November 29, 2011

Department of the Treasury
Office of Financial Research
Attention: Post-Employment Interim Rule
Room 1334
1500 Pennsylvania Avenue, NW
Washington, DC 20220

RE: Interim Rule: Supplemental Standards for Ethical Conduct for Employees of the Department of the Treasury, Office of Financial Research; RIN 1505-AC38

Dear Treasury Staff:

Better Markets, Inc.[1] appreciates the opportunity to comment on the above captioned Interim Final Rule ("Proposed Rule") issued by the Department of the Treasury ("Treasury"), which would establish certain post-employment prohibitions on employees of the Office of Financial Research ("OFR") in accordance with Section 152(g) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").

INTRODUCTION

Although technical in nature, the one-year post-employment prohibition of Section 152(g) of the Dodd-Frank Act serves two critically important purposes. First, it prevents OFR employees from inadvertently or intentionally using or misusing their access to sensitive business information for personal gain after they leave OFR, and second, it encourages the free flow of data between regulators and financial companies, which is essential to the success of OFR.

The newly-created OFR is tasked with the responsibility of collecting and analyzing financial data to support the work of the Financial Stability Oversight Council ("FSOC") in assessing systemic risk. The OFR was also established to provide Congress with independent analysis of significant financial market developments and threats to financial stability. In connection with those responsibilities, certain OFR employees will have access to enormous amounts of transaction, position, or business confidential data and information that would be highly advantageous to financial companies. By placing meaningful post-employment prohibitions on OFR employees in accordance with Section 152(g), OFR can help limit inadvertent or intentional use of that confidential information, avoid the appearance of impropriety, and encourage financial companies to willingly share

[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.

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necessary information with regulators. The Proposed Rule seeks to promote these goals by imposing certain post-employment limitations on OFR employees along with a limited waiver provision.

At the same time, the Proposed Rule is constructed in a way that those limitations are not likely to be so restrictive that they discourage the highly qualified and experienced people OFR needs to hire to perform its crucially important tasks. One-year post-employment limitations are routine in the financial services industry, and applying such a limit to OFR employees will provide ample protection for sensitive information, which will be stale and of little use after a year. Likewise, the very narrow waiver provision—to be used solely to shorten the one-year time period—is an appropriate mechanism to address situations where an employee's access to information is so limited that the full one-year post-employment bar is unnecessary.

SUMMARY OF COMMENTS

The Proposed Rule falls short of complying with the letter and spirit of Section 152(g) and it lacks clarity. To address these problems, the Proposed Rule must:

- Include the OFR Director in the one-year post-employment restriction, regardless of the Director's access to data;
- Allow waivers to be used only to shorten the one-year bar, not to create other types of exemptions from the bar;
- Apply to "business confidential information" regardless of whether it is maintained by the Data Center;
- Clearly define or cross-reference a definition for the term "Financial Entities;" and
- Establish a strong enforcement mechanism and penalties for violations of the Proposed Rule.

COMMENTS

The Proposed Rule Must Include the OFR Director in the One-year Post-Employment Restriction, Regardless of the Director's Access to Data.

Section 152(g) of the Dodd-Frank Act states that the Treasury—

> [S]hall issue regulations prohibiting **the Director** and any employee of the Office who has had access to the transaction or position data maintained by the Data Center or other business confidential

> information about financial entities required to report to the Office from being employed by or providing advice or consulting services to a financial company, for a period of 1 year after last having had access . . . .[2]

By its terms, the statute thus differentiates between "any employee" and "the Director" and includes the Director of OFR within the one-year post-employment restriction regardless of his or her access to specified data. The Proposed Rule neglects this mandate, only applying the restriction to a "current or former employee" with data access.[3] By leaving the term "Director" out of § 1600.1(b), which imposes the post-employment restriction, the Proposed Rule deviates from the explicit letter of the law.

The inclusion of the Director within the one-year post-employment restriction is essential to preserving the integrity of OFR and avoiding the appearance of impropriety. The Director should not be held to a lesser ethical standard than other OFR employees. Regardless of his or her actual access to sensitive information protected by the Proposed Rule, the Director serves as the head of OFR and as such is a representative of the office and its ethical commitments.

Other restrictions on the Director appear in Section 152(b) of the Dodd-Frank Act. Of note is subpart (4), which prevents the Director from serving as the head of any financial regulatory agency during his tenure. This restriction is illustrative of the government's interest in holding the OFR Director to heightened ethical standards. To promote this interest consistently and to comply with the express provisions of the law, the one-year post-employment restriction must be applied to the OFR Director.

To ensure that the OFR operates according to the Dodd-Frank Act and that the Director is held to ethical standards that are as strong or stronger than those applicable to OFR employees, Treasury must amend the Proposed Rule to include the Director within its one-year post-employment restrictions regardless of his or her access to data.[4]

The Proposed Rule Must Allow Waivers To Be Used Only to Shorten the One-Year Bar, Not to Create Other Types of Exemptions From the Bar.

Section 152(g) of the Dodd-Frank Act prevents an OFR employee from being employed by or providing advice or consulting services to a financial company for one-year following that employee's access to certain specified data. However, that section also gives

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[2] Section 152(g) of the Dodd-Frank Act (emphasis added).

[3] Propose Rule § 1600.1(b).

[4] In light of the failure of the Proposed Rule to distinguish OFR employees from the Director in Section 1600.1(b), the Proposed Rule should also add parenthetical language confirming that the Director is ineligible for waivers. The Dodd-Frank Act clearly reflects this intent, and the Proposed Rule *appears* to reflect the same intent by affording waivers solely to "employees." *See* Section 152(g) of the Dodd-Frank Act; Proposed Rule § 1600(c). However, as discussed above in text, the Proposed Rule ignores clear statutory language imposing the post-employment limitation on the Director, regardless of access to data. To ensure that the statutory language on waivers will not be similarly misinterpreted or misapplied, the Proposed Rule should expressly exclude Directors from waiver eligibility.

Treasury the authority to create a waiver for those employees with "limited access" to information. Section 152(g) provides in part that—

> [R]egulations may provide, on a case-by-case-basis, for a **shorter** period of post-employment prohibition, provided that the shorter period does not compromise business confidential information.[5]

This statutory waiver provision makes clear that the one-year post-employment restriction may simply be **shortened**. In contrast, the Proposed Rule includes an impermissibly broader waiver provision. For example, Section 1600.1(c) provides that a waiver of the one-year limitation may be made "in whole or in part," suggesting that waivers may involve more than mere time limitations. The examples provided in the Proposed Rule confirm this.

Example 5 sets forth a qualitative approach to the waiver process that is inconsistent with the express language of the Dodd-Frank Act. Specifically, Example 5 states:

> (i) Fact pattern: OFR employs a data analyst and such employee has access to transaction or position data maintained by the Data Center or other business confidential information *relating to a particular sector (i.e. banking).*
>
> (ii) Designated Agency Ethics Official's Determination: Upon termination of employment by OFR, such employee would be prohibited, for a period of one year immediately after leaving OFR, from being employed by or providing advice or consulting services to a financial company *in that particular sector (i.e. banking)* where such employment or services involves employment or advice or consulting services, regardless of whether that financial company is required to report to the Office. Such employee would be granted a waiver to work in other designated sectors immediately after leaving OFR.[6]

This example contemplates a post-employment limitation purportedly tailored to the specific type of information an employee has had access to, but that is at odds with the bright-line timing limitation in Section 152(g) of the Dodd-Frank Act. It is clear that under the statute, any waiver may only be applied to reduce the general one-year limit.

There is simply no statutory basis for any other type of waiver of the post-employment restrictions, and the Proposed Rule cannot create any such exceptions not otherwise provided in the statute.

Moreover, the creation of sector-based waivers will undermine the policy goals that Section 152(g) was intended to achieve. Because of the considerable overlap among sectors in the financial industry, confidential information seemingly specific to one sector

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5 Section 152(g) of the Dodd-Frank Act (emphasis added).

6 Propose Rule § 1600.1(d)(5) (emphasis in original).

may be useful and provide for a competitive advantage to businesses in another sector. The Dodd-Frank Act and the Proposed Rule anticipates this likely and frequent overlap by defining "financial company" broadly and including insured depository institutions and insurance companies within the definition.[7] Any waiver based on exposure to so-called "sector" information would defeat this statutory goal and might well "compromise business confidential information." This, in turn, could undermine the trust and confidence of the private sector in OFR and thereby cripple its ability to perform its statutory duties.

This bright-line one-year prohibition (with a very limited waiver provision) is integral to the success of OFR, which will depend squarely upon its ability to gather sufficiently broad and detailed information. A one-year bar makes clear to everyone that no one employed by OFR will leave and use that information, intentionally or otherwise, to obtain an economic advantage. This eliminates post-employment conflicts and the appearance of post-employment conflicts. Here, clarity is crucial.

Finally, allowing for sector-based waivers would pose practical challenges that would prove nearly unmanageable and certainly unjustifiable. It would require the Designated Agency Ethics Official who determines waiver requests to investigate and understand the internal operations of all types of private entities. That official would also have to make a variety of complex and nuanced judgments in designating a particular entity as belonging to a particular sector, or in determining how an entity's sector affiliation might change in the future. That exercise would quickly become a time-consuming and unproductive morass, offering no appreciable benefit.

A one-year post-employment bar with a waiver available only as to time, provided it would "not compromise business confidential information," eliminates all of these pitfalls.

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[7] The Proposed Rule and Section 151(2) of the Dodd-Frank Act defines "financial company" by reference to Section 201 of the Dodd-Frank Act and includes an insured depository institution and an insurance company. Supplemental Standards for Ethical Conduct for Employees of the Department of the Treasury, 76 Fed. Reg, 60708 (Sept. 30, 2011) (to be codified at 12 C.F.R. Part 1600).
In turn, Section 201(a)(11) of the Dodd-Frank Act provides:
FINANCIAL COMPANY- The term 'financial company' means any company that--
(A) Is incorporated or organized under any provision of Federal law or the laws of any State
(B) Is--
(i) a bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a));
(ii) a nonbank financial company supervised by the Board of Governors;
(iii) any company that is predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)) other than a company described in clause (i) or (ii);
(iv) any subsidiary of any company described in any of clauses (i) through (iii) that is predominantly engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)) (other than a subsidiary that is an insured depository institution or an insurance company); and
(C) is not a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971, as amended (12 U.S.C. 2001 et seq.), a governmental entity, or a regulated entity, as defined under section 1303(20) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4502(20)).
124 Stat. 1376(2010).

That is presumably why the statute is so clear and unambiguous and why the Proposed Rule should follow suit. Accordingly, the text of the Proposed Rule, including the Examples, must be amended and clarified to ensure that any waiver only shortens the one-year restriction and only if it does "not compromise business confidential information."

The Proposed Rule Must Apply to "Business Confidential Information" Regardless of Whether It Is Maintained by the Data Center.

The Dodd-Frank Act sets forth three categories of data that trigger application of the one-year post-employment limitation. Specifically, section 152(g) of the Dodd-Frank Act provides that Treasury—

> [S]hall issue regulations prohibiting the Director and any employee of the Office who has had access **to the transaction or position data maintained by the Data Center or other business confidential information about financial entities required to report to the Office** from being employed by or providing advice or consulting services to a financial company.[8]

This section clearly distinguishes three types of relevant data: (1) transaction data maintained by the Data Center, (2) position data maintained by the Data Center, and (3) other business confidential information about financial entities required to report to OFR, regardless of whether the data is maintained by the Data Center. Congress clearly intended the third category of "other business confidential information" to serve as a broad catchall provision that would help protect a large universe of data from being transmitted by OFR employees who obtain employment in the financial sector.

The Proposed Rule inappropriately narrows this third, broad category by applying the qualifier "maintained at the Data Center" to other business confidential information about financial entities required to report to OFR.[9] Restricting business confidential information only to that maintained by the Data Center conflicts with the statute and unduly limits the scope of the protected information.

The structure of OFR lends support for this view. Because OFR encompasses both a Data Center and a Research and Analysis Center, employees of the latter unit will have access to confidential data and analysis which may not necessarily be held at the Data Center. It is clearly appropriate to subject a broad category of data to the post-employment restrictions **irrespective** of the specific unit within OFR that may be responsible for maintaining the data.

To promote integrity and the free flow of data, Sections 1600.1(b)(1) and (2) of the Proposed Rule must be amended to reflect the three distinct classifications of data recognized in Section 152(g) of the Dodd-Frank Act.

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8 Section 152(g) of the Dodd-Frank Act (emphasis added).
9 Proposed Rule § 1600.1(b)(1) and (2).

The Proposed Rule Must Clearly Define or Cross-Reference a Definition for the Term "Financial Entities."

Section 152(g) of the Dodd-Frank Act refers to "financial entities," which will report data to OFR, and "financial companies," which OFR employees may be restricted from joining during the one-year bar period. The Proposed Rule, however, only defines "financial company."[10] By not also defining "financial entity," the Proposed Rule creates ambiguity and lacks clarity in scope. This confusion is compounded by the omission of "financial entity" in the definitions section of the OFR Subtitle in the Dodd-Frank Act.

While Treasury may, in coordination with other regulators, establish an appropriate definition for "financial entity" in a future rulemaking, that is insufficient. Omitting a definition or cross-reference in the Proposed Rule creates an unnecessary ambiguity and a risk that the Proposed Rule will be interpreted in accordance with an otherwise inappropriate definition.

As it addresses this issue, Treasury must recognize that the businesses that OFR employees may not work for post-employment (i.e., "financial companies") should be a **broader** segment of the industry than those businesses submitting data to OFR (i.e., "financial entities"). This scope is required by Section 152(g) and reflected in the Proposed Rule, which restricts employment by financial companies "regardless of whether that financial company is required to report to the Office." The breadth of the restriction recognizes the potential utility of specified data across the entire financial industry.

To ensure the appropriate implementation of Section 152(g), the Proposed Rule must include either a definition of "financial entity" or a suitable cross-reference to another existing rule in which such a definition is set forth.

The Proposed Rule Must Establish a Strong Enforcement Mechanism and Penalties for Violations of the Proposed Rule.

In light of the importance of establishing ethical standards for OFR employees, it is imperative that the Proposed Rule incorporate enforcement mechanisms and penalties for its violation. Without such provisions, the Proposed Rule could prove meaningless in application.

At a minimum the proposed rule should be incorporated into Treasury's ethical regulations under Title 5 of the Code of Federal Regulations. This would ensure that the disciplinary measures referenced in 31 C.F.R. § 0.102 would clearly apply to the proposed rule via 5 C.F.R. § 3101.101. Additionally, placing the proposed rule in Title 5 would promote clarity and ease of reference. The Proposed Rule is currently listed under Title 12, which pertains to "Banks and Banking." Because the Proposed Rule deals with ethical conduct of Treasury employees, incorporating it in Title 5, which addresses "Supplemental Standards of Ethical Conduct for Employees of the Department of the Treasury," would be much more appropriate.

[10] *Id.*

However, merely placing the Proposed Rule in Title 5 would be insufficient. Treasury must also expressly reference additional applicable penalty provisions, such as those found in 18 U.S.C. § 207 and 5 C.F.R. Part 2641, as well as any other potential civil penalties and fines that are necessary to ensure adherence to the Proposed Rule. These additional specifications would not only provide OFR employees and the public with clear, advance notice of potential disciplinary measures, but would also serve as a meaningful deterrent against violations of the Proposed Rule.

CONCLUSION

The ethical standards for Treasury employees, as set forth in the Proposed Rule, are an important means for protecting the integrity of the data that OFR will collect and analyze. They will also help promote trust and foster greater cooperation with OFR among the financial firms that must submit information to OFR. To fully achieve these goals, Treasury must amend the Proposed Rule to address the issues identified above.

We appreciate the opportunity to comment on the Proposed Rule and we hope that these comments are helpful.

Sincerely,

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