion in lending, investing and philanthropy over five years. CONA stated that it participated in almost weekly discussion sessions from April through July 2024 with four lead community organizations that collectively represent over 800 nonprofits in developing its CBP, and that these partners helped assess over 130 proposals. Additionally, CONA represented that its CBP reflects input from its 30-member Community Advisory Council, nationwide listening sessions with community organizations in Illinois, Delaware, New York, Virginia, Maryland, Washington, District of Columbia, and California, and input from over 100 elected officials. CONA also represented that it invited other community groups to participate, but that these groups declined the offer.

Several commenters voiced support for the CBP or for CONA's and Discover Bank's current community engagement and investments, including in LMI geographies. Commenters mentioned examples including employee volunteer work; support for nonprofits, small businesses, and community development financial institutions; and philanthropy, especially in Delaware, Illinois, and Virginia.

Some commenters, however, expressed concerns with the CBP, such as with the amount of new funding commitments or with the lack of commitments on subjects such as interest rates and fees. Still other commenters expressed concern with the process by which the CBP was formed, citing the use of nondisclosure agreements. Finally, a number of commenters expressed concern about CONA's commitment to its CBP based on its history of implementing a previous plan related to its 2012 acquisition of ING Direct. Specifically, commenters pointed to CONA's 2017 decision to exit mortgage lending prior to meeting its mortgage lending commitments under the previous plan.

CONA responded that the CBP includes significant new community development lending and investment commitments and represents an expansion of CONA's offering of products and services to underserved small businesses and consumers in LMI communities. Regarding the ING community benefits plan, CONA stated that its decision to largely exit mortgage lending was based on its inability to successfully compete with nonbank mortgage lenders, despite investing significant resources.

Some commenters also expressed concerns that the Bank Merger would jeopardize Discover Bank's CRA community development lending and investment programs, including affordable housing investments. CONA stated that it has consistently ranked among the banks with the highest community development lending for the past decade. It represented that its CBP also includes new community development lending and investment commitments. The Resulting Bank's community development lending and investments will continue to be routinely evaluated under the CRA following the Bank Merger.

Finally, some commenters requested that the OCC condition approval of the Bank Merger on CONA complying with the CBP. Although under the CRA, the OCC evaluates a bank's record of meeting the credit needs of its entire community, neither the CRA nor the BMA requires that a bank engage in any particular type of activity or enter agreements with third parties. The OCC does not monitor compliance with nor enforce these agreements. *See* "Interagency Questions and Answers Regarding Community Reinvestment," 81 Fed. Reg. 48,506 (July 25, 2016) (Q&A § __.29(b) -2).