



November 1, 2013

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Public Feedback on OFR Study on Asset Management

Dear Ms. Murphy:

On September 30, 2013, the Office of Financial Research (“OFR”) issued a report entitled “Asset Management and Financial Stability” (“Report”), which is purportedly an overview of the asset management industry. That same day, the Securities and Exchange Commission (“SEC”) posted the Report on its website and announced that it would accept feedback from members of the public interested in providing input on it. Better Markets, Inc.¹ (“Better Markets”) appreciates the opportunity to submit its views.

OFR was designed to be a highly regarded crown jewel in the country’s financial reform architecture. The legislative and executive branches created and structured OFR to be a very powerful, independent resource and support structure for financial reform generally and the fight against systemic risk in particular. Independent funding, subpoena power, and virtually unlimited jurisdiction were the pillars to enable OFR to produce superior, high quality, and robust data, research, and analysis.

OFR was intended to be a transformative, game-changing organization. It was supposed to be the all-source financial fusion center as well as the heart of the policy-making circulatory system that nourished the other parts of the government. Its work was not just to improve the quality of financial data to policy makers; it was expected to set the gold standard for independent, rigorous, unimpeachable, and sophisticated analysis of the financial system.

Regrettably, OFR has thus far fallen short of the goals set for it and short of the standards that it was expected to meet and that the American people need it to meet. The glaring deficiencies of this Report are, unfortunately, evidence of these shortcomings.

¹ Better Markets, Inc. is a nonprofit organization that promotes the public interest in the capital and commodity markets, including in particular the rulemaking process associated with the Dodd-Frank Act.

The first and most obvious problem is the inexcusable lack of transparency and disclosure regarding how and why the Report came about as well as how its analysis (such as it is) was conducted and with who's input and direction. Most troubling, it appears to confirm some of the worst suspicions that OFR is influenced by and biased toward the too-big-to-fail sell-side banks that dominate Wall Street. After all, rather than focusing on the known systemic risks that they pose, which materialized just five years ago and which inflicted widespread economic wreckage across the country, OFR chooses to take aim at the asset management buy-side of the financial industry, which, by comparison, presents much lower risk and played no role or virtually no role in the most recent financial crash.

Equally troubling is the inexplicably and indefensibly poor quality of the work presented in the Report. As explained in detail below, the Report adopts an arbitrary analytical framework; it provides little empirical support; it ignores or minimizes the significance of relevant factors; and it conveys its findings in such vague and amorphous terms that it proves to be of little value and is in fact misleading. The Report suggests that the asset management industry poses a threat to the stability of our financial system, but the information set forth in the Report, skeletal though it is, actually suggests the opposite.

The Report will also have a negative, if not pernicious, impact. First and foremost, it risks discrediting OFR, its independence, its mission, and its work. It may also lead to the imposition of prudential supervision in the asset management sector, where such enhanced oversight appears to be unwarranted. In addition, it represents a costly distraction from more important challenges facing the Financial Stability Oversight Council ("FSOC") and other regulators: addressing the already-known and still-unresolved systemic risks inherent in our overleveraged, undercapitalized, fragile, and too often unregulated too-big-to-fail bank and non-bank system. Indeed, the most telling aspect of the Report is not what it says about the asset management industry, but what it confirms by comparison about the egregious shortcomings in the current state of the systemically significant part of the banking industry.

Finally, and of greatest concern to Better Markets, the Report may undermine confidence in the quality of the research and analysis that the OFR can and should produce. This is a major failure and a gross disservice to the American people because OFR has such a critical role to play in identifying, analyzing, and controlling systemic risk in our financial system. Ultimately, the protection of the American people, our financial system, and our standard of living is at stake. OFR can and must do better. It must withdraw this Report and focus on the much larger, imminent, and known threats to systemic stability. Only after those threats are eliminated, and only after a thorough re-evaluation of priorities, should OFR direct its attention to other possible threats.

SUMMARY OF THE REPORT

The Report states that it is a “brief overview of the asset management industry.”² However, the origins of the Report are unclear and undisclosed. The FSOC apparently asked the OFR to provide data and analysis to assist the FSOC in determining “whether—and how—to consider asset management firms for enhanced prudential standards and supervision under Section 113 of the Dodd-Frank Act.”³

In response, the OFR did not apply the template of statutory factors that governs the FSOC’s designation of financial institutions under Section 113. Nor did the OFR apply the three-stage protocol adopted by the FSOC to identify candidates for further scrutiny under Section 113. Inexplicably, the OFR responded by generically “analyzing industry activities, describing the factors that make the industry and individual firms vulnerable to financial shocks, and considering the channels through which the industry could transmit risks across financial markets.”⁴

The findings of the Report are couched in exceptionally tentative and vague terms, and without significant empirical support. Indeed, the Report does not include some basic, publicly available information that one would expect, much less the information and data that OFR was specifically authorized to collect and analyze. And some of the Report is inaccurate.

The Report essentially makes the following observations:

- The asset management industry is a diverse mix of businesses, highly concentrated, offering a broad variety of funds, and overseeing a large amount of financial assets, estimated at \$53 trillion.⁵
- The asset management industry **may** be vulnerable to financial shocks by virtue of (1) reaching for yield; (2) redemption risk; (3) leverage; and (4) the distress or failure of a large asset management firm.⁶
- Asset managers **could** transmit risk across the financial system through (1) exposure of creditors, counterparties, and other market participants to asset manager activity, and (2) disruption to financial markets caused by fire sales.⁷

² OFR, ASSET MANAGEMENT AND FINANCIAL STABILITY, at 1 (Sept. 2013), *available at* http://www.treasury.gov/initiatives/ofr/research/Documents/OFR_AMFS_FINAL.pdf.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 3.

⁶ *Id.* at 9.

⁷ *Id.* at 21.

- There is a shortage of available data with respect to separate accounts, securities lending, the repo market, and private asset managers that do not issue public financial statements.⁸

While the Report describes a number of “possible” risks associated with asset managers, it ignores or sets aside evidence suggesting that asset managers, by virtue of their structure, activities, and role in the last crisis (or lack thereof), do **not** pose significant levels of systemic risk.⁹ And the Report provides no judgments about the weight of the points listed above, or the likelihood that the asset management industry will in fact incubate and propagate systemic risk in our financial system. Perhaps the most shocking omission is the lack of any context or prioritization of the “possible” risks from asset managers relative to the many other known and clear systemic risks that remain unaddressed, unabated, and unregulated in our financial system. It is to those risks that the time, resources, and attention of the FSOC and the OFR should be devoted.¹⁰

COMMENTS

I. The Report is not transparent, as it does not reveal important information about the basis for the FSOC’s decision to focus on asset managers as potential sources of systemic risk.

The Report is remarkably uninformative about exactly why or how the FSOC chose to focus its time, efforts, and resources, as well as those of the OFR, on asset managers. The OFR simply states in the Report that “[t]he FSOC **decided** to study the activities of asset management firms to better inform its analysis of whether—and how—to consider such firms for enhanced prudential standards and supervision under Section 113 of the Dodd-Frank Act.”¹¹ But the Report provides no information regarding the basis for that decision.¹²

Elsewhere, the Report offers this observation about the origins of the study: “The diversity of [asset management] activities and the vulnerabilities they may create, either

⁸ *Id.* at 24.

⁹ The point is not that asset management funds could never transmit systemic risk or contribute to a fall in market confidence by virtue of runs or fire sales. Rather, the point is that asset management typically limits that risk to the maximum possible extent by placing it on investors rather than creditors and U.S. taxpayers, and by relying principally on equity funding rather than leverage. These enormously important distinctions are not recognized, analyzed, or weighted accordingly in the OFR Report.

¹⁰ The Report notes that it does **not** focus on either money market funds or private funds such as hedge funds and private equity funds. Report at 2.

¹¹ Report at 1 (emphasis added).

¹² When the OFR posted the Report on its website, it was similarly terse in describing its origins: “The OFR studied the activities of asset management firms and funds at the request of the Council.” U.S. Dept. of the Treas., OFR, Asset Management and Financial Stability, <http://www.treasury.gov/initiatives/ofr/research/Pages/AssetManagementFinancialStability.aspx>. The SEC simply posted the Report and invited comment, without any discussion or analysis of its own views.

separately or in combination, **has attracted attention** to the potential implications of these activities for financial stability.”¹³ But here too the Report raises more questions than it answers—*attracted whose “attention” and why?*—and it provides no insight into the FSOC’s decision to focus on asset managers. These decisions are all the more important given the many other well-known and clearly observable systemic risks that persist,¹⁴ many of which materialized just five years ago at great cost to the country.¹⁵

Previously, the FSOC disclosed that it was analyzing asset management companies as a potential threat to financial stability. On April 11, 2012, the FSOC issued a rule regarding the manner in which FSOC intends to apply the statutory designation authority granted in Section 113 of the Dodd-Frank Act (“FSOC Release”).¹⁶ In the FSOC Release, the FSOC noted that:

[T]he Council, its member agencies, and the OFR are analyzing the extent to which there are potential threats to U.S. financial stability arising from asset management companies. This analysis is considering what threats exist, if any, and whether such threats can be mitigated by subjecting such companies to Board of Governors supervision and prudential standards, or whether they are better addressed through other regulatory measures.”¹⁷

Yet again, this statement was unaccompanied by any information regarding the reasons for the FSOC’s decision to “analyze” asset management companies.

This is unacceptable, and the American people deserve better. The FSOC and the OFR must do more to promote transparency as they discharge their duties under Section 113. Certainly, the designation authority is one of the most important measures that Congress adopted in the Dodd-Frank Act. Designation has profound consequences for financial companies, their competitors, the economy more widely, and the American people.¹⁸ All of these constituents are entitled to an understanding of how the FSOC is using its formidable power, even in the preliminary stages of the process.

¹³ Report at 1 (emphasis added).

¹⁴ Because the OFR and the FSOC face such important challenges with limited time and resources, prioritization and a clear ranking of systemic risks is essential.

¹⁵ See BETTER MARKETS, THE COST OF THE WALL STREET-CAUSED FINANCIAL COLLAPSE AND ONGOING ECONOMIC CRISIS IS MORE THAN \$12.8 TRILLION, at 36-39 (Sept. 15, 2012), available at http://bettermarkets.com/sites/default/files/Cost%20of%20The%20Crisis_0.pdf.

¹⁶ Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21,637 (Apr. 11, 2013) (“FSOC Release”).

¹⁷ FSOC Release at 21,644.

¹⁸ The GAO Report, discussed *infra*, cites a number of positive and negative consequences that can flow from a Section 113 designation, including fees and compliance costs and competitive advantages accruing from the perception that the institution is too big to fail. GAO, FINANCIAL STABILITY: NEW COUNCIL AND RESEARCH OFFICE SHOULD STRENGTHEN THE ACCOUNTABILITY AND TRANSPARENCY OF THEIR DECISIONS, GAO-12-886, at 44-45 (Sept. 2012), available at <http://www.gao.gov/products/GAO-12-886> (“GAO Report”).

Certainly, for example, the extent to which representatives from competing industries, or any other interested parties, may have communicated with (or more directly lobbied) the FSOC in hopes of influencing the process should be disclosed. In addition, an understanding of how the FSOC prioritizes its activities is key. Those priorities affect the allocation of the FSOC's resources, and may ultimately determine how quickly and effectively other types of nonbank financial companies are assessed for possible designation—including companies that pose far more acute systemic risks. And the public, along with Congress, needs insight into the workings of the FSOC, as well as the OFR, to gauge their effectiveness.

In fact, the FSOC itself has acknowledged the importance of transparency in the designation process. Furthermore, it has stated that it intends to “foster” that transparency through the publication of guidance containing profiles of firms likely to be evaluated for potential designation, and the factors the FSOC intends to use to make its determinations.¹⁹ Thus, providing greater openness in connection with the evaluation of asset managers for potential Section 113 designation is what the FSOC has already promised, yet failed to do here.

The GAO has confirmed the lack of transparency in the FSOC's operations. In its September 2012 report on the FSOC (“GAO Report”),²⁰ the GAO concluded that—

Public information on FSOC's and OFR's decision-making and activities is limited, which makes assessing their progress in carrying out their missions difficult. . . . Appropriate accountability and transparency mechanisms also need to be established to determine whether FSOC and OFR are effective and to ensure that the public and Congress have sufficient information to hold the entities accountable for results.²¹

The OFR Report proves that GAO's concerns were not only valid, but remain unaddressed.

¹⁹ FSOC Release at 21,639.

²⁰ GAO Report.

²¹ GAO Report, at Introduction and 50-51.

II. The Report indicates that the FSOC and the OFR either did not follow, or do not have, meaningful protocols for early-stage evaluation of potential systemic risks.

The Report is especially striking because it ignores the specific methodology that the FSOC adopted as a guide for deciding which financial companies should be candidates for Section 113 designation. In the Section 113 Release, the FSOC set forth a three-stage process that it intends to use for that purpose. A “Stage 1” analysis is “designed to narrow the universe of nonbank financial companies to a smaller set,” and ultimately “to identify nonbank financial companies that should be subject to further evaluation in subsequent stages of review.”²²

The FSOC further explained that in Stage 1, “the Council intends to evaluate nonbank financial companies by applying **uniform quantitative thresholds** that are broadly applicable across the financial sector.”²³ Those thresholds include size, interconnectedness, leverage, liquidity risk, and maturity mismatch.²⁴ Moreover, the release states that “the Council will apply the Stage 1 thresholds to **all** types of nonbank financial companies, including . . . asset management companies.”²⁵

However, the Report contains no indication that the FSOC did in fact conduct a Stage 1 analysis as the basis for asking the OFR to further study asset managers. Nor does it set forth any other standard the FSOC might have used as a kind of “pre-Stage 1” test for deciding how and where to direct its resources and those of OFR.²⁶ Thus, either the FSOC and OFR are operating without processes and standards that guide their early-stage identification of potential systemic risks, or they have ignored the methodologies that they have established. Either way, they have failed to disclose which path they chose and both alternatives are unacceptable.

This problem has also drawn criticism from the GAO. In its September 2012 report, the GAO made this finding:

FSOC has not developed a systematic forward-looking process for identifying potential emerging threats in its mandated annual reporting

²² FSOC Release at 21,642.

²³ *Id.* (emphasis added).

²⁴ *Id.*

²⁵ *Id.* at 21,643 (emphasis added).

²⁶ The only reference to OFR’s **methodology** is this uninformative statement that appeared on the website upon release of the Report: “In developing the report, the OFR staff reviewed existing research, analyzed industry data, interviewed market participants, and consulted extensively with Council member agencies.” U.S. Dept. of the Treas., OFR, Asset Management and Financial Stability, <http://www.treasury.gov/initiatives/ofr/research/Pages/AssetManagementFinancialStability.aspx>. Given the glaring deficiencies in the Report, OFR owes it to the American people to disclose the details of all the information reviewed, people consulted, and other activities undertaken in preparation of the Report.

process. In particular, FSOC does not have processes for consistently identifying such threats, separating them from more current threats, or prioritizing them.²⁷

The FSOC should promptly correct this situation. It must either establish new objective protocols for early-stage evaluation of financial companies that may warrant Section 113 designation, or apply the ones that exist in a transparent manner.

III. The Report adopts a weak analytical framework.

Even if the FSOC has not yet developed a methodology for preliminary evaluation of nonbank financial companies under Section 113, the OFR could have and should have adopted and disclosed a more useful analytical framework in the Report. An obvious choice would have been to consider asset management in terms of the statutory factors for designation set forth in Section 113. However, the Report does not follow any of the statutory or regulatory templates that have been established to guide the implementation of Section 113. For example, the Report does not track or mention the ten statutory factors that the FSOC must apply when making a Section 113 designation determination. Nor does the Report track or mention the six-factor test that the FSOC has developed for implementing the statutory standards.²⁸

Furthermore, as discussed above, the Report omits any reference to the three-stage test adopted by FSOC for triaging the universe of nonbank financial companies that may be appropriate subjects of further scrutiny under Section 113. Finally, the Report makes no mention of the framework that the FSOC developed for identifying the channels that are most likely to transmit the “negative effects of a nonbank financial company’s material financial distress or activities to other firms and markets.”²⁹

The Report offers no explanation for the seemingly ad hoc selection of issues that the OFR chose to address. As a result, it is difficult to derive helpful information from the Report **in terms of** the statutory and regulatory factors that ultimately determine whether a nonbank financial company should be subjected to enhanced supervision under Section 113.

IV. The Report is so hypothetical and conditional that it lacks value, and even misleads by exaggerating the potential threats posed by asset managers.

The Report draws very few helpful judgments or conclusions. Many observations are couched in such vague terms that they provide little useful information. As a result, by simply listing a range of possible ways in which asset managers might theoretically create

²⁷ GAO Report, second page of Introduction.

²⁸ FSOC Release at 21,641.

²⁹ *Id.*

systemic risk, the Report implies that the threat is far more serious than the OFR Report establishes or than it actually is.

For example, the Report includes some basic facts about asset management, but fails to provide meaningful assessments regarding the implications of those facts. It is certainly true that investors in managed funds can lose money; that managers may be tempted to reach for yield; that funds can experience flight and fire sales; that a small subset of funds employ leverage; and that funds might transmit risk to some degree via counterparties, creditors, and fire sales. But the Report fails to offer insights into how significant these facts are, or how likely they are in reality to contribute to systemic instability in our financial markets.

The observations in the Report are not only hypothetical, but also conditional. For example, the Report states that “Some activities highlighted in this report that **could** create vulnerabilities—if improperly managed or accompanied by use of leverage, liquidity transformation, or funding mismatches—include risk-taking in separate accounts and reinvestment of cash collateral from securities lending.”³⁰ Elsewhere the Report states that “The failure of a large asset management firm **could** be a source of risk, **depending** on its size, complexity, and the interaction among its various investment management strategies and activities.”³¹ Such hypothetical and conditional statements provide little meaningful information. Yet the Report is replete with them, and it thereby fosters the unsupported impression that asset managers pose significant threats of systemic instability.

V. The Report offers little concrete support, and it ignores or minimizes relevant factors.

The Report lacks robust empirical support. It includes a number of snapshots aimed primarily at conveying rudimentary information about the asset management sector, including the leading firms and their size. However, it does not include much in the way of specific information that could provide a detailed and dynamic profile, reflecting money flows, interconnections, and the actual track record of asset management firms during the 2008 crisis and other periods of market instability.

In addition, while the Report acknowledges a number of important features of the asset management industry, it fails to assess their significance. For example, the Report notes a fundamental distinction between the asset management industry and banks. Asset managers are predominantly agents for clients, and it is client funds that are risk. In contrast, banks and insurance companies are principals, and in the event of failure, they put shareholder, creditor, and ultimately taxpayer money at risk.³² This distinction strongly suggests that while investors may lose money through asset management, those activities

³⁰ Report at 1.

³¹ Report at 18.

³² Report at 1.

do not threaten wide spread contagion. However, the significance of these distinctions is not analyzed in the Report.

The Report observes that economic conditions may induce portfolio managers to reach for yield by purchasing riskier assets.³³ At the same time, the Report points out that “The asset management industry has many practices and regulatory restrictions that can mitigate such risks.”³⁴ The Report further observes that this problem is also addressed through investor disclosure requirements regarding a fund’s risks, holdings, and investment strategies.³⁵ Yet, nowhere does the Report assess the effectiveness of these mitigants or net out all of the relevant concerns and factors.

The Report’s discussion of leverage is among the most uninformative and is, in fact, misleading. It essentially notes that leverage may be used in funds themselves or at the firm level.³⁶ It also cites anecdotal information that during the financial crisis, leverage caused “significant losses for some registered funds.”³⁷

But, inexcusably, the Report does not quantify the amount of leverage currently deployed in the asset management industry, which is in fact relatively low. Indeed, while hedge funds employ leverage strategies, they appear to be used in less than 5% of the asset management industry,³⁸ and the leverage ratio that hedge funds use averages less than 3 to 1.³⁹ To the extent the Report suggests that such use of leverage poses unacceptable threats to systemic stability, then it speaks volumes about the need for much greater leverage limits in the banking sector: Under Basel III, banks can assume risks funded with 3% equity and 97% debt, equating with a leverage ratio of 33 to 1.⁴⁰

The Report fails to provide this important context for assessing leverage used by asset managers. Moreover, it again raises the fundamental question of why the FSOC and OFR focused on merely “possible” risks arising from a low-leverage activity with a largely stable asset base, when so many high-leverage, fragile, short-term, hot-money systemic

³³ *Id.* at 9.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 17.

³⁷ *Id.* at 18.

³⁸ See Managed Funds Association, Hedge Fund Basics, Industry Size, <http://www.managedfunds.org/hedge-fund-investors/industry-fact-sheets/industry-size/> (last visited Nov. 1, 2013) (noting hedge funds comprise \$2.51 trillion); Boston Consulting Group, *Press Releases* (July 9, 2013), available at <http://www.bcg.com/media/PressReleaseDetails.aspx?id=tcm:12-139274> (citing the \$62.4 trillion global asset management industry as of 2012).

³⁹ Citiprime Finance, *Hedge Fund Industry Snapshot*, at 1 (Aug. 2013), available at http://www.citibank.com/icg/global_markets/prime_finance/docs/hf_monthly_sep13.pdf (calculating gross leverage on a mean basis as 1.96x).

⁴⁰ KPMG, *Basel III Issues and Implications*, at 10 (2011), available at <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/basell-III-issues-implications.pdf> (noting bank leverage limit is 3%).

risks remain. These agencies can and must be expected to make better judgments and establish better priorities.

VI. The Report will have a predominantly negative impact, far outweighing the modest benefits that it provides, and it should be withdrawn.

The Report will have several deleterious effects, which outweigh its limited value. The Report is useful in that it provides some basic information about the asset management industry. Furthermore, it reflects a generally laudable impulse by the FSOC to search diligently for possible systemic risks in our financial system. And it highlights several subsectors in the asset management industry where more data should be available to regulators.

However, the drawbacks of the Report are far more significant. Obviously, the weaknesses in the Report will only undermine confidence in the ability of the FSOC to apply transparent, objective metrics or to make sound and informed judgments about potential systemic risks. The Report also casts doubt about the ability of the OFR to support the FSOC's mission with useful and independent data, research, and analysis.

More importantly, the Report does not in fact support the notion that asset management funds or firms should be subjected to enhanced supervision under Section 113. Yet because of the many flaws and deficiencies described above, it may lead to such an eventuality. That outcome would impose undeserved, adverse, and unwarranted consequences on the asset management industry, without affording the benefits that Section 113 was intended to confer.

Finally, the Report represents a potentially costly distraction from more important challenges facing the FSOC and other regulators. As the GAO report found, the FSOC has struggled to prioritize the emerging systemic risks that it perceives in our financial system. This failure creates its own unique hazards, and the Report unfortunately illustrates the point. By drawing attention to asset managers, the Report diverts attention from more pressing regulatory challenges. And among those noteworthy challenges is addressing the persistent systemic risks created by our too-big-to fail banks.

In light of the foregoing, the FSOC and the OFR must withdraw this Report and focus on the serious, known systemic risks that pose grave threats to the American people today. If, after those risks have been addressed, the agencies decide that attention to the possible threats from the asset management industry is still warranted—based upon a publicly disclosed and robust ordering of priorities—then they must rectify the defects described above in any further report.

CONCLUSION

We hope that our comments are helpful.

Sincerely,



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