

An Update on the Capital One/Discover Merger: Is There a Subprime Market for Credit Cards?

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Executive Summary

The proposed \$35 billion combination of Discover Financial Services Inc. and Capital One Financial Corp. has faced scrutiny regarding its impact on “subprime” credit-card customers. Though the deal has been approved by federal regulators, there remains the potential that states could object to the combination on grounds that it harms subprime consumers. This issue brief examines whether such consumers constitute a distinct market for antitrust purposes and concludes they do not.

A fundamental challenge is the absence of a standardized definition of “subprime.” Credit bureaus, lenders, and government agencies use different credit-score thresholds to classify consumers—e.g. VantageScore considers scores between 300-600 to be subprime, while FICO uses different terminology entirely. This inconsistency makes it impossible to clearly delineate a market segment. Additionally, credit scores are highly dynamic, with research showing that about 40% of subprime borrowers improved to higher credit tiers during the pandemic.

Consumers with lower credit scores have numerous alternatives to traditional credit cards, including secured cards, buy-now-pay-later services (used by 21% of consumers with credit records in 2022), and personal loans. These substitutes prevent the merged entity from exercising market power. Major banks like JPMorgan Chase, Citigroup, and Bank of America already serve subprime borrowers, and could expand these offerings if needed.

Rather than harming competition, a merged Capital One-Discover could benefit consumers with lower credit scores by expanding the reach of Capital One’s sophisticated analytics, which identify lower-risk individuals among those with subprime scores. While the combined company would control approximately 30% of subprime credit-card balances, this falls far short of monopoly power, given the competitive constraints from other issuers and alternative credit products.

I. Introduction

The proposed combination of Discover Financial Services Inc. and Capital One Financial Corp. has been cleared by the relevant federal regulators. Earlier this month, the U.S. Justice Department (DOJ) reportedly informed financial regulators that it does not intend to block the \$35 billion deal.¹ More recently, the Federal Reserve Board of Governors and the U.S. Office of the Comptroller of the Currency both announced April 18 that they have approved the transaction.² Moreover, the Delaware Office of the State Bank Commissioner granted approval in December 2024,³ and shareholders of both Capital One and Discover overwhelmingly approved the merger in February 2025.⁴ Nonetheless, the potential that other state regulators or attorneys general might still challenge the transaction remains.

Under traditional antitrust analysis, Capital One-Discover barely raises an eyebrow. The combined company would become the third-largest credit-card issuer by purchaser volume, after JPMorgan Chase and American Express.⁵ Given that there are thousands of credit-card-issuing banks in the United States, and even the largest issuers hold only a modest percentage of all transaction volume, any potential countervailing adverse effect on competition would likely be minor, if noticeable at all. As with its banking operations, the combined company's scale and innovative approach toward credit cards could drive improvements—especially for those with lower credit scores—both directly for its customers and indirectly for customers of other banks, who would be driven to provide competitive offerings.

The proposed acquisition has the potential to transform competition and consumer welfare in the retail-banking market. Through synergies and cost savings, the new entity would compete more vigorously with other banks and payment networks. Not only will this better serve the public in general, by bringing together the firms' traditional expertise in the development of innovative banking services and credit-card markets aimed at middle-income consumers, it would also likely expand financial inclusion among underserved communities.

¹ *Capital One's Discover Acquisition Gains Approval from Justice Department*, GLOBALDATA (Apr. 7, 2025), <https://finance.yahoo.com/news/capital-one-discover-acquisition-gains-112243059.html>.

² Ashley Capoot, *Capital One and Discover Merger Approved by Federal Reserve*, CNBC (Apr. 18, 2025), <https://www.cnbc.com/2025/04/18/capital-one-and-discover-merger-approved-by-federal-reserve-board.html>.

³ Katie Tabeling, *Delaware Bank Regulators Approve Capital One, Discover Deal*, DEL. BUS. TIMES (Dec. 19, 2024), <https://delawarebusinesstimes.com/news/delaware-bank-regulators-capital-one>.

⁴ Press Release, *Capital One and Discover Stockholders Approve Capital One's Proposed Acquisition of Discover*, CAPITAL ONE FINANCIAL CORP. (Feb. 18, 2025), <https://investor.capitalone.com/news-releases/news-release-details/capital-one-and-discover-stockholders-approve-capital-ones>.

⁵ Tiziana Barghini, *Capital One's Discover Acquisition Would Reshape US Credit Card Industry*, GLOB. FINANCE MAG. (Mar. 4, 2024), <https://gfmag.com/banking/capital-one-acquires-discover>.

Nevertheless, New York State Attorney General Letitia James has raised concerns that the combined company would control roughly 30% of the subprime credit-card market.⁶ While this figure might seem significant at first glance, it requires deeper analysis. The term “subprime” is commonly used in the credit-card industry to categorize borrowers who present a higher risk of default due to their credit history.⁷ But a significant challenge to analyzing this market segment—especially to evaluate antitrust concerns related to mergers—lies in the absence of a uniform definition for “subprime.”

This lack of standardization is evident when examining the diverse criteria employed by credit-card issuers and government agencies to classify borrowers. Bank of America’s annual report notes that “a standard industry definition for subprime loans... does not exist.”⁸ Experian reports that “subprime is a moving target. Each lender defines subprime and prime depending on their lending strategies and business goals.”⁹

Credit-card companies primarily use the credit-scoring models developed by FICO and VantageScore, both of which present different perspectives on creditworthiness.¹⁰ VantageScore explicitly defines the “subprime” range as encompassing credit scores between 300 and 600.¹¹ In contrast, FICO does not use the term “subprime” directly, but instead identifies scores below 670 as “Fair” and below 580 as “Poor,” with both classifications generally considered to be subprime.¹² In addition, Experian identifies scores of 660 and lower as “nonprime,” 600 and lower as “subprime,” and below 500 as “deep subprime.”¹³ The fundamental differences among service providers illustrates an inherent ambiguity in defining subprime at the foundational level of credit assessment.

Government agencies, such as the Consumer Financial Protection Bureau (CFPB) and the Federal Reserve System, also play a crucial role in understanding the credit-card market, but their definitions

⁶ Caitlin Mullen, *Capital One-Discover Deal Draws NY Scrutiny*, PAYMENTS DIVE (Oct. 25, 2024), <https://www.paymentsdive.com/news/ny-ag-letitia-james-capital-one-discover-deal-antitrust-probe/731004>.

⁷ Tim Maxwell, *The Pros and Cons of Subprime Mortgages*, EXPERIAN (Jul. 11, 2022), <https://www.experian.com/blogs/ask-experian/the-pros-and-cons-of-subprime-mortgages>.

⁸ Annual Report (Form 10-K), BANK OF AMERICA CORP. (Mar. 25, 2025), available at <https://investor.bankofamerica.com/regulatory-and-other-filings/all-sec-filings/content/0000070858-25-000139/0000070858-25-000139.pdf>.

⁹ Louis DeNicola, *What Does Subprime Mean?*, EXPERIAN (Jul. 9, 2022), <https://www.experian.com/blogs/ask-experian/what-is-subprime>.

¹⁰ Louis DeNicola, *The Difference Between VantageScore Credit Scores and FICO Scores*, EXPERIAN (Mar. 31, 2023), <https://www.experian.com/blogs/ask-experian/the-difference-between-vantage-scores-and-fico-scores>.

¹¹ *VantageScore 4.0 User Guide*, VANTAGE SCORE (Sep. 2022), available at https://web.archive.org/web/20250108190418/https://www.vantagescore.com/wp-content/uploads/2022/09/VantageScore4.0-UserGuide_abr_Sep22.pdf.

¹² Brianna McGurran, *What Is a FICO Score, and Why Is It Important?*, EXPERIAN (Jul. 24, 2024), <https://www.experian.com/blogs/ask-experian/fico-score-what-it-is-and-why-its-important>.

¹³ Elizabeth Gravier, *The 5 Credit Score Ranges You Need to Know*, CNBC (Dec. 27, 2024), <https://www.cnbc.com/select/borrower-risk-profiles-based-on-credit-score>.

of “subprime” further contribute to the lack of a unified standard. For example, in a 2025 report, the CFPB described FICO scores of 300-579 as “deep subprime,” 580-619 as “subprime,” and 620-659 as “near prime.”¹⁴ Research published by the Federal Reserve defines “subprime” as those borrowers with Equifax Risk Scores of less than 620, and “near prime” as those with scores of 620-719.¹⁵ This inconsistency across government agencies underscores the absence of a universally accepted definition.

“Subprime” credit-card markets also lack a coherent definition because of the unusually dynamic nature of the consumers that comprise it. Consumer credit scores can change dramatically within very short periods of time. As a result, there is a great deal of churn in the individual consumers who, over time, comprise the subprime credit-card market. Thus, while certain companies may maintain a larger market share in the subprime market at a given point in time, it is only by virtue of their relative ability to attract new customers with their offerings, as existing customers either graduate out of the subprime market or drop out of the market from default.

This issue brief examines the market for credit-card borrowing, and concludes that lending to consumers with “subprime” credit does not constitute any distinct relevant market for conducting an antitrust review of the merger. Section II describes the standards for delineating a relevant market under U.S. law and policy. Section III demonstrates that demand-side substitution fatally undermines claims that “subprime” constitutes a distinct antitrust market. Sections III and IV provide evidence that demand-side and supply-side substitution further negate the claim that “subprime” constitutes a relevant antitrust market. Section V identifies ways the proposed merger will likely be procompetitive for consumers with “subprime” credit.

II. Legal Standards for Market Definition

Much of the concern about the proposed Capital One/Discover combination has focused on potential harms to specific groups of credit-card customers, especially what has been described as the “near-prime” or “subprime” segments of borrowers with FICO scores below 660.¹⁶ A key question for antitrust analysis is whether these consumers constitute a distinct relevant market. One critic of the merger argues that these consumers’ higher risk, as well as Capital One and Discover’s direct-

¹⁴ *Consumer Use of Buy Now, Pay Later and Other Unsecured Debt*, CONSUM. FINANC. PROT. BUR. (Jan. 2025), available at https://files.consumerfinance.gov/f/documents/cfpb_BNPL_Report_2025_01.pdf.

¹⁵ John Driscoll, Jessica Flagg, Bradley Katcher, & Kamila Sommer, *The Effects of Credit Score Migration on Subprime Auto Loan and Credit Card Delinquencies*, FEDS NOTES (Jan. 12, 2024), <https://www.federalreserve.gov/econres/notes/feds-notes/the-effects-of-credit-score-migration-on-subprime-auto-loan-and-credit-card-delinquencies-20240112.html>.

¹⁶ CFPB provides the following definitions: superprime (800 or greater), prime plus (720 to 799), prime (660 to 719), near-prime (620 to 659), subprime (580 to 619), and deep subprime (579 or less). *The Consumer Credit Card Market*, CONSUM. FINANC. PROT. BUR. (Oct. 2023), at 12, available at https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf.

mail marketing strategies targeting them, suggest they constitute a distinct “submarket.”¹⁷ In contrast, the Bank Policy Institute reports:

No evidence has been put forth by critics of the proposed merger to define the boundaries of the subprime segment and establish that consumers in this segment are sufficiently isolated for it to be considered a distinct submarket for antitrust purposes.¹⁸

Broadly speaking, U.S. antitrust law provides two approaches for evaluating which products and services comprise a relevant market. The first are known as the “principal indicia,” first described in *Brown Shoe v. United States*. The second and more recent approach is the “hypothetical monopolist test.”

A. *Brown Shoe* ‘Practical Indicia’

Brown Shoe Co. v. United States established the “practical indicia” test for market boundaries, requiring evidence of distinct product characteristics, specialized vendors, or unique consumer groups.¹⁹ This approach has long been controversial.

For example, Geoffrey Manne and Marcellus Williamson criticize *Brown Shoe*’s reliance on “industry or public recognition of the market as a separate economic entity.”²⁰ They argue that this approach is fundamentally flawed, because business people and the public often use the term “market” for various reasons unrelated to economic substitutability, which is the core of a proper antitrust market definition. They emphasize that antitrust market definition should be based on economic analysis of substitutability, not on how businesses casually use terms like “market” or “industry.” Manne and Williamson warn that relying on such noneconomic evidence can lead to overly narrow market definitions that exaggerate market power and result in erroneous antitrust decisions. Their criticism is especially apt in the context of attempting to delineate markets, “submarkets,” or “segments” based on credit score, as it was rumored that the DOJ may have been concerned that the Capital One/Discover merger would be anticompetitive in “subprime,” “near prime,” “student,” or “no-credit-history” submarkets.²¹

¹⁷ Shahid Naeem, *Capital One-Discover: A Competition Policy and Regulatory Deep Dive*, AM. ECON. LIB. PROJ. (Mar. 2024), available at <https://www.economicliberties.us/wp-content/uploads/2024/03/2024-03-20-Capital-One-Discover-Brief-post-design-FINAL.pdf>.

¹⁸ Haelim Anderson, Paul Calem, & Benjamin Gross, *Is the Subprime Segment of the Credit Card Market Concentrated?* BANK POLICY INST. (May 31, 2024), <https://bpi.com/is-the-subprime-segment-of-the-credit-card-market-concentrated>.

¹⁹ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

²⁰ Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. R. 609 (2005), available at <https://laweconcenter.org/wp-content/uploads/2005/01/47arizlrev609.pdf>.

²¹ See also Diana Moss, *The Capital One Financial-Discover Financial Services Merger: A Test for the Biden Merger Agenda?*, PROGRESS. POLICY INST. (Jun. 20, 2024), at 5, available at <https://www.progressivepolicy.org/wp->

While companies, analysts, and commentators may casually refer to “prime” or “subprime” consumers, such shorthand does not necessarily define relevant economic markets for evaluating the competitive effects of a proposed merger. Indeed, among the business press, there is a stunning paucity of articles that describe a “subprime *market*” for credit cards. The most recent is an op-ed by former Federal Deposit Insurance Corp. (FDIC) Chair Sheila Bair, who concluded that barriers to entry do not explain the concentration of firms serving subprime consumers:

I suspect Capital One’s subprime market share is relatively substantial because other banks simply have less (or no) interest in serving subprime customers. Subprime lending involves higher capital requirements, greater regulatory scrutiny and more resources to underwrite and manage those accounts. Any concentrations in the subprime market are the result of banks’ conscious investment decisions, not barriers to entry.²²

Even if one accepts, for the sake of argument, that *Brown Shoe* is an appropriate framework to evaluate whether there is distinct subprime—or near prime, student, or no-credit-history—credit-card market, none of these categories satisfy *Brown Shoe*’s principle indicia. As we discuss below, such proposed markets do not have distinct product characteristics, do not constitute unique consumer groups, and are not served by specialized vendors.

B. Hypothetical Monopolist Test in a Two-Sided Market

Credit cards are a classic example of a two-sided platform, as they facilitate transactions between merchants and cardholders. In *Ohio v. American Express*, the U.S. Supreme Court established that credit-card networks are “two-sided transaction platforms” where merchants and cardholders simultaneously choose to use the network.²³ The Court held that these platforms cannot be analyzed by looking at just one side of the market in isolation, as the value of the platform to users on one side depends on the number of users on the other side.

[content/uploads/2024/06/PPI-Capitol-One-Discover-Commentary.pdf](https://www.fdic.gov/content/uploads/2024/06/PPI-Capitol-One-Discover-Commentary.pdf) (“Both Capital One and Discover serve the non-prime credit card lending market, where some commentators note that the merger could raise interest rates and fees, thus widening gaps in wealth and income, particularly for at-risk communities.”).

²² Sheila Bair, *How the Capital One/Discover Deal Could Boost Competition*, FINANC. TIMES (May 31, 2024), <https://on.ft.com/4640E6h>.

²³ *Ohio v. American Express Co.*, 138, S.Ct. 2274, 2276-77, 585 U.S. 529 (2018) (“Respondent... Amex... operate[s] what economists call a ‘two-sided platform,’ providing services to two different groups (cardholders and merchants) who depend on the platform to intermediate between them. Because the interaction between the two groups is a transaction, credit-card networks are a special type of two-sided platform known as a ‘transaction’ platform. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other. Unlike traditional markets, two-sided platforms exhibit ‘indirect network effects,’ which exist where the value of the platform to one group depends on how many members of another group participate. Two-sided platforms must take these effects into account before making a change in price on either side, or they risk creating a feedback loop of declining demand. Thus, striking the optimal balance of the prices charged on each side of the platform is essential for two-sided platforms to maximize the value of their services and to compete with their rivals.”)

The Hypothetical Monopolist Test (HMT) evaluates whether a group of products is sufficiently broad to constitute a relevant antitrust market by asking whether eliminating competition among these products by combining them under the control of a hypothetical monopolist would likely lead to worsening terms for customers. The test is typically assessed by using “small but significant and non-transitory increase in price” (SSNIP) analysis, which asks whether a hypothetical monopolist could profitably impose a 5-10% price increase on the candidate market.

In two-sided markets like credit cards, the traditional HMT must be modified to account for the interdependence between the two sides of the platform. As the 2nd U.S. Circuit Court of Appeals noted in the *Amex* case, the proper HMT analysis must “consider the feedback effects inherent on the platform” by accounting for how changes in demand on one side would affect demand on the other side.²⁴

For subprime credit cards, this means examining:

1. **Both sides of the platform simultaneously:** The analysis must consider both merchants who accept the cards and cardholders who use them. On the merchant side, this would include merchant discount rates and interchange fees. On the cardholder side, this would include interest rates, annual fees, late fees, and rewards programs.
2. **Net price, rather than one-sided price:** Following *Ohio v. American Express*, the analysis should focus on the “net price” of transactions across the platform, not just prices on one side.
3. **Cross-platform substitution:** The analysis must assess whether prime credit cards or other financial products—such as personal loans, buy-now-pay-later, or secured cards—constrain the pricing of subprime cards sufficiently to prevent a profitable SSNIP. It must also assess whether merchants could steer subprime customers to other payment methods without losing significant business.

We are not aware of any published research using the HMT to evaluate whether subprime credit cards are a relevant market. While published research discusses application of the HMT to the broader credit-card market, including its complexities as a two-sided market, there is no specific mention or analysis of the subprime segment within this market. The academic literature focuses instead on defining the relevant market for credit-card services in general, often debating whether to consider the “total price,” or specific fees like interchange fees.²⁵

This is likely because conducting robust HMT analysis requires detailed data on price elasticities and substitution patterns. Obtaining granular data specifically for the subprime credit-card market, separate from the broader credit-card market, might be challenging. Moreover, the credit scores used to

²⁴ *United States v. American Express Co.*, No. 15-1672 (2d Cir. 2016).

²⁵ See, e.g., Eric Emch & T. Scott Thompson, *Market Definition and Market Power in Payment Card Networks*, 5 REV. NETWORK ECON. 45.

define “subprime” are arbitrary and the boundaries of the subprime market are fluid, with borrowers frequently moving between credit-score categories over time. Thus, applying the HMT to reliably evaluate a distinct subprime market may be so complex as to be nearly impossible.

III. Demand-Side Substitution

Demand-side substitution—that is, consumers’ ability to switch to alternative products in response to price increases or reduced quality—fatally undermines claims that “subprime” constitutes a distinct antitrust market.

Citing *Brown Shoe*, the latest version of the DOJ/FTC Merger Guidelines, notes: “The outer boundaries of a relevant product market are determined by the ‘reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.’”²⁶ Substitutability is the *sine qua non* of market definition: If two products are reasonably substitutable or—even better—actually substituted by consumers, then the two products are said to be in the same relevant market. Sweet onions and yellow onions are reasonable substitutes for each other, but fresh onions and frozen battered onion rings are not. For consumers with subprime credit scores, the question is what the reasonable substitutes for a credit card are.

In a 2024 earnings call, Capital One Chairman and CEO Richard Fairbank identified several substitute products that are “looking to take market share from traditional credit card players”:

Let’s also remember that consumers can choose to use another form of payment entirely, cash, debit or Buy Now Pay Later, which has exploded onto the marketplace. New fintechs are entering the payments in small dollar credit space every day, all looking to take market share from traditional credit card players like Capital One. We faced this competition for years and we’ll continue to face it in the future. It’s powerful evidence of a healthy and fiercely competitive marketplace.²⁷

Evidence from the CFPB indicates that subprime borrowers routinely access credit-card alternatives, such as buy-now-pay-later (BNPL):

- Roughly 21% of consumers with a credit record borrowed using BNPL from at least one of the six firms at least once during 2022.²⁸

²⁶ *Horizontal Merger Guidelines*, U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N (2023), at 4.3, available at https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

²⁷ *Earnings Call*, CAPITAL ONE FINANC. CORP. (Apr. 25, 2024), <https://www.sec.gov/Archives/edgar/data/1393612/000092762824000164/a425-04252024cofearningstr.htm>.

²⁸ CFPB, *supra* note 14.

- From 2021 to 2022, borrowers with deep subprime credit scores accounted for 45% of BNPL originations, while those with subprime credit scores were responsible for another 16% of originations.²⁹

Consumers without a credit history access secured credit cards, which they can use to establish credit, increase their credit scores, and “graduate” to unsecured cards. Research published in 2024 by the Federal Reserve Bank of Philadelphia reports that about 57% of new secured card borrowers lack a credit score at origination.³⁰ Of those with a credit score, about half are “deep subprime” and another 25% are “subprime.”³¹

The clear, arbitrary distinction between “prime” and “subprime” products has eroded. In a letter to the CFPB, the American Bankers Association, Consumer Bankers Association, and National Association of Federally-Insured Credit Unions reported that, by mid-2022, rewards cards made up 85% of total U.S. credit-card accounts.³² For new accounts (less than two years old), rewards cards comprised 78% of total accounts. Among subprime accounts, rewards cards made up 72% of total card volume, compared to only 42% of total volume in 2008. With rewards card available to—and adopted by—consumers with subprime credit, the presence or absence of rewards provides little information about whether a given card is a “prime” or “subprime” product.

One important consideration in evaluating this concern is that a consumer’s credit status is rarely static over time. Due to changes in income and other circumstances, a subprime borrower today may be a prime borrower next year, and vice versa. Using data from 2014 and 2015, Fair Isaac found that a “notable percentage” of FICO scores migrated up or down more than 20 points in a six-month period, with 14% of accounts decreasing by more than 20 points, and 19% increasing by more than 20 points.³³ The CFPB reports that 43% of consumers with subprime credit scores moved up at least one tier during the COVID-19 pandemic, whereas in the 10 years prior to the pandemic, only 37% moved up at least one tier.³⁴

In a letter to the Federal Reserve Bank of Richmond and the Office of the Comptroller of the Currency, Capital One reported that: “Since our founding, we have enabled more than 42 million

²⁹ *Id.*

³⁰ Larry Santucci, *Secured Card Market Update*, FED. RESERVE BANK PHILA. (May 2024), available at <https://www.philadelphiafed.org/-/media/frbp/assets/consumer-finance/reports/secured-card-market-update.pdf>.

³¹ *Id.*

³² *Letter from American Bankers Association, Consumer Bankers Association & National Association of Federally-Insured Credit Unions to Bureau of Consumer Financial Protection* (Apr. 24, 2023), available at <https://www.nafcu.org/system/files/files/CFPB-2023-0009%20Joint%20Trades%20Letter%20to%20CFPB%20re%20Consumer%20Credit%20Card%20Market.pdf>.

³³ See FICO Research: *Consumer Credit Score Migration*, FAIR ISAAC CORP. (2018), <https://www.fico.com/en/latest-thinking/white-paper/fico-research-consumer-credit-score-migration>.

³⁴ Alyssa Brown & Siobhán McAlister, *Office of Research Blog: Credit Score Transitions During the COVID-19 Pandemic*, CONSUM. FINANC. PROT. BUR. (Jan. 25, 2023), <https://www.consumerfinance.gov/about-us/blog/office-of-research-blog-credit-score-transitions-during-the-covid-19-pandemic>.

customers with subprime or no FICO scores when they opened a card with the bank to achieve prime or better FICO scores.”³⁵

The 2024 Philadelphia Fed report examined the extent to which holders of secured credit cards “graduate” to unsecured cards.³⁶ The report found that most graduations occur between six and 12 month into an account’s life, with 33% of “unscored” borrowers (*i.e.*, those with no credit history when the account was opened) graduating within a year, and about half graduating within 30 months.

Thus, even if a subprime or near-prime market segment could be defined, migration into and out of these segments makes it exceedingly difficult to establish a reliable market definition for antitrust analysis.

IV. Supply-Side Substitution

Supply-side substitution—the ability of firms to redeploy resources to produce substitute goods or enter new markets—further negates the claim that “subprime” constitutes a distinct antitrust market. This analysis demonstrates that credit-card issuers and financial-technology firms (“fintechs”) can rapidly adjust offerings to compete for subprime borrowers, constraining any potential anticompetitive behavior.

While the prevailing approach in U.S. antitrust analysis, as outlined in the 2023 Horizontal Merger Guidelines, prioritizes demand-side substitution in the initial market definition, supply-side considerations are not entirely excluded. Supply responses are taken into account when identifying the participants in the relevant market and when assessing the likelihood of new entry. Specifically, firms that are not currently producing the product in question, but that could rapidly enter the market without incurring significant sunk costs in response to a price increase, are considered “rapid entrants” and therefore factored into the competitive analysis. These rapid entrants are defined as firms that “very likely would rapidly enter with direct competitive impact in the event of a small but significant change in competitive conditions.”³⁷ Jorge Padilla explains:

Indeed, even if consumers were unable to react immediately to an increase in price, producers might be able to do so rather quickly. How? First, some of them may be endowed with assets (physical and human) that can be easily adjusted to produce substitute goods. If these producers were able to respond to a price increase by switching their production

³⁵ Letter from Andres L. Navarrete, Executive Vice President, Head of External Affairs, Capital One to Brent Hassell, Assistant Vice President, Federal Reserve Bank of Richmond and Jason Almonte, Director for Bank Licensing, Office of the Comptroller of the Currency (Aug. 7, 2024), available at <https://www.federalreserve.gov/foia/files/capital-one-supplemental-information-20240807.pdf>.

³⁶ Santucci, *supra* note 30.

³⁷ Merger Guidelines, *supra* note 26 at 4.4.A.

facilities to produce the goods or services subject to such price increase, then consumers would be able to avoid abuse.³⁸

Capital One entered and gained its market share in “subprime” over time through its data-driven strategy. This has enabled the company to identify those lower-risk individuals in otherwise higher-risk groups, thereby serving otherwise underserved consumers while limiting default risk.³⁹ It’s been estimated that the combined company would account for approximately 30% of the subprime segment (Table 1). While this may be a sizable share, it is far short of a monopoly.

Table 1: Credit-Card Balances for Issuers with > \$1B in Balances

| BANK | TOTAL BALANCES | SHARE OF TOTAL | TOTAL SUBPRIME BALANCES | SUBPRIME SHARE OF TOTAL BALANCES | SHARE OF SUBPRIME BALANCES |
|--------------------------------|------------------|----------------|-------------------------|----------------------------------|----------------------------|
| Capital One | \$142.4 | 12.8% | \$45.6 | 32% | 20.6% |
| Discover | 102.1 | 9.2% | 20.4 | 20% | 9.2% |
| JPMorgan Chase | 185.8 | 16.8% | 26.4 | 14% | 11.9% |
| Citigroup | 173.0 | 15.6% | 27.7 | 16% | 12.5% |
| Bank of America | 102.2 | 9.2% | 17.0 | 17% | 7.7% |
| American Express | 98.1 | 8.8% | - | - | - |
| Synchrony Financial | 97.0 | 8.7% | 27.2 | 28% | 12.3% |
| Wells Fargo | 53.0 | 4.8% | 10.6 | 20% | 4.8% |
| Barclays US | 31.8 | 2.9% | 3.8 | 12% | 1.7% |
| Navy Federal CU | 29.3 | 2.6% | 11.9 | 41% | 5.4% |
| U.S. Bancorp | 28.7 | 2.6% | 4.0 | 14% | 1.8% |
| Goldman Sachs | 19.2 | 1.7% | 6.9 | 36% | 3.1% |
| Bread Financial | 17.9 | 1.6% | 7.7 | 43% | 3.5% |
| 1 st Nat’l Nebraska | 8.1 | 0.7% | 2.0 | 25% | 0.9% |
| PNC Financial | 6.2 | 0.6% | 0.9 | 15% | 0.4% |
| Merrick Bank | 3.9 | 0.4% | 3.9 | 100% | 1.8% |
| Citizens Financial | 2.1 | 0.2% | 0.3 | 13% | 0.1% |
| Fifth Third | 1.9 | 0.2% | 0.1 | 4% | 0.0% |
| Stride Bank | 1.6 | 0.1% | 1.6 | 100% | 0.7% |
| United National | 1.5 | 0.1% | 1.5 | 100% | 0.7% |
| Regions Financial | 1.3 | 0.1% | 0.3 | 19% | 0.1% |
| Credit One Bank | 1.1 | 0.1% | 1.1 | 100% | 0.5% |
| KeyCorp | 1.0 | 0.1% | 0.1 | 11% | 0.0% |
| Total | \$1,109.2 | 100.0% | \$221.0 | | 100.0% |

SOURCE: Bank Policy Institute⁴⁰

³⁸ Atilano Jorge Padilla, *The Role of Supply-Side Substitution in the Definition of the Relevant Market in Merger Control*, Report for DG Enterprise A/4, EUR. COMM. (Jun. 2001), <https://ec.europa.eu/docsroom/documents/2658/attachments/1/translations/en/renditions/native>.

³⁹ See Andrew Becker, *The Secret History of the Credit Card*, FRONTLINE (Nov. 23, 2004), <https://www.pbs.org/wgbh/pages/frontline/shows/credit/more/battle.html> (“By identifying lower-risk individuals in high-risk groups, Capital One was able to market to reliable consumers other companies wouldn’t touch,’ says [Chris] Meyer [CEO of Monitor Networks]. In just six years, Capital One became the sixth-largest credit card issuer in the country. ‘When others were attacking the market with blunt instruments, Capital One used a scalpel,’ says Meyer.”).

⁴⁰ Bank Policy Institute, *supra* note 18.

Moreover, the other three of the five largest issuers—JP Morgan Chase, Citigroup, and Bank of America—account for about one-third of subprime balances. These firms have the expertise and resources to respond to any post-merger increase in price, or diminution of quality. The fact that major prime credit-card issuers already operate in the subprime segment demonstrates that the necessary infrastructure, regulatory understanding, and risk-management frameworks are not unique to specialized subprime lenders. These firms could easily expand their subprime offerings if market conditions, such as a price increase, made doing so more attractive.

Capital One's Fairbank noted in the previously mentioned 2024 earnings that that "any existing bank can choose where in the credit spectrum they play simply by changing their credit policy."⁴¹ In that same call, he claimed that BNPL "has exploded onto the marketplace." Commenting on the pending deal between Capital One and Discover, Michael Imerman of the University of California, Irvine concluded:

As a result, the combined bank would be in a position to be more competitive against digital banks and fintech competitors that have made significant progress moving up-market in the consumer banking space in the past few years.⁴²

V. Procompetitive Effects for Subprime Consumers

Capital One and Discover have specialized in differing ways in providing services to customers with lower credit scores, and the combination will enable them to leverage their combined expertise to serve those customers better. For example, it will be able to use Capital One's algorithms to identify Discover customers who, despite having low credit scores, are lower risk, and offer those customers loans at preferential rates.

This highlights the reality of "subprime" credit: it is not a separate credit-card "market" because, as discussed above, the individuals classified as "subprime" are dynamic; many subprime consumers improve their credit and gain access to prime cards, while those with higher credit scores may hit bumps in the road and move in the opposite direction.

Most major card issuers have focused on catering to wealthier, high-spend, and low-risk consumers who require less effort to underwrite and serve, and lower capital-reserve requirements. Capital One gained its market share in "subprime" over time through its data-driven strategy and ability to better identify diamonds in the subprime rough than its competitors. This also provides opportunities for

⁴¹ Capital One, *supra* note 27.

⁴² Spencer Tierney, *What the Capital One-Discover Deal Could Mean for Bank Accounts*, NERDWALLET (Feb. 21, 2024), <https://www.nerdwallet.com/article/banking/capital-one-discover-deal-impact-on-bank-accounts>.

these consumers to migrate toward a lower-risk category by gradually increasing the size of their credit lines as they demonstrate creditworthiness.⁴³

The combination of Capital One and Discover will almost certainly increase access to credit for people with low credit scores, thereby enabling them to get onto the first rung of the credit ladder and to build or rebuild their credit record. It should thus be considered a good outcome for the new administration, with its increased attention to the effects of mergers on working-class Americans.

VI. Conclusion

The proposed combination of Discover and Capital One should not raise significant antitrust concerns based on “subprime” market concentration. As demonstrated throughout this analysis, the concept of a distinct “subprime” credit-card market fails to satisfy established legal standards for market definition. The fluid nature of credit scores undermines attempts to define static market boundaries. Moreover, the extensive demand-side substitution opportunities—including secured cards, BNPL services, and traditional banking products—provide meaningful competitive constraints on any potential market power in credit-card lending to consumers with lower credit scores.

From a supply-side perspective, major credit-card issuers like JPMorgan Chase, Citigroup, and Bank of America already serve subprime borrowers and could readily expand their offerings if the merged entity attempted to raise prices or reduce quality. Rather than harming competition, the Capital One/Discover merger promises to enhance financial access for consumers with lower credit scores by combining Capital One’s sophisticated risk-assessment algorithms with Discover’s infrastructure. This would enable the merged entity to better identify lower-risk individuals within traditionally higher-risk categories, potentially offering them more favorable terms than either company could provide independently.

⁴³ Naomi Snyder, *Capital One’s Secret to Success*, BANK DIR. (Aug. 15, 2022), <https://www.bankdirector.com/article/capital-ones-secret-to-success>.