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Via Electronic Mail

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: Proposed Rule: Alternative Net Capital Requirements For Broker-Dealers That Are Part Of Consolidated Supervised Entities (File No. S7-21-03), 68 Federal Register 62872 (November 6, 2003).

Dear Mr. Katz:

This letter responds to the request of the Securities and Exchange Commission ("Commission") for comments on the Commission's proposed alternative net capital rule (amending Rule 15c3-1) ("Proposed Rule"), as set forth in Release No. 34-48690 ("Release"). The American Bankers Association Securities Association ("ABASA") is a separately chartered trade association and non-profit affiliate of the American Bankers Association consisting of banking organizations that broker, underwrite and deal in securities, proprietary mutual funds and derivatives. ABASA's members have broker-dealer affiliates that are subject to the Commission's existing net capital rules.

OVERVIEW

The fundamental principle animating the Proposed Rule is that a broker-dealer can be eligible for a different and potentially more favorable type of broker-dealer capital requirement if it is part of an organization or holding company that operates with an appropriate degree of consolidated risk management and consolidated risk-based capital. Consistent with this principle, the Proposed Rule would impose new requirements on holding companies that own a broker dealer and seek to take advantage of the alternative broker-dealer capital requirement. For example, the affiliates of a broker-dealer within such a holding company generally would have to agree to Commission examination of their books and records, required reporting to the Commission, and certain standards related to capital and risk management established by the Commission. The Proposed Rule recognizes, however, that in some circumstances it would be neither desirable nor necessary to extend at least some of the proposed new requirements to an affiliate of a broker-dealer that is already subject to an appropriate level of examination and supervision by another regulatory agency.

As a general matter, ABASA strongly supports the animating principle of the Proposed Rule; the availability of the benefits of the proposed alternative capital treatment to broker-dealers owned by bank holding companies; and the general recognition that, because of the nature of their regulation, bank holding companies should not be subject to all of the same regulatory requirements as unregulated affiliates of broker-dealers. Nevertheless, our members remain very concerned that the Proposed Rule does not go far enough to recognize the existing regulation already applicable to bank holding companies through their consolidated examination, reporting, capital, and risk management requirements – all of which are applicable to bank holding companies under the Federal Reserve's regulations implementing the Basel regime that the Proposed Rule appropriately recognizes as its model. As explained in more detail below, ABASA's principal concerns are as follows –

- ***Regulatory requirements applicable only to certain bank holding companies***. Some of the regulatory relief in the Proposed Rule applies only to a subcategory of bank holding companies that are "primarily in the insured depository institutions business"; ABASA believes that such relief should apply to ***all*** bank holding companies, and that, in any event, the test for determining which institutions fall in the subcategory is unworkable.

- ***Examination of bank holding company affiliates***. The relief from Commission examination for qualifying bank holding companies already subject to Federal Reserve Board ("Federal Reserve") examination is too limited because it appears to apply only to the unconsolidated holding company and certain narrowly defined categories of affiliates, such as banks and insurance companies. ABASA believes that, given the extensive Federal Reserve regulation of ***all*** affiliates of a bank holding company, it is unnecessary for the Commission to examine any of them (other than affiliates that are directly subject to Commission regulation, such as a broker-dealer).

- ***Reporting requirements***. The Proposed Rule provides ***no*** relief for any bank holding company from the new holding company reporting requirements that would be imposed. ABASA believes that, instead, the Commission should rely to the maximum extent possible on the very similar reporting that is already provided by bank holding companies to the Federal Reserve.

- ***Confidentiality***. ABASA believes the Commission should take several steps to maximize the protection for confidential information it receives from affiliates of broker-dealers pursuant to the requirements of the Proposed Rule.

- ***Methodology for capital calculation***. Finally, ABASA believes bank holding companies, which are allowed to use their holding company capital requirements under Federal Reserve regulations implementing the Basel regime to address the holding company capital requirements of the Proposed Rule, should be allowed to use those same requirements to satisfy the alternative broker-dealer capital requirements of the Proposed Rule.

DISCUSSION

Regulatory Requirements Applicable Only to Certain Bank Holding Companies. ABASA strongly supports the concept of reduced regulatory requirements under the Proposed Rule for "an entity that has a principal regulator" as a prudent means to avoid burdensome and unnecessary regulation for organizations that are already subject to the type of consolidated capital and risk management regulatory requirements that are applicable to and appropriate for both broker-dealers and their affiliates. All bank holding companies are subject to such requirements under the Bank Holding Company Act of 1956, as implemented through extensive regulation by the Federal Reserve, and as a result, we believe all such companies should be treated as "entities with a principal regulator" for purposes of the Proposed Rule.

Unfortunately, however, the definition in the Proposed Rule of an "entity that has a principal regulator" includes only a subset of bank holding companies, *i.e.*, only those bank holding companies that are "primarily in the insured depository institutions business (excluding [their] insurance and commercial businesses)." § 240.15c-3-1(13)(ii). We applaud the Commission's recognition that, at least for these bank holding companies, the Federal Reserve provides meaningful consolidated supervision on which the Commission can rely. But by drawing the definition so narrowly, the Proposed Rule effectively ignores the extensive Federal Reserve regulation that applies uniformly to ***all*** bank holding companies, regardless of the level of their "insured depository institutions business."

Bank holding companies are subject to extensive, consolidated supervision by the Federal Reserve of ***both*** their banking and non-banking activities. 12 U.S.C. § 1844(c); 12 C.F.R. part 225. (Of course, as discussed below, pp. 7-8, the Federal Reserve does defer to the primary expertise of "functional regulators" of certain types of holding company affiliates, such as broker-dealers and insurance companies.) "In general," the Federal Reserve will examine, "the largest and most complex BHCs . . . at least annually," and "the largest BHCs, and those with significant problems . . . semiannually." Federal Reserve Board, *Bank Holding*

Company Supervision Manual § 5000.0.2 (updated Dec. 2003).[1] Indeed, many of ABASA's members have resident examiners who are continually on-site.

The Federal Reserve's examinations include both the banking and nonbanking activities of bank holding companies, *see id.* § 5000.0, and are in addition to the capital and other reporting requirements imposed on bank holding companies by Federal Reserve regulation. *See generally* 12 U.S.C. § 1844(c)(1); 12 C.F.R. part 225 appendices. Such examinations concentrate on the nature (*e.g.*, credit, operational, liquidity, and systemic) and amount of risks faced by the bank holding company and its affiliates. 12 U.S.C. § 1844(c)(2). They also focus on the bank holding company management's procedures for controlling and minimizing these risks and the holding company's results in complying with those procedures. *Id*.

Given the thorough examination of ***all*** bank holding companies and their affiliates by the Federal Reserve, the proposed duplication of such efforts by the Commission with respect to even a subset of such companies is unwarranted. It risks not only generating conflicting supervisory goals, but also creating additional burdens and expenses for those bank holding companies that do not fit within the proposed definition. Such a result is at odds with the spirit of the Commission's Proposed Rule, which recognizes the value of avoiding unnecessary burdens in part through reliance on appropriate and effective regulation provided by other agencies.

In addition, while ABASA strongly believes there is no reason to limit the category of bank holding companies covered by the definition, the particular limit proposed by the Commission – to bank holding companies "primarily in the insured depository institutions business" – is especially problematic. *First*, it is unclear what is meant by "primarily in the insured depository institutions business." For instance, "primarily" could be read to mean "more than 50%," but it also could be interpreted as requiring some much higher percentage. By way of example, a number of years ago the Federal Reserve interpreted the comparable phrase "engaged principally" in the former section 20 of the Glass-Steagall Act to mean that section 20 affiliates had to derive at least 95%, then 90%, then 75% of their revenues from eligible activities. *See* Revenue Limit on Bank-Ineligible Activities of Subsidiaries of Bank Holding Companies Engaged in Underwriting and Dealing in Securities, 61 Fed. Reg. 68750, 68750 (Dec. 30, 1996). In addition to the arbitrary nature of such limits, abiding by them proved to be extraordinarily complex, costly, and difficult, requiring special systems and enormous time spent on compliance and legal questions. Similarly, the phrase "depository institutions business" in the Proposed Rule is ill-defined, as it could be interpreted as a test based on revenues, assets, or some other factor not mentioned in the rule (or

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[1] Smaller holding companies "with no known problems will be reviewed on a more limited basis." *Id.* However, for a variety of reasons, including the dollar thresholds for broker-dealers applying for the alternative capital treatment, it is likely that the only bank holding companies applying for such treatment will be the large banking organizations subject to examination at least annually.

some combination of such factors), while at the same time there are no articulated standards regarding when the measurement will take place and at what intervals.

Second, even assuming the Proposed Rule's standard were amended with more specificity, for example, to require that a bank holding company have more than half of its consolidated assets in insured depository institutions, the definition would still be too narrow. There are many extensively regulated bank holding companies that might not satisfy such a definition, even ones that own very large banks, because of their extensive involvement in other activities that do not involve insured depositories. Indeed, most U.S. operations of foreign banks, which are extensively regulated by the Federal Reserve, take no insured deposits. *See* 12 U.S.C. § 3104.

Third, the Proposed Rule's definition is unworkable. As noted above, operating under the artificial section 20 limits is just one example of the compliance quagmire that can result from arbitrary business limits imposed by regulation. Whatever the test adopted to implement the "primarily in the depository institutions business" standard in the Proposed Rule, a bank holding company might satisfy the test at the time of its application, but be in jeopardy of failing it subsequently with every new change in its asset mix, whether by acquisition or otherwise. And the corollary effect of that constraint is that the Commission could well be thrust into the business of effectively having to approve mergers and acquisitions involving a bank holding company whose "insured depository institution business" is close to whatever line is ultimately articulated – even though the Federal Reserve already exercises that responsibility in a thorough manner. *See* 12 U.S.C. § 1842; 12 C.F.R. § 225.41 *et seq.* Thus, the definitional limit included in the Proposed Rule could have the perverse effect of increasing, rather than alleviating, the regulatory burden on bank holding companies.

For all these reasons, ABASA submits that any bank holding company that is subject to consolidated examination and capital requirements under the Bank Holding Company Act, and all of its subsidiaries (other than those expressly subject to Commission examination, such as broker-dealers), should be treated as an "entity that has a principal regulator." These Federal Reserve-supervised companies are already subject to the most rigorous consolidated supervision of any type of financial institution in the United States. There is simply no reason, and no workable way, to limit the Commission's designation to some subset of such institutions.

<u>Examination of bank holding company affiliates.</u> ABASA believes that the Proposed Rule appropriately recognizes that the Commission should not examine the books and records of "any affiliate of a broker dealer, including the holding company, that has a principal regulator." § 240.15c-3-1e(a)(viii)(E). However, the Proposed Rule could be read to mean that only the unconsolidated holding company and any "functionally regulated" affiliate of the broker-dealer, such as a depository institution, insurance company, or futures commissions merchant, would be exempt from Commission examination. Such an interpretation would appear to be based on a conclusion that the Federal Reserve's holding company regulation extends only to the parent holding company, and not to any subsidiary or affiliate that is not otherwise subject to separate regulation as a bank, insurance company, etc. That is simply not the case. ***All*** nonbank affiliates of a bank holding company are subject to extensive regulation and supervision by the Federal Reserve. *See* 12 U.S.C. § 1844(c)(1) & (2); *see also* Federal Reserve Board, *Bank Holding Company Supervision Manual* § 5000.0.4.5.1 (detailing the procedures for "On-Site Reviews of Nonbank Subsidiaries"). There is no sound reason why the Commission should rely on the Federal Reserve's examination authority with respect to the unconsolidated holding company of a broker-dealer, but not on its comparable examination authority with respect to the subsidiaries of that holding company. Doing so would only create a more complex maze of regulatory requirements for a consolidated bank holding company. Accordingly, the Commission should ensure in its Final Rule that all affiliates of bank holding companies are exempt from Commission examination (other than those expressly subject to Commission examination, such as broker-dealers), whether the bank holding company affiliates themselves have their own functional regulator, or are regulated through the holding company by the Federal Reserve.

Reporting requirements. Unlike its treatment of examination requirements, the Proposed Rule provides no relief from the Commission's reporting requirements for an "entity that has a principal regulator." Thus, even a bank holding company that qualified as such an entity would be subject to the Commission's reporting requirements imposed by the Proposed Rule, even though such a holding company provides to its primary regulator, the Federal Reserve, virtually the same information that would be required under the Proposed Rule. This makes little sense. It is incongruous for the Proposed Rule to recognize that principal regulators, like the Federal Reserve, provide adequate examinations of the entities they regulate on the one hand, but then not provide for use of the relevant parts of those regulators' reports in the Commission's supervision. ABASA therefore submits that the Commission should amend the Rule so that the Commission takes full advantage of the relevant reporting already provided to the Federal Reserve as the first and best way to satisfy its reporting needs with respect to bank holding companies that apply for the alternative net capital treatment.

As discussed above, pp. 3-4, bank holding companies and their affiliates are subject to extensive regulation on a consolidated basis, including examination, supervision, reporting, and enforcement, by the Federal Reserve. A fundamental part of this consolidated regulation has focused on the risk management and internal capital allocation systems that bank holding companies have established and adapted, with increasing sophistication, over time. Indeed, banks and bank holding companies have been deeply involved in the development of the financial derivatives market since its inception in the early 1980s, partly because of the credit-intensive nature of that business. Such derivatives have become an efficient and innovative means for end-users to manage a broad variety of risks in ways that previously had not been possible. But banks' use of such derivatives demanded their own establishment of new and sophisticated kinds of risk management and capital allocation systems, including through widely publicized proposals for "best practices."[2] In turn, bank regulators – and especially the Federal Reserve with respect to the consolidated operations of bank holding companies – developed increasingly sophisticated and nuanced examination and reporting requirements to oversee, for safety and soundness purposes, the effectiveness of such consolidated risk management and capital allocation systems. And it was this experience over time that led to adaptations by the Basel Committee of supervisory requirements applicable to banking organizations worldwide, particularly with respect to oversight of market risk,[3] but culminating in the far more sophisticated requirements that are at the heart of the so-called "Basel II" proposal[4] – which the Proposed Rule rightly recognizes as an appropriate model for the kind of risk management system that would make organizations eligible for alternative net capital treatment.

The point of all this is that bank holding companies are already reporting to the Federal Reserve exactly the type of information that the Proposed Rule appears to envision as the predicate for alternative net capital treatment. That being the case, ABASA strongly urges cooperation between the Commission and the Federal Reserve so that the Commission may (1) determine whether the information the Commission would seek from bank holding companies is in fact already provided by such companies to the Federal Reserve; and (2) to the extent such information is already so provided, to use that information for reporting purposes with respect to bank holding companies, as opposed to requiring bank holding companies to develop a new and unnecessary reporting function.

There is a model that Congress has recently and expressly enacted for exactly this kind of regulatory cooperation among financial institution regulatory agencies, *i.e.*, the streamlined supervision requirements of the Gramm-Leach Bliley Act ("GLBA"). While Congress designated the Federal Reserve as the "umbrella supervisor" for bank holding companies and their affiliates, it also required the Federal Reserve to coordinate with other regulators to obtain reports created through their supervisory efforts so as to avoid duplicative regulatory burdens on bank holding companies. GLBA § 111; H.R. Conf. Rep. 106-434 (1999), at 157. GLBA § 111 requires the Federal Reserve, "to the fullest extent possible," to accept reports already submitted to another federal or state regulator, and reports that are otherwise public. 12 U.S.C. § 1844(c)(1)(B). Moreover, "[i]n the event that the Board requires a report . . . from a functionally regulated subsidiary of a bank holding company of a kind that is not required by another federal or state regulatory authority or an appropriate self-regulatory organization," the Board must "first request that the appropriate regulatory

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[2] *E.g.*, Group of Thirty, *Derivatives: Practices and Principles* (1993).

[3] 12 C.F.R. part 225 App. E.

[4] *The New Basel Capital Accord* (Apr. 2003); *Implementation of New Basel Capital Accord*, 68 Fed. Reg. 45900 (Aug. 4, 2003) (proposed rule).

authority or self-regulatory organization obtain such report." *Id.* § 1844(c)(1)(B)(iii)(I). Only if the Board is unable to obtain the desired report from the other regulator (*e.g.*, the Commission) does it then have jurisdiction to seek the report directly from the functionally regulated subsidiary of the bank holding company (*e.g.*, a broker-dealer). *Id.* § 1844(c)(1)(B)(iii)(II). (In addition, national bank subsidiaries of bank holding companies are subject to the exclusive "visitorial powers" of the Office of the Comptroller of the Currency. *See* 12 U.S.C. § 484(a); 12 C.F.R. § 7.4000. Such "visitorial powers" include requiring reports from and examining national banks, among other things. *See* 12 C.F.R. § 7.4000.) We believe the Commission has traditionally supported the functional regulation principle underlying the GLBA limitation on the Federal Reserve's reporting authority, which encourages reliance in the first instance on regulatory reports already prepared by other regulators and avoids needless regulatory burdens.

For precisely the same reason, ABASA believes that the Commission's Final Rule should apply a similar procedure to the one that Congress enacted in GLBA § 111, *i.e.*, to streamline regulatory reporting and avoid undue regulatory burden on bank holding companies and their affiliates. Thus, we believe that, in order to satisfy its needs regarding risk management and capital reporting requirements, the Commission should obtain from the Federal Reserve – and the Federal Reserve should agree to promptly provide – the reports that bank holding companies have already provided to the Federal Reserve on precisely these subjects. Further, when additional reports are required that have not been previously provided to the Federal Reserve, the Commission should first request the Federal Reserve to obtain them, just as the Federal Reserve must take this course under GLBA when it requires reports from broker-dealers that have not previously been provided to the Commission. Only if that process does not work should the Commission request reports directly from bank holding companies. ABASA believes that this system for obtaining information from bank holding company affiliates would, as GLBA recognizes, achieve the twin goals of providing important information to the Commission, and doing so without needlessly imposing new and costly reporting requirements on bank holding companies.

The other advantage of such an approach is that it would maximize protection from unwarranted public disclosure of confidential bank holding company business information obtained by the Commission for purposes of the alternative net capital calculation. As explained below, there are concerns that, with respect to Freedom of Information Act ("FOIA") requests for public disclosure of certain information provided to the Commission under the Proposed Rule, the Commission may not be able to invoke successfully the so-called "(b)(8)" exemption from FOIA disclosure for examination information. As further explained below, however, such concerns would be irrelevant if the Commission obtained the information directly from the Federal Reserve, because a unique provision added by GLBA, which is codified in § 17(j) of the Securities Exchange Act 1934 Act, 15 U.S.C. § 78q(j), would enable the SEC to prevent the disclosure of such information notwithstanding its treatment under FOIA. *See infra* pp. 10-11.

To the extent the Commission believes that it needs information from bank holding companies that is not otherwise provided to the Federal Reserve, ABASA believes that the final Rule should identify with as much specificity as possible the precise types of information that would be required. Moreover, ABASA believes it is critical that such information be limited to the reports that bank holding companies already generate internally for risk management and capital allocation systems. This is the information that management relies on to protect the viability of a firm, and enormous investments have already been made to ensure that such internal reporting is robust and reliable. To create an entirely new kind of reporting requirement that would require new systems and reporting structures would be, we believe, both costly and potentially counterproductive. Moreover, the use in the first instance of existing internal risk management reports is a principle that the Proposed Rule generally embraces, appropriately, we believe.[5] In short, by using the sophisticated internal reports that bank holding companies already use for risk management purposes, any additional reporting required by the Commission would not require the creation of additional reports.

Finally, to the extent that the Commission does require any additional reports from bank holding company affiliates of a broker-dealer, the Commission should obtain such reports through the broker-dealer, over which the Commission has regulatory jurisdiction under the securities laws. The Commission could draft its Final Rule such that, as a condition of a holding company maintaining favorable broker-dealer capital treatment for its registered broker-dealer subsidiary under the Rule, the broker-dealer would agree to submit reports to the Commission that the broker-dealer obtains from its non-broker-dealer affiliates that are requested or required by the Commission. Such a system would be consistent with a system of functional regulation, as discussed above. Moreover, there would be no question of the Commission's authority to claim the FOIA examination reports exemption for reports it obtains from a registered broker-dealer.

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[5] *See* Proposed Rule, 68 Fed. Reg. at 62890 ("[W]e believe that the burden under this proposal would be lower than the Rule 17a-12 burden estimates because CSEs already generate many of the required reports for intenal management purposes. We expect that any additional burden associated with the requirements of proposed Appendix G relating to making, keeping, and preserving records would be minimal because a prudent firm that manages risk on a group-wide basis would make and preserve these records in the ordinary course of its business."); *see also id.* at 62893 ("We anticipate that cost savings [from the Proposed Rule] would result in several areas. Under the proposal, a broker-dealer would become subject to specifically tailored capital and other requirements. The broker-dealer would be able to compute certain of its net capital charges using internally developed mathematical models that the firm uses to manage risk and to report risks to the Commission using internal reports that the firm already generates for risk management purposes.").

Notwithstanding any other experience the Commission may have had with obtaining reports on affiliates from broker-dealers, doing so in this instance would be both practical and workable because the Commission can condition favorable capital treatment – a significant benefit to holding companies – on the broker-dealer's ability to obtain the requested or required reports from the non-broker-dealer affiliates. Moreover, the Commission could exercise its full enforcement authority against the broker-dealer if the broker-dealer failed to comply with the Commission's request for reports from non-broker-dealer affiliates of the bank holding company.

Confidentiality. The Commission should amend the Proposed Rule to maximize the protection from public disclosure of operating condition information obtained from bank holding companies. As previously mentioned, one sure way the Commission could do so would be to obtain such information from the Federal Reserve, rather than from the bank holding companies themselves. Because of an amendment to the Exchange Act by the GLBA, the Commission has authority "[n]otwithstanding any other provision of law," including the Freedom of Information Act, to prevent public disclosure of "any information supplied to the Commission by any domestic or foreign regulatory agency that relates to the financial or operational condition of any associated person of a broker or dealer . . . ." 15 U.S.C. § 78q(j). This blanket protection simply would not apply if a bank holding company made this information available to the Commission directly as the Proposed Rule contemplates. Accordingly, the Rule should be amended to maximize the protection from public disclosure by having the Commission obtain required information directly from the principal regulator – the Federal Reserve for bank holding companies – in the first instance.

Also, to further maximize confidentiality protection, ABASA requests that the Commission expressly recognize the confidential nature of the information likely to be required under the Rule and that, as a result, it is very likely that such information will be treated as the type of competitively sensitive business information that will be exempt from public disclosure pursuant to the FOIA statutory exception for such materials, 5 U.S.C. § 552a(b)(4), as well as the Commission's regulatory exception to its public disclosure obligations for competitively sensitive information, 17 C.F.R. § 200.80(b)(4).

Similarly, ABASA further requests that the Commission recognize expressly in its Final Rule the applicability of the FOIA disclosure exemption for examination and condition information provided to a financial regulator – even where the information concerns an affiliate of a broker-dealer that is not directly subject to the Commission's regulation or supervision. That is, the Commission should clarify that (1) any information that it receives regarding an affiliate of a broker-dealer that contains or is related to "examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions," including the Commission, will be fully subject to the exception from FOIA for such records, 5 U.S.C. § 552(b)(8), as well as the Commission's regulation interpreting such exception, 17

C.F.R. § 200.80(b)(8) (hereinafter the "(b)(8) exception"); and (2) the (b)(8) exemption applies regardless of whether information is prepared for the Commission or another financial institution regulator, such as the Federal Reserve. Although the (b)(8) exception refers to records prepared for "an agency responsible for the regulation or supervision of financial institutions," the Commission should find that, for such exception to apply, it is not necessary that the Commission itself be de jure "responsible for the supervision of" the entities to which the information relates, such as bank holding companies, or that the records must be prepared in the first instance for the Commission. Rather, the Commission should construe the (b)(8) exception as the courts have – broadly – and find that it "does not require that the agency regulate or supervise the particular institution that is the subject of the report," *Public Citizen v. Farm Credit Administration*, 938 F.2d 290, 293 (D.C. Cir. 1991) (per curiam), and that the importance of protecting sensitive information contained in financial institution examination reports is "implicated regardless of whether the agency regulates or supervises the financial institution." *Id.*

Methodology for capital calculation. ABASA strongly supports the provision in the Proposed Rule that provides that, with the Commission's prior approval, a "holding company may compute a capital assessment consistent with standards promulgated by the Basel Committee on Banking Supervision (as modified from time to time) that it is required to submit to a financial regulator or supervisor in lieu of the computations" otherwise required under the Proposed Rule. § 240.15c3-1g(a)(5). The Proposed Rule should be amended, however, so that bank holding companies are allowed to use the same Basel capital requirements that are currently in place at the holding company or will be in place when a new Basel capital accord is adopted for their broker-dealer subsidiaries. As the Proposed Rule now reads, a bank holding company may be able to use its existing Basel capital computations at the holding company level, but may not be able to do so at the broker-dealer level. If this were so, the Commission would impose a needlessly complex (and differing) set of capital requirements on bank holding companies and their broker-dealer affiliates – an outcome that would be at odds with the regulatory burden relief envisioned by the Proposed Rule. The new capital standards in the Proposed Rule for broker-dealer affiliates of nonbanks should not apply to broker-dealer affiliates of banks because the Basel capital regime – which the Proposed Rule recognizes as an appropriate regime for all broker-dealer holding companies – already applies to broker-dealer affiliates of banks to the same extent as it applies to all other affiliates of banks as required by Federal Reserve regulation. In sum, an additional capital regime at the broker-dealer level is simply unnecessary for broker-dealers that are subject to the Basel regime as the result of the consolidated capital regulation applicable to bank holding companies generally.

Technical Amendment for Undertakings. As noted above, ABASA commends the Commission for allowing a "holding company [to] compute a capital assessment consistent with standards promulgated by the Basel Committee on Banking Supervision (as modified from time to time) that it is required to submit to a financial regulator or supervisor in lieu of the computations" otherwise required under the § 240.15c3-1g(a)(2) and (a)(3). *See* § 240.15c3-1g(a)(5). However, it makes little sense that "if the holding company fails to comply with any provision of its undertaking [as required by Appendix E], the Commission may, . . . increase the multiplication factors the holding company uses to calculate allowances for market and credit risk as defined in § 240.15c3-1g(a)(2) and (a)(3)." In other words, the Proposed Rule could be read to mean that if a bank holding company that is permitted by the Commission to use the Basel requirements of its own regulator (the Federal Reserve) under § 240.15c3-1g(a)(5), but then later fails in its undertaking to the Commission, the Commission will not only increase its capital requirements, but will also simultaneously impose new and different requirements on the holding company. ABASA believes that such an interpretation was likely not intended by the Commission because it appears inconsistent with the recognition of and reliance on the capital regime already applicable to bank holding companies. Accordingly, the Proposed Rule should be clarified so that to the extent that there are capital remedies suggested for a company that violates its undertakings to the Commission, and that company is a bank holding company that already complies with its regulator's capital requirements on a consolidated basis, then any such capital remedies should be imposed only on the broker-dealer and not on the holding company.

Please contact ABASA if we can provide additional information or assistance.

Sincerely,

Beth L. Climo

Beth L. Climo