

Capital One Deal Approval Lights Up Path For Bank M&A

By **Amber Hay, Robert Azarow and Paul Lim** (July 10, 2025)

On May 18, Capital One Financial Corp. closed its acquisition of Discover Financial Services, and the merger of Discover Bank with and into Capital One's bank subsidiary, Capital One, National Association. CONA is the resulting bank.

CONA is now the eighth-largest insured depository institution in the U.S., with total consolidated assets of \$637.8 billion.

The applications of Capital One and CONA were approved by the Federal Reserve Board and the Office of the Comptroller of the Currency on April 18.

This article highlights key aspects of the approvals that provide further insight into the agencies' approaches to evaluating bank merger transactions and takeaways for financial institutions.

Key Aspects of the Regulatory Review of the Merger

Comments on the Applications

Following an extended public comment period of approximately 119 days, and which included a virtual public meeting, over 6,000 public comments were submitted on the applications. The Fed's approval order notes that 552 comments were in support of the proposal, while around 428 unique comments were received in opposition (with 5,152 copies of a substantially identical form comment letter in opposition).[1]

While the overwhelming majority of the comments were form letters, the Fed considered the comments to the extent that they were relevant to the statutory factors under the Bank Holding Company Act.

The Fed received comments from various sources, including customers of the banking organizations, businesses, members of Congress, state legislators, community groups and nonprofit organizations, and other interested persons, in support of or opposing the transaction.

The OCC received 1,370 public comments that focused on convenience and needs; consumer protection and public benefits; competition (in banking and payments); financial stability; supervisory records of CONA and Discover Bank with respect to anti-money laundering, consumer protection, and discrimination laws and regulations, as well as data security; and the ability of CONA to integrate Discover Bank within its risk management framework.[2]

The Fed addressed comments received on the holding company application within the approval order, while the OCC added an appendix to its order approving the bank merger to specifically address the public comments it received.



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The Fed addressed comments that raised social concerns that were prioritized under the prior administration but deemed to be outside of the scope of the statutory factors the Fed considered as part of the merger.

For example, the board, in response to one commenter's concern over providing financing to companies engaged in fossil fuel projects and another commenter's concern that certain business practices exacerbate the racial wealth gap, made clear that such matters are "outside the scope of the limited statutory factors that the Board is authorized to consider." [3]

The board also made clear that the "potential for job losses resulting from a merger is outside of the limited statutory factors that the Board is authorized to consider." [4]

The agencies' prioritization of addressing the public comments, including those that were noted as not relevant to any of the statutory factors, not only informs the public of what is required to be considered as part of a bank M&A transaction, but demonstrates that the agencies are focused on staying within the confines of the statutory framework for review.

Supervisory Concerns Resulted in Conditions and Consent Orders

With the approval of Capital One's application, the board announced a consent order with Discover and assessed a \$100 million penalty for overcharging interchange fees for credit cards issued by Discover Bank. [5] The board noted that Discover has terminated these practices and is repaying overcharged fees to affected customers.

On the same day, the Federal Deposit Insurance Corp. entered into an amended and restated consent order with Discover Bank, asserting that, for approximately 17 years, Discover Bank misclassified millions of consumer credit cards as commercial, which resulted in merchants being overcharged over \$1 billion in interchange fees when accepting payments with the misclassified credit cards. [6]

The 2025 FDIC order amends and restates the consent order issued against Discover Bank on Sept. 25, 2023, for shortcomings in the bank's compliance management system for consumer protection laws. [7]

Importantly, the OCC conditioned its approval on CONA submitting a plan for supervisory nonobjection that "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."

In the past, the agencies have been hesitant to approve an application if an applicant has material unresolved issues, [8] but the agencies have been willing to approve applications with a troubled target provided that the acquirer had adequate financial and managerial resources to remediate concerns with the target and the resulting institution remained strong.

The agencies' decision to approve the applications with conditions is consistent with prior statements of the agencies that a transaction can be approved even if there are concerns with the target if the acquirer has the appropriate financial and managerial resources to address identified deficiencies.

Competitive Review: The 1995 Bank Merger Guidelines Are Still Relevant

The board approval order includes a detailed discussion of the potential competitive effects of the transaction. The board acknowledges the U.S. Department of Justice's withdrawal from the 1995 Bank Merger Guidelines, but affirmatively states that none of the federal banking agencies have withdrawn from the 1995 Bank Merger Guidelines, and "[t]he Board continues to apply the 1995 Bank Merger Guidelines in evaluating bank merger proposals." [9]

The board relied on the "cluster of banking products and services" as the market for analyzing the competitive effects but also reviewed the competitive effects with respect to certain subsets of banking products and services, and specifically the business related to the issuance of credit cards for purposes of the competitive review under Section 3 of the Bank Holding Company Act.

Based on its review, the board found the transaction consistent with approval. Interestingly, the Fed noted that when calculating the Herfindahl-Hirschman index for a particular banking market, it weighs the deposits of online depository institutions and other special-purpose banks at 0%.

Additionally, when the board compared the pro forma organization's share of deposits in each local banking market in which customers of both firms are located, as compared to commercial banks and thrift institutions with branches in those markets using local deposit and market share data, the board did not include deposits of other institutions that solicit deposits through the internet in these locations.

Because the transaction was consummated as a step merger, the OCC evaluated the competitive effects of the proposed transaction from the vantage point that CONA and Discover Bank would be affiliates after Capital One acquired Discover, and thus the bank merger would "generally [be] considered competitively neutral." [10]

Based on public sources, the DOJ informed the banking regulators as part of the review process that it did not see sufficient evidence of competition issues to block the deal. [11]

Causes of 2023 Bank Failures Were Considered Under Financial Stability Review

In evaluating the statutory criteria as to the potential impact on the financial stability of the U.S., both the OCC and the board noted several distinctions between CONA and Discover Bank and the banking organizations that failed in 2023, particularly as to CONA's and Discover Bank's higher proportions of FDIC-insured deposits and less reliance on noncore deposit funding and short-term wholesale funding operations.

This signals that the agencies will continue to apply lessons learned from the failures in 2023 but are opting for a more pragmatic approach rather than applying broad restrictions across the banking industry. [12]

Takeaways

The agencies seem to be taking a more coordinated approach in bank merger review and acting on proposals. This is consistent with statements made by U.S. Secretary of the Treasury Scott Bessent in coordinating banking supervision and regulation generally among the agencies. [13]

The agencies deciding to approve the applications (assuming with the nonobjection of the FDIC), rather than denying or further delaying action until the supervisory concerns were remediated, moves away from the more conservative trend of the Biden administration to delay or withhold approval from such transactions, and is more consistent with historical statements by the agencies that a merger is approvable if the resultant institution will remain strong, and the transaction otherwise meets the statutory factors.

The federal banking agencies continue to apply the 1995 Bank Merger Guidelines to evaluate competitive considerations, despite the DOJ abandoning those guidelines in 2023. The OCC approval order noted that the applicants addressed both sets of standards.

For complex institutions, the banking agencies will go beyond a deposit concentration analysis by branch-based geographic markets and evaluate various subsets of the overall cluster of banking products and services as part of the competitive considerations analysis.

For example, the board approval order states the board reviewed small business lending data, information on card payment networks and credit card issuance data broken down by number of customers, and balances and transactions for further subsets of subprime customers and new-to-credit customers.

The board made clear that its review will not consider "matters [that] are outside the scope of the limited statutory factors that the Board is authorized to consider" when addressing public comments on topics of applicants' providing financing to companies engaged in fossil fuel projects, the impact of business practices on the racial wealth gap, and potential job losses resulting from the transaction.

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The approval of the transaction signals the agencies' willingness to consider and approve large merger transactions below the global systemically important bank level and a more favorable environment generally for bank mergers under the Trump administration.

The banking agencies appear willing to approve transactions despite significant regulatory compliance issues at the target company so long as remedial steps are put in place and the resulting entity commits to follow through on those remedial steps.

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[1] Board Approval Order, see, FRB Order No. 2025-10, Capital One Financial Corporation (April 18m, 2025), pgs. 3 and
4. <https://www.federalreserve.gov/newsevents/pressreleases/files/orders20250418a2.pdf>.

[2] OCC Approval Order, see 2024-Combination-3367070, Application for the merger of Discover Bank, Greenwood, Delaware with and into Capital One, National Association, McLean, Virginia (April 18, 2025) pgs. 2, 5-6. <https://www.occ.treas.gov/news-issuances/news-releases/2025/nr-occ-2025-36a.pdf>.

[3] Board Approval Order at fn. 53.

[4] Board Approval Order at fn. 62.

[5] Press Release, 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 (April 18, 2025).

[6] Press Release, FDIC Announces Three Orders Against Discover Bank, Greenwood, Delaware (April 18, 2025).

[7] The FDIC also assessed a \$150 million civil money penalty and required a restitution plan to distribute at least \$1.225 billion to affected merchants and related parties.

[8] See, e.g., Board, Order Approving the Acquisition of a Savings and Loan Holding Company, Merger of Depository Institutions, and Establishment of Branches, M&T Bank Corporation and Manufacturers and Traders Trust Company, FRB Order No. 2015-27 (Sept. 30, 2015) at fn. 28 ("The Board expects that a banking organization will resolve all material weaknesses identified by examiners before applying to engage in expansionary activity."); see also, Comptroller's Licensing Manual, Business Combinations (January 2021), pg. 3 ("Applications from banks in troubled condition or from sound banks seeking to acquire banks in less than satisfactory condition may raise questions regarding the safety and soundness of the resulting institution.").

[9] Board Approval Order at fn. 30.

[10] In the appendix to the OCC Approval Order, the OCC acknowledged CONA's representation that the transaction would not exceed concentration thresholds in either the 1995 Bank Merger Guidelines or the 2023 DOJ and U.S. Federal Trade Commission (FTC) Merger Guidelines.

[11] Report: Justice Department Will Not Block Capital One Acquisition of Discover, PYMNTS (Apr. 3, 2025).

[12] Michelle W. Bowman, A Message from Governor Bowman, Community Banking Connections (last visited May 6, 2025); Michelle W. Bowman, Reflections on 2024: Monetary Policy, Economic Performance, and Lessons for Banking Regulation (Jan. 9, 2025).

[13] Department of Treasury, Treasury Secretary Scott Bessent Remarks at the Economic Club of New York (Mar. 6, 2025).