



**American Express Company**  
World Financial Center  
New York, NY 10285

October 15, 2009

Jennifer J. Johnson  
Secretary  
Board of Governors of the Federal Reserve System  
20th Street and Constitution Avenue, N.W.  
Washington, D.C. 20551

Mr. Robert E. Feldman  
Executive Secretary  
Federal Deposit Insurance Corporation  
550 17th Street, N.W.  
Washington, D.C. 20429

Regulation Comments  
Chief Counsel's Office  
Office of Thrift Supervision  
1700 G Street, N.W.  
Washington, D.C. 20552

Attn: Comments

Re: Notice of Proposed Rulemaking – Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance: Regulatory Capital; Impact of Modifications to Generally Accepted Accounting Principles; Consolidation of Asset-Backed Commercial Paper Programs; and Other Related Issues

Federal Reserve Board Docket No. R-1368  
FDIC RIN 3064-AD48  
OTS-2009-0015

Dear Sir or Madam:

American Express Company, American Express Travel Related Services Company, Inc. (“*TRS*”), American Express Centurion Bank (“*AECB*”) and American Express Bank, FSB (“*AEBFSB*”) and, together with American Express, TRS and AECB,

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“*American Express*”) appreciate the opportunity to comment on the interagency notice of proposed rulemaking (the “*Proposal*”)<sup>1</sup> regarding certain issues relating to the risk-based capital adequacy frameworks of the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision (the “*Agencies*”). The Proposal requests comment on the effect on the Agencies’ risk-based capital adequacy frameworks of the modifications to U.S. GAAP arising from the application of FASB Statement No. 166 *Accounting for Transfers of Financial Assets, an Amendment to FASB Statement No. 140* (“*FAS 166*”) and No. 167 *Amendment to FASB Interpretation No. 46(R)* (“*FAS 167*”). Under FAS 166 and FAS 167, a company will be required to consolidate on its balance sheet the assets, liabilities and equity of certain special-purpose vehicles in which the company has a “controlling financial interest”.

American Express generally agrees with the Agencies’ statement that regulatory capital requirements should “reflect[] the risks to which banking organizations are exposed”,<sup>2</sup> including with respect to assets transferred to a special purpose entity as part of a structured finance transaction. In light of this principle, however, American Express encourages the Agencies to consider the effects on the treatment of certain securitization arrangements, such as joint trusts (as described below), of the changes in required regulatory capital arising from the application of FAS 166 and FAS 167. The principle of control underlying the consolidation analysis in FAS 166 and FAS 167 is distinctly different from the principle of risk under the regulatory capital requirements. Thus, although the impact of the application of FAS 166 and FAS 167 on the consolidated holding company’s regulatory capital requirements is relatively straightforward, the regulatory capital requirements of a subsidiary bank could reflect risks not borne by the bank, and be duplicated across subsidiary banks. Therefore, until the Agencies can be certain that the regulatory capital treatment of securitized assets

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<sup>1</sup> 74 Fed. Reg. 47138 (Sept. 15, 2009).

<sup>2</sup> 74 Fed. Reg. at 47142.

closely reflects a banking organization's risk, the Agencies should delay the application of regulatory capital requirements to any assets (and corresponding reserves) consolidated under FAS 166 and FAS 167. Furthermore, American Express believes that the implementation of FAS 166 and FAS 167 could have a significant adverse impact on the capital positions of banking organizations that rely on structured finance transactions that share risk. Therefore, the Agencies should at a minimum consider phasing in the application of regulatory capital requirements to assets and corresponding reserves consolidated under FAS 166 and FAS 167 over a three-year period to ensure that banking organizations have adequate time to take such appropriate steps as necessary in an orderly, economical and safe and sound manner.

## **I. Information About American Express**

### *A. American Express Company and TRS*

American Express Company is a leading financial services company founded in 1850. Its principal products and services are charge and credit card payment products and travel-related services offered to consumers and businesses around the world. To support the cards that it issues to consumers and businesses, American Express Company operates a global general-purpose charge and credit card network, through which it contracts with merchants to accept cards and processes and settles card transactions for those merchants. American Express Company also offers merchants point-of-sale and back-office products and services, as well as marketing programs.

TRS is a wholly owned subsidiary of American Express Company that performs a range of activities, including those related to payment and consumer credit services and travel agency services. TRS issues charge cards, operates the American Express network and provides payment processing and card and account servicing to issuers of American Express-branded charge cards and credit cards, including AECCB and AEBFSB.

On November 14, 2008, American Express and TRS each became bank holding companies under the Bank Holding Company Act of 1956 (the “*BHC Act*”) and also elected to be treated as financial holding companies under the BHC Act.

*B. AECB*

AECB is a Utah-chartered state non-member bank, with total assets of approximately \$23.3 billion and total deposits of approximately \$10.6 billion as of June 30, 2009. AECB issues American Express revolving credit cards and certain consumer charge cards in the United States.

*C. AEBFSB*

AEBFSB is a federal savings bank, with total assets of approximately \$29.9 billion and total deposits of approximately \$10.9 billion as of June 30, 2009. AEBFSB also issues American Express revolving credit cards and certain small business charge cards in the United States.

*D. American Express Credit Account Master Trust*

American Express has established the American Express Credit Account Master Trust (the “*Lending Trust*”) to securitize receivables generated from time to time in a portfolio of designated American Express credit cards and certain consumer revolving credit accounts or features. The Lending Trust is sponsored by AECB and AEBFSB, which sell eligible receivables to affiliated depositor entities that in turn transfer such receivables to the Lending Trust. TRS acts as servicer to the Lending Trust pursuant to a servicing agreement. As of June 30, 2009, the Lending Trust had total assets of \$29.6 billion.

**II. Discussion**

American Express views the capital of a banking organization as an important tool to absorb losses, thereby protecting the organization and its shareholders, depositors and creditors from greater loss in order to avoid the organization’s failure. American Express shares the view of the Agencies that regulatory capital requirements

should carefully reflect the risk exposure of a banking organization through the risk weighting of assets and other regulatory tools.

FAS 166 and FAS 167 will require banking organizations to consolidate the assets, liabilities and equity of certain securitization vehicles onto their balance sheets. American Express expects that most credit card issuers will be required to consolidate their receivables securitization trusts as a result of the modifications set forth in FAS 166 and FAS 167. For many banking organizations, the result of this consolidation could be a significant decline in regulatory capital ratios, due primarily to increases in both risk-weighted assets and reserves. Following the implementation of these accounting standards, American Express believes that situations will exist in which current regulatory capital requirements will not appropriately reflect the risk to which a banking organization is exposed with respect to its securitization vehicles.

Until these situations can be properly evaluated and regulatory capital requirements adjusted as necessary, American Express encourages the Agencies to delay the application of regulatory capital requirements to the assets and corresponding reserves consolidated onto the balance sheets of banking organizations as a result of FAS 166 and FAS 167. Even if the Agencies choose not to delay the application of regulatory capital requirements, the application should, at a minimum, be phased in over a period of three years to allow affected banking organizations adequate time to take such appropriate steps as necessary in an orderly, economical and safe and sound manner.<sup>3</sup>

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<sup>3</sup> In addition, we note that major rating agencies have expressed concern that the FDIC will no longer treat securitized assets as assets of a third party not subject to receivership, given that FAS 166 and FAS 167 no longer provide for a "true sale" from an accounting perspective. Unless the FDIC confirms that the contracts to sell such assets to a securitization vehicle will continue to be free from repudiation in receivership, the independent ratings currently available to securitization vehicles would be compromised. Although the rating agencies' concerns do not directly relate to capital treatment, American Express shares their view that this safe harbor is necessary to ensure the continued viability of securitization structures.

*A. Joint Trusts*

The application of FAS 166 and FAS 167 to securitization trusts maintained jointly by one or more different banking organizations would lead to unintended results under current regulatory capital rules, because the regulatory capital required after consolidation under current rules would not correspond to the exposures to which the organizations maintaining the trust are exposed. Under U.S. GAAP principles as modified by FAS 166 and FAS 167, a joint trust may be consolidated onto the balance sheet of only one of the entities sponsoring the trust. As a result, under current regulatory capital rules, this consolidating entity would be required to hold capital against the entirety of the assets of the trust that are currently off-balance sheet. In some situations, however, capital may already be held against a certain portion of the trust's assets by an entity not required to consolidate the trust onto its balance sheet. For example, if an entity has provided implicit support to the trust, it would be required to hold capital against the receivables in the trust that it originated. Even if no implicit support was provided, a non-consolidating entity would still be required to hold a certain level of capital (though less than if it had provided implicit support) against the interest-only strip and accrued interest receivable balance sheet items pertaining to those receivables in the trust that it originated. In all of these cases, then, even where a non-consolidating entity is required to hold capital against a portion of the trust's assets, the consolidating entity will still be required to hold capital against the entirety of the assets of the trust that are currently off-balance sheet. This would give rise to duplicative capital requirements that clearly do not align with the respective risks borne by the entities maintaining the joint trust.

In addition, because the standard for consolidation under FAS 167 is based on a "controlling financial interest" in a securitization vehicle, it is possible in the case of a joint trust that the consolidating entity could change from time to time, as each of the entities maintaining the vehicle would be required to conduct ongoing assessments of whether the vehicle would be subject to consolidation. Under current regulatory capital rules, when such a change occurs, there could be dramatic shifts in required capital

among the entities maintaining the joint trust. Even though U.S. GAAP may require entities maintaining a joint trust to shift consolidation from time to time, there may be little or no change to the respective risks assumed by the entities. Current regulatory capital rules, therefore, may not achieve the objective of matching capital to risk exposure where joint trusts are concerned, and may subject a banking organization to rapid shifts in required capital. Raising adequate capital to account for these rapid shifts could prove difficult and costly for an organization and may ultimately impede the ability of an organization to continue lending at historical levels.

Joint trusts may also pose the problem of misalignment between the entity in which reserves are established and the entity exposed to risk of loss. U.S. GAAP would require an entity consolidating a joint trust under FAS 167 to establish reserves relative to the entire pool of assets in the joint trust. Although reserves would be established in only one of the entities maintaining the joint trust, a non-consolidating entity would still retain the risk for the portion of the receivables in the trust that it originated. This would create a scenario where the consolidating entity would accrue for reserves and a non-consolidating entity would take the losses on a cash basis, because it would not have established reserves. The result of this scenario is that capital may need to be held within multiple entities for a portion of the reserves, because the consolidating entity would need to establish reserves for the entire pool of assets and a non-consolidating entity may need to have adequate capital to absorb the losses.

For these reasons, American Express believes that the capital treatment of consolidated joint trusts must be considered in further detail to determine any necessary changes to the capital rules to ensure alignment between capital and risk. For example, capital for the same risk should only be held at one institution, particularly when the institutions maintaining the joint trust are part of the same group, to avoid the duplication of capital requirements arising from the scenarios described above.

*B. Sale of Subordinated Tranches*

Another situation in which capital requirements may not correspond to risk exposure arises with the sale by a banking organization into the market of subordinated tranches of debt issued by a consolidated securitization vehicle. In this case, although the banking organization would still be required to consolidate the vehicle under FAS 167 and hold capital against the vehicle's assets, the risk of loss would be shared by the organization *and* the buyers of these subordinated tranches. In this scenario, American Express does not believe that it is appropriate to require a banking organization to hold capital against the entirety of the vehicle's assets at the same time as a buyer of subordinated tranches is required to hold capital because of the acquisition of subordinated debt. As a result, the consolidating organization should be afforded a corresponding reduction in risk-weighted assets against which capital must be maintained.

*C. Effects on Available Capital Resources of Increases in Reserves*

Many of the assets that will be consolidated onto the balance sheets of banking organizations as a result of FAS 166 and FAS 167 will be securitized loans that, after consolidation, will be subject to the same allowance for loan losses as similar non-securitized loans. Because any loans securitized would remain on the balance sheet for accounting purposes (and thus for the purpose of determining reserves), an organization may be penalized in the form of reduced capital ratios by establishing a greater allowance for loan losses.

The addition of reserves for the newly consolidated loans will reduce retained earnings and the Tier 1 capital of banking organizations required to consolidate. Although organizations will have an incremental increase to Tier 2 capital, the amount of this increase will be limited because reserves only up to 1.25 percent of total risk-weighted assets are eligible for inclusion in Tier 2 capital, with the remainder of the allowance going to reduce risk-weighted assets. The net result of this increase in reserves will in most cases be a reduction of capital across the banking industry.

The application of current regulatory capital rules to assets consolidated under FAS 166 and FAS 167 produces the unintended consequence of penalizing consolidating banking organizations in the form of weakened capital ratios for establishing an additional allowance for loan losses. As mentioned above, because of the way in which securitization spreads the risk of loss on securitized assets to investors, a banking organization may be penalized in this manner even where no losses have occurred and where the organization is not actually exposed to any meaningful risk of loss. Furthermore, this dynamic creates the unintended consequence of reducing lending activity in those areas where assets require a high loss reserve level, as banking organizations may be reluctant to originate those types of loans that could have the most severe adverse effect on their capital ratios.

American Express believes that this is another area in which current regulatory capital requirements would improperly be aligned with risk of loss. The Agencies should consider eliminating the limit of 1.25 percent of total risk-weighted assets for inclusion of reserves in Tier 2 capital or, alternatively, vary this limit with respect to asset class (such as consumer loans, mortgage loans, and commercial and industrial loans) to better align includable Tier 2 capital with actual and expected loss rates of the asset classes.

### **III. Recommendations**

#### *A. Relief from Application of Regulatory Capital Requirements to Consolidated Assets*

As illustrated by the scenarios discussed above, American Express believes that current regulatory capital requirements in some cases do not reflect the risk of loss to which a banking organization may be exposed with respect to assets required to be consolidated under FAS 166 and FAS 167. A proper evaluation of the effects of regulatory capital requirements on consolidated assets, particularly upon organizations affiliated with joint trusts, and the appropriate allocation of capital would require additional time and input from industry participants. For this reason, American Express encourages the Agencies to consider delaying the application of regulatory capital

requirements to assets and corresponding reserves consolidated under FAS 166 and FAS 167 until such time as this evaluation can be undertaken.

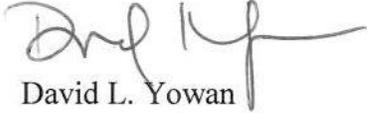
*B. Phase-in of Application of Regulatory Capital Requirements*

At a minimum, American Express believes that it would be appropriate for the Agencies to phase in the application of regulatory capital requirements to assets and corresponding reserves consolidated under FAS 166 and FAS 167 over a period of three years. It is very likely that many banking organizations will be required to raise additional capital as a result of consolidation. Unless they are given adequate time to raise capital in an orderly manner, it will prove difficult and costly, particularly with the current state of the capital markets, to raise adequate capital in a way that will not stifle the operations or lending ability of the banking industry.

Given the significant costs of an immediate implementation of the existing regulatory capital requirements to newly consolidated entities, American Express believes that it is preferable to delay any immediate increase in capital that would result and phase in the increase over three years. Over the first year, then, there should be no increase in capital. By the end of each of 2011 and 2012, a banking organization would be required to hold capital in an amount equal to 50% and 100%, respectively, of formerly off-balance sheet assets consolidated as of January 1, 2010.

Thank you for considering the views expressed in this letter. Should you have any questions, please contact Juliana S. O'Reilly, Chief Bank Regulatory Counsel, on behalf of the undersigned, at (212) 640-3532.

Sincerely,



David L. Yowan  
Treasurer  
American Express Company  
American Express Travel Related  
Services Company, Inc.

Scott C. Godderidge  
Chief Financial Officer  
American Express Centurion Bank

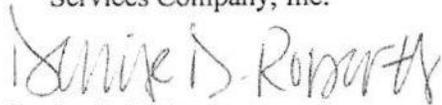
Denise D. Roberts  
Chief Financial Officer  
American Express Bank, FSB

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