Capital One Financial Corporation
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McLean, VA 22102

November 18, 2009

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

Re: Regulation Z Proposed CARD Act Rule (Docket No. R-1370)

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 $114.5 billion in deposits and $209.7 billion in total managed assets outstanding as of September 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. 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 rule proposed by the Federal Reserve Board ("Board").[1] Among other things, the proposed rule implements the provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) that are effective February 22, 2010.[2]

Capital One appreciates the speed with which the Board issued the proposed rules and the speed with which the Board must finalize these rules in order for issuers to have sufficient time to implement the final rules. As such, we provide our comments below in an abbreviated format. We would also like to incorporate by reference comments made

[1] 74 Fed. Reg. 54124 (Oct. 21, 2009).

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

in our September 21 letter on the Board's Regulation Z interim final rules. Many of these earlier comments remain relevant as the Board finalizes these Regulation Z rules.

Modifications to §226.51 for credit line increases would permit use of methods that more accurately predict the consumer's ability to pay.

Consideration of experience information, such as payment history, should be one method of satisfying the requirement to analyze the consumer's ability to pay prior to a credit line increase.

The CARD Act, TILA §150 requires the issuer to consider the consumer's ability to make the required payments prior to opening an account or increasing the credit line. Proposed §226.51(a) adds the requirement to consider income or assets, and current obligations. This is a reasonable requirement prior to opening an account.

However, with credit line increases, income and assets, while predictors of ability to pay, are quickly eclipsed by experience data, such as payment history. By the time an account is 3 to 6 months old, our payment-history based models are five and a half times more effective than income at predicting risk of default. Once an account is twelve to eighteen months old, our models are over twelve times more effective than income at predicting default. As such, §226.51(a) should recognize consideration of experience information, such as successful payment history over a particular period of time, as an alternative to consideration of income and asset information for credit line increases.

Use of predictive and validated income models should satisfy the requirement to consider income or assets in the analysis of ability to pay prior to a credit line increase.

Where income or assets are taken into consideration for credit line increases, the use of modeled income should be recognized as a way to satisfy the requirement to consider income or assets. Modeled income, a statistical and analytical means to predict a consumer's income based on an array of consumer-level attributes (e.g. a consumer's mortgage or auto loan balance, or payment patterns on other accounts) is a highly accurate predictor of the consumer's income, and often more reliable than reported income. As such, consideration of income information derived from a predictive and validated income model should satisfy the requirement to consider income or assets when increasing a credit line.

Reconsideration of assets, income, and obligations for credit line increases should be unnecessary where the consumer qualified for the higher limit at account opening.

If the use of experience information, such as payment history, alone does not satisfy the requirement to analyze the ability to pay, we request clarification that a reconsideration of assets, income and obligations for a credit line increase is unnecessary if the consumer's income and assets could have qualified them for a higher credit limit at account opening, but other factors (e.g., credit score) necessitated an extended period of review and analysis to assess longer-term credit worthiness. For example, to help consumers who are new to credit notwithstanding significant income, an issuer may choose to provide credit on an incremental basis (e.g., an initial line of $500 rising over time to $1000) depending on a consumer's early stage performance or activity on the account (e.g., timely payments, additional security deposit funds, staying within their credit line). In such cases, an issuer would typically state to the consumer at account opening what conditions must be met (e.g., 6-12 months of on-time payments) in order for the credit line to increase to the maximum amount that was supported by the analysis of the ability to pay and other factors relating to creditworthiness.

Clarification in the commentary to §226.51(a) that in such situations, the original analysis of ability to pay satisfies the §226.51 requirement for the credit line increase would be helpful. If the Board decides against such an interpretation, a transition rule grandfathering such existing offers and accounts is necessary to avoid contractual violations and possibly unfair or deceptive liability.

Transition rules are needed to clarify when the rules would apply for firm offers of credit and for accounts opened prior to February 22, 2010.

If consideration of income or assets and current obligations remain requirements in §226.51, a transition rule is needed for firm offers of credit and for accounts opened prior to February 22.

A transition rule is needed for firm offers of credit where income was not identified as a condition of eligibility. Fair Credit Reporting Act §603(l)(1)(A) prohibits an issuer from conditioning a firm offer of credit on income information if income was not established as a condition prior to the prescreening taking place. A transition rule is needed for any such prescreening done before the Board issues the final rule. We suggest that the requirement to collect income, asset, and obligation information apply only to prescreening done on or after February 22.

A similar transition rule is needed to clarify when the rule applies to mailed solicitations mailed prior to the effective date. Without such a transition rule, changes must be made to credit policies, application processing systems, and application forms themselves a signification amount of time before the February 22 effective date. Unlike internet and telephone applications, mailed applications cannot be retracted immediately upon the effective date. Therefore, we suggest a transition rule that exempts solicitations mailed prior to the effective date but expiring a short period of time after the effective date.

A transition rule is also needed for credit line increases if consideration of experience information does not satisfy the ability to pay requirement. Since in some cases the issuer may not have income information on accounts currently in existence, time is needed to collect income information for any credit line increase occurring after February 22. We suggest a transition period of 6 months to allow issuers time to collect the required information without disrupting credit line increases due to some consumers.

The exceptions in §226.55(b) for rate reductions should also extend to fee reductions.

The Board in proposed §226.55(a) has interpreted the CARD Act's prohibition on increasing rates or fees on outstanding balances to include a prohibition on increasing rates or fees on both outstanding balances and future transactions. The prohibition, by referencing §226.6(b)(2)(ii) in §226.55(a), applies to any membership fee. Unfortunately the Board's exceptions to this prohibition in §226.55(b)(1) for temporary rate reductions and §226.55(b)(6) for SCRA only apply to rates and not to fees. Thus, where Capital One may lower or waive a membership fee temporarily for a specified time, the Board's proposed rule in §226.55(b)(3) would require a 45 day advance notice and right to reject when the specified period expires and the original membership fee amount applies. Such 45 day advance notice and right to reject dissuades issuers from lowering fees for their customers. The Board has the authority under TILA §105 to include fees in the proposed §226.55(b) exceptions.

Similarly, omission of membership fees in the skip feature comment in comment 9(c)(2)(v)-2 will discourage issuers from assisting consumers by temporarily lowering or waiving such fees. Comment i in 9(c)(2)(v)-2.i provides an exception to the 45 day advance notice when there's a temporary reduction in finance charges. There's no such exception for a temporary reduction in membership fees. As such, we suggest that a corresponding exception for membership fees be created by expanding comment 9(c)(2)(v)-2.i to cover both finance charges and fees for issuance or availability of credit.

Changes to the §226.9(c) notice and timing requirements are needed to make the notice and process more consumer-friendly.

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

Proposed comment 9(c)(2)(v)-8.iii requires disclosure of the go-to fee and finance charge amounts if they are reduced or waived under workout/hardship arrangements. As mentioned above, this includes annual fees. These disclosures are in addition to the disclosures in proposed §226.9(c)(2)(v)(D) of the specific APRs for the various categories of transactions and likely multiple protected balances, and with the addition of any promotional rates that may still apply if the consumer leaves the arrangement earlier than expected. Disclosing all this information results in information overload for consumers. Simplifying the content and timing requirements for workout and hardship notices will increase the chance that consumers will read and understand the notices. Furthermore, the CARD Act and Regulation Z already contain substantive consumer protections by prohibiting APRs, fees, and finance charges from exceeding amounts applicable prior to the workout or hardship arrangement. As such, a clear and simple statement that upon termination, the APRs, fees, and finance charges will return to the amounts applicable prior to the arrangement, is sufficient. If the Board believes specific go-to APRs, fees, and finance charge amounts should be disclosed, limiting such disclosures to the APRs and amounts applicable immediately prior to entering (or alternatively, the APRs and amounts applicable upon the expected completion of) the hardship/workout arrangements will make the disclosures informative without overwhelming consumers. If specific fees must be included in the notices, we request the transition rule state that such fees must be disclosed starting with notices sent on or after February 22.

Combining the notices under §226.9 when lowering rates and changing from a variable to non-variable rate under a §226.55 exception would be more consumer-friendly.

Proposed §226.9(c)(2)(v) provides exceptions to the requirement for a 45 day advance notice of a change in terms. For example, if the consumer has a 15% rate and the issuer wants to temporarily reduce it to a 6% rate for a year, the issuer may provide written notice under proposed §226.9(c)(2)(v)(B) prior to commencement of the temporary rate reduction and thus avoid having to provide the 45 day advance notice (and right to reject) when the temporary non-variable rate expires. However, proposed comment 9(c)(2)(v)-3 (and -4) would require 45 day advance notice of the temporary change from the variable rate to the non-variable rate (e.g. 15% *variable* rate to a 6% *non-variable* rate for one year). This 45 day advance notice would be in addition to the temporary rate reduction notice that is required prior to commencement of the temporary rate period. Two notices describing the same temporary rate reduction and having to delay the reduction of the temporary rate is confusing to consumers and adds an unnecessary burden to issuers. It is more consumer- friendly and operationally easier to combine the notices such that one notice prior to commencement of the temporary rate period (or hardship or workout program) should be sufficient for purposes of comment 9(c)(2)(v)-3.

Expanding the timing exception in comment 9(c)(2)(v)-5 would allow faster implementation of reductions and consumers' requests.

In providing an exception to the "prior to commencement" timing requirement for telephone purchases in comment 9(c)(2)(v)-5, the Board recognized that the general timing requirement for the written notice would hinder the consumer benefiting immediately from a temporary rate reduction. For that reason, this timing exception should also apply to all temporary rate reductions and workout/hardship arrangements discussed by telephone. Similar to the consumer protections in comment 9(c)(2)(v)-5, where the temporary rate reduction or workout/hardship arrangement is offered by telephone, i.) the rate would be reduced immediately; ii) the consumer has the right to change her mind within 45 days of the written disclosures required by proposed §226.9(c)(2)(v)(B) or (D); and iii) the 226.9(c)(2)(v)(B) or (D) disclosures and right to reject the temporary reduction or workout/hardship offer are disclosed to the consumer. If a consumer does reject the reduction or workout/hardship offer, the issuer would unwind the application of the temporary reduction or workout/hardship offer and apply the original terms to past and future transactions. It would be as if the consumer never accepted the offer. Under such a regime, consumers would benefit from immediate rate reductions -- yet receive the written disclosures and 45 days to change their mind and be returned to their original position.

A similar exception could be constructed for the 45 day advance notice currently required under comment 9(c)(2)(i)-3 when a consumer requests or consents to changing terms on her account (e.g. requesting better reward terms in exchange for imposition of an annual fee). To avoid delayed implementation of her request, one solution is to create an exception to the timing notice similar to proposed comment 9(c)(2)(v)-5. Where the consumer requests or consents to term changes, i.) the changes would be implemented immediately; ii) the consumer has the right to change her mind within 45 days of the written disclosures required by proposed §226.9(c)(2); and iii) the 226.9(c)(2) disclosures and right to reject the requested changes are disclosed to the consumer. If a consumer does reject the requested changes, the issuer would unwind the application of the requested changes and apply the original terms to the past and future transactions. It would be as if the consumer never requested or consented to the changes. Under such a regime, the consumer benefits from immediate implementation of her request -- yet receives the written disclosures and 45 days to change her mind and be returned to her original position.

Transition rules permitting early consumer consent to over-the-limit transactions will avoid consumer and business disruptions on and after February 22, 2010.

The proposed over-the-limit rule is a reasonable interpretation of the requirements of the CARD Act. We agree with the Board's approach giving issuers flexibility in accepting consent and revocation of consent by phone, writing, or internet (but not necessarily all three). We also appreciate the Board considering permitting issuers to obtain consumers' consent early. The ability to obtain consent prior to February 22 would avoid the resulting consumer and business disruption of over-the-limit transactions being rejected starting February 22 because issuers may only begin obtaining consent on February 22. Earlier implementation would serve multiple beneficial purposes: (1) it would provide consumers with advance notice of this important change in policy prior to the change taking place, inform them of their options, and give them an opportunity to make an informed choice with ample time to avoid surprises at the point of sale; and (2) it would phase-in the implementation of these new requirements in a manner that avoids a sudden flood of opt-in notices and transaction denials on and after February 22, 2010.[3]

In obtaining consent early, the issuer would disclose the information required by §226.56, in addition to disclosing that the consent (or lack of consent) would apply to transactions

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[3] We anticipate that some commenters may suggest that issuers could simply approve over-the-limit transactions on or after February 22, 2010 without charging a fee in order to avoid this disruption. This belief fails to acknowledge the relationship between the fee and the ability of the issuer to authorize the transaction. The ability of an issuer to authorize an over-the-limit transaction is dependent upon the ability of that issuer to be compensated for the costs and risks associated with the transaction. Eliminating over-the-limit fees will necessarily lead to reduced approvals for over-the-limit transactions for many customers and elimination of such authorizations for others.

that occur on or after February 22. We believe that this process would include appropriate checks and balances – e.g., the issuer would assume the risk of a consumer asking to opt out in advance of the actual prohibition date, thus compelling the issuer to immediately apply the opt-out to all future transactions, including those occurring before February 22. The issuer would weigh this risk against the benefit of avoiding consumer surprise and disruption in determining whether to obtain consent early.

Non-CARD Act requirements should retain their July 2010 effective date.

Many of the disclosure and formatting requirements proposed by the Board and not mandated by the CARD Act are effective July 2010. We strongly support the Board maintaining the previously adopted effective date for these provisions, such as the formatting requirements for account-opening disclosures under §226.6(b), portions of the periodic statement under §226.7(b), disclosures provided with convenience checks under §226.9(b)(3), change-in-terms notices under §226.9(c)(2), and notice of penalty rate increases under §226.9(g). We also believe that the effective date should not be accelerated on the new periodic statement requirements in §226.5(b)(2)(i) and comments 2, 3, and 4; and the new billing error requirements in comment 13(c)(2). For example, implementing the periodic statement requirements in §226.5(b)(2)(i) *alone* would take 30,000 – 40,000 worker hours and $3-5 million in costs, resources that are currently engaged in implementing the CARD Act provisions effective in February. Not surprisingly, implementation efforts for not only the CARD Act, but for surviving portions of the Board's original Regulation Z proposal has been underway for nearly a year. Implementation schedules and allocation of limited IT, operational and compliance resources, were set at that time. Changing these schedules at this time would be highly disruptive and likely lead to significant unintended consequences for consumers, with little meaningful consumer benefit.

Because of these resource constraints and operational complexities involved with implementing the July 2010 provisions, we urge the Board to retain its original effective date of July 2010.

Additional Issues

Limitation on increasing rates, fees, and charges §226.55

- Crediting interest and fees: As discussed in our September 21 letter, we request confirmation in §226.9(c) and §226.55 that crediting back interest or fees does not trigger the workout, hardship, or temporary rate reduction notice, and that ceasing to credit interest and fees is not an increase triggering the 45 day advance notice and right to reject. Since no rate or fee change has been applied to the account, and since the interest and fees continue to appear on the periodic statement, the consumer is continually reminded of the cost of credit while benefiting from having to pay less in interest and fees.

- Extending temporary rate reductions: When a customer is currently in a temporary rate reduction period, the issuer may extend the period of the current rate reduction or offer another temporary rate reduction that would apply immediately following the expiration of the first rate reduction. Advance notice is required prior to the extension or second reduction. Clarification in the commentary is needed with regards to the timing of the advance notice. Under proposed §226.55(b)(1) and proposed §226.9(c)(2)(v)(B), the issuer is required to provide the advance notice prior to the commencement of the extension or reduction period. However, proposed comment 55(b)-3.ii.A. provides an example where the advance notice is provided 45 days (November 16) prior to the commencement (January 1) of the extension or second reduction. Consistent with proposed §226.55(b)(1) and §226.9(c)(2)(v)(B), comment 55(b)-3.ii.A. should clarify that the advance notice must be provided prior to January 1 of year two, but not necessarily on or before November 16.

- Delayed implementation of increase: We appreciate comments 55(b)-2 and 55(b)(4)-3iii which recognize that creditors may not be able to implement rate or fee increases mid-cycle and provide that increases effective mid-cycle may be implemented on the first day of the following billing cycle. Using the example in comment 55(b)-2 where the first day of each billing cycle is the fifteenth of the month and the rate change would occur on July 1, we would like to confirm that in disclosing the effective date, the disclosures may state "July 1" although the rate increase may be implemented on various days after that, depending on when the particular customer starts his or her next billing cycle. This clarification would have no detrimental impact to the consumer, and potentially only benefit the consumer in circumstances were the change took effect later than the disclosed date. Similarly, we would like to confirm that we could disclose that the right to reject also ends on July 1.

- Workout and temporary hardship arrangement exception: Comment 55(b)(5)-1 states that proposed workout and temporary hardship exception in §226.55(b)(5) does not alter the general prohibition on increasing rates or fees in proposed §226.55. In the Supplemental Information explaining comment 55(b)(5)-1, the Board states that "[i]n addition, a card issuer cannot require the consumer to make payments with respect to a protected balance that exceed the payments permitted under §226.55(c).[4] Not being able to increase the minimum payment during a workout program makes it difficult to offer workout programs, many of which are agreements between the customer and issuer for the customer to pay a higher minimum payment in return for lower rates and fees or a deduction from the balance of accrued interest and fees. Not only is it an agreement, but the customer is additionally protected under the CARD Act and the proposed rules. The customer may, at any time during the workout program, choose to leave the workout program and return to the original minimum payment amount and rate and fee terms. Furthermore, the Board in [comment 55(b)(4)-1] contemplates

[4] 74 Fed. Reg. at 54175.

increased minimum payments. Clarification in §226.55 that minimum payments may be increased in a workout program would permit issuers to continue offering these programs to customers.

Temporary rate for six months or longer §226.55(b)(1)

- Balance transfers: Proposed §226.55(b)(1) requires that any temporary rate reduction must be for a period of six months or longer. In comments 55(b)(1)-2.i, ii, and iii, the six month period begins on the date the issuer offers the purchase rate reduction to the consumer and the consumer has the right to take advantage of that rate reduction. However, for balance transfers, comment 55(b)(1)-2.v. suggests that the six month period begins when the consumer actually makes the balance transfer, not when the issuer offers the rate reduction and the consumer has the right to make the transfer. Thus, the issuer has no certainty as to when the 6 month period may expire since the consumer may make the balance transfer the first day it is offered or 6 months later. In fact, the consumer may make multiple balance transfers. To provide certainty for systems and risk management purposes and to provide consistency with the purchase timing requirement, the 6 month period for balance transfers should begin the date the issuer offers the rate reduction and the consumer has the right to take advantage of the reduction. Thus the example in comment 55(b)(1)-2.v. should reflect that the issuer would not be permitted to accrue interest at 15% until December 1 (and not December 15, as currently stated).

- Transition rule: A transition rule is needed with regards to the requirement that temporary rates apply for 6 months or longer. The rule should apply to rate reductions offered on or after February 22. Such a transition rule would avoid applying the rule retroactively to promotional rates that apply now and end sometime after February 22.

Periodic statement payment disclosures §226.7(b)(11) and (12)

- Charged-off accounts: Under proposed §226.7(b)(11) and (12) certain disclosures about payment due date, and the amount and time to payoff the balance must be disclosed in the periodic statement. However, for charged-off accounts, these disclosures do not make sense since the consumer is over 180 days late, the account has been placed into charge-off status, and full payment is due immediately. As such, the disclosures would be meaningless to the consumer as the due date is "immediately" and such payment would pay off the balance in one day. Thus, a charge-off exception should exist for §226.7(b)(11) and (12) disclosures.

Renewal disclosures §226.9(e)(1)

- Accounts with no annual or renewal fee: In proposed §226.9(e)(1), regardless of whether any annual or renewal fee is assessed, an issuer must provide notice of terms changed or amended and not previously disclosed to the consumer. Such notice must be provided at least 30 days prior to the scheduled renewal of the card. This provision, as in the original Regulation Z, should remain limited to instances where an annual or renewal fee is assessed. Where no such fee is assessed, there is no additional cost to the consumer upon renewal of the card. If such provision does apply to accounts that do not have an annual or renewal fee, we suggest that "renewal" be defined as when the existing plastic expires. We also suggest a transition rule that applies the proposed broader renewal notice requirement only to changes occurring on or after February 22. Changes occurring before February 22 would not have to be disclosed. Such a transition rule avoids issuers having to comb records going back several years prior to February 22, 2010 for any consumer-friendly term change about which the consumer was not already notified.

- Transition rule: Due to the requirement that renewal notices be provided at least 30 days prior to the renewal, we suggest that the requirements of §226.9(e)(1) start to apply with accounts that renew 30 days after February 22, 2010. As such, renewal notices provided around February 22, 2010 will comply with the §226.9(e)(1) requirements.

Account-opening disclosures §226.6(b)(4)(i)(A)

- Periodic rates: The Board in proposed §226.6(b)(4)(i)(A) requires disclosure of the periodic rate. Consistent with other Regulation Z disclosures and with findings from the Board's consumer testing, it would be more consumer-friendly to disclose the APR and eliminate disclosure of any periodic rate.

Billing error resolution §226.13(d)(1)

- Automatic payment plan: In proposed §226.13(d)(1), the Board proposes that an issuer must reduce the automatic payments by the disputed amount for any automatic payment this is scheduled to occur 3 or more days after receipt of the dispute. We suggest that 10 days, instead of 3 days, is the more feasible timeframe since the billing error must be entered into the system, the disputed amount must be backed out of the balance and requested payment, and the ACH request must be adjusted.

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Capital One appreciates the opportunity to comment on the proposed Regulation Z 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

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