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

June 10, 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: Proposed Clarifications for Regulations Z and AA (Docket No. R-1314 and R-1286)

Dear Ms. Johnson:

Capital One Financial Corporation ("Capital One") is pleased to submit comments on the Regulation Z clarifications proposed by the Federal Reserve Board ("Board") and the Regulation AA clarifications proposed by the Board, Office of Thrift Supervision ("OTS"), and the National Credit Union Administration ("NCUA").[1]

Capital One Financial Corporation (www.capitalone.com) is a financial holding company whose subsidiaries, which include Capital One, N.A., Capital One Bank (USA), N.A., and Chevy Chase, F.S. B., collectively had $121 billion in total deposits and approximately $220 billion in managed assets, both as of March 31, 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. and Chevy Chase Bank, F.S.B. have 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.

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[1] Proposed Regulation Z, 74 Fed. Reg. 20784 (May 5, 2009). Proposed Regulation AA, 74 Fed. Reg. 20804 (May 5, 2009). The OTS and NCUA issued proposed clarifications to be contained in 12 CFR Part 535 and 12 CFR Part 706, respectively. References in this comment letter to Regulation AA also apply to the OTS and NCUA's proposed rules.

Capital One appreciates the thought and effort the Board invested in the final Regulation Z and Regulation AA rules ("final rules") and in the proposed clarifications to the Regulation Z and Regulation AA rules ("clarifications").[2] The Credit Card Accountability Responsibility and Disclosure Act ("Credit CARD Act") enacted May 22, 2009 will result in drastic changes to the final rules and proposed clarifications, including accelerated effective dates and Regulation Z rule writing. As such, the Board should concentrate its efforts on quickly issuing proposed Regulation Z rules implementing the Credit CARD Act and withdrawing the credit card rules in Regulation AA. We strongly urge the Board to reconsider the proposed clarifications and the final rules in the context of the Credit CARD Act. There will likely be unintended adverse consequences as the recently issued proposed clarifications and final rules interact with the extensive Credit CARD provisions and with the existing Regulation Z rules.

Assuming the Board will likely issue final clarifications either separately or as part of the Credit CARD implementing rules, Capital One respectfully submits the comments below on the proposed clarifications. The Board emphasized that "the purpose of these rulemakings is to clarify and facilitate compliance with the final rule, not to reconsider the need for – or the extent of—the protections that the rule affords consumers."[3] Accordingly, we limit our comments below to clarification and compliance issues. Where appropriate, we note the interaction of the Credit CARD Act with the proposed clarifications.

Definition of consumer credit card account

The Board proposes that if a consumer credit card balance is transferred to another loan by the same bank or its affiliate or subsidiary, the balance retains the Regulation AA applications from the original account, including application of the provisions regarding the timing of periodic statements, payment allocation, and increasing the APR.[4] These provisions continue to apply as they would under the original account even if the original credit card is 1) replaced or substituted with another credit card offering different terms; 2) consolidated or combined with one or more credit card accounts into a single credit card account; or 3) replaced or substituted with a line of credit accessed only by an account number.[5] However, the Regulation AA provisions would not continue to apply if the balance is transferred to an account or loan with a different bank.[6]

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[2] Final Regulation Z, 74 Fed. Reg. 5244 (Jan. 29, 2009). Final Regulation AA, 74 Fed. Reg. 5498 (Jan. 29, 2009).

[3] 74 Fed. Reg. at 20805.

[4] Proposed Regulation AA comment 21(a)-3(i).

[5] Proposed Regulation AA comment 21(c)-3(i)(B), (C), and (D).

[6] Proposed Regulation AA comment 21(c)-3(ii).

This proposed definition and clarification is unnecessary because there is a well-established and well-understood definition of consumer credit card account in Regulation Z. The Regulation Z definitions of *consumer*, *credit card*, *consumer credit*, and *cardholder*[7] are the foundation of years of rules, case law, policies, and practices regarding when consumer credit card protections and disclosures are triggered. As such, the proposed definition in the clarification is unnecessary.

In addition, the clarification's expanded definition of consumer credit card is troublesome if it either is inserted in Regulation Z or remains in Regulation AA. The proposed definition reaches beyond credit cards and encompasses closed-end credit and open-end credit that do not have credit cards attached to the accounts.[8] This reverses the established Regulation Z framework where consumer protections and disclosures are triggered based on the existing account. If a consumer chooses to transfer the credit card balance to another account, the original rights and disclosures do not carry on into the new account. Instead, the new account has its own set of Regulation Z consumer protection and disclosures, regardless of whether the account is a closed-end loan, another credit card account, or a non-card line of credit. If this proposed expanded definition is inserted into Regulation Z, it will trigger other Regulation Z credit card provisions and numerous Credit CARD Act provisions resulting in these provisions applying to closed-end loans, non-card lines of credit, and subsequent credit card accounts because the transferred balance passed through or accrued on a credit card.[9]

Understandably, the Board is trying to protect consumers and anticipate evasion of the protections in proposing the expanded definition of consumer credit card accounts. However, the proposed clarifications are not necessary since the Board and other regulators may use their supervisory and enforcement authority, including their authority under the Truth-in-Lending Act (TILA) and the Federal Trade Commission Act, to stop acts or practices designed to evade the consumer protections. Furthermore, with the recent enactment of the Credit CARD Act, there are numerous additional consumer protections that are a result of Congress, the White House, and many others engaging in intense deliberations. With all the additional consumer protections, Congress did not feel the need to expand the definition of consumer credit card account in the Credit CARD Act as proposed in the clarifications. For these reasons and the reasons mentioned above,

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[7] Regulation Z §226.2.

[8] Proposed Regulation AA comment 21(c)-3(i) states that the Regulation AA credit card provisions extend to balances that are "transferred from a consumer credit card account issued by a bank to another *credit account* issued by the same bank or its affiliate or subsidiary." Emphasis added. As an example of a credit account where the Regulation AA credit card provisions apply, proposed comment 21(c)-3(i)(D) describes "a line of credit that can be accessed solely by an account number."

[9] For example, if a consumer consolidates debt by transferring a credit card balance into a closed-end loan offered by the same bank, under the proposed definition, various Regulation Z and Credit CARD Act provisions would apply to the closed-end loan, including the Regulation Z special credit card provisions currently in §226.12 and Credit CARD Act provisions regarding penalty fees in §102(b), interest rate reductions in §101(c), and minimum payment disclosures in §201.

the proposed clarifications expanding the definition of consumer credit card account should be withdrawn.

Consent exception to the timing requirement for change-in-terms notice

The current Regulation Z commentary states that a change-in-terms notice is not required in advance, that it may be provided at the same time as the date of the change, in the case where the consumer consents to the change. However, this exception does not apply in such cases where consent is in the form of the consumer's use of the credit card, a general acceptance of a contract provision where the creditor reserves the right to change terms, or an acceptance that applies to all consumers with that type of account.[10] The proposed clarification narrows this exception by stating that the timing exception does not apply to "the consumer's request to reopen a closed account or to upgrade an existing account offered by the creditor with different credit or other features."[11]

This proposed clarification contradicts the existing commentary and hurts the consumer. The existing three examples of what does not qualify as consumer consent are examples of implied or general consent to non-specific changes. Unlike the existing examples, the proposed clarification provides an example of where the consumer specifically requests to re-open or upgrade the account and is provided and agrees to the terms. The consumer's request would be frustrated by the proposed clarification which would require that the request not be implemented until 45 days after a change-in-terms notice is provided to the consumer. For example, a consumer who asks for an upgrade to a different credit card account because he wants better rewards and a lower APR but with the addition of an annual fee would have to wait 45 days for the upgrade, despite having requested the change and receiving the terms of his new account earlier.

With regards to re-opened accounts, the proposed clarification is unclear whether any request to re-open an account or just a request to reopen on different terms triggers the 45 day timing requirement. In either case, the advance timing requirement is unnecessary. A consumer requesting to re-open the account because he needs to use the credit line would have to wait 45 days after the notice is sent for the account to be re-opened, even though he already received the original account opening disclosures and any necessary change-in-terms notice would reach him well before day 45. This proposed clarification hurts the consumer who needs the credit quickly, wants to save money on interest or fees, or wants to earn better rewards. In keeping with the consumer-friendly intent of the original comment, the proposed advance timing clarification should be withdrawn.

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[10] Regulation Z comment 9(c)(1)-3.

[11] Proposed Regulation AA comment 9(c)(1)-3.

Date of transaction for determining the protected balance

Under Regulation AA, the APR cannot increase on transactions that occurred before and within 7 days of the delivery of the 45 day advance notice.[12] The 7 day cushion is provided so the consumer would have time to read the notice and stop using the card if the consumer does not want the higher rate to apply to future transactions. The proposed clarification states that whether a transaction is within the 7 days is determined by the transaction date.[13] With the passage of the Credit CARD Act, this clarification is no longer necessary since the Credit CARD Act prohibits increasing the APR on the amount owed as of the end of the 14th day after notice is provided.[14]

Prior to the passage of the Credit CARD Act, it is understandable that the Board defined the protected balance based on the transaction date. Such a definition would protect consumers by capturing transactions that occurred within the 7 days but are posted after the 7th day. Such protection is not necessary under the Act's expansion of the time period to 14 days. The consumer still has the necessary 7 days to read and react to the notice. Under the Credit CARD Act, the addition of 7 more days is to capture transactions that post after the first 7 days. Thus, the definition under the Credit CARD Act should be based transactions that post by the 14th day. This is supported by definitions in the Credit CARD Act. Unlike Regulation AA, the Credit CARD does not prohibit increasing the APR on *transactions*, but instead prohibits increasing the APR on the *outstanding balance*.[15] The Credit CARD Act defines *outstanding balance* as "the amount owed ...as of the end of the 14th day after the date on which the creditor provides notice...."[16] The Credit CARD Act's focus on the outstanding balance instead of transactions eliminates the focus on the date of each transaction. Instead, the focus is on the amount outstanding as of the end of day 14. Any amount posted after day 14 is not part of the outstanding balance. For this reason, the proposed clarification should be withdrawn from Regulation AA. Instead, a definition of outstanding balance based on the amount posted as of day 14 should be proposed in Regulation Z to implement the Credit CARD Act.

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[12] Regulation AA §227.24(a).

[13] Proposed Regulation AA comment 24(b)(3)-2.

[14] Credit CARD Act §101(b) adding new TILA §171.

[15] The Credit CARD Act states in part that "no creditor may increase any annual percentage rate, fee, or finance charge applicable to any *outstanding balance*...." Credit CARD Act §101(b) adding new TILA §171. Emphasis added.

[16] Credit CARD Act §101(b) adding new TILA §171.

Other issues

In addition, we would like to offer short comments on the following issues:

- SCRA exception. The Board thoughtfully added a Servicemembers Civil Relief Act exception to the prohibition on increasing the APR on outstanding balances. We ask that the Board clarify that the exception includes circumstances when the rate after the termination of the SCRA is higher than the rate prior to application of the SCRA due to i) a promotional rate expiring during the period the SCRA applied, and ii) operation of the index resulting in a higher variable rate. In addition, we note that while the Credit CARD Act does not explicitly include a SCRA exception, we believe the Board has authority under TILA section 105 and under the Credit CARD Act's workout and temporary hardship exception to create a SCRA exception.

- Disclosure of interest and fees of acquired accounts. The final Regulation Z rules require that periodic statements disclose the aggregate amount of interest charges and fees for the statement period as well as for the year. The proposed clarifications would require the aggregated amount to include interest charges and fees assessed prior to the bank acquiring the credit card account. Since creditors are not required to maintain and disclose such information prior to July 1 2010, there is concern about the quality of the data from the original creditor to the acquiring creditor for disclosure on the acquiring creditor's periodic statement. As such, the transition rules should permit the acquiring creditor to disclose only those pre-acquisition fees and interests that were assessed after July 1, 2010.

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Capital One appreciates the opportunity to comment on the proposed Regulation AA and Regulation Z clarifications. 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