



February 17, 2016

Mr. Robert deV. Frierson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

RE: Regulations Q and Y; Risk-Based Capital and Other Regulatory Requirements for Activities of Financial Holding Companies Related to Physical Commodities and Risk- Based Capital Requirements for Merchant Banking Investments (Docket No. R-1547, RIN 7100 AE-58).

Dear Mr. Frierson:

Better Markets, Inc.¹ appreciates the opportunity to comment on the matters identified in the above-captioned Notice of Proposed Rulemaking ("Release" or "Proposal"). The Release addresses key issues relating to physical commodity activities of financial holding companies and proposes new restrictions on those activities to limit the substantial systemic, financial, legal, and reputational risks they pose.

OVERVIEW

The issue of physical commodity activities conducted by financial holding companies ("FHCs") is one of the last, unfortunate policy vestiges of a decade of deregulation. The Board of Governors of the Federal Reserve ("the Board") has an important role, and the necessary authority, to ensure that those activities are appropriately regulated. The Release, as adopted with the improvements detailed below, will finally begin reversing the unhealthy and dangerous commingling of commodities and banking.

The permissive, deregulatory language of several sections of the Gramm-Leach-Bliley Act of 1999 ("GLB Act"), along with the similarly permissive subsequent interpretations by the Board, have led to an expansion of banking activities never envisioned by Congress. Specifically, the provisions governing physical commodities activities in the Bank Holding

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support financial reform, and re-balance our financial system to work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

Company Act of 1956 ("BHC Act"), as amended by the GLB Act,² have been increasingly used by FHCs in a manner that poses serious risks to the institutions themselves, our financial markets, and our economy.

The commercial physical commodity activities of FHCs, which have been authorized by Congress and approved by the Board or grandfathered in, carry at least seven distinct risks:

- "(1) it provides banks with unfair economic and informational advantages;
- (2) it distorts credit decision-making;
- (3) it creates conflicts of interest between banks and their clients;
- (4) it invites market manipulation and excessive commodity speculation³;
- (5) it creates inappropriate bank and systemic risks;
- (6) it creates undue concentrations of economic power; and
- (7) it intensifies the too-big-to-fail problem by creating financial conglomerates that are too big to manage or regulate."⁴

These risks may lead to dangerous and unacceptable consequences: unstable FHCs, an anticompetitive environment, and market manipulation that unfairly harms other market participants and ultimately consumers. Unless a regulatory or legislative response adequately addresses these threats, they will only intensify and FHCs will pose increasing dangers.

The Board's Proposal, formed after an extensive study and following an Advance Notice of Proposed Rulemaking (January 2014) on the subject, aims to:

- (1) adopt additional limitations on physical commodity activities conducted pursuant to the complementary activity authority in Section 4(k)(1)(B) and

² In particular, Section 4(k)(4)(H) relating to investment banking activities, Section 4(k)(1)(B) relating to "complementary activities," and Section 4(o) relating to grandfathered activities.

³ The warehousing of aluminum by Goldman Sachs, revealed in the summer of 2013, illustrates how effectively a FHC can manipulate prices of commodities. Through its ownership of warehouses that store aluminum for other banks, traders, and producers, Goldman was able to increase the delay of its aluminum deliveries (from 6 weeks to 16 months) thereby increasing the costs of storage and allegedly manipulating the price of aluminum. This action resulted in Goldman Sachs, a bank, driving up prices of everyday products for consumers like soda cans and car parts. See Editorial Board *Goldman Sachs' Aluminum Pile*, NY TIMES, July 26, 2013, <http://www.nytimes.com/2013/07/27/opinion/goldman-sachss-aluminum-pile.html? r=0>. Moreover, by owning the warehouses, Goldman has had and continues to have unique, inside information on the future costs of aluminum, which presents a clear conflict of interest with its business as a dealer in the derivatives markets and may lead to further market manipulation. Indeed, JPMorgan Chase, another FHC, was accused of such manipulation in the energy markets stemming from its ownership of power plants that the bank acquired from Bear Stearns in 2008. (See, "In Re Make-Whole Payments and Related Bidding Strategies," 144 FERC ^ 61,068 (July 30, 2013). See also Jessica Silver-Greenberg & Ben Protess, *JPMorgan Looks to Pay to Settle U.S. Inquiries*, DEALBOOK NY TIMES, July 30, 2013, <http://dealbook.nytimes.com/2013/07/30/ipmorgan-to-pay-410-million-in-power-market-manipulation-case/>).

⁴ See Senate Permanent Subcommittee on Investigations, Wall Street Bank Involvement with Physical Commodities Report, Nov. 20, 2014, at 34.

clarify certain existing limitations on those activities to reduce potential risks these activities may pose to the safety and soundness of FHCs and their depository institutions;

(2) amend the Board's risk-based capital requirements to increase the requirements associated with physical commodity activities and merchant banking investments to better reflect the potential risks of legal liability associated with catastrophic events involving these physical commodity activities;

(3) rescind the findings underlying the Board orders authorizing certain FHCs to engage in energy management services and energy tolling under complementary authority and provide firms currently authorized to conduct these activities a transition period to unwind or divest these activities;

(4) remove copper from the list of metals that BHCs are permitted to own and store as an activity closely related to banking under section 4(c)(8) of the BHC Act and Regulation Y; and

(5) increase transparency regarding the physical commodity activities of FHCs through more comprehensive regulatory reporting.⁵

In the comments below, we highlight the need for a strong final rule on both legal and policy grounds, and we urge the Board to approve the Proposal but with some suggested enhancements. Our key recommendations for strengthening the Proposal are these:

- The Board must actively and meaningfully engage in coordination and, crucially, information-sharing among related market regulators.
- The Board must consider the need to prevent evasion of other laws dealing with financial market oversight.
- The Board must ensure that non-banking businesses are not afforded the unfair advantage of access to federal Discount Window funding, and other implicit and explicit subsidies afforded to the banking system.
- The Board must not exempt any FHCs from the new disclosure requirements.

⁵ Release, 81 Fed. Reg. at 67225.

COMMENTS

Congress never intended FHCs to engage in the depth and breadth of commodities activities present today. The Proposal aligns the regulatory framework with Congressional intent and with the immense challenges of overseeing FHCs engaged in commercial enterprises.

When Congress considered the statutes on complementary activities of FHCs, it clearly did not anticipate that they would be used to permit the extent of non-banking activities permitted today, either by being grandfathered in or approved by the Board. Indeed, the testimony providing justification for the provision was focused on seemingly uncontroversial ownership such as magazine publications which might augment financial services.⁶ However, as applied by the Board to date, those narrow provisions have been dramatically expanded, opening the door for a panoply of diversified commodity ownership and trading activities by FHCs. These activities are an unnatural and inappropriate expansion of FHC activities beyond what Congress intended, and they pose unnecessary risks in the form of unfair competition, market manipulation, and institutional and systemic instability.

The GLB Act provided three distinct authorities under which BHCs may engage in non-banking endeavors, each with explicit limitations. In particular,

- **Complementary Activity Authority**: Section 4(k)(1)(B)⁷ of the BHC act as amended allows FHCs to conduct activities, subject to Board approval, that are determined to be "complementary to a financial activity" of the FHC. In making a determination, the Board must find that the activity does not pose a substantial risk to the safety and soundness of the depository institution subsidiaries of the FHC or the financial system more generally. It must further weigh the benefits of allowing the activity against the risks posed by such an allowance.

Specifically, the Board must consider such things as convenience, competition, and efficiencies that would be promoted if a FHC is granted approval to engage in such complementary investments. At the same time, the Board must consider several potential negative factors, including whether such complementary activities may result in undue concentration, decreased or unfair competition, or conflicts of interest. Under this authority, the Board has allowed a limited number of firms to engage in complementary activities, including physical commodity trading, energy management services, and energy tolling agreements. However, the Board also imposed limits, including a cap on the aggregate market value of the commodities involved of 5% of the FHC's tier 1 capital.

⁶ Testimony of Michael Patterson, Vice Chairman, JPM, before the Banking and Financial Services Committee hearing, February 10, 1999.

⁷ Public Law 106-102, the Gramm-Leach-Bliley Act of 1999, amendment to the Public Law 84-511, the Bank Holding Company Act of 1956, Section 4(k)(1)(B), 12 U.S.C. § 1843(j)(1)(A).

- Grandfather Authority: Section 4(o)⁸ of the BHC Act as amended also provides a narrow safe harbor permitting a non-bank holding company that had commodities operations before 1997 and that becomes a FHC after November 1999 to retain those operations for two years, subject to an additional three-year extension by the Board.⁹ This provision allowed grandfathered firms to engage in a broader range of commodities activities, including extracting, transporting, and storing physical commodities, subject to a limit of 5% of the FHC's total consolidated assets.
- Merchant Banking Authority: Under Section 4(k)(4)(H)¹⁰ of the BHC Act as amended, FHCs are permitted to invest in non-financial companies if, among other requirements, those investments are made as part of a "bona fide underwriting or merchant or investment banking activity." Furthermore, the investment must be held "only for a period of time [generally ten years] to enable the sale or disposition thereof on a reasonable basis consistent with the financial viability of the FHC's merchant banking investment activities." Additionally, the FHC may not "routinely manage or operate" any portfolio company in which it made the investment, except as may be necessary to obtain a reasonable return on investment upon resale or disposition.

Thus, even as Congress expanded the permissible range of FHC activities into the commodities realm, it did so only to a limited degree and only subject to substantial conditions and provisos. These statutory limitations seek to generally continue what has been a longstanding restriction on ownership of physical commodities. The primary purpose of the FHC must remain purely "financial" in nature. Indeed, on its face, the law **does not** permit FHCs, whose expertise is (and should be) focused on finance, to engage in indisputably non-financial ventures. This makes sense since FHCs, by their nature, do not have the business expertise required to run such agriculture, energy, or metals-related ventures. The skills and experience of a banker obviously do not translate into those of a gas pipeline operator, for instance.

Similarly, banking analysts, banking auditors, and even investors specializing in FHCs cannot be expected to have the skillset necessary to effectively monitor and analyze a non-financial commercial endeavor conducted by an otherwise financial or banking institution. Indeed, due to the woefully inadequate reporting and disclosure requirements with respect to such non-financial businesses, it is likely that many investors and analysts are simply unaware of the broad set of risks posed by such ancillary business endeavors.¹¹

⁸ Public Law 106-102, the Gramm-Leach-Bliley Act of 1999, amendment to the Public Law 84-511, the Bank Holding Company Act of 1956, Section 4(0), 12 U.S.C. § 1843(n)(3).

⁹ This section currently only applies to Goldman Sachs and Morgan Stanley, who ironically only became FHCs because of their systemic importance as revealed during the financial crisis when they were permitted to convert to a FHC virtually overnight.

¹⁰ Public Law 106-102, the Gramm-Leach-Bliley Act of 1999, amendment to the Public Law 84-511, the Bank Holding Company Act of 1956, Section 4(k)(4)(H), 12 U.S.C. § 1843(k)(7).

¹¹ The bankruptcy of James River Coal is just one example of the challenges of the physical commodities industry - a leveraged business facing competitive and regulatory pressures as well as logistical, practical challenges unique to a commercial enterprise. The company had over 30 operating subsidiaries, each with

Furthermore, the Board, a prudential banking regulator, faces formidable challenges in the effort to review, determine, and opine upon the specific risks associated with the ownership or operation of various commodity businesses, some very complex and interrelated. The Board does not possess the expertise, let alone adequate data, to meaningfully oversee such businesses or the markets in which they trade—markets which can impact virtually every American. Indeed, the Federal Reserve System—either as a central bank or prudential banking regulator—could never reasonably have been expected to do so.

The largest banks have capitalized on what was intended to be a modest conditional expansion in permitted activities, to greatly expand the scope of their commodities and industrial footprints. Adequately addressing this phenomenon would require legislative as well as regulatory changes. Indeed, we agree with the Board's assessment, as expressed in the "Report to the Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act", that Congress should:

- repeal the authority of FHCs to engage in merchant banking activities entirely; and
- repeal the grandfather authority for certain FHCs to engage in commodities activities under section 4(o) of the BHC Act.¹²

We further agree with the Board's assessment that those legislative fixes "would better align the activities and investments of, as well as the regulatory and supervisory framework governing, regulated financial institutions and corporate owners of insured depository institutions. In doing so, these changes would create a more level playing field among regulated financial institutions and owners of insured depository institutions. Additionally, many of these changes would further limit the commercial activities of banking entities and, as a result, help to enhance safety and soundness, minimize the concentration of economic resources by limiting an institution's ability to take on risk associated with commercial activities, and help ensure the separation of banking and commerce."¹³

While the Board may not be able to implement the full range of necessary reforms in this area, it is rightly taking the appropriate regulatory action under existing authority

its own logistical procedures oriented around the mining, warehousing, transportation, and marketing of physical coal, all of which are currently seeking Chapter 11 protection. These commercial challenges are of a nature FHCs have neither the expertise nor the business model to adequately cope with. See Swetha Gopinath, *James River Coal files for bankruptcy protection*, Reuters, April 7, 2014, <http://www.reuters.com/article/2014/04/07/james-river-coal-bankruptcy-idUSL3N0MZ3S220140407>).

¹² See Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation and Office of the Comptroller of the Currency, *Report to the Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act*, September 2016, at 28. In response to the Advance Notice of Proposed Rulemaking, we called on the Board to, in essence, outright ban the ownership of physical commodities by FHCs. See Better Markets Comment Letter at https://www.federalreserve.gov/SECRS/2014/May/20140509/R-1479/R-1479_041614_124558_481903138096_1.pdf

¹³ *Id.* at 29.

consistent with its statutory mandates to address these problems by curtailing the commodities activities of BHCs and FHCs. The benefits will include reduced institutional and systemic risk; more fair competition; and better fulfillment of original Congressional intent.

The Proposal appropriately narrows the permitted amount and scope of commodities-related activities under the "complementary activity" authority.

The Proposal makes several important changes in the permitted scope of commodities activities under the "complementary" authority:

- First, it would tighten the 5% limit on commodities trading. The Proposal would prohibit an FHC from purchasing, selling, or delivering physical commodities if the market value of those commodities owned by the FHC or its subsidiaries **under any authority** exceeds 5% of the consolidated tier 1 capital of the FHC. Thus, if an FHC engaged in permitted commodities activities under other statutory authorities, those activities would have to count toward the 5% limit under the "complementary authority."
- Second, the Proposal would codify the limitation that FHC's may not own, operate, or invest in facilities for the extraction, transportation, storage, or distribution of commodities. In addition, it would clarify and strengthen those limitations by explicitly prohibiting participation in the day-to-day management of such facilities and other related activities.
- Third, the Proposal would flatly prohibit FHCs from engaging in energy tolling and energy management services.

All of these measures are appropriate and necessary to address the significant legal, reputational, and financial risks associated with commodities-related activities by FHCs.

The risk-based capital requirements for covered physical commodities are especially important reforms, as they help ameliorate the threat to safety and soundness that commodities activities pose.

At the heart of the Proposal are the new risk weights assigned to commodities assets and exposures. Under the Proposal, the Fed would increase the capital requirements associated with an FHCs covered physical commodities, depending on the statutory authority allowing the commodity-related activity. Specifically, the Proposal would impose four different risk weights based on the following three authorities: 1) grandfathered authority; 2) merchant banking authority; and 3) complementary authority.

For covered physical commodities exposures held under the grandfathered authority, the Proposal would require a risk-based weighting of 1,250 percent, which is the highest risk weight currently defined under the Federal Reserve's Basel III standards, essentially requiring FHCs to retain one dollar of capital for every dollar of exposure. Similarly, under the Proposal, covered physical commodity infrastructure assets held under the

grandfathered authority would also be subject to a risk-based weighting requirement of 1,250 percent.

In general, the Proposal requires a risk-based capital weighing of 1,250 percent for covered physical commodity exposures under the merchant banking authority, with two limited exceptions. If the merchant banking investment is in a covered commodity trading portfolio company, then one of two risk weights would apply depending on whether the company's shares are publicly listed. For a company whose shares are publicly listed, a risk-based capital weight of 300 percent is required. On the other hand, if a company's shares are not listed, then a risk-based capital weighting of 400 percent is required.

Finally, the Proposal implements a two-tiered, risk-based capital weighting for covered physical commodity exposures held under the complementary authority. For covered physical commodity exposures held under this authority, the Proposal requires a risk-based weighting of 300 percent. However, if the FHC's total amount of covered physical exposures exceeds 5 percent of its Tier 1 capital, then the excess is subject to a risk-based weighting of 1,250 percent.

We fully endorse these provisions and commend the decision to subject covered physical commodity exposures to significantly increased capital requirements. Through these provisions, the Proposal will provide much stronger protections against the high degree of risk associated with commodities activities.

Recommended Changes:

The Board must share information and coordinate with other regulators to ensure adequate supervision and oversight.

One of the key criticisms of the "public stewards of our financial system" by the Financial Crisis Inquiry Commission ("FCIC") in its 2011 Report is that leading up to the 2008 financial collapse, "they lacked a full understanding of the risks and interconnectedness in financial markets."¹⁴ Indeed, a nearly complete absence of inter-agency coordination and information sharing ensured that regulators "did not have a clear grasp of the financial system they were charged with overseeing."¹⁵

The existing environment, marked by excessive FHC ownership of commodities enterprises coupled with regulatory silos and information gaps, echoes the FCIC's expressed concerns. To remedy problems like these, the Board must share more information, improve coordination among regulators, and take a broader view of markets, including commodities.

While the Board approves FHC commodity activities and possesses information relating thereto, other market regulators do not have access to the same FHC commodity-related ownership information. The information is not shared with the primary commodity

¹⁴ See Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, Jan. 2011, at 21 <http://fcic.law.stanford.edu/report>.

¹⁵ *Id.* at 21.

market regulator, the CFTC, nor is it shared the Federal Energy Regulatory Commission ("FERC") or the Securities and Exchange Commission ("SEC").

Indeed, there is no formalized mechanism, such as a memorandum of understanding ("MOU"), for accepting or sharing significant commodities ownership and commodities market-related information held by the Board.¹⁶ This is a major regulatory blind spot that could lead to serious and significant market malfunctions that may impact FHCs, the markets themselves, the economy, and ultimately, the public.

Specifically, the Board can and should establish a mechanism for sharing the precise nature and percentage of any commodities ownership among BHCs and FHCs with interested oversight and enforcement officials at other financial regulators (CFTC, FERC, SEC, and OCC). The information should include descriptions of any potential impact upon supply and demand fundamentals. Furthermore, such information should be discussed, considered, and acted upon as part of the coordinated work that Congress expected from the Financial Stability Oversight Council ("FSOC"). We would encourage Chair Yellen, as a member of FSOC, to advocate for this to be on the FSOC agenda and to drive the process to ensure appropriate and adequate information sharing.

Additionally, basic information about a FHC's commodity ownership should be presented in a periodic and frequent manner on the Board's website in an easy-to-understand fashion for the benefit of the public and commodity firms.

Finally, we urge that the Board seek continuous and formalized input from other regulators (CFTC, FERC, SEC, and OCC) related to the work of the Board's Large Institution Supervision Coordinating Council ("LISCC"). Coordination among regulators, viewed by some as a pedestrian or insignificant supervisory responsibility, is actually vital, yet it has all too often been ignored. The Board should take the lead, through the LISCC, in ensuring all is being done to protect our economy and the public in this area.

As it finalizes the Proposal, the Board must consider the need to prevent evasion of other laws dealing with financial market oversight.

Reforming the nature and scope of FHC commodities trading is especially important to help minimize the risk of evasion under other statutory provisions aimed at regulatory oversight of the financial markets. In particular, the Board must bear in mind the regulatory regime embodied in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), a law designed to reduce systemic risk and to prevent another financial crisis and economic collapse. Moreover, the Board must take into account laws governing anti-trust, insider-trading, and anti-manipulation to ensure that the Proposal does not provide FHCs with dangerous loopholes.

¹⁶ See, e.g., Memorandum of Understanding between the Federal Energy Regulatory Commission and the Commodity Futures Trading Commission, available at <http://www.ferc.gov/legal/mou/mou-ferc-cftc-jurisdictional.pdf>.

For example, the Dodd-Frank Act strengthened the regulation of commodity markets under the CFTC's purview through, for example, position limits. Commodity exchange officials currently establish and enforce those position limits, which seek to minimize excessive speculation in a commodity contract by setting a cap on concentration levels held by one trader. However, there are exceptions to such limits, which the exchanges grant when a trader demonstrates that a legitimate business risk needs to be hedged—like owning a commodity or commodity-related business. There is no evidence that an exchange has ever refused to grant such an exemption. Should a FHC seek such an exemption, due to their commodity-related ownership or activities, history indicates it will be granted. The result is that an FHC, already positioned to influence the supply and demand of a commodity, may acquire yet further power to destabilize or manipulate the markets through commodity positions that exceed normally allowable limits. In fact, something similar has already taken place with regard to the energy markets and electricity prices.¹⁷

As discussed above, FHCs that own such commodity businesses have what amounts to insider information about supply and demand fundamentals of commodities in which they trade. Not only is this anti-competitive, it also can lead to insider trading and manipulation. FHCs should not be permitted to undertake such ownership where it creates the opportunity to engage in potentially abusive market manipulation.

The best way to thwart such abuses is to minimize the commodities-related activities of FHCs. The Proposal is a step in the right direction, and it certainly should not be weakened in the final version. In addition, the Board should consider even more prophylactic solutions—such as revoking the orders that have been improvidently granted by the Board allowing FHCs to own commodity-related enterprises.

FHCs with physical commodity ownership should not have access to the Discount Window.

Historically, the U.S. banking system has been fashioned to ensure that institutions taking deposits and engaged in commercial lending do not own non-financial interests—preventing concentration of potentially monopolistic economic power, among other undesirable consequences. The effect of maintaining such a separation has been to promote the safety and soundness of insured depository institutions, and to enable an efficient and effective flow of credit.

Allowing FHCs to engage in commodities related activities not only violates this core principle of banking regulation, but also creates a profound unfairness because FHCs have access to the Federal Reserve Discount Window.¹⁸ It is one thing to permit abundant and inexpensive money to be used for financial activities, but when such funding is used as a mechanism to support an otherwise competitive commodity activity, it is manifestly unfair

¹⁷ See State of California Department of Justice, *Attorney General Kamala D. Harris Announces \$300 Million Settlement with JP Morgan Chase*, Department of Justice News Release, Nov. 19, 2013, <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-300-million-settlement-jp-morgan>.

¹⁸ Section 10B of the Federal Reserve Act provides the statutory framework for such Board programs, including the Discount Window.

to others who may not access such special, federally-subsidized, low-cost funds. It is antithetical to competition.

Furthermore, we have recently witnessed, from an enforcement perspective, situations where some banks have abused markets while enjoying billions of dollars from the special privilege of being federally-subsidized through access to the Federal Reserve Discount Window. The Discount Window and other Board programs have been used at a higher than average rate for the benefit of larger banks and bank holding companies. In fact, unprecedented sums of subsidized aid to financial institutions have been extended, much of it in the wake of the financial crisis, including more than a trillion dollars in loans and hundreds of billions of dollars in capital and guarantees.¹⁹ To permit such assistance to FHCs that own physical commodity businesses amounts to yet another subsidy, which is unjustifiable. The simple and appropriate response is to deny, or greatly restrict, the ability of FHCs to own commodity businesses.

The Board must not exempt any FHCs from the enhanced disclosure requirements related to engaging or planning to engage in physical commodities activities.

The Proposal would require FHCs to provide greater disclosure regarding their physical commodity holdings and activities. As the Proposal states, such disclosures "would provide the public with important information on the degree to which FHCs are involved in trading covered physical commodities, improving market discipline, and enhancing understanding of the role FHCs play in these markets through their nonfinancial activities."²⁰ Furthermore, such disclosure should provide regulators with additional insights about the risks associated with FHCs' activities with physical commodities.

But despite the Board's own conclusions about the importance of such disclosures, the Proposal would permit any FHC to ask the Board for confidential treatment of the information they provide. All that is required of the FHC is a mere representation that the company "believes that, based on its particular individual circumstances, disclosure of specific commercial or financial information would **likely** result in substantial harm to its competitive position or that disclosure would result in unwarranted invasion of personal privacy."

This broad, easy-to-claim and easy-to-meet exemption can and will be abused. We think it will be in the self-interest of all FHCs who engages in physical commodities activities in pursuit of profits to argue that release of the information about their activities would "likely" result in substantial harm to their competitive positions. At a minimum, the Board should establish further conditions for such an exemption, including a finding that such exemption is strictly in the public interest and will promote the safety and soundness of the financial markets. And in any case, the Board must evaluate the basis for any such claim for confidential treatment to ensure that there is in fact substantial data and evidence supporting a claim of "likely . . . substantial harm to its competitive position or that

¹⁹ See Government Accountability Office, *Government Support for Bank Holding Companies*, Government Accountability Office Report, Nov. 2013, available at <http://www.gao.gov/assets/660/659004.pdf>.

²⁰ See Release, 81 Fed. Reg. at 67234.

disclosure would result in unwarranted invasion of personal privacy." Such broad exemptions simply cannot be based solely on the FHC's self-serving, unsubstantiated claims.

CONCLUSION

We hope these comments are helpful as the Board finalizes the Proposal. The Board has proposed a strong rule. In the interest of the American public; a fair, robust, and competitive business climate; and the overall financial stability of the U.S., the Board would do well to incorporate the changes offered in this letter, and approve the final rule.

Sincerely,



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