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August 13, 2009

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Via e-mail: rule-comments@sec.gov

Re: File Number S7-10-09 (Facilitating Shareholder Director Nominations)

Dear Ms. Murphy:

This comment letter is respectfully submitted by American Express Company in connection with the Commission's proposed rule on Facilitating Shareholder Director Nominations.

American Express supports amending Rule 14a-8 to facilitate shareholder proxy access and to foster the goals stated by the Commission in its proposing release, but does not believe that the Commission should adopt proposed Rule 14a-11 at this time. We believe that shareholders should determine the form of proxy access desirable for their companies, and that companies and shareholders should have the flexibility to experiment with different forms of proxy access regimes. We believe that this approach, which some have termed "private ordering", will be the most effective way to resolve issues related to proxy access and result in proxy access systems that are compatible with the particular needs and circumstances of a company.

If, after a number of years, the Commission determines that it is necessary to provide for proxy access at all public companies, the Commission would then have the benefit of actual experience to determine the optimal parameters of the rule and achieve the goal to promote Board accountability at companies that have not been responsive to shareholders.

Should the Commission determine to adopt proposed Rule 14a-11 at this time, we comment on a number of the issues raised in the release.

Shareholders should determine the form of proxy access for their companies.

Proxy access may indeed be a desirable reform at companies that shareholders consider to be poorly governed and unresponsive to shareholder concerns. At other companies, shareholders may feel that the costs to the Company (cash costs, management and Board distraction and negative media coverage) outweigh the benefits, given their

satisfaction with the state of governance and avenues of assuring Board accountability at their company. Reasonable shareholders will have different views of the matter, and accordingly we believe it should be up to a company's shareholders to determine whether it is a desirable process for their company and, if so, what the parameters of the rule should be.

For example, under virtually all companies' majority voting standards, when an election becomes contested, as would be the case if a proxy nominee were included in an issuer's proxy statement, plurality voting supersedes majority voting and the candidates no longer need to receive the affirmative votes of a majority of votes cast. Shareholders may feel that a majority voting requirement is more valuable in assuring director accountability and effective governance and accordingly desire to condition proxy access on more stringent triggers than contained in proposed Rule 14a-11.

Accordingly, we support amending Rule 14a-8 to facilitate shareholder proposals on proxy access, thereby allowing companies and shareholders to adopt substantive proxy access regimes that suit their particular circumstances and their views as to the state of governance and accountability at their particular company. We believe that over a short period of time, thoughtful proxy access proposals would be considered at many companies, both through Rule 14a-8 and, after discussion with shareholders, through management proposals.

Mandatory proxy access is not necessary to hold directors accountable at the wide majority of companies.

Shareholders do communicate with and influence Boards of Directors. Over the past few years, there has been a dramatic increase in the number of companies with enhanced corporate governance policies, including in addition to majority voting for directors, dismemberment of classified boards and of board adopted shareholder rights plans, repeal of super-majority voting requirements and other anti-takeover measures, and increased Board independence. These reforms have come about through the urging of retail and institutional shareholders. Additional reforms that have been adopted or are under serious consideration include the Commission's proposed rules for increased proxy disclosure about director candidates, the recent amendments to Rule 452, and the holding of advisory votes on executive compensation.

Further, directors that are not responsive to shareholders increasingly face "Just Vote No" and "Withhold Vote" campaigns, withhold or against vote recommendations from influential proxy advisory services, adverse media scrutiny and failed elections. With the widespread adoption of majority voting in uncontested director elections, the recent amendments to Rule 452 prohibiting discretionary broker voting in these elections, and shareholders' sophisticated use of the internet to organize campaigns, shareholders more than ever before have the means to determine who remains on the Board. This is a significant lever to assure Board accountability.

We do not believe that universal proxy access is therefore necessary to hold directors accountable in the wide majority of companies. Situations where a specific Board has been unresponsive can be addressed by the shareholders of that company proposing and adopting proxy access, or through a triggering event that ties federally mandated proxy access to a governance failure (such as Board failure to act on a shareholder proposal that received a majority vote or refusal to accept the resignation of a director who received less than a majority of votes cast).

The Commission should adopt a prescriptive proxy access regime only after and in light of U.S. companies' actual experiences with proxy access for at least several years.

Many commentators expressed concern in 2003 that mandatory proxy access will lead to less effective governance because it significantly increases the prospect of divided Boards or directors that represent narrow interests rather than the interests of shareholders as a whole. Others expressed concern that a relatively small group of shareholders may use the threat of a proxy contest to promote a short-term goal, to the detriment of the long-term interests of a corporation. These concerns are still valid.

We believe that proxy contests (and threats of proxy contests) should be the exception, not the rule. We are concerned that the atmosphere of trust and candor that is a necessary ingredient of effective Board functioning would be threatened when one or more persons, not vetted by the nominating committee, is thrust into the Boardroom. These concerns are not based on a desire to maintain the status quo or to shield directors from new or conflicting viewpoints. Rather, many directors feel that only in an atmosphere of trust and a sense of shared purpose can candid, probing, free-ranging discussion occur. When even one dissident or single-issue director joins a board, the atmosphere of trust can be lost, members can become guarded and discussion may no longer be free and open.

At the moment, we just don't know how proxy access will operate in practice and how it will affect U.S. companies and Board functioning. We don't know how prevalent the use of proxy access will be; who will use it and how they will use it; the result on Board effectiveness; whether the confusion of a single ballot will end up further disenfranchising retail holders -- to name only a few of the unanswered questions. Therefore, we don't know what the optimal parameters of a proxy access rule should be.

In light of these legitimate concerns, we urge the Commission to take no action beyond revision of Rule 14a-8(i)(8) until a body of experience has been developed concerning implementation and operation of proxy access at a meaningful number of companies.

If the Commission does determine to adopt proposed Rule 14a-11 at this time, we believe the following modifications to the rule should apply.

Shareholders should be free to modify the rule or even reject it entirely.

In order to preserve the ability of shareholders to make their own decisions with respect to proxy access, we believe that any prescriptive rule that is adopted by the Commission should include provisions allowing shareholders to modify Rule 14a-11 or to eliminate it in its entirety through shareholder approved by-laws. For example, recently, an influential union submitted numerous shareholder proposals to companies seeking a triennial advisory vote on executive compensation as an alternative to an annual "say on pay" vote. This was a thoughtful proposal that sought to address the perceived problems with an annual vote. We think that shareholders and companies should similarly be able to experiment with various proxy access regimes. In order to encourage this private ordering, the Commission could delay the effectiveness of any mandatory proxy access rule to give shareholders and their companies an opportunity to adopt proxy access by-laws.

Higher trigger thresholds should apply.

The costs and disruption to the Company of a proxy contest is borne by all shareholders. We believe that 1% of a corporation's outstanding shares, especially when an unlimited number of shareholders can aggregate their holdings to achieve that 1%, is an insufficient showing of support to warrant the placing of a dissident candidate in the corporation's proxy materials. A mere 1% showing of interest in a candidate is no predictor of success, and the inability to aggregate more than 1% would be a more likely predictor of failure.

We suggest a holding of at least 5% for a single nominating shareholder and 10% for a group should be required to subject a company to the costs and disruption of a proxy contest. This threshold strikes the appropriate balance to ensure that the nominating holders represent a significant portion of shareholders before subjecting the company to the substantial cost, disruption and adverse publicity of a proxy contest. We note that at our company, several shareholders currently could meet this threshold alone and many more could meet this threshold with only one or a small number of other shareholders.

Persons Soliciting Participation in a Nominating Group and Members of that Group Should be Required to Have Bona Fide Intent to Nominate and Disclaim Control Intent.

We also recommend that the rule amendment creating an exemption from the proxy rules for a nominating group specifically require a certification by the person or persons soliciting other holders to join the group that the sole purpose of the solicitation is to form a nominating group, that it or they have a bona fide intent to make a nomination and that they do not have a "control" intent. We believe all members of the

group should be required to make a similar certification as to their bona fide intent to make a nomination and to disclaim any control intent. Absent such limitations, we are concerned that a party could commence a solicitation for purposes of "testing the waters" for purposes other than a proxy access nomination, such as formation of a Section 13(d) group with a control intent.

A two-year "net long" ownership requirement should apply.

The premise of the ownership requirement is that a long-term beneficial owner with a meaningful economic interest would have a continuing interest in the success of the company consistent with the interests of other long-term investors. In addition to voting power the ownership should also entail exposure to economic risk in order to ensure that the nominating shareholder has an economic interest aligned with the long-term investors in the company.

In order to ensure this is the case, the ownership requirement should be increased to two years of continuous ownership, evidenced by a net long economic position (i.e., no "hedging" of economic risk). In order for the nominee to be elected, this beneficial ownership must continue at least through the election and be evidenced by certification of the nominating shareholder(s).

Limitations on the Number of Proxy Access Nominees.

In order to assure that proxy access does not facilitate a change of control at a company, the most any single shareholder or group of shareholders should be able to nominate is a single director and, in any one proxy season, no more than 10% of the Board should be eligible to be nominated through proxy access.

Realistically, the ability of a single shareholder or group to nominate 25% of a Board gives that shareholder or group practical control. In this regard, we note that under the Change in Bank Control Act, an acquirer of 10% of a public company's shares is deemed to control the entity if that acquirer has even one Board seat or the right to nominate even one candidate to serve on the Board.

The proposed rule is silent on the situation where the company's nominating committee includes in its slate a director who was elected as a shareholder nominee the previous year (which we refer to as a "proxy access director"). We believe the proper way to address this is to provide that the number of total nominees for which access must be provided in respect of an annual meeting is reduced by the number of proxy access directors re-nominated by the Board. A director's status as a proxy access director would cease after a period, which we suggest as three years, of continuous service on the Board. Otherwise, over a period of years, the election of a succession of proxy access directors could in our view severely disrupt Board functioning. The three-year continuity of status as a proxy access director will enhance the opportunity for the access director to be integrated into the Board without the concern of adverse consequences to the Board

composition in terms of his or her re-nomination opening a slot for an additional proxy access director.

Finally, if a company is or prior to the meeting becomes the subject of a proxy contest outside of the proxy access regime, none of the proxy access nominees should remain eligible for election to the board. We believe two simultaneous election contests under different rules would be confusing to shareholders. We are also concerned about the potential for cooperation between supporters of the proxy access nominee(s) and the proponents of the conventional proxy contest, and feel that in such a situation, even without any cooperation, election of the proxy access nominee(s) in conjunction with a successful short slate proxy contest could actually effect a change of control, which is inconsistent with the premise of proxy access.

Additional disclosure should be required with respect to Nominating Shareholder(s) and Nominees; Nominating Shareholder(s) should represent that information provided for the proxy statement contains no material misstatements or omissions; and Nominees should be required to furnish information by which the company could validate independence.

Shareholders should receive full disclosure about the nominating shareholder(s) and the nominee(s) to be able to assess the reasons for mounting the election contest and the implications for the company if the proxy access nominee(s) were to be elected.

The required disclosure should include the following plus any additional information required in a company's advance notice bylaws: (a) the name and record address of the nominating shareholder(s) and the class, series and number of all securities of the company owned of record or beneficially by such holder(s), (b) whether and the extent to which any derivative instrument, swap, option, warrant, short interest, hedge or profit interest has been entered into by or on behalf of such holder or any of its affiliates or associates with respect to shares of the company, (c) whether any other transaction, agreement, arrangement or understanding (including any short position or any borrowing or lending of shares) has been made by or on behalf of such holder(s) or any of its affiliates or associates, the effect or intent of which is to mitigate loss to, or to manage the risk or benefit of share price changes for, such holder(s) or any of its affiliates or associates or to increase or decrease the voting power or pecuniary or economic interest of such holder or any of its affiliates or associates with respect to the shares of the company, (d) a description of all arrangements and understandings between any nominating shareholder(s) and each proposed nominee and any other person or persons (including their names) pursuant to which the nomination(s) were made by the nominating shareholders(s), (e) a description of all relationships between the nominating shareholder(s) and the nominee, including family or employment relationships, ownership interests, commercial relationships and other arrangements or agreements, and (e) such other information as is required to be disclosed in solicitations for proxies for elections of directors under the Commission's current proxy rules.

We also believe that shareholders are entitled to know what percentage of the board would actually meet the company's independence criteria after the election. Each nominee should therefore be required to provide a written undertaking to the Company to furnish the Company information it may reasonably request for the purpose of determining such individual's eligibility to serve as a director and such individual's independence and failure to do so should disqualify the nominee. Such information, for example, could include the directors' questionnaire that many companies require each year from their directors. In addition, the nominee should be required to consent in writing to a background check, if that is the process that the company follows to vet all its proposed director nominees.

Finally, the nominating shareholder(s) should represent that there are no material misstatements or omissions in the materials submitted by the nominating shareholder(s) for inclusion in the company's proxy statement. We do not see any benefit to shifting liability to the company, as there is no mechanism for the company to omit or refuse to print any information provided by the nominating shareholder(s) that it believes is false or misleading. As currently proposed, the company could be forced to postpone the meeting and litigate the matter if the shareholder did not agree to amend any statements that the company believed created potential liability. That would not benefit anyone. The rule could provide a statement from the company in the proxy that it takes no responsibility for the information provided by the holder(s), and that it has received the representation from the holder(s) as to no material misstatements or omissions. In that way, shareholders would understand that the company has not vetted the material submitted by the holder(s) but is relying on that representation. This is similar to shareholders' expectations as to supporting statements contained in proxy statements with respect to shareholder proposals.

The Nominee should be independent of the Nominating Shareholder(s).

The Commission has asked for views on whether the shareholder nominee should be required to be independent from the nominating shareholder, as was required in the Commission's 2003 proposal. We believe that such a restriction is appropriate to ensure that the nominee acts in the interest of all shareholders and is not disposed to advance the interests of a nominating shareholder.

This requirement would address legitimate concerns about the risk of "narrow interest" directors.

Timetable Concerns.

Proposed Rule 14a-11 provides that if a company has an advance notice by-law provision, a nominating shareholder could provide notice to the company of its Schedule 14N as late as the final date under the advance notice by-law. As is the case for many companies, our advance notice by-law provides a minimum notice period of **90 days before the date of our prior year's annual meeting**. Assuming that we hold our annual meeting on April 27, as we did this year, and file our definitive proxy statement on or

about March 13 (in accordance with our typical schedule, giving us 6 weeks to solicit proxies), the rule would require that we make the no-action request no later than December 23 of the prior year (**80 days before the filing of the definitive proxy**). However, shareholders would have until January 27 (90 days before April 27) to even file their Schedule 14N. We think it benefits shareholders to have an advance notice by-law with a notice period that is relatively close to the annual meeting, so we propose that the deadline for proxy access not be tied to the advance notice by-law deadline.

We propose that nominating shareholders be required to provide the information concerning the nominee as is provided in a company's director questionnaire; and that each nominee be required to furnish a written consent for a background check, all in order for the Company to determine eligibility, independence and conformity with the company's director qualifications and to have enough time to give adequate consideration to the proposed nominee. In a comment letter submitted to the Commission and dated August 11, 2009, the law firm of Davis Polk suggested a window period for nominations selected by the company and that begins on a Monday that is at least 180 days after the date the prior year's proxy materials were mailed, and ends on the Friday of the fourth week thereafter. We agree with this approach and agree that this would give companies sufficient notice to handle the process in an orderly way, including invoking any dispute resolution process or negotiating with the nominating shareholder(s) or both.

The proposed rule is silent on what happens if it is later determined that one or more nominees does not meet the eligibility requirements. This could happen for a number of reasons, including a change in status of a nominee or determination after the end of the year that payments made to an affiliated entity caused the nominee to become ineligible. (For example, for a NYSE listed company, a director would not be considered independent if the director is a current employee or an immediate family member is an executive officer of an entity that made payments to or received payments from the company for property or services in an amount which, in any of the last three fiscal years, exceeded the greater of $1 million or 2% of such other company's consolidated gross revenues.) As this cannot be determined until some period of time after year-end, we believe a company should still be able to exclude the nominee in this circumstance so long as the proxy statement has not yet been mailed.

We believe the proxy access rule should not permit substitution of proxy access nominees if an original nominee is determined not to be eligible or otherwise becomes unavailable to serve later than the cut-off date for filing the Schedule 14N. We do not see that any other outcome is workable, as neither the company nor the nominating shareholder(s) would have sufficient time to investigate, negotiate with each other, and resolve disputes.

Proxy Ballot.

We believe that issuers should not be precluded from preparing a ballot that permits shareholders to vote for all of management's nominees. We do not think it unfairly prejudices a nominating shareholder to permit shareholders who desire to vote

that way an easy way to so vote, so long as the ballot accurately and clearly advises shareholders how it will be voted. Similarly, issuers should be able to include an instruction that signing the proxy, without further instructions, will be deemed to be a vote in accordance with management's recommendations. Shareholders are used to this, and there is a risk that they will continue to complete their proxies this way. We do not think such shareholders should be disenfranchised.

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We appreciate the opportunity to submit these comments. The workings of a proxy access rule are complex. We believe that with the proposed revisions to Rule 14a-8(i)(8), shareholders and companies will over a number of proxy seasons find best practices and a range of approaches that satisfactorily balance the issues presented by the Commission's proposal. We urge the Commission to allow that to occur.

Sincerely,

Carol V. Schwartz

Carol V. Schwartz
Secretary and Chief Governance Officer

cc: Hon. Mary L. Schaprio, Chairman
Hon. Luis A. Aguilar, Commissioner
Hon. Kathleen L. Casey, Commissioner
Hon. Troy A. Paredes, Commissioner
Hon. Elisse B. Walter, Commissioner