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August 17, 2009

Ms. Elizabeth M. Murphy, Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Via e-mail  
[rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Re: Facilitating Shareholder Director Nominations  
Release Nos. 33-9046; 34-60089; IC-28765  
File No. S7-10-09 (June 10, 2009)

Dear Ms. Murphy:

U.S. Bancorp appreciates this opportunity to provide comments on the shareholder proxy access rules proposed by the Securities and Exchange Commission (the "Commission") in the releases referenced above (the "Proposed Access Rules").

U.S. Bancorp is a Delaware corporation and the parent of U.S. Bank National Association, the sixth largest commercial bank in the United States. U.S. Bancorp has more than 1.7 billion shares of common stock outstanding, and our shares are held by more than 500,000 beneficial owners.

U.S. Bancorp is one of the strongest and most successful financial services companies in the United States. Our Board of Directors and management are dedicated to exemplary corporate governance, and believe good corporate governance is vital to our continued success.

As a company keenly interested in evolving corporate governance practices, U.S. Bancorp has carefully reviewed, and has strong views regarding the implementation of, the Proposed Access Rules. We do not believe the Commission should adopt a mandatory one-size-fits-all federal rule imposing proxy access on all public companies. Instead, we believe the Commission should encourage the development of a more flexible approach to proxy access that allows companies to adopt individualized approaches.

In order to achieve this goal, the Commission should amend its shareholder proposal rules to permit proxy access bylaw amendment proposals. By amending Rule

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14a-8 so that it is no longer an impediment to the “private ordering” of proxy access, shareholders and management will be able to work out mutually acceptable shareholder proxy access standards through the development of appropriate bylaw provisions.

In the event the Commission disagrees with our views and decides to adopt a mandatory federal proxy access rule, we believe fundamental changes should be made to Rule 14a-11 in its proposed form. Rule 14a-11 is intended to ensure that shareholders can hold the board of directors accountable for advancing the long-term interests of the company and shareholders. As discussed below, we believe Rule 14a-11 as currently proposed would undermine this very objective by facilitating the election of “special-interest” and “single issue” directors.

#### We Oppose the Adoption of Proposed Rule 14a-11

Under proposed Rule 14a-11, a shareholder or shareholder group would be able to require that its nominees be included in a company’s proxy materials if the nominating shareholder or group meets certain criteria (*e.g.*, minimum ownership level, holding period, no “control” purpose and independence). As proposed, new Rule 14a-11 would establish proxy access standards that could not be modified by the company’s charter documents or state law to impose more stringent requirements.

We oppose a federally mandated proxy access rule. We believe proposed Rule 14a-11 could be misused by special-interest shareholders to promote private agendas that are detrimental to the interests of our other shareholders and the company as whole. Under Rule 14a-11, a shareholder or shareholder group owning only 1% of the outstanding shares of our common stock could obtain access to our proxy statement to nominate directors. Because of our high profile as a leading financial institution, we are particularly concerned that Rule 14a-11 would be used by special-interest shareholders that do not own a meaningful percentage of our stock to advance a variety of public policy positions that may actually be detrimental to our business and the best interests of the vast majority of our shareholders. This use of Rule 14a-11 would undermine the primary goal of nominating qualified directors dedicated to increasing long-term shareholder value.

In addition, proposed Rule 14a-11 undercuts one of the fundamental elements of good corporate governance by eliminating the judgments of shareholders and boards of directors in determining how to best govern the corporation. In establishing standards for proxy access, companies need flexibility because their shareholder bases, voting rights and governance practices relating to the election of directors vary considerably. If Rule 14a-11 is adopted as proposed, shareholders and boards of directors will be unable to work out their own standards for shareholder access.

Shareholders and boards of directors should be permitted to develop proxy access rights that are compatible with the particular needs and circumstances of their company. For example, in the case of U.S. Bancorp, we would want to adopt proxy access rules that limit the ability of special-interest shareholders to hijack the director election process.

In recent years, many public companies have made significant changes in their corporate governance practices, primarily as a result of engaging their shareholders on governance issues. The recent experience with the majority-election movement shows how quickly and effectively changes in corporate governance standards can be effected based on private ordering. In the last three years, a majority of S&P 500 companies have adopted majority voting rules for the election of directors. Similarly, due in part to shareholder proposals requesting companies to declassify their boards, the percentage of S&P 500 companies with classified boards has declined dramatically in the last 10 years. U.S. Bancorp specifically has made certain changes to its governing documents after dialogue with its shareholders, such as eliminating our classified board structure and terminating our shareholder rights plan.

#### We Support the Amendment of Rule 14a-8 to Permit Proposals regarding Proxy-Access Bylaws

If Rule 14a-8(i)(8) were amended to eliminate the provision allowing companies to exclude shareholder proposals relating to procedures for the nomination or election of directors, the shareholders and the board of directors could develop appropriate criteria and procedures for proxy access through the shareholder proposal process.

As discussed above, we support a private ordering approach to corporate governance, and believe shareholders and companies may work together to establish shareholder access procedures that meet the particular needs of individual companies. If Rule 14a-8(i)(8) is amended to permit shareholders to have proposals regarding shareholder access included in the company's proxy materials, this well-understood mechanism for receiving shareholder input could be used to develop appropriate proxy access rules.

#### If Proxy Access Rules Are Adopted, Proposed Rule 14a-11 Should Be Significantly Revised

As discussed above, we oppose the implementation of proposed Rule 14a-11. However, if the Commission decides to adopt a federal proxy access right, we believe that significant modifications should be made to proposed Rule 14a-11.

More than anything else, we believe Rule 14a-11 should be revised to allow a company to adopt more stringent proxy access standards than those provided for in the

proposed rule. Companies should be allowed to place reasonable restrictions on proxy access to promote orderly corporate governance and prevent special-interest shareholders from misusing Rule 14a-11. We believe that, if proposed Rule 14a-11 is adopted, companies and their shareholders should be permitted to “opt out” of the rule by adopting their own form of proxy access procedures. Accordingly, we recommend that proposed Rule 14a-11 apply only to companies that have not opted out of the rule prior to the first annual meeting of shareholders after the adoption of Rule 14a-11 by the Commission.

U.S. Bancorp supports the primary objective of the Proposed Access Rules, which is to remove barriers to shareholders being able to hold boards of directors accountable for advancing the long-term best interests of the company. However, we are concerned that a number of the provisions of Rule 14a-11 as proposed will undercut this objective.

Specifically, we are concerned that, if Rule 14a-11 is adopted in its present form, directors nominated by a particular shareholder may advance short-term financial gain or narrow special-interest agendas that are in conflict with the long-term best interests of the company’s broader shareholder base. In order to mitigate these concerns, we believe Rule 14a-11 should be revised as follows:

- **Share Ownership Threshold.** A higher level of share ownership should be required for proxy access. U.S. Bancorp is a large accelerated filer. As a result, under proposed Rule 14a-11, a shareholder or shareholder group owning a mere 1% of the outstanding shares of our common stock could obtain access to our proxy materials to nominate directors. The proposed ownership eligibility threshold is exceedingly low, particularly because the rule permits shareholders to aggregate their holdings to meet the threshold. Because of the significant monetary and intangible costs of proxy election contests, which are borne by all shareholders, only significant shareholders with real “skin-in-the-game” should be given proxy access. We are concerned that the proposed share ownership threshold is so low that it will encourage special-interest shareholders to nominate their own candidates or threaten to make nominations in order to extract concessions from the company. As a very large financial institution, our company receives a great deal of media attention. Financial institutions are now viewed by some as “quasi-governmental” entities, and have become targets of critics attempting to advance broad agendas aimed at the financial services industry, or even society, as a whole. We do not believe Rule 14a-11 should be adopted if it contains a provision that would allow shareholders which do not own a meaningful percentage of the company’s stock to abuse the director election process by advancing these agendas, which may be inconsistent with the long-term best interests of the company and its other shareholders. We

would suggest that a 5% threshold would be a more appropriate ownership level for a shareholder, and some higher percentage for a shareholder group, to advance a director nominee and force the company to expend the significant resources required in a director election contest.

- **Type of Share Ownership.** Rule 14a-11 should be clarified to define the type of share ownership that is required to meet the share ownership threshold requirements for proxy access. Derivative securities, which often de-couple economic interests from voting rights, are common in today's equity markets. As a result, we recommend that Rule 14a-11 require a nominating shareholder to have sole voting rights and a full economic interest in the shares it holds. Specifically, Rule 14a-11 should require the nominating shareholder to have a net long beneficial ownership position in its shares during the entire requisite holding period provided for in the rule.
- **Prioritization of Nominations.** The shareholder or shareholder group that owns the most shares should be given priority in making director nominations. As proposed, Rule 14a-11 contains a "first-in-time" rule that gives priority to the shareholder that first notifies the company. We believe Rule 14a-11 should be revised to provide a selection criterion among competing nominators that has more relevance to the process than a successful race to the mailbox. More importantly, we believe that it is appropriate for the shareholders with the largest economic stake in the company to be given priority in the proxy access process.
- **Holding Period.** Under proposed Rule 14a-11, a nominating shareholder is required to have had the requisite level of share ownership for at least one year, and to certify that this ownership level will be maintained through the date of the annual meeting. Only holders of a significant long-term interest in the company should be allowed proxy access under Rule 14a-11, and we do not believe that shareholders which have held their shares for only one year meet this standard. As an alternative to the Commission's proposal, we recommend that a nominating shareholder seeking proxy access be required to have held its shares for a minimum of two years, and to agree to continue to hold the shares through the end of its nominee's first term as a director. We further recommend that the nominee be required to tender his or her resignation from the board if the requisite level of share ownership is not maintained throughout this period.
- **Limit on Number of Nominees.** The limit on the number of director candidates that can be nominated by shareholders pursuant to proposed Rule 14a-11 is too high. Under the proposed rule, a company would be

required to include nominees representing up to 25% of its directors. Accordingly, a single shareholder owning only 1% of the outstanding shares of common stock of U.S. Bancorp could potentially nominate up to 25% of our directors. Obviously, the ratio of 1% economic interest to 25% nominating power is disproportionately high. U.S. Bancorp currently has 13 directors, and, under proposed Rule 14a-11, shareholders could nominate up to three directors. In any given year, we would need to manage a director election process involving up to three director candidates nominated by shareholders. In addition, we believe that adding three new directors with no prior experience on the U.S. Bancorp board could significantly disrupt the functioning of our Board of Directors. The addition of three directors who may not share the other directors' views on managing the company would likely result in a less cohesive board that is less able to reach consensus on important issues facing the company. As an alternative to the limit on director nominees proposed in Rule 14a-11, we recommend that no single shareholder or shareholder group should be allowed to nominate more than one director, with the total number of shareholder nominees constituting no more than 15% of the directors.

- **Relationship between Nominee and Nominating Shareholder.** Rule 14a-11 should require that any director candidate nominated by a shareholder be independent of the nominating shareholder. Without an independence requirement, there can be no assurance that a shareholder nominee will not be unduly influenced by the nominating shareholder in a way that prevents the nominee from properly exercising his or her fiduciary duties to all shareholders. A Rule 14a-11 requirement that a director nominee be independent of the nominating shareholder would be consistent with the proxy access proposal made by the Commission in 2003, when the Commission expressed concern regarding the possibility that proxy access could result in "special-interest" or "single issue" directors.
- **Independence and Qualifications.** Proposed Rule 14a-11 requires that a shareholder nominee meet the objective criteria for independence set forth in the rules of the applicable national securities exchange. No other qualifications are required. U.S. Bancorp has invested a significant amount of time and effort to ensure that our directors meet stringent independence requirements and are highly qualified to serve on our Board. Our carefully developed independence and qualification standards are set forth in our corporate governance guidelines. We strongly believe that Rule 14a-11 should be revised to require that any shareholder nominee meet the independence and qualification requirements of a company so long as they are applicable to all directors on a non-discriminatory basis. In addition,

Rule 14a-11 should include a requirement that shareholder nominees disclose any significant shareholdings in competitors of the company. Finally, we believe that director candidates nominated pursuant to Rule 14a-11 should be obligated to have an interview with the governance or nominating committee of the company's board, so that the board can develop a better-informed opinion of the candidate, and fulfill its responsibility to recommend the best-qualified candidates and ensure the most desirable overall composition of the board.

- **Information Required.** Under U.S. Bancorp's bylaws, shareholders nominating a director candidate are required to provide the company with certain important information regarding the nominating shareholder and its nominee. For example, the nominating shareholder is required to disclose any derivative positions it has with respect to our common stock. Director candidates nominated by a shareholder are required to complete a detailed questionnaire relating to the nominee's independence and qualifications to serve as a director. In addition to complying with the disclosure requirements of Schedule 14N under Rule 14a-11, we believe any shareholder seeking proxy access should be required to provide U.S. Bancorp with the same information required by our bylaws to be disclosed by any other shareholder making a director nomination.
- **Contested Elections.** We believe Rule 14a-11 should be revised to eliminate a proxy access right if a company is engaged in a proxy contest in which proxies are being solicited by a dissident shareholder pursuant to its own proxy materials. If proxy access is permitted during a traditional proxy fight, the company could be faced with shareholder-nominated directors from multiple sources. The combination of these nominations could result in a change of a majority of the company's board of directors. Because a basic premise of proposed Rule 14a-11 is that the rule should not be used to effect a change in control, we believe proxy access under Rule 14a-11 should be denied in situations where the company is already engaged in a traditional proxy fight.
- **Resubmissions of Nominees.** Frequent resubmissions of director nominations by shareholders whose candidates have not been successful in past elections would be costly and disruptive to the director election process. As a result, Rule 14a-11 should include a provision that would deny proxy access to any nominating shareholder, if the shareholder has had a nominee included in the company's proxy statement in previous years and the nominee did not receive a requisite level of votes (*e.g.*, 25%). In these situations, the nominating shareholder has not received a level of support

from other shareholders sufficient to indicate that its nominee has a reasonable chance of being elected, and repeated use of the company's proxy materials is not justified. The need for a restriction on resubmissions is particularly important because of the significant cost of annual director election contests.

- **Proxy Card.** We believe Rule 14a-11 will complicate the proxy voting process, and create shareholder confusion in any election in which a shareholder nominee is included on the company's proxy card. In particular, we object to the provision of proposed Rule 14a-11 under which a shareholder may not be granted authority to vote for a company's nominees as a group if the proxy card contains a shareholder nominee. At U.S. Bancorp, we have a careful selection process involving the entire slate of nominees, which takes into account the expertise and experience of the director slate as a whole. For this reason, we strongly believe that shareholders should be allowed to vote for the company's nominees as a group, and recommend that the Commission provide in Rule 14a-11 that any proxy card containing a shareholder nominee which is voted in blank continue to be treated as a vote for the entire slate of management nominees.

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In summary, we strongly recommend that the Commission not implement Rule 14a-11, but rather allow a more flexible private ordering approach that allows shareholders and companies to develop proxy access procedures that are suited to each company's particular needs and circumstances. If the Commission rejects this recommendation, we hope that the Commission will consider our suggested revisions to Rule 14a-11. We appreciate the opportunity to provide comment on the important proposals contained in the Proposed Access Rules.

Sincerely,

U.S. BANCORP



Lee R. Mitau  
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and General Counsel