Capital One Financial Corporation
1680 Capital One Drive
McLean, VA 22102

September 21, 2009

Ms. Jennifer J. Johnson
Secretary
Board of Governors
Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Regulation Z Interim Final Rule (Docket No. R-1364)

Dear Ms. Johnson:

Capital One Financial Corporation (www.capitalone.com) is a financial holding company whose subsidiaries, which include Capital One, N.A. and Capital One Bank (USA), N.A., had $116.7 billion in deposits and $146.3 billion in managed loans outstanding as of June 30, 2009. Headquartered in McLean, Virginia, Capital One offers a broad spectrum of financial products and services to consumers, small businesses and commercial clients. Capital One, N.A. has approximately 1,000 branch locations primarily in New York, New Jersey, Texas, Louisiana, Maryland, Virginia, and the District of Columbia. Among its product lines, Capital One is one of the largest issuers of Visa and MasterCard credit cards in the world. A Fortune 500 company, Capital One trades on the New York Stock Exchange under the symbol "COF" and is included in the S&P 100 index.

Capital One is pleased to submit comments on the Regulation Z interim final rule proposed by the Federal Reserve Board ("Board").[1] The rule implements the provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) that are effective August 20, 2009.[2]

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[1] 74 Fed. Reg. 36077 (July 22, 2009).

[2] Pub. L. No. 111-24, 123 Stat. 1734 (2009).

The Board began its thorough review of the Regulation Z credit card (open-end) rules at the end of 2004.[3] Years of proposals, intervening legislation, information gathering and analysis, including consumer testing, culminated in Regulation Z and Regulation AA credit card rules that revamped the industry.[4] As credit card issuers and others began altering policies, procedures, systems, and disclosures to implement these drastic rules, Congress passed and the President signed into law the CARD Act at the end of May of this year. The CARD Act further overhauls the credit card industry and does so on an accelerated time table, including provisions that became effective 90 days after the bill became law. The interim final rule implements the 90 day provisions of the CARD Act which pertain to the timing of periodic statements and 45 days advance notice of significant account changes.

Capital One appreciates the speed, thought and effort the Board invested in the interim final rule to provide clarity to the CARD Act provisions prior to the August 20 effective date. The rule presents a reasonable interpretation of the CARD Act. However, certain modifications to the 45 day notice requirements are necessary to avoid unintended consequences and enhance the CARD Act and rule's objective of protecting consumers.

Consumers are facing challenging financial times, as evidenced by the high unemployment rate.[5] Capital One wants to assist our customers as soon as possible, such as by offering lower rates and fees. Unfortunately, some provisions of the interim final rule create unintentional obstacles and delay in our assisting customers. In fact, we suspended some of our workout and hardship programs because of the operational difficulties in complying with the interim final rules. Where the interim rule hinders assistance to or protection of consumers, we respectfully suggest modifications to the rule. These suggested modifications are discussed in detail below.

Clarification that commencement of a workout, hardship, or promotional program is the day the creditor lowers the rate would result in more immediate assistance to consumers experiencing financial hardship.

Under the CARD Act and rule, prior to any significant change in terms, a creditor must provide the consumer a 45 day advance notice and the right to reject the term changes.[6] However, for workout, hardship, and promotional rate programs, rates may increase at the termination of a program without triggering the 45 day advance notice and

[3] Regulation Z Advance Notice of Proposed Rulemaking, 69 Fed. Reg. 70925 (Dec. 8, 2004).

[4] Regulation Z final rule, 74 Fed. Reg. 5244 (Jan. 29, 2009). Regulation AA final rule, 74 Fed. Reg. 5498 (Jan. 29, 2009).

[5] The US Bureau of Labor Statistics reported that the national unemployment rate rose to 9.7% (Sept. 4, 2009).

[6] CARD Act §101(a)(1). Interim final rule §226.9(c)(2) for changes to the credit card agreement, and §226.9(g) for changes according to the credit card agreement.

right to reject if certain conditions are met. Such conditions include that written disclosure of the terms of the program are provided "prior to commencement" of the program.[7]

Clarification is needed regarding the meaning of "prior to commencement." Assume that a billing cycle starts the first day of the month and ends the last day of the same month. If our customer calls us October 20 to let us know that she lost her job, we may offer to lower her rate to 0% for several months while she looks for a new job. Prior to the interim rule, we would apply the 0% rate the day she called us, October 20.[8] In other cases, for operational simplicity, we may commence the lower rate at the beginning of the current cycle - i.e., October 1.

However, under the interim rule, creditors are required to provide written program disclosure prior to the commencement of the hardship program. If October 1 is deemed the commencement date, we cannot go back in time and provide the customer with the program disclosure prior to October 1. Thus, we must ask the customer to wait until the November cycle before she gets the 0% rate. She misses out on a whole cycle at the 0% rate despite our desire to help her immediately. To avoid this delay in assisting consumers, we suggest a clarification that "commencement" of the program occurs the day the creditor lowers the rate for the consumer, even if that lower rate applies to balances that existed or transactions that occurred earlier that same cycle.

Permitting oral program disclosures followed by written disclosures would balance immediate assistance to consumers with consumer protections.

If the rule clarifies that the commencement date is the day the creditor lowers the rate (October 20), a delay in assisting consumers still exists. The complex written program disclosure the interim rule requires (discussed further below) results in an implementation delay of 3 to 5 days to ensure that the written program disclosure is mailed prior to implementation of the rate decrease. Creditors cannot risk lowering the customer's rate prior to providing her with the program disclosure because that would result in her having the right to 45 day advance notice before her rate returns to the original rate, and, more importantly, having the right to reject a return to the original go-to rate at the end of her hardship program.[9] As such, the complex written hardship program disclosure must be

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[7] CARD Act §101. Interim final rule §226.9(c)(2)(v)(D) and 9(g)(4) for workout and hardship programs; and §226.9(c)(2)(v)(B)(1) for promotional rate programs.

[8] Under some programs, such as some workout programs, the consumer is no longer able to use her credit card for additional transactions in order to limit the debt she owes under the workout program. Under other programs, such as some temporary hardship programs, the consumer may continue using her credit card. The consumer may need the credit to purchase food, medication, and other necessities. Cutting off credit would leave the consumer without the means to purchase necessities and create a disincentive for consumers to notify creditors if they are having financial trouble.

[9] Interim final rule §226.9(c)(2)(v)(D) and 9(g)(4) for workout and hardship programs; and §226.9(c)(2)(v)(B)(1) for promotional rate programs.

given to the customer prior to commencement of the hardship program. But such a requirement delays the application of the lower 0% rate. These delays result in a higher balance, potentially falling further behind on payments, and added stress for the customer than would have occurred prior to the rule.

To assist and protect consumers, the rule should interpret the CARD Act to permit oral disclosure prior to commencement of the program followed by written confirmation. The CARD Act does not require that the program disclosure be provided in writing. The CARD Act merely requires that the creditor provide a "clear and conspicuous *disclosure*", or that the creditor "*disclose*[] to the consumer" certain terms prior to the commencement of the program. [10] Where Congress intended disclosures to be in writing, the CARD Act explicitly states so, such as with the advance 45 day notices where the "creditor shall provide a *written* notice of an increase" in rates.[11] Thus the rule could permit the program disclosure to be provided orally, such as during the telephone conversation when the customer tells the creditor about her job loss and the creditor offers to lower her rate effective that same day. A follow-up written confirmation would contain the same information as the oral disclosures but could be provided within a reasonable period of time after the commencement of the workout, hardship, or promotional rate period. Such interpretations of the CARD Act would allow consumers to reap maximum benefit from lower rates offered as part of workout, hardship, and promotional programs while still being protected with disclosures provided before they agree to the workout, hardship, or promotional program.

Elimination of specific go-to APRs in the workout and hardship program disclosures will make the disclosures more readable and understandable for consumers and result in more immediate assistance to consumers.

As mentioned above, the program disclosures for workout and hardship programs are complex. The rule requires that workout and hardship program disclosures include the specific APR that will apply upon completion or failure to comply with terms of the workout or hardship program.[12] While we agree that the disclosure should include the specific APR applicable during the workout or hardship program, the disclosure of the specific APRs that apply upon termination of these programs should be eliminated. Including such APRs would confuse consumers, and would delay assistance to consumers because of its operational complexity.

Most credit card accounts have several APRs that apply at one time. For instance, one APR for purchases, another APR for cash advances, and another for balance transfers. There might also be additional APRs if there are promotional rate programs

[10] CARD Act §101(b)(2) describing modifications to TILA §171(b)(3) and (b)(1). Italics added.

[11] CARD Act §101(a)(1). Italics added.

[12] Interim final rule comment 9(c)(2)(v)(D)-7ii.

applicable to various types of transactions. The number of APRs multiplies under the CARD Act as there would be a set of APRs for existing balances and a set of APRs for future transactions. Over time, several classes of existing balances with different APRs may exist on a single account. However, when we help a customer under a hardship program, such as in the above example where we offer a 0% rate, we apply that 0% to all the balances on the account. Under the interim rule, we would have to provide a disclosure of the various APRs that will apply once the workout or hardship program terminates, including promotional APRs that may still be in effect if the workout or hardship program terminates earlier than expected because the consumer fails to comply with the terms of the workout or hardship program. This does not result in a disclosure of just one APR but a disclosure of many different APRs for the various types of transactions multiplied by the number of any repricings that may have occurred.[13]

Disclosing to consumers this profusion of APRs will result in overwhelming or confusing consumers and turning them off to reading the notice at all. Furthermore, attempting to make such operationally complex and specific rate disclosures unnecessarily delays the ability to send out the notice. Such a delay results in delayed implementation of workout or hardship programs for consumers when they most need immediate assistance. This consumer confusion and delay is unnecessary since the CARD Act does not require disclosure of these specific APRs.[14] In fact, the CARD Act already contains substantive consumer protections by prohibiting the APRs from exceeding the APRs applicable prior to the workout or hardship program.[15] A clear and simple statement that upon termination, the APRs will return to the APRs that applied prior to the program, is sufficient and won't confuse, overwhelm, and penalize consumers. If consumers don't remember their APRs, they can refer to their periodic statements, their Schumer Box, their account opening disclosures, and their customized online disclosures, or by calling us at the telephone numbers on the back of their credit card, on the periodic statement, and on the workout and hardship notice itself. Simplifying the content and timing requirements for workout and hardship program notices will increase the chance that consumers will receive immediate assistance and that they will read and understand the notices.

Crediting accrued interest and fees is not a rate decrease and ceasing to credit accrued interest and fees is not a rate increase.

As discussed above, a 45 day advance notice and right to reject the change is required when rates are increased. Exceptions are provided when rates are increased at the termination of workout, hardship, and promotional programs if certain requirements are met. For the sake of clarity, the rule or commentary should explicitly state that crediting back interest and fees is not a rate decrease triggering the workout, hardship, or

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[13] The repricings may have occurred under Interim Rule §226.9(c) or §226.9(g).

[14] CARD Act §101(b)(2) adding TILA §171(b)(3)(B).

[15] CARD Act §101(b)(2) adding TILA §171(b)(3)(A).

promotional program disclosure, and that ceasing to credit interest and fees is not a rate increase triggering the 45 day advance notice and right to reject.

Such a situation may arise when a customer receives her periodic statement and calls us to say she can't pay the full amount of the minimum payment that month. Thus, we may offer to lower her minimum payment by crediting back the interest and fees that accrued in that month. If she explains that she is temporarily bringing home less money per paycheck because her work hours have been reduced under a furlough program, we may also offer to credit back future interest and fees for the duration of her furlough. No changes have been made to the rate applied to the account. The interest and the fees continue to appear on her periodic statement. As such, the crediting of interest and fees should not be treated as a reduction of the rate. And when the interest and fees are no longer credited, that should not be treated as an increase to the rate. The customer benefits from having to pay less each month and from an ultimately lower balance than if the interest and fees were not deducted. At the same time, the customer continues to see the fees and interest on her statement so she is continually reminded of the cost of credit.

Applying a lower non-variable APR under a workout, hardship, or promotional program and then returning to the original variable APR upon termination of the program should not trigger the advance notice and right to reject.

Under the interim rule, when an creditor switches an account from a variable rate to a non-variable rate (or vise versa), a 45 day advance notice and right to reject is triggered, regardless of whether the non-variable rate is lower than the variable rate.[16] Under the above hardship program example, we may substantially lower our customer's rate to a non-variable APR from a higher variable APR. Clarification is needed that a statement in the program disclosure of the non-variable nature of the rate is sufficient to avoid triggering the 45 day advance notice of and the right to reject a return to the original variable rate. Such clarification would encourage creditors to continuing assisting consumers in this way.

Assistance provided to servicemembers under the Servicemembers Civil Relief Act should be treated as a hardship program with unique requirements.

Under the Servicemembers Civil Relief Act (SCRA), rates must be no higher than 6% during a servicemember's military service. However, once military service ends, the SCRA permits rates and fees to return to the original terms that applied prior to active duty.[17] The CARD Act and the rule did not create an explicit SCRA exception to the

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[16] Interim Rule comment 9(c)(2)(v)-3 and -4.

[17] SCRA §207(a)(1) states:

> An obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember's spouse

CARD Act requirement that 45 day advance notice and right to reject be provided when rates are increased, in this instance, when the rates are raised from the 6% to the original rate once military service ends. However, since a servicemember risking his or her own life in military service is experiencing the ultimate hardship, interpreting SCRA programs as a category of hardship programs appears consistent with the intent of the CARD Act and interim rule. An explicit provision recognizing SCRA programs as a category of hardship programs would provide certainty and assist in compliance.[18]

Even if application of the SCRA is deemed a hardship program, the rule's requirements for hardship programs should be modified to take into account the requirements of the SCRA. As discussed above, a hardship program disclosure is required prior to commencement of the hardship program. However, under the SCRA, a servicemember may return from military service today, notify the creditor that she was on military service since last January 1, and have her rate lowered to 6% and applied retroactively to last January 1.[19] The creditor is not able to go back in time to provide the hardship program disclosure prior to January 1. Furthermore, the servicemember does not need such disclosure. Under the SCRA, the military is required to provide the servicemember with information concerning the SCRA during military training.[20] Furthermore, in order to benefit from the SCRA, the servicemember must notify the creditor in writing of the time period of her active duty.[21] Thus the servicemember is well aware of her rights under the SCRA and well aware of when the SCRA benefits start and end since that coincides with her entering and leaving military service. Thus, the rule's program disclosure is superfluous as well as impossible to provide prior to commencement of the application of SCRA benefits in many instances. As such, we request that the Board use its rulewriting authority and TILA §105 exception authority rule to deem compliance with the SCRA requirements to satisfy the requirements for the

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> jointly, before the servicemembers enters military service shall not bear interest at a rate in excess of 6 percent per year during the period of military service.

[18] The Board recognized SCRA programs as an exception to the prohibition on repricing in Regulation AA §227.24(b)(6).

[19] SCRA §207(b)(1) permits the servicemember to have up to 180 days *after* leaving military service to notify the creditor of the period of service. SCRA §207(b)(2) requires the creditor to reduce the rate to 6 percent as of the date the servicemember was called to military service.

[20] SCRA §105, entitled "Notification of benefits" states that "The Secretary concerned shall ensure that notice of the benefits accorded by this Act is provided in writing to persons in military service and to persons entering military service."

[21] SCRA §207(b)(1) states:

> Written Notice to Creditor. -- In order for an obligation or liability of a servicemember to be subject to the interest rate limitation [of 6 percent per year] in subsection (a), the servicemember shall provide to the creditor written notice and a copy of the military orders calling the servicemember to military service and any orders further extending military service, not later than 180 days after the date of the servicemembers' termination or release from military service.

hardship program exception. This will eliminate any conflicts and redundancies between the SCRA and the rule. If the Board does not provide for a specific SCRA exception or rule, a transition rule is necessary regarding servicemembers who notify their creditors after August 20, 2009 of their military service that began prior to August 20, 2009.

The right to reject is illogical in certain situations and exclusions for such situations should be explicit.

Generally, the CARD Act provides that the 45 day advance notice shall contain a disclosure of the consumer's right to cancel or reject the change described in the notice.[22] The Board established certain exceptions to this general rule, such as when the change is an increase in the minimum payment, a penalty or default rate increase triggered by a payment that is more than 60 days late, or a change applied to transactions that occur more than 14 days after the 45 day advance notice is provided.[23] These exceptions should be expanded to the situations discussed below to avoid unintended consequences or illogical results:

- As mentioned, there is no right to reject changes that apply to transactions that occur 14 days after the 45 day advance notice is provided. Thus, where the change only applies to future transactions that occur more than 14 days after delivery of the advance notice, no disclosure of the right to reject should be included. Such a disclosure would be both meaningless and confusing since the only way a consumer could actually "reject" the change is by avoiding engaging in transactions 14 days after the notice is sent.

- The interim rule states that the right to reject attaches when the rate is changed from a variable rate to a non-variable rate or vice versa.[24] We recognize that such a change triggers the 45 day advance notice, even under the Regulation Z and AA rules effective July 2010. With this interim rule, not only is the requirement to provide advance notice accelerated and effective as of last August, but now the right to reject the change attaches. However, the right to reject leads to an illogical result such as where the creditor's system isn't able to handle the variable rate and index on a purchased portfolio. If the creditor substitutes an equal or lower non-variable rate, consumers have the right to reject the change, leaving the creditor having to implement a variable rate that its system could not support, notwithstanding that the consumer is offered a benefit.

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[22] CARD Act §101(a) adding TILA §127(i)(2).

[23] Interim Rule §226.9(h)(3) and comment 9(h)(3)-1.

[24] Interim rule comment 9(c)(2)(v)-3 and -4.

- We appreciate the Board creating an exception to the 45 timing requirement for the advance notice where the consumer consents to the change.[25] We request clarification that the exception extends to the need to disclose the right to reject. Disclosing the right to reject in this situation would only confuse consumers who had just consented to the change.[26]

- Unfortunately, there may be times when a creditor properly discloses the APR and other terms of the account in the Schumer Box and the account opening disclosures but, due to an inadvertent operational error, mistakenly applies a lower rate or lower fees to the account for several billing cycles. In such cases, the creditor should be able to correct the error applying going forward the disclosed APR and other terms of the account without giving the consumer the right to reject the disclosed terms. If the Board requires the 45 day advance notice, the disclosure of the right to reject the terms is unnecessary since the creditor is simply applying the terms previously disclosed in the Schumer Box and account opening disclosures.

Clarifications are requested.

Clarification is requested in the situations discussed below:

- The interim rule requires disclosure of the date a change will be effective.[27] We understand that it would be helpful for the consumer to have a specific date instead of a phrase that the change is effective 45 days after delivery of the notice. However, due to the operational complexity effecting mid-cycle APR changes[28] and to minimize the burden of having to tailor each notice to reflect the first cycle date for each consumer, we request that the rule clarify that a permissible disclosure would include a disclosure that the change would be "effective the first day of your billing cycle after [a specific date]." For example, where December 15 is over 45 days after the delivery of the advance notice, this notice would read "effective the first day of your billing cycle after December 15." This is consistent with the spirit of the rule since it provides a date certain for each consumer – even if not expressed as an exact date. It also benefits consumers by providing the earliest date the change may be implemented although the change is

[25] Interim rule comment 9(c)(2)(i)-3.

[26] Furthermore, Interim rule comment 9(c)(2)(i)-3 permits the notice to be mailed or delivered as late as the effective date of the change.

[27] Interim rule §§226.9(c)(2)(iv)(C) and 9(g)(3)(ii).

[28] The Board recognized and made allowances for operational challenges with mid-cycles changes. Regulation AA comment 24(b)-1 states that if a bank is permitted to apply an increased APR on a date that is not the first day of a billing cycle, "the bank may delay application of the increased rate until the first day of the following bulling cycle without relinquishing the ability to apply that rate."

likely delayed for several days depending on when the next billing cycle begins. Perhaps even clearer, the Fed should adopt a simplified disclosure format that is consistent with the clarification rulemaking issued in April with respect to the end of promotional rate periods.[29] Specifically, creditors should be permitted to comply with the disclosure of the effective date by printing a particular date that is at least 45 days after the notice was mailed (e.g., December 15), but have the flexibility to apply the change beginning with the first day of the billing period that begins after December 15th. Again, in all instances, any deviation from the stated date would be in the customer's favor – i.e., later in the cycle.

- If the above disclosure is permissible, we request clarification that the right to reject continues to extend for only 45 days. To avoid any possible consumer confusion, the advance notice would include the specific date by which the right to reject terminates. Using the example above, the disclosure would state that the consumer has the right to reject the APR increase prior to December 15. Such a clarification also provides creditors with a cushion of time in which to implement any rejection submitted at the end of the 45 day period.

- There is a possible contradiction between the rule which states that the increased rate applies to and the right to reject does not apply to "transactions that occur" more than 14 days after delivery of the 45 day advance notice[30] and the commentary which provides an example where the "account was used" more than 14 days after delivery of the advance notice.[31] Under the rule, whether a fee (e.g. annual, overlimit, late payment, non-sufficient funds) is treated as occurring before the 14 day cut-off or after the cut-off depends on the date the fee is applied to the account under the creditor's policy. However, the commentary creates confusion since the last time the "account was used" by the consumer may be a purchase on day 12 but the annual fee on the account is assessed on day 17. To eliminate this possible contradiction, the language in the commentary should be similar to the rule and consistently refer to the date of the transaction.

- As discussed earlier, an increase to the minimum payment triggers the 45 day advance notice.[32] However, requiring payment in full once an account charges off, should not trigger the 45 day advance notice. When payment is delinquent by 180 days, the creditor is required to charge off the account. Terms of the account (and the entire nature of the creditor-debtor relationship) will necessarily change once the account is charged-off. For example, the required minimum payment as previously disclosed to the consumer is irrelevant since the only way a charged-off balance can be satisfied is by paying off the balance in full (or a lesser

[29] Regulation AA comment 24(b)-1.

[30] Interim rule §226.9(h)(3)(ii).

[31] Interim rule comment 9(h)(3)(ii)-1.

[32] Interim rule §226.9(c)(2)(i) and comment 9(h)(3)-1.

settlement amount, if any). Moreover, the consumer's delinquency status on the account and at the credit bureaus will not be altered other than as the result of full payment or settlement of the debt. Because the concept of minimum payment is moot once a credit card account has charged off, we request that the Board clarify that seeking to collect or demand payment in full at that point is not an increase in the minimum payment requiring the 45 days notice. Similarly, the creditor should not have to provide advance notice at charge-off prior to changing the APR applicable to all outstanding balances to a statutory rate of interest or other interest rate that does not exceed the APR being applied prior to charge-off – even if the new APR is a non-variable rate and the previous APR was a variable rate. If the Board interprets the CARD Act to require 45 day advance notice when requiring payment in full at charge-off, creditors should be permitted to satisfy the advance notice through a statement in the customer agreement or any delinquency notice provided to customers that payment in full is required if the account charges-off.

- We request clarification that if there is a change in the rate, only the APR, and not the daily periodic rate, must be disclosed in the 45 day advance notice. While the disclosure requirement in interim rule section 226.9(c)(2)(ii)(A) is entitled "annual percentage rate" the section requires disclosure of the "periodic rate." Consistent with the disclosure requirements for the Schumer Box, account opening disclosure, and periodic statement, the rate disclosed should be "expressed as an annual percentage rate.[33] As such, clarification that the advance notice does not require disclosure of the periodic rate would result in more consumer friendly notices for consumers.

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Capital One appreciates the opportunity to comment on the Regulation Z interim final rules. If you have any questions about this matter or our comments, please contact me, Ducie Le, at 703-720-2260.

Sincerely,

Minh-Duc T. Le
Assistant General Counsel, Policy Analysis

[33] Regulation Z 2008 final rule §§226.5a, 6, and 7. Regulation Z comment 5a(b)(1)-8 expressly prohibits disclosure of the rate as a daily periodic rate.