



Capital One Financial Corporation
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February 22, 2011

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE.,
Washington, DC 20549-1090
Rule-comments@sec.gov

**Re: Proposed Rule on Registration of Municipal Advisors
(File Number S7-45-10)**

Dear Ms. Murphy:

Capital One Financial Corporation (Capital One)¹ is pleased to submit comments to the Securities and Exchange Commission (Commission) regarding the proposed rule on the registration of municipal advisors.² The proposed rule implements section 975 of Title IX of the Dodd-Frank Act (DFA) which requires that municipal advisors register with the Commission and the Municipal Securities Rulemaking Board (MSRB). Capital One supports the intent of DFA section 975 to require unregulated financial advisors to register with a federal regulator and the Commission's efforts to establish a permanent registration regime for municipal advisors in order to protect municipal entities and their constituents. However, we believe that the proposed rule extends the definition of municipal advisor well beyond the intent of Congress in this regard. Thus, we agree with the Commission's request for comment that the definition should contain an exclusion for banks offering traditional bank products and services.

¹ Capital One Financial Corporation (www.capitalone.com) is a financial holding company whose subsidiaries, Capital One (Europe) plc., Capital One Bank (Canada Branch), Capital One, N.A., and Capital One Bank (USA), N. A., collectively had \$122.2 billion in deposits and \$197.5 billion in total assets outstanding as of December 31, 2010. 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.

² See 76 Fed. Reg. 824 (January 6, 2011).

Without an exclusion, local bank employees providing traditional bank products and services would be captured by the expanded definition of municipal advisor

The proposed broad definition of municipal advisor encompasses local banks and their bank tellers offering traditional banking products and services. Recognizing this, the Commission requests comments on whether it should exclude from that definition banks offering traditional banking products and services.³ Capital One supports such an exclusion.

Such an exclusion is critical because the rule as proposed has the potential to inhibit the ability and willingness of banks to provide traditional banking services including insured checking, savings and certificate of deposit accounts, as well as credit facilities and cash management services, to municipal entities. These are products and services that municipal entities have come to expect and rely on. In particular, we are concerned with the Commission's interpretation of Congress' intent that the definition of "municipal advisor" includes those persons who provide advice with respect to plans, programs or assets of a municipal entity. This overly broad definition would easily capture bank tellers and other bank employees providing ordinary everyday banking services to their customers. For example, a bank teller would be caught under the definition when helping an employee of the municipal entity deposit money into the entity's checking account if the teller, seeing that the account carries a high balance, recommends a savings account or certificate of deposit that would give the entity a higher rate of return. Other bank employees would also be caught by the definition of municipal advisor as they participate in their local community activities, such as attending a community board meeting where the mayor of their town may ask them about the traditional banking services and products the bank offers.

³ The Commission requests comment on whether it should exclude from the definition of a "municipal advisor" banks

- providing advice to a municipal entity concerning transactions that involve a deposit (e.g., insured checking and savings accounts and certificates of deposit) at an insured depository institution;
- providing a listing of the options available from the bank for the short-term investment of excess cash (e.g., interest-bearing bank accounts and overnight or other periodic investment sweeps) and negotiating the terms of an investment with the municipal entity;
- providing the terms upon which the bank would purchase for the bank's own account securities issued by the municipal entity (e.g. bond anticipation notes, tax anticipation notes, or revenue anticipation notes);
- directing or executing purchases and sales of securities or other instruments with respect to funds in a trust account or other fiduciary account;
- providing other fiduciary services to municipal entities (e.g. acting as trustees with respect to governmental pension plans and other similar capacities).

See 76 Fed. Reg. at 837.

Applying the municipal advisor requirements to banks would provide little benefit to municipal entities

The result of this expansive reading of DFA section 975 is that, each local bank and each bank employee providing services, as discussed above, would be required to register as a municipal advisor with the Commission. Further, each bank would then be required to register as a municipal advisor with the MSRB. Each employee would have to complete Form MA-I. The form requires such information as the addresses of all offices at which the employee will be physically located or supervised.⁴ It is not unusual for bank branch employees to be re-assigned temporarily, for a day or even intra-day, to one of many branches within a geographic region. In a large metropolitan area, with well over 75 branches within driving distance, such a requirement would produce an enormous volume of information while adding little or nothing to the stated objective of protecting municipal entities. Further, the Form would require each applicant to list the name and address of any other business in which the applicant is engaged, as well as nature of the business, duties, start date, and approximate numbers of hours per month devoted to the other business.⁵ It is not uncommon for bank branch employees to hold second jobs on a part-time basis, often in retail service industries. Although bank employees, including bank tellers, would not be required to register individually with the MSRB⁶, the MSRB's rules for continuing education and oversight would necessarily mean that each bank would have to develop materials and procedures to ensure compliance with such rules.

In addition to the above mentioned requirements, the expansive definition of "municipal advisor" would trigger for bank employees, including bank tellers, a fiduciary relationship with the municipal entity to which they are giving advice.⁷ Changing the relationship between banks with their customers from a commercial transaction involving traditional deposit and lending products to a fiduciary relationship would be a revolutionary change. Banks provide fiduciary services in specialized areas with specially trained personnel, such as in their trust departments. Outside of such specialized areas, customers, including municipalities, do not expect a fiduciary relationship between the bank employee and themselves. Furthermore, banks have no means of knowing the details of a municipal entity's financial objectives, revenue and expense expectations, and related information that would be necessary to fulfill fiduciary responsibilities. Opening a checking account or certificate of deposit would entail a lengthy interview with municipal entity employees and the disclosure of vast amounts of municipal financial information to the bank in order for the bank to fulfill its fiduciary responsibilities.

At this point, it is difficult to quantify the full impact of the expanded definition of "municipal advisor" on banks and the products and services they provide to municipal entities. However, it is clear that traditional banks are already regulated and examined

⁴ See 76 Fed. Reg. at 840.

⁵ See *id.*

⁶ MSRB Notice 2010-50 (November 15, 2010)

⁷ See DFA amending section 15B(c)1 of the Securities Exchange Act, 15 U.S.C. 78a *et seq.*

closely by their regulators, such as the FDIC, the OCC, and the Federal Reserve, on a regular basis. Adding an additional layer of registration and regulation on top of the pre-existing regulatory structure results in little or nothing to the protection of municipal entities but would result in banks pulling back the level of service and products it currently provides municipal entities. To avoid such an adverse impact on local banks and municipal entities, we support the Commission adopting an exclusion from the definition of "municipal advisors" for banks offering traditional banking products and services.

* * *

Capital One appreciates the opportunity to comment on the proposed rule on the registration of municipal advisors. If you would like to discuss our comments, please contact Steven Brownlee, Associate General Counsel, at (703) 720-6491.

Sincerely,

A handwritten signature in blue ink, appearing to read "Charles V. Motil", with a long horizontal flourish extending to the right.

Charles V. Motil
Head of Government Banking