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Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551
Attention: Robert deV. Frierson, Secretary
Docket No. R—1547; RIN 7100 AE-58

Re: Comment on Proposed Commodities Rulemaking, Docket No. R-1547 / RIN 7100 AE-58

Dear Sirs and Madams:

Barrick Gold of North America, Inc. ("Barrick") appreciates the opportunity to comment on the proposed rule (the "Proposal")[1] by the Board of Governors of the Federal Reserve System (the "Federal Reserve") that would alter the authorities and capital requirements with respect to commodities activities conducted by bank holding companies ("BHCs"). Barrick is a subsidiary of Barrick Gold Corporation, one of the largest gold mining companies in the world, and is also a significant miner of copper. Barrick Gold Corporation is a Canadian company headquartered in Toronto, Ontario and listed on the Toronto Stock Exchange and the New York Stock Exchange, with a market capitalization of approximately US $21 billion. It is one of the world's largest gold producers, with 13 core operating mines and a pipeline of projects located across five continents. These include four producing mines located in the United States – Goldstrike, Cortez, Turquoise Ridge, and Golden Sunlight – as well as development projects and exploration activities in Nevada, Alaska and other states.

We are writing to express our strong concern that the Proposal, if finalized, would constitute an unnecessary intrusion of the Federal Reserve into markets, including the metals markets, that have not been demonstrated to present – and do not present – substantial risks to BHCs. This lack of evidence is fatal to the Proposal, as the Federal Reserve has not and cannot demonstrate that the metals market poses a sufficient risk to warrant the Proposal, and so has failed to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[2]

The Proposal would place substantial restrictions on physical commodity trading activities conducted by those BHCs that qualify as financial holding companies ("FHCs");[3] impose

1 81 Fed. Reg. 67,220 (Sept. 30, 2016).

2 *Motor Vehicle Mfrs.' Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation marks omitted).

3 BHCs that satisfy certain requirements may elect to become FHCs, which permits them to engage in a wider range of financial activities than other BHCs. Similarly, foreign banking organizations that (continued…)

punitive risk-based capital requirements on FHCs that engage in commodities activities; remove copper from the list of metals that BHCs are permitted to own and store; and rescind findings related to the authorization of FHCs to participate in energy management services and energy tolling. These sweeping changes would impact not only financial entities, but have the potential to affect all of the participants in those markets. We believe that finalization of the Proposal would cause significant adverse consequences for the mining industry by removing liquidity from our markets and limiting critical and highly capable counterparties who intermediate our industry's financial risk and facilitate trade and investment.

In addition, the Proposal injects the Federal Reserve into highly regulated and technical areas of government oversight involving the environment that are already addressed by an intricate web of federal and state laws and regulations administered by a host of expert regulatory agencies – far outside of the Federal Reserve's realm of expertise. Further, the Proposal also unfairly creates a negative cloud on our industry by unjustifiably asserting the existence of unmanageable legal, reputational, and financial risks arising from physical commodity activities.

As a result, the Federal Reserve should withdraw the Proposal or, if it continues to move forward, substantially amend it to avoid causing needless disruption to metals markets.

Part I explains why the actual risks to BHCs from metals activities are not substantial and are adequately addressed by existing and ongoing regulatory developments. Part II of this letter explains why the Proposal would disrupt the metals markets, harming mining companies like Barrick; the counterparties of mining companies; consumers; and ultimately the real economy. Part III explains why the Proposal should not reclassify copper under Regulation Y. Finally, Part IV describes our recommendations to modify the Proposal, should the Federal Reserve determine to move forward regardless of these several concerns.

I. Metals-Related Commodity Activities Do Not Present the Degree of Risk to BHCs That Would Justify the Proposal's Sweeping Restrictions

The Proposal is devoid of evidence of any material risks for BHCs in connection with metals-related activities, which include (1) mere ownership of processed metals, (2) transportation of metals, (3) metals-related derivatives, and (4) mining of metals. The only instances of risks described in the Proposal relate to the oil and gas sector, not the metals sector, and the Proposal even acknowledges – but fails to respond to – comments on the Federal Reserve's January 2014 Advanced Notice of Proposed Rulemaking explaining that the oil and gas incidents were distinguishable from any risks faced in other commodity sectors.[4] Under the Administrative Procedure Act, this failure alone is fatal to any attempt to impose heightened controls regarding metals activities, because the Federal Reserve has failed to "examine the relevant data and

satisfy certain requirements may elect to be treated as FHCs. Virtually all of the largest banking organizations operating in the United States have made an FHC election.

4 81 Fed. Reg. at 67,224.

articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[5]

Moreover, the evidence demonstrates that there is in fact no material risk of environmental or similar liabilities arising out of BHCs' current participation in the metals market.

First, as to mere ownership of finished or processed metals, such ownership generally does not give rise to liability under federal or state environmental statutes. For instance, under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), a mere owner of a commodity would not fall within the scope of any of the four categories of potentially liable parties.[6] Moreover, there is no evidence that there have been incidents involving, for example, "spills" of finished copper or gold, giving rise to environmental liability. And unlike oil or gas, finished metals are solid products that cannot readily escape into the environment. These basic real-world considerations weigh decisively against including finished metals within the scope of the Proposal.[7]

In addition, the expert environmental regulatory agencies are not concerned with solid, processed copper being released, but rather, with releases of small particles of copper into the environment (for example, in effluent), which is an issue wholly inapplicable to copper in its commodity form. While copper is listed as a hazardous substance under CERCLA, Environmental Protection Agency ("EPA") regulations make clear that no reporting of releases of copper is required under CERCLA "if the diameter of the pieces of the solid metal released is larger than 100 micrometers (.004 inches)."[8] This again demonstrates the insignificant risk posed by finished copper – the form in which copper is held by BHCs.

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5 *Motor Vehicle Mfrs.' Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation marks omitted).

6 *See* 42 U.S.C. § 9607(a).

7 The Proposal cites the laws of six states for the proposition that owners of hazardous substances can be liable in some instances under state law. 81 Fed. Reg. at 67,222 n. 13. However, all of the cited statutes except Alaska's are limited to discharges of oil and certain other non-metal substances:

- the California statute applies only to spills of oil, Cal. Gov. Code §§ 8670.3(aa), 8670.56.5(a);
- the Florida statute applies only to oil, gasoline, pesticides, ammonia, and chlorine, Fla. Stat. § 376.031(16);
- the Maryland statute applies only to discharges of oil, Md. Envir. Code Ann. § 4-401(c)(1), (d);
- the Oregon statute applies only to discharges of oil, Or. Rev. Stat. § 468B.310(1); and
- the Washington statute applies only to discharges of oil, Wash. Rev. Code Ann. § 90.56.370.

The fact that all but one of these statutes specifically focuses only on oil further highlights that it is inappropriate for the Federal Reserve to simply assume that oil incidents are representative of the risks posed by other commodities.

8 40 C.F.R. § 302.4.

Second, there is no basis for finding that transportation of finished metals products such as copper or gold poses any significant environmental risk. There is no evidence of incidents relating to spills of metals in transportation that could give rise to environmental liability. Indeed, neither copper nor gold is listed as a hazardous material for purposes of the Pipeline and Hazardous Safety Materials Administration (PHMSA) hazardous materials transportation requirements, demonstrating the low degree of risk posed by transport of such finished commodities.[9]

Third, modern mining activities already take place under a regulatory regime that both (1) imposes rigorous safety and environmental controls, and (2) contains financial assurance requirements that ensure that, should any environmental risk materialize, the mining entity itself maintains adequate capital available to address that risk.

To begin with, mining operations are heavily regulated by both federal and state authorities. For example, Barrick's Cortez gold mine, located 60 miles southwest of Elko, Nevada, is authorized and regulated by the Bureau of Land Management ("BLM"), the EPA, and the Nevada Department of Environmental Protection ("NDEP"), and is subject to a variety of environmental permits imposing controls on its operations. For instance, Barrick is required by permit and regulation to appropriately dispose of solid and hazardous wastes in accordance with the Resource Conservation and Recovery Act and other requirements. Its water discharges are closely regulated. These various substantive requirements are designed to prevent any environmental issues from arising at the site in the first instance.

Moreover, mining operations are subject to a wide variety of federal and state financial assurance requirements, designed to ensure that the sites are properly closed and that any environmental issues are addressed. In the case of Barrick's Cortez mine, BLM and NDEP jointly hold $231.9 million in such financial assurance that Barrick has financed, plus additional funds for post-mine-closure expenses. These requirements are detailed on the attached slides.[10]

In addition, EPA has very recently proposed additional financial requirements under CERCLA for hardrock mining facilities.[11] While the propriety of that proposal is outside the scope of these comments and Barrick has some concerns about the need for and structure of EPA's approach, the fact that EPA is evaluating the issue, on top of already existing state and federal requirements, demonstrates that environmental regulators are rigorously engaged in ensuring that there is adequate financial assurance for mining operations. Indeed, the EPA's rulemaking process is the appropriate forum for raising these complex and highly detailed issues. The Federal Reserve is outside of its realm of expertise in injecting itself into this space, and it would be arbitrary and capricious for the Federal Reserve to ignore these extant requirements and EPA's ongoing rulemaking.

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9 *See* 49 C.F.R. § 172.101.

10 *See* Barrick Gold Submission to OMB Office of Information and Regulatory Affairs on CERLCA Section 108(b), Meeting Slides 13 and 14 (Nov. 7, 2016) (attached hereto).

11 Financial Responsibility Requirements under CERCLA § 108(b) for Classes of Facilities in the Hardrock Mining Industry, 82 Fed. Reg. 3,388 (Jan. 11, 2017).

Finally, any risks to FHCs that might exist from physical commodity activities conducted through a merchant bank portfolio company are further reduced by the limitations already imposed by Regulation Y and the fundamental protections afforded by the corporate veil. Under Regulation Y, FHCs are generally prohibited from "routinely manag[ing] or operat[ing] any portfolio company." [12] This prohibition effectively means that FHCs should not be held liable as operators under CERCLA or other environmental laws, because they do not and cannot "manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[13]

These restrictions, as well as the routine business practices of FHCs, also make it highly unlikely that a court would be willing to pierce the corporate veil between FHCs and portfolio company subsidiaries that are involved in metals-related activity, thus further reducing any risk to FHCs. The Supreme Court has made clear that the protections afforded by the corporate veil are "deeply ingrained in our economic and legal systems," and fully applicable to environmental liabilities, including liabilities arising under CERCLA.[14] Thus, even were environmental risks to materialize in connection with copper or other metals-related activities, it is highly unlikely that a court would countenance piercing the corporate veil to hold FHCs liable and that there would be any resulting impact on their safety and soundness.

In sum, an inordinate number of extremely unlikely contingencies would need to materialize in order for there to be a risk posed to FHCs from holding, trading, or transporting metals: there would need to be a release of copper or precious metals in their commodity form into the environment, which the Federal Reserve has not given a single example of having ever taken place; that release would need to give rise to environmental liability; that environmental liability would need to not be adequately addressed by the party responsible for the release and beyond the scope of financial assurance requirements already in place; the relevant FHC subsidiary would need to be found to be an owner or operator (or an otherwise liable party), even though mere owners of commodities are generally outside the scope of liability of environmental statutes; and then a court would need to pierce the corporate veil to hold the FHC liable for the subsidiary's liabilities. The Federal Reserve can point to no evidence indicating even a remote chance that this chain of events might materialize.

II. The Proposal Would Disrupt the Metals Markets, Harming Mining Companies, Their Counterparties, and Consumers

Despite the lack of any rational basis for the Federal Reserve to apply its rule to metals-related activities, the Proposal would have significant adverse effects on the metals markets.

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12 12 C.F.R. § 225.171(a).

13 *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998).

14 *Bestfoods*, 524 U.S. at 61.

A. The Proposal could cause BHCs to exit markets for precious metals

BHCs are major players in the precious metals markets as buyers and sellers of the metals. Barrick uses BHC affiliates as brokers to sell gold into the market, and other BHCs and their affiliates are often the buyers.

While the Proposal does not appear to be intended to curtail BHCs' precious metals activities, we believe it could very well have that effect, for at least three reasons:

1. First, the scope of the proposed definition of "covered physical commodity" is highly uncertain, as it depends on state law and definitions interpreted by the EPA for entirely different purposes. To stay in a commodity business without being subject to substantial capital requirements, BHCs would need to canvass, and stay apprised of, the environmental laws of 50 states, as well as the EPA's ongoing interpretations of federal environmental statutes and regulatory activity under such statutes. BHCs do not currently have the expertise to obtain comfort on these questions, would incur significant costs in any attempt to do so, and may decide to exit the commodity entirely rather than be subject to an uncertain, complex, and continually shifting landscape of environmental law.

2. Second, the Proposal would significantly tighten the capacity for FHCs to invest in commodities under the "complementary" authority of section 4(k)(1)(B) of the Bank Holding Company Act of 1956, as amended (the "BHC Act"), by counting commodities that FHCs and their subsidiaries hold under *other* authorities toward the cap of 5 percent of Tier 1 capital for commodities held under the "complementary" authority. This cap would apply *regardless* of whether the commodity is a "covered physical commodity." The proposed tighter cap on commodities held under the "complementary" authority could cause FHCs to exit lower-margin commodities businesses such as precious metals in order to remain in higher-margin commodities businesses.

3. Third, BHCs could become less competitive in precious metals markets once they are forced to exit the copper market. Dealers that have a presence in more metals markets have an information advantage over dealers that have a presence in fewer of these markets. Moreover, dealers that buy many types of metals from mining companies have a relationship advantage over dealers that buy fewer types of metals. Unlike is the case in banking regulation, the mining sector is not neatly fragmented into precious and industrial metals. Companies such as Barrick mine a variety of types of metals, and try to establish vendor, dealer, and customer relationships that cut across all of our metals. For these reasons, BHCs that are unable to deal in copper could find themselves at a competitive disadvantage with respect to their competitors in precious metals markets.

As a result of the uncertainty, tighter caps, and competitive disadvantages that the Proposal would impose on BHCs engaged in precious metals-related activities, Barrick is concerned that BHCs may well decide to exit the markets for precious metals eventually – as several have already done. BHCs are among the most capable, and highly regulated, participants in these markets. Not only would their withdrawal harm market participants and consumers, it would also upend a centuries-old tradition of banking organizations engaging in this core banking function. A rule that does not offer a single shred of evidence about the risks arising from metals (much less precious metals) should be structured more carefully to avoid this result.

B. The Proposal could cause BHCs to exit the physical copper market entirely

Currently, BHCs play an important role in the copper markets as buyers, brokers, and service providers downstream from mining companies. For instance, at the London Metals Exchange, one of the largest copper exchanges in the world,[15] banking organizations comprise more than half of the "Category 1" and "Category 2" members, *i.e.*, the members with the most extensive trading, market making, and brokerage privileges.[16] At COMEX, another large copper exchange,[17] banking organizations comprise just under half of the members.[18]

The Proposal would impose a combination of four severe restrictions on BHCs' copper activities:

1. First, copper assets held by an FHC under the "complementary" authority would be subject to an extremely high 300 percent risk weight because copper would be a "covered physical commodity." Copper-related assets held under merchant banking authority or the grandfather authority of section 4(o) of the BHC Act would be subject to an enormously high 1,250 percent risk weight. These higher risk weights would be in addition to the market and operational risk weighted asset amounts that *already* apply to copper assets.

2. Second, the Proposal would significantly tighten the capacity for FHCs to invest in commodities under the "complementary" authority by counting, as explained above, commodities held under other authorities toward that cap.

3. Third, the Proposal would rescind all BHCs' authority to deal, invest in, or store copper for themselves or their customers under the "closely related" authority of section 4(c)(8) of the BHC Act.

4. Fourth, the Proposal would rescind BHCs' authority to enter into physically-settled copper derivatives under the "closely related" authority.

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15 *See* Josephine Mason, As LME Preps Sale, NY Rival Gains Copper Trade Share, Reuters (May 30, 2012), available at http://www.reuters.com/article/us-lme-comex-volume-idUSBRE84T04120120530 (reporting 65 percent market share in global copper futures).

16 *See* London Metal Exchange Category 1 Members (accessed Dec. 17, 2016), https://www.lme.com/trading/membership/category-1/; London Metal Exchange Category 2 Members (accessed Dec. 17, 2016), https://www.lme.com/trading/membership/category-2/.

17 *See* Dalton Barker, CME Grows Comex OI and Volumes Through Asia Expansion, FastMarkets (May 13, 2016), available at https://www.fastmarkets.com/base-metals-news/americas/focus-cme-grows-comex-oi-and-volumes-through-asia-expansion-113669/ (reporting 17 percent market share in global copper in 2015).

18 *See* CME Group, Clearing Firms (accessed Dec. 17, 2016), http://www.cmegroup.com/clearing/financial-and-regulatory-surveillance/clearing-firms.html.

In combination, these restrictions would likely cause BHCs, including FHCs, to exit the copper market. BHCs that are <u>not</u> FHCs would not have other authorities to deal, invest in, or store copper. At the same time, BHCs that <u>are</u> FHCs could not realistically shift the authority to hold copper to merchant banking or the section 4(o) grandfather, as the enormously high risk weights assigned to assets held under those authorities would make doing so uneconomical.

A banking organization allocates capital to business lines based on its expected returns on that capital in each business. That is, in order to be competitive and raise capital, a banking organization will use its balance sheet to fund businesses that can meet return-on-equity (ROE) targets given the amount of capital required to be held against the activities of each business. If a capital measure requires a greater amount of capital to be maintained to support a business than is warranted by the actual risk-adjusted returns that business offers – as is true of the capital requirements in the Proposal – the banking organization will be incentivized to either exit that business or increase returns on that business. For the reasons discussed in Part I of this letter, the Proposal would in fact require FHCs to maintain a far greater amount of capital for copper assets than is warranted by the actual risk-adjusted returns that those assets generate. Thus, FHCs would be extremely unlikely to hold copper assets under the merchant banking or section 4(o) authorities.

Moreover, FHCs are not likely to hold copper assets under their "complementary" authority for three reasons. First, FHCs would be much more limited in their ability to hold copper assets under their "complementary" authority. Because the proposed tighter cap on "complementary" authority would apply to *any* commodity, whether or not it is a "covered physical commodity," FHCs would have to choose whether to hold copper or other commodities that yield much higher risk-adjusted returns, given the capital requirements associated with each type of asset. Second, a 300 percent risk weight would cause copper assets to be uneconomical, given the actual risk-adjusted return of copper. Third, the proposed elimination of authority for FHCs to enter into physically-settled copper derivatives, coupled with the tighter cap on the use of "complementary" authority, could make it more difficult for FHCs to hedge the risks arising out of their copper assets. As a result, FHCs would have no good options for legal authorities to support their copper activities.

An exit from the copper market by BHCs would significantly disrupt the market, as it would reduce liquidity and efficiency, with the likely effect of causing an increase in prices for consumers.

III. Copper Should Not Be Removed from the List of Precious Metals

Barrick disagrees with the proposed removal of copper from the list of precious metals under Regulation Y. The Federal Reserve's treatment of copper as a precious metal has been established for nearly 20 years, and while the Federal Reserve asserts that the usage of copper has changed significantly during that time, it has not identified any evidence relating to changes over time in the use of copper. Accordingly, the Proposal does not satisfy the requirement that an agency must "provide more substantial justification when its new policy rests upon factual findings that contradict those which underlay its prior policy."[19] Nor does the Federal Reserve address the reliance interests of market participants in having copper continue to be treated as a precious metal.[20]

At a minimum, the Federal Reserve should follow the example of the Office of the Comptroller of the Currency ("OCC") in that agency's parallel rulemaking. The OCC's recent rule on metals-related banking activities only prohibits national banks and federal savings associations from dealing or investing in copper to the extent it is in a physical form "primarily suited for industrial or commercial use."[21] This approach recognizes that copper can still be used as a medium of exchange or store of value apart from its commercial applications.

The Proposal does not provide any explanation for why BHCs' authority to hold copper should be more limited than that of banks. To the contrary, an activity that national banks and federal savings banks are permitted to conduct should be considered to be "closely related to banking" – as the latter is a broader authority than banking itself.[22] Thus, the Federal Reserve should only remove copper from treatment as a precious metal if the copper is in a physical form primarily suited for industrial or commercial use.

For the same reasons, the final rule should only rescind BHCs' authority to enter into physically-settled copper derivatives under the "closely related" authority to the extent the copper is in a physical form primarily suited for industrial or commercial use. Finally, the final rule should clarify that BHCs may continue to engage in transitory title transfers in metals for the accommodation of customers, because, as the OCC has stated, such transactions "do not involve the customary activities relating to, or risks attendant to, commodity ownership, such as storage costs, insurance, and environmental protection."[23]

IV. Recommendations

For the reasons described above, the Federal Reserve should withdraw its proposed rulemaking. Should it not do so, the Federal Reserve should make the following changes to improve the Proposal:

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19 *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1219 (2015) (citation and quotation marks omitted).

20 *Id.* (noting that agencies must also provide additional justification if a proposed rule would impact "serious reliance interests").

21 *See* 81 Fed. Reg. 96,353 (Dec. 30, 2016).

22 The Federal Reserve and the courts have established the following guidelines for determining whether an activity is "closely related to banking": (1) whether banks have generally provided the service, (2) whether banks generally provide services that are operationally or functionally so similar to the proposed service as to equip them particularly well to provide the proposed service, and (3) whether banks generally provide services that are so integrally related to the proposed service as to require their provision in specialized form. *See* National Courier Association v. Board of Governors, 516 F. 2d 1229 (D.C. Cir. 1975).

23 *See* 81 Fed. Reg. at 96,359.

- ***Exclude metals from the definition of "covered physical commodity."*** The final rule should carve out metals (or at least finished or processed metals) from the definition of "covered physical commodity" because, as discussed above, metals do not present the type of environmental tail risk that other commodities arguably may present. At the very least, the final rule should exempt direct ownership of metals (as opposed to equity investments in metals companies or investments in metals infrastructure assets) from the proposed 300 percent risk-weighted capital charge for covered physical commodities held under the "complementary" authority. We are not aware of any evidence that direct ownership of metals – and particularly finished or processed metals – presents any meaningful environmental risk – much less any risk that would extend to FHCs – and the Proposal provides no such evidence. In addition, the final rule should delete subsection (5) of the proposed definition of covered physical commodity and its references to state law, and list with specific citations to the Code of Federal Regulations the relevant "regulations interpreting the foregoing terms under the corresponding statute" in subsection (4). These changes would reduce the compliance burden on BHCs, and reduce potential ambiguity and confusion that could cause BHCs to exit markets for precious metals.

- ***Reclassify copper under the "closely related" authority only to the extent the metal is in a form primarily suited for industrial or commercial use.*** The Federal Reserve's final rule should align with the OCC's rule and only rescind BHCs' authority to deal or invest in copper, or enter into physically-settled copper derivatives, under the "closely related" authority to the extent the metal is in a form primarily suited for industrial or commercial use. In addition, the Federal Reserve's final rule should expressly provide that BHCs continue to be permitted to engage in transitory title transfers in metals for the accommodation of customers under the "closely related" authority.

- ***Exclude non-covered physical commodities from the tighter cap on assets held under "complementary" authority.*** The Proposal does not make any case for why commodities that are not "covered physical commodities" present risks to FHCs that are left unaddressed by the current regulatory scheme. Accordingly, there is no reason to include non-covered physical commodities within the tighter cap on assets held under "complementary" authority, and thereby risk the possibility that FHCs will exit metals markets so that they can remain involved with higher-risk commodities.

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We appreciate the Federal Reserve's consideration of our concerns. Should you have any questions please do not hesitate to contact us.

Respectfully submitted,

Peter Webster
General Counsel U.S.
Barrick Gold of North America, Inc.