February 17, 2017

Mr. Robert deV. Frierson
Secretary, Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551
Attn. Docket Nos.: R-1547 and RIN 7100 AE-58

Submitted via e-mail to: regs.comments@federalreserve.gov

In Re: Comments of the National Mining Association on the Board of Governors of the Federal Reserve System's Proposed Rulemaking, "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"

Dear Mr. deV. Frierson:

The National Mining Association (NMA) appreciates the opportunity to comment on the Board of Governors of the Federal Reserve System's (Board's) proposal, "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."

NMA is a national trade association that includes: the producers of most of the nation's metals, coal, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. The proposed rule is premised on a presumption of risk associated with an environmental catastrophe involving physical commodities, and has the potential to negatively impact liquidity in commodities markets. As such, NMA's members have a direct and substantial interest in the proposed rulemaking.

NMA has three primary concerns with the proposed rule. First, the proposal does not take into account the robust federal and state environmental regulations applicable to mining operations, including those that require mining companies to post financial assurance instruments designed to cover potential unintended environmental releases. The proposed rule is therefore premised on an overstated perceived market risk to financial holding companies (FHCs) associated with an environmental catastrophe at a mining operation. Second, the rule will decrease liquidity in commodities markets and the significant benefits mining companies derive from the intermediation services provided by

FHCs with no discernible corresponding benefit. Finally, the proposal has failed to justify the need for the proposed restrictions on merchant banking investments in commodities markets. NMA therefore asks that the Board withdraw the proposed rule.

The Proposed Rule Fails to Take Into Account the Comprehensive Federal and State Environmental Regulatory Programs Applicable to the Mining Industry

While NMA appreciates the Federal Reserve's desire to protect against potential legal, reputational and financial risks associated with trading activities, the proposed rule fails to acknowledge the complex and comprehensive framework of federal and state laws and regulations that address every aspect of modern mining. This framework is designed to minimize environmental impacts and prevent unintended environmental releases. Additionally, mining companies commit tens to hundreds of millions of dollars to ensure that money is set aside to properly close sites and, in the unlikely event of a release, to monitor and remediate any long-term environmental issues. Because of this failure, the proposal is based on an inaccurate presumption of risk to FHCs participating in commodities markets.

Federal and State Environmental Laws Protect Against Environmental Accidents

The mining industry is subject to a comprehensive environmental regulatory framework based on federal environmental laws including: the Clean Water Act (CWA); the Safe Drinking Water Act (SDWA); the Clean Air Act (CAA); the Toxic Substances Control Act; the Resource Conservation and Recovery Act (RCRA); the Endangered Species Act; the Surface Mining Control and Reclamation Act (SMCRA); and numerous others. Additionally, mining operations on public lands must undergo extensive permitting processes to obtain approvals from appropriate land management agencies, such as the Bureau of Land Management (BLM) and the U.S. Forest Service (USFS). These regulations and permitting processes ensure that operations are fully protective of public health and safety, the environment, and wildlife.

The number of approvals and permits the typical mining operation must obtain is evidence of the thoroughness of this regulatory framework. For example, a typical hardrock mining operation on federal lands must obtain:

- Approval of a plan of operations from the BLM or USFS, including a reclamation plan, closure plan, and cultural resources plan. The plan of operations is then scrutinized under the National Environmental Policy Act (NEPA), which usually requires the preparation of an environmental impact statement (EIS) that evaluates potential environmental impacts of the mining operation, assesses alternatives and requires the identification of mitigation measures to reduce potentially significant environmental impacts. Permits for hardrock mining operations on public lands cannot be approved if the applicant cannot demonstrate that it will comply with numerous design and operation requirements, which are in place to

minimize the risk of significant spills and other releases that could adversely impact the environment. If any such accidents occur, the relevant regulations require the mining company to take appropriate corrective action. Additionally, post-mining reclamation activities are required.[1]

- Air quality permits from the U.S. Environmental Protection Agency (EPA) or state agencies with delegated programs under the CAA. The complexity of the air quality permits increases if there are substantial onsite processing facilities. All sites must have an approved fugitive dust control program.
- Water quality permits from EPA or state agencies with delegated programs under the CWA. Water quality permits include spill prevention plans, wastewater discharge permits, stormwater management permits, and dredge and fill permits as applicable to each site.
- States also often require permits to address potential impacts to ground water.
- EPA identification number and other applicable hazardous waste requirements under RCRA that govern storage, transportation and disposal of hazardous wastes.
- Authorization under the National Historic Preservation Act if cultural or historic resources are present.

States also have equally protective environmental regulations that address mining, including programs designed to prevent and address potentially hazardous releases from mining operations. Notably, these comprehensive state regulatory programs set criteria for permitting, exploration, development, and reclamation of mining operations, with provisions for financial assurance, protection of surface and ground water, designation of post-mining land use, and public notice and review. Generally, such programs apply to all lands within the state, regardless of whether the lands in question are federal, state or private. Furthermore, states typically have primacy for environmental regulation of mining operations on both federal and non-federal lands through the CWA, the CAA and RCRA.

In addition to imposing operational and permitting requirements on mining companies, as the proposal notes, these environmental laws grant state and federal agencies the authority to impose fines and clean-up costs for accidental releases. However, the proposal fails to recognize that the threat of such liability promotes vigilance and adherence to best management practices on the part of mining companies, and acts as a significant financial deterrent to practices that could lead to the type of environmental accident envisioned in the proposal.

[1] Similar mining plans are required for all coal mining operations under SMCRA.

Existing Environmental Laws Impose Financial Assurance Requirements on the Mining Industry

Both state and federal environmental laws already provide for financial protections in the event of an accidental release at a mine site.

A) Bonding Requirements Under SMCRA

SMCRA provides comprehensive requirements to ensure that coal mining operations are adequately bonded as a prerequisite for obtaining a SMCRA permit. In order to obtain a permit, an applicant must post a bond to ensure that the regulatory authority will have sufficient funds to reclaim the mine site if the permittee fails to complete the reclamation plan approved in the permit. Operators may satisfy these bonding requirements using one of three mechanisms: corporate surety bonds, collateral bonds, or self-bonds which cover reclamation liabilities without the use of a separate surety or collateral if an applicant meets certain state and federal thresholds. To remain qualified, self-bonded permittees must maintain a tangible net worth of at least $10 million, possess fixed assets in the U.S. of at least $20 million, and either meet certain financial ratios or have an "A" or higher bond rating. Collateral posted as bond must be owned solely by the permittee, be free of all liens, and be valued at current market value not face value.

The permitting authority establishes the minimum amount for the bond required, based on the estimated reclamation costs and the agency's independent analysis of the amount that would be necessary for a third party to complete the reclamation plan in the event of bond forfeiture. The bond amount is calculated to reflect the maximum potential cost of reclamation liability within the permit area or an initial increment of that area. Prior to disturbing new acreage, the permittee must post additional bond. Additionally, the regulatory authority must require the permittee to post additional bond whenever the cost of future reclamation increases.

When a surety company writes a surety bond, the surety company guarantees the completion of the reclamation plan approved in the permit. If the permittee does not reclaim the site, the surety company must pay the bond sum to the SMCRA regulatory authority. The regulatory authority may allow the surety to perform the reclamation in lieu of paying the bond amount. However, the surety must comply with all reclamation requirements of the approved permit and regulatory program, including the revegetation responsibility period.

Permittees are not eligible for final bond release until the performance standards of the regulatory program, the approved permit, and the approved reclamation plan have been met and all surface coal mining and reclamation operations have been successfully completed. This includes a demonstration that revegetation meets the success standards in the approved permit and the regulations to support the approved post-mining land uses, as well as a demonstration that all surface mining and reclamation activities have

been conducted to minimize disturbance of the hydrologic balance within the permit and adjacent areas, and to prevent material damage to the hydrologic balance outside the permit area.

B) BLM Financial Assurance Requirements

Pursuant to the BLM 3809 regulations, any person wishing to conduct exploration or hardrock mining operations on BLM-administered lands under a notice of intent or an approved plan of operations must first provide a financial guarantee to BLM. See 43 C.F.R. § 3809.500. The guarantee must cover the estimated costs of reclamation that would be incurred were BLM to contract with a third party to reclaim the operations pursuant to the approved reclamation plan. This includes construction and maintenance costs for any treatment facilities necessary to meet federal and state environmental standards. See 43 C.F.R. §3809.552(a). The financial guarantee must also cover any interim stabilization and infrastructure maintenance costs needed to maintain the area of operations in compliance with applicable environmental requirements while third party contracts are developed and executed. Id.

The BLM regulations specify various mechanisms that can be used to satisfy the financial guarantee requirements, including surety bonds that meet the requirements of Treasury Department Circular 570; cash; irrevocable letters of credit; certificates of deposit and savings accounts; negotiable U.S. government, state and municipal securities or bonds; certain investment-grade securities; and insurance. See 43 C.F.R. § 3809.555. In addition, if allowed by the state in which operations occur, the financial guarantee may be satisfied by participation in a state bond pool or by use of a corporate guarantee that existed on January 20, 2001. See 43 C.F.R. §§ 3809.570 - .571. The financial guarantee must remain in place until: (a) a new operator replaces it with another financial guarantee subject to BLM's concurrence; or (b) BLM releases the requirement to maintain the financial guarantee, in whole or in part, after reclamation, or portions of the reclamation, have been completed. See 43 C.F.R. § 3809.582.

In addition, if BLM identifies a need for it, an operator must establish a trust fund or other funding mechanism available to BLM to ensure the continuation of long-term treatment to achieve water quality standards and for other long-term, post-mining maintenance requirements. See 43 C.F.R. § 3809.552(c). Such funding must be adequate to provide for construction, long-term operation, maintenance or replacement of any treatment facilities and infrastructure, for as long as the treatment and facilities are needed after mine closure. Id.

In 2001, pursuant to a recommendation of the National Academy of Sciences, BLM strengthened its regulations to require financial guarantees for all mining and exploration disturbances, no matter how small, before activities can proceed. BLM has the authority to require operators to update or modify Plans of Operation to reflect on-the-ground developments. 43 C.F.R. § 3809.431. Furthermore, BLM requires periodic review of reclamation funding.

BLM has implemented a tracking system under which BLM state directors are required to certify each fiscal year that the reclamation cost estimates for proposed and operating mines have been reviewed and are sufficient to cover the cost of reclamation. BLM currently holds $2.9 billion in financial guarantees to cover the costs of reclamation of mining operations on BLM-managed public lands.

C) USFS Financial Assurance Requirements

The USFS has had bonding requirements for mineral projects on National Forest System lands dating back to 1974. See 36 C.F.R. §228.13. Since that time, the USFS has had the authority to require a reclamation bond for any mineral activity that requires a Plan of Operations. The USFS updated its bonding requirements in 2004 to reflect lessons learned over the previous 30 years. USFS issued a document entitled "Training Guide for Reclamation Bond Estimation and Administration" in April 2004. The guide is designed to be used in estimating new bonds and updating existing bonds for projects on National Forest System lands.

Allowable financial assurance mechanisms under the USFS program include corporate sureties; irrevocable letters of credit; United States treasury bills, notes, bonds, or other government obligations; cash deposits; and assignment of savings account or certificates of deposit. See Forest Service Handbook 6509.11k, chapter 80 on bonding administration. Similar to BLM, the USFS conducts an annual review of financial assurances and can require operators to provide additional financial assurance as needed. Similarly, via policy, the USFS also requires inclusion of long-term water treatment under certain circumstances. As of May 2016, the USFS holds over $325 million in reclamation bonds for approximately 530 projects. Of that $325 million, approximately $304 million is for eight large operations.

D) State Financial Assurance Requirements

States with hardrock mining within their boundaries also have regulations in place requiring financial assurance for mining operations. Many states, similar to BLM and the USFS, have updated their financial assurance requirements over the last decade. For example, in Nevada, the Nevada Division of Environmental Protection worked with BLM, the USFS, and the Nevada mining industry to update Nevada's bonding requirements in response to lessons learned using bond monies to reclaim several bankrupt sites. Other states, such as Colorado and Montana, have done likewise.

State requirements for financial assurance are often quite extensive. Again, using Nevada as an example, Nevada's regulations for "Reclamation of Land Subject to Mining Operations or Exploration Projects" (NAC 519A) include stringent requirements for reclamation plans and reclamation bond cost estimates for projects on public, state, and

private lands. All Nevada mines and exploration projects affecting more than five acres – regardless of land status – require a reclamation bond. Nevada's NAC 519A bonding regulations require that bonds be reviewed and updated at least every three years, and sooner if the project is modified. There is currently over $2.66 billion in posted financial assurance in Nevada.

The Proposed Rule Will Decrease the Significant Benefits Mining Companies Derive from FHC Participation in Commodities Markets

Mining companies rely on FHCs for a wide range of intermediation services to help hedge the risks associated with long-term investment projects and facilitate market liquidity and access. For example, mining companies enter into fixed-price sales agreements with FHCs to protect against price decreases, which in turn increases operational efficiency and lowers costs. FHCs may also provide funding to mining companies by agreeing to pay for commodities sooner than other purchases would pay, or provide financing arrangements that increase available capital for mining companies which can then be used to invest in both daily operations and profit-making projects.

FHCs also engage in intermediation activities that are used by other commodities market participants, including consumers and investors. By way of example, FHCs may maintain commodities inventories in anticipation of near-term demand, which provides consumers with a steady supply source for the commodity. Similarly, FHCs may enter into fixed-price purchase agreements with consumers to protect against volatile commodities price increases.

Importantly, FHCs act as market makers on a consistent basis in commodities markets, and are subject to comprehensive regulations. Furthermore, FHCs are well capitalized and financially stable. Therefore, while other market participants may provide intermediation services on occasion, they do not provide an effective replacement should FHCs no longer be able to participate in commodities markets.

Domestic minerals production provides critical benefits to the U.S. economy. Mining provides essential power and materials for nearly every industry and consumer product and supplies low-cost, reliable fuel for homes and businesses across the country. The value added by major industries that consume the $75 billion of minerals produced in the U.S. is an estimated $2.8 trillion (2016), or 15 percent of our gross domestic product. Mining's direct and indirect economic contributions include nearly 1.7 million jobs with wages and benefits well above state averages for the industrial sector. In addition, domestic mining generates more than $40 billion in tax payments to federal, state and local governments.

Mining is also critical to the success of American manufacturers. According to a Sept. 2014 Edelman Berland survey of 400 manufacturing executives, more than 90 percent of executives are concerned about supply disruptions outside of their control, citing

geopolitics and increasing global demand as the most pressing factors. Most executives surveyed also believe minerals and metals demand will only increase in the next five to 10 years. In addition, 80 percent of business leaders within the U.S. manufacturing sector recognize the importance of sourcing minerals and metals from the United States, noting decreased dependence on foreign minerals and metals and strengthened national security as reasons for doing so. And nearly 85 percent also believe a strong domestic supply chain of critical minerals and metals will ensure job creation and economic growth in America.

However, in 2016, imports supplied more than half of U.S. consumption of 50 important mineral commodities, and the U.S. was 100 percent reliant for 20 of those. That represents an increase from 47 and 19 minerals, respectively, in 2015, and marks a record high. U.S. import reliance has increased significantly since 1978, the year that such information was first reported by USGS. At that time, the U.S. was 100 percent import reliant for only seven mineral commodities, and more than 50 percent import reliant for 25 mineral commodities.

Therefore, by removing FHC participation from minerals markets, the proposed regulations will further marginalize domestic mining, which in turn will decrease global competitiveness and supply chain stability and harm domestic manufacturing, technological innovation, national security, and future economic growth. Such negative ramifications are particularly unjustified in light of the lack of environmental risk associated with the ownership of mining commodities. Warehouses storing copper cathodes and trucks shipping gold bullion present no risk of the type of environmental catastrophe described in the proposal.

The Proposal Fails to Justify the Need for the Proposed Restrictions on Merchant Banking Activities

Merchant banking investments provide capital support and financial expertise to mining companies with economic potential and sound management teams. This capital allows mining companies to strategically reposition and invest in operational improvements and technological innovation. However, the proposed risk-based capital requirements on FHCs and their merchant banking investments will disproportionately penalize legitimate merchant banking activities related to commodities markets, thereby disincentivizing such innovation and growth.

The proposed capital requirements are particularly unwarranted, as merchant banking activities are comprehensively regulated under the Gramm-Leach-Bliley Act (GLB Act) and the oversight of the Board. FHCs also have robust internal risk-assessment and management policies and practices that allow them to identify, evaluate and manage the risks arising from merchant banking activities. Furthermore, in light of the principles of corporate separateness and the limited liability of shareholders, the possibility that an FHC would be subject to liability for the type of environmental accident envisioned by the

Board is extremely remote. Notably, the Board fails to adequately acknowledge the basic tenant of corporate law that an entity is distinct from its shareholders provided that proper corporate separateness is maintained. Because the statutory and regulatory requirements governing merchant banking activities help ensure that merchant banking portfolio companies are recognized as separate corporate entities, there is minimal risk that veil-piercing will occur or that environmental liability will accrue to FHCs. Indeed, the proposal itself does not provide any examples of material loss resulting from merchant banking activities in commodities markets, and instead uses hypothetical, unrealized risks to justify eliminating the real, demonstrated benefits from merchant banking in commodities.

Conclusion

In light of the aforementioned concerns, NMA asks that the Board withdraw the proposed rule. Please feel free to contact me at aaspatore@nma.org if you have any questions or would like to further discuss any of these concerns.

Sincerely,

Amanda E. Aspatore
Vice President, Water Law & Policy
National Mining Association