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Via electronic delivery

Robert deV. Frierson
Secretary
Board of Governors of the Federal Reserve System
20^{th} Street & Constitution Avenue NW
Washington, DC 20551

Docket No.1536 and RIN No. 7100 AE–50

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7^{th} Street SW, Suite 3E–218
Mail Stop 9W–11
Washington, DC 20219

Docket ID OCC–2011–0001 and RIN No. 1557-AD39

Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17^{th} Street NW
Washington, DC 20429

RIN No. 3064–AD86

Re: Incentive-Based Compensation Arrangements

Ladies and Gentlemen:

American Express Company on behalf of itself and its two FDIC-insured institutions American Express Centurion Bank, a Utah industrial loan bank, and American Express Bank, FSB, a federal savings bank (hereafter the "Company" or "American Express") appreciates the opportunity to provide comments to the proposed regulations on incentive-based compensation ("Proposed Regulations") issued pursuant to Section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Section 956"). The Proposed Regulations prohibit any types of incentive compensation arrangements that encourage inappropriate risks by employees of a covered financial institution.

American Express supports the Regulators' policy objective that the design of incentive compensation programs should not encourage employees to take imprudent risks, thereby jeopardizing the safety and soundness of the institution. We respectfully note, however, that certain sections of the Proposed Regulations do not align with the intent expressed in the Introduction of the Proposed Regulations. We believe a better way forward is to build off the approach currently employed by the FRB, the FDIC, the OCC and the OTS pursuant to the 2010 Federal Banking Agency Guidance on Sound Incentive Compensation Policies ("Guidance") which requires that incentive compensation programs are risk balanced and do not incent employees to take imprudent risk.

We address herein those provisions of the Proposed Regulations that we believe are both inconsistent with the overall objectives of the Proposed Regulations and the most challenging to comply with, as well as our suggested alternatives.

I. Executive Summary

American Express supports the Regulators' policy objectives that the design of incentive compensation programs should not encourage imprudent risk-taking activities. However, the Proposed Regulations, in their current form, do not adequately take into account the enormous amount of work covered institutions have undertaken over the last six years in conjunction with regulatory authorities to comply with the Guidance. Since the Guidance is based on the same principles as the Proposed Regulations, tightening this already established rigor, rather than setting up a new set of prescriptive rules, would be a more acceptable approach and more practical for companies, management and boards of all covered institutions.

The Proposed Regulations define "covered person", "incentive-based compensation plan" and "significant risk taker" ("SRT") with virtually no consideration of the risk posed by any given employee or incentive plan, resulting in every employee receiving incentive compensation at American Express (over 30,000 employees, 60% of the workforce) and every one of numerous incentive plans being subject to the Proposed Regulations. Our recommendation is to continue enhancing the current process under the Guidance to identify employees who can place covered institutions at risk of material financial loss and review the incentive plans applicable to them to make sure they do not incent these employees to take imprudent risk.

We agree that a deferral requirement should be applied to a portion of all forms of incentive compensation. The objective of deferring is to allow negative risk events attributable to actions taken in a given performance period to manifest before an institution pays out all of the incentive compensation. This objective, however, can be achieved without the unduly complicated approach set forth in the Proposed Regulations. We suggest that the deferral period for all forms of incentive compensation be the same and that no distinction be made between short-term and long-term incentives and cash versus equity. The deferral period should commence immediately after the award is granted and equity awards should not be subject to additional deferral periods.

Our other suggestions include either removing the maximum incentive payout limit or using a limit of 200% and starting the claw-back period when the incentives are granted. The Proposed

Regulations also need modification to avoid unintended negative accounting implications. As currently written, the Proposed Regulations are likely to create volatility in quarterly income statements that could negatively impact the financial stability of a company.

II. The Proposed Regulations Will Place the Regulated Financial Services Industry at a Competitive Disadvantage in the War for Talent

We believe implementation of the Proposed Regulations, in their current form, will cause the regulated financial services industry to be at a distinct competitive disadvantage to both unregulated financial and nonfinancial institutions because it is likely to substantially impede our ability to retain and recruit employees. Key American Express' business competitors, such as Visa, MasterCard, and PayPal, would not be subject to the restraints set forth in the Proposed Regulations. The rules restrict covered institutions' ability to compensate employees on a competitive basis, thus limiting their ability to attract and retain critical talent. The Proposed Regulations even make support jobs (e.g. communications) subject to the rules although most of these positions generate no material risk to the institutions and employees in these roles are even more employable across industries which are not subject to these rules.

III. The Definitions of "Covered Person" and "Incentive-Based Compensation Plan" Inappropriately Apply to Employees and Incentive Plans that Do Not Create Material Risk

The most challenging aspect of the Proposed Regulations is the sheer number of employees and incentive compensation plans to which they will apply to at covered institutions, especially Level 1 or Level 2 institutions.

Specifically, the Proposed Regulations derive their breadth primarily from how the terms "covered person" and "incentive-based compensation plan" are defined. The terms include any employee who receives incentive compensation and any plan that pays out incentive compensation without regard to whether an employee can create a material financial loss or the design of a plan encourages inappropriate risk taking. These broad definitions will require institutions to track hundreds of plans and thousands of employees with no consideration to the risk they pose to the enterprise at large. At American Express, our initial estimate is that the Proposed Regulations would cover over 30,000 employees, representing approximately 60% of our workforce, in over 30 countries falling under a few hundred plans. The vast majority of these employees are in roles such as customer service, back office support and staff roles and do not subject the Company to a risk of material financial loss. For example, this population would include employees in our back office support functions, who receive incentives based on the level of customer service provided to our cardmembers. There are approximately 1,600 participants in this plan, with an average payout of $3,000 annually. These employees are not taking risk on behalf of the Company, but under the Proposed Regulations would be considered "Covered Persons."

Covered institutions would also be required to ascertain whether each and every covered employee in every incentive-based compensation plan received "excessive compensation." Lacking a risk-based analysis to inform the determination of what employees and plans are covered by the Proposed Regulations is contrary to the intent of Section 956 as articulated in the Introduction to the Proposed Regulations:

> "Of particular note were incentive-based compensation arrangements for ***employees in a position to expose the institution to substantial risk*** that failed to align the employees interest with those of the institution."[1]

A risk-based analysis for identifying covered employees is also called for by the Guidance.

> "In determining whether an employee, or group of employees, may expose a banking organization to material risk, the organization should consider the full range of inherent risks arising from, or generated by, the employee's activities, even if the organization uses risk-management processes or controls to limit the risks such activities ultimately may pose to the organization."[2]

We ask that the approach outlined in the Guidance, for which large banking organizations have spent substantial time and effort developing processes for identifying significant risk-takers, be adopted for purposes of Section 956. Covered "incentive-based compensation plans" could be defined as those incentive plans in which covered employees participate. Alternatively, a banking organization could be required to do a risk-based analysis of each incentive plan, focusing on the inherent risk in metrics that drive payouts under the plan. Those plans that pose a high level of risk would be considered covered incentive-based compensation plans.

IV. The Definition of Significant Risk Taker Should Be Revised to Focus on Employees Whose Roles Expose the Company to Material Risk

Under the Proposed Regulations, employees of a Level 2 covered institution such as American Express are considered SRTs if they receive incentive-based compensation: (1) that is at least one-third of the total of their annual salary and incentive-based compensation, and (2) places them in the top 2% (based on salary and incentive-based compensation) among all employees who receive incentive-based compensation.[3] The stated intent of this definition is to "include individuals who are not senior executive officers but are in the position to put a Level 1 or Level 2 covered institution at risk of material financial loss."[4] This test will yield arbitrary results that are contrary to the stated intent, in some instances excluding employees who can expose a

[1] Federal Register, Vol. 81, No. 112, 6-2-16, page 37674. (emphasis added)

[2] Federal Register, Vol. 75, No. 122, 6-25-10, page 36407.

[3] American Express is not addressing the second test for determining significant risk-taker (the exposure test), which is based on whether an employee has authority to commit 0.5 percent or more of the Company's capital. We note that this is not intended to be an endorsement of the merits of the exposure test.

[4] Federal Register, Vol. 81, No. 112, 6-2-16, page 37692.

financial institution to material financial loss and in other instances including employees who generate virtually no risk to the institution. For example:

- Among a group of employees doing the same job such as a sales force, in any given performance year some of those employees will be SRTs under the Proposed Regulations while others will not, based solely on the amount of incentive compensation they were paid in the prior year. In the subsequent performance year, a new group of SRTs will emerge from the same group with some leaving off the significant risk-taker roster and others being added based merely on whether they had a successful year under the applicable sales incentive plan. Given that all the employees have the same role and the same opportunity to expose the institution to risk, they should all be categorized as either SRTs or not based on the nature of what they do.

- Employees in support roles such as those in communications roles, most of whom have little opportunity to generate significant risk, will be swept into the significant risk-taker category with no consideration of what they actually do.

- An employee who takes a significant risk that yields poor results and has his/her incentive compensation reduced as a result might be excluded from the significant risk-taker category in the subsequent year because of this reduction, even though the employee will still be able to take significant risk on behalf of the institution.

The fact that an employee can have the same role year after year but will not consistently be designated a SRT because of fluctuations in the amount of incentive compensation the employee receives, is very concerning. This contrasts to the process companies have adopted under the Guidance where employees who are identified as SRTs in any given year will generally remain on the roster in subsequent years unless their role changes; this is because the analysis is based on what an employee does as opposed to simply being based on what the employee gets paid.

The rationale for using a 2% figure appears to rely in part on a review of a limited sample size of Level 2 covered institutions that had "identified approximately 2 percent of their total global employees whose activities may expose the organization to material amounts of risk [based on application of the Guidance]."[5] But this explanation ignores the fact that application of the proposed 2% rule to these same institutions will yield a materially different group of SRTs than the Guidance because the 2% rule requires no analysis or review of what employees are actually doing.

We believe the process each covered institution has devised to comply with the Guidance, with input from their appropriate Federal regulator, is a far better approach for determining who is a SRT because it involves an analysis of the role itself in determining whether any given individual or groups of individuals can create material risk for the institution.

[5] Federal Register, Vol. 81, No. 112, 6-2-16, page 37695.

If in fact the current practice under the Guidance is yielding a roster of SRTs of approximately 2%,[6] we believe it would be a mistake to move to an alternative approach that yields 2% but applies no analysis of whether employees are putting the institution at risk of material financial loss while increasing the burden on covered institutions to comply.

V. Application of the Prohibition on Excessive Compensation is Overly Broad

American Express has over 30,000 employees who receive some amount of incentive compensation. All of them would be considered covered persons under the Proposed Regulations and subject to the blanket prohibition that a covered institution cannot pay them "excessive compensation." In determining whether compensation is excessive, institutions are required to consider "all relevant factors" including six specifically enumerated factors.[7] These enumerated factors include such things as "the compensation history of the covered person and other individuals with comparable expertise at the covered institution" and "compensation practices at comparable institutions, based upon such factors as asset size, geographic location, and the complexity of the covered institutions operations and assets."[8] Gathering the data required to do an excessive compensation analysis for so many employees is impractical, will require an inordinate amount of hours and resources, and will not serve the goal of protecting the safety and soundness of the covered institution.

We think a more appropriate approach to address "excessive compensation" would be to limit this prohibition to senior executive officers ("SEOs") as defined in the Proposed Regulations since these are the people making the most significant decisions and the compensation of the SEOs will be approved by the compensation committee of a covered institution each year. Even with respect to SEOs, the Proposed Regulations should be modified to clarify that the assessment of whether compensation is excessive should be based on known facts at the time the compensation decision was made and, with respect to compensation decisions made by an independent compensation committee, deference should be given to the committee if it was provided with and considered information that a prudent committee would deem relevant in making a compensation decision.

VI. The Proposed Regulations if Adopted Will Result in Unintended Accounting Implications

Based on current accounting rules, Financial Accounting Standards Board's Accounting Standards Codification (ASC) 718 Compensation – Stock Compensation, the Proposed Regulations will result in liability/variable accounting for equity-based incentives.

Variable accounting requires an accrual for an equity-based incentive award to be adjusted periodically to reflect fluctuations in the stock price as opposed to fixed accounting where an accrual is based on the stock value at the time of grant. Under variable accounting, a company's

[6] Federal Register, Vol. 81, No. 112, 6-2-16, page 37695.
[7] Federal Register, Vol. 81, No. 112, 6-2-16, page 37809, FRB Proposed Regulations Section 236.4.
[8] Federal Register, Vol. 81, No. 112, 6-2-16, page 37809, FRB Proposed Regulations Section 236.4.

Income Statement may experience greater volatility without any apparent underlying business or economic driver. This volatility in quarterly income statements, without any business drivers behind it, can negatively impact the financial stability of a company. This goes back to the very fundamental nature of the "safety and soundness" principle.

We've identified at least two provisions in the Proposed Regulations that would trigger a change from a fixed accounting approach to a variable accounting approach. First, the Proposed Regulations require that a substantial portion of equity-based compensation be deferred in cash and equity. Under the current accounting rules an equity award that is required to be settled in cash, is treated as a liability award and is accounted for using the variable approach.

Second, the rules governing the accounting for equity awards require a mutual understanding of key award terms between employers and employees to establish the cost of an equity award as of the grant date. The Proposed Regulations would require a forfeiture or reduction in equity awards granted to an employee as a consequence of intervening risk-related activities. Under the Proposed Regulations, a high level of discretion will be required to determine the number of shares of a previously granted equity award that will be permitted to vest in the event of an identified risk activity. Furthermore, it will be extremely difficult to identify and communicate all possible risk-based adjustments at the time of grant. Under accounting rules, this lack of clarity of award terms at grant may require companies to use a variable accounting approach.

Variable accounting could cause some companies to reconsider the use of equity-based incentives for employees, as it is likely to put us at a competitive disadvantage by causing the cost of equity compensation to fluctuate after it is granted. If such a change is made, the risk-balancing provided by the current incentive structure that includes a proper mix of cash and equity-based incentives, is likely to be diminished. Additionally, Board compensation committees are likely to find themselves in an extremely contradictory position—with shareholders demanding greater use of equity-based compensation and the Proposed Regulations indirectly discouraging use of such programs.

Our suggestion is to specify that any time incentive compensation is required to be deferred, it must be deferred in the same form, cash and/or equity, as the underlying incentive compensation program was designed. In other words, cash incentive programs should be deferred in cash and equity incentive programs should be deferred in equity. To support a risk-incentive balancing approach, companies could still be required to use a combination of cash and equity programs and to provide for appropriate fixed risk metrics up front that would downwardly adjust equity awards if the metrics are exceeded. This approach avoids variable accounting while allowing companies to satisfy regulators' expectations.

VII. The Deferral Requirements are Unnecessarily Complicated

Under the Proposed Regulations, covered institutions would be required to defer a significant portion of the incentive compensation from virtually every incentive-based compensation program applicable to SEOs and SRTs for a certain period of years. The Proposed Regulations explicitly require that a substantial portion of the deferral has to be cash and a substantial portion has to be equity.[9] These requirements are "intended to maximize the balancing effect of deferred incentive-based compensation, to make administration of the requirements and prohibitions easier for covered institutions, and to facilitate the Agencies' supervision for compliance."[10]

We agree that a portion of SEOs and SRTs total incentive-based compensation should be deferred for a period of time to allow risks incurred in the current performance year to manifest themselves before the compensation is paid in full. The methodology, however, set forth in the Proposed Regulations goes further than is required to achieve the stated objective because (1) it applies different deferral periods to short-term incentives (denominated as "qualifying incentive-based compensation" under the Proposed Regulations) and long-term incentives and (2) it distinguishes between cash and equity. We believe these distinctions unduly complicate the administration of incentive compensation programs without enhancing the objective of having a sufficient holdback if negative risk events occur after the performance period.

The different deferral periods for short-term and long-term incentives suggest a misunderstanding of how long-term equity incentives operate in practice. The size of an equity award for an employee is typically based on the employee's performance in a one year performance period. Payment of the award is then deferred, typically for three or four years, with vesting occurring either ratably or on a cliff basis subject to the employee's continued employment. Additionally, at regulators urging pursuant to the Guidance, as well as to recognize shareholders' preference, achievement of certain company-wide performance metrics during the deferral period is required in order for the award to vest in full for certain employees.

Thus, in calculating the deferral period for all incentive-based compensation, the time period should commence running at the end of the performance year for which the incentive compensation was granted. Any deferred incentive-based compensation should be applied toward the required deferral percentage without regard to whether it is cash or equity. In the case of equity awards, the deferral period would include the three or four year period during which the awards vest and such awards should not be required to be deferred for an additional year as required by the Proposed Regulations.

We believe the deferral objective can be achieved by requiring a fixed percentage of all incentive compensation to be deferred, both short-term and long-term incentive compensation, for the same defined period of time. This is consistent with the methodology put forth by the regulatory agencies in their initial proposed regulations on Incentive-Based Compensation Arrangements ("the 2011 Proposed Regulations"). The 2011 Proposed Regulations provided that:

> "At least 50 percent of the annual incentive-based compensation of the executive officer to be deferred over a period of no less than three years, with the release of deferred amounts to occur no faster than on a pro rata basis."[11]

[9] Federal Register, Vol. 81, No. 112, 6-2-16, page 37811.
[10] Federal Register, Vol. 81, No. 112, 6-2-16, page 37717.
[11] Federal Register, Vol. 76, No. 72, 4-14-11, page 21207.

The 2011 Proposed Regulations make no distinction between short-term and long-term incentives or cash and equity in meeting the deferral requirement and we see no basis for this distinction. We believe the regulators should adopt the approach set forth in the 2011 Proposed Regulations for SEOs. This change would provide covered institutions greater flexibility to achieve the deferral objective without having to unnecessarily redesign their existing programs.

For a level 2 institution, the Proposed Regulations would require that 40% of a SRTs' incentive-based compensation be deferred.[12] For SRTs, we suggest a deferral requirement of 25% for the first $500,000 in incentive compensation and 50% of any amounts over $500,000. Unlike SEOs, who can be expected to earn in excess of $500,000 in incentive-based compensation each year, SRTs incentive compensation may vary and we believe a lower deferral amount is appropriate for the first $500,000 in incentive-based compensation and then they should be subject to the same level of deferral as SEOs for amounts that exceed $500,000.

VIII. Other Aspects of the Rule

a. The Maximum Incentive Payout Opportunity is Too Restrictive

The Proposed Regulations prohibit incentive compensation in excess of 125% of target to SEOs and 150% of target to SRTs. We believe these limits are too restrictive, unreasonable, and redundant, considering other risk-balancing requirements that exist under the Proposed Regulations. We believe that these limitations would result in "tying our hands" as to what extent we incentivize employees and drive performance differentiation. Companies should be allowed to set reasonable goals that are stretch, but attainable. The Proposed Regulations do not allow companies to do so.

Our suggestion is to remove the maximum incentive limit since the Proposed Regulations include other mechanisms to risk balance incentives (i.e. deferral, forfeiture, downward adjustments, and claw-back requirements). If the Proposed Regulations are finalized as drafted and continue to include a limit, our suggestion is raise the limit to 200% of target for all impacted employees. This type of construct is utilized in industries unrelated to financial services and would thereby limit the impact that these Proposed Regulations might have on attracting and retaining talent in institutions subject to the Proposed Regulations. This limit allows companies to incentivize employees without providing excessive upside opportunities that could encourage imprudent risk taking activities. Further, the limit should apply on an aggregate basis to all incentives to provide design flexibility to companies in order to achieve their desired business objectives.

b. The Proposed 7-Year Claw-back Requirement Should Run Concurrently With the Deferral Period

The claw-back in the Proposed Regulations targets former and current SEOs and SRTs, and applies to all incentive compensation which has vested in the last seven years.

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[12] Federal Register, Vol. 81, No. 112, 6-2-16, page 37810.

Although we understand and support the intent of this claw-back requirement, we do also believe that it is excessive in length and unnecessary in light of other best practices and statutory mandates like risk adjustment, deferral and forfeiture. To highlight, the claw-back combined with the four-year deferral requirement on incentive compensation effectively puts a covered employee's incentive compensation at risk for up to 11 years. This, we believe, is an unnecessarily long time period and also would further obstruct the competitive positioning of the Company, making it harder to attract key talent that have opportunities in other companies and industries which do not need to comply with such requirements. Therefore, we would suggest the claw-back period of 7 years starts at the time of grant of incentive compensation awards.

c. Limiting the Value of Deferred Options to 15% of Total Incentive Compensation Does Not Advance Regulatory Objectives

The Proposed Regulations provide that in meeting the deferral requirements, companies can defer stock options but the value of stock options deferred cannot exceed 15% of the value of all incentive compensation paid to the SEO or SRT for that performance period.[13] The underlying concern for the regulators, as we understand it, is that reliance on options is too risky. We adamantly disagree; if stock options are properly designed, they align an executive's interest with the long-term success of the organization and are a valuable part of a balanced incentive-compensation mix.

We suggest that the Proposed Regulations not limit the use of stock options to meet deferral requirements and require instead that companies ensure that overall program design and pay mix are risk-balanced. Stock options are a valuable tool and companies should be able to determine the appropriate amount of stock options depending on the facts and circumstances. These programs tie incentives to a company's performance over a longer time period (typically 10 years) and are preferred by shareholders. If the final regulations include a limit on stock option deferrals, we suggest this limit be 50% and not 15%. We would also note that the use of stock options is very common in all industries and publicly-traded companies subject to SEC Regulation S-K (item 402(s)) are required to disclose compensation policies and practices as they relate to risk management practices and risk-taking incentives "to the extent that risks arising from [its] compensation policies and practices for its employees are reasonably likely to have a material adverse effect on the registrant."[14] Almost all of these companies conclude that their incentive programs, that include stock options, do not create such risks. If other industries can use stock options as a significant portion of their incentive compensation programs without any prescribed limits, the same approach should apply to banks.

d. The Definition of Control Functions Should Be Narrowed

The Proposed Regulations define Control Functions as a Compliance, Risk Management, Internal Audit, Legal, Human Resources, Accounting, Financial Reporting, or Finance role responsible for identifying, measuring, monitoring, or controlling risk-taking. This definition includes those groups (e.g., risk management) that not only "control" or "monitor" incentive

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[13] Federal Register, Vol. 81, No. 112, 6-2-16, page 37811.
[14] 17 CFR Part 229.402(s).

compensation, but also groups (e.g., Human Resources) that design and administer incentive-based compensation.

We believe that the definition of Control Functions is extremely broad and ideally should be limited to those functions that are truly controlling and monitoring risk. We suggest limiting the definition to the functions that are viewed as our Company's second and third line of defense that need to be completely neutral parties to be able to appropriately assess and monitor risk.

This would mean limiting the Control functions to Compliance, Risk Management and Internal Audit roles, and excluding Human Resources, Legal, Accounting, Financial Reporting, or other Finance roles.

Conclusion

In conclusion, we would like to reiterate that American Express strongly supports the risk-incentive balancing objective of the various agencies and has been fully committed to working with the regulators over the last six years to ensure full compliance with the Guidance. We support the spirit of continuous improvement but also would like to caution against eliminating the current structure that we and many other companies have built. Instead, we recommend building upon it.

We appreciate the agencies' consideration of our comments. Please kindly contact the undersigned with any questions.

Sincerely,

L. Kevin Cox
Chief Human Resources Officer