



CENTER FOR CAPITAL MARKETS  
COMPETITIVENESS

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November 8, 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 Final Rule: Post-Employment Restrictions for  
Employees of the Department of Treasury, Office of  
Financial Research; RIN 1505-AC38.**

To Whom It May Concern:

The U.S. Chamber of Commerce is the world's largest business federation, representing over three million companies of every size, sector and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for the capital markets to fully function in the 21<sup>st</sup> Century economy. The CCMC welcomes the opportunity to comment on the Interim Final Rule ("proposed rule") regarding the post-employment restrictions applicable to employees of the newly-created Office of Financial Research ("OFR") who have had access to transaction or position data or other business confidential information about companies required to provide sensitive data and information to OFR.<sup>1</sup>

The CCMC supports meaningful restrictions that guard against the anti-competitive harm companies required to report to OFR may suffer if OFR staff can leave government service and immediately profit from the use of the sensitive information they collected and reviewed during the last year of their public service. Rules that prevent this from happening effectuate the intent of section 152(g) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").

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<sup>1</sup> Supplemental Standards for Ethical Conduct for Employees of the Department of the Treasury, 76 Fed. Reg. 60707 (September 30, 2011) (to be codified at 12 C.F.R. Part 1600).

They also serve the government's interest in avoiding disincentives for companies to provide information to OFR. Preventing the conversion of OFR data into an asset former staff can sell to financial companies that hire them will also protect reporting companies and the public from market distortions arising from the use of such non-public information in the financial markets. The CCMC, however, is concerned that the proposed rule is not adequate to achieve these important goals. Therefore, we respectfully request that the proposed rule be clarified and amended as discussed below before it is adopted as a final regulation.

### Discussion

#### **I. OFR Must Clearly Define the “Financial Entities” Protected by this Rule**

Section 152(g) of Dodd-Frank provides that Treasury shall issue regulations:

[P]rohibiting the [OFR] Director and any employee of [OFR] who has had access to the transaction or position data maintained by OFR's Data Center or other business confidential information about *financial entities* required to report to the OFR from being employed by or providing advice or consulting services to a *financial company*, for a period of one year after last having had access in the course of official duties to such transaction or position data or business confidential information regardless of whether that entity is required to report to OFR. [Emphasis added].

This statutory text invites confusion as to the difference between the terms “financial entities,” used to describe the sources of data collected by OFR, and “financial company,” used to delineate the businesses OFR employees may be restricted from working for following their access to such data. Unfortunately, the proposed rule does not eliminate this confusion. It defines “financial company” broadly by reference to Section 201 of Dodd-Frank,<sup>2</sup> and further states it “includes an

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<sup>2</sup> Section 201(a)(11) of Dodd-Frank defines “financial company” as follows:

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--

insured depository institution and an insurance company.”<sup>3</sup> The proposed rule is, however, silent as to the definition of “financial entities.” Moreover, the term “financial entities” is not a term defined in the definitions section of the Subtitle of Dodd-Frank that includes section 152(g)—the provision the proposed rule is implementing.

The problem posed by the proposed rule’s silence as to the definition of the plural term “financial entities” is compounded by the fact that the singular form of the term—“financial entity”—is defined in the definitions section of Title VII of Dodd-Frank,<sup>4</sup> which is focused on derivatives. It is much narrower than the

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- (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); or
  - (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).

<sup>3</sup> *Supra* note 1, at 60708.

<sup>4</sup> In section 723(c) of Dodd-Frank “financial entity” is defined as follows:

- (i) IN GENERAL- For the purposes of this paragraph, the term ‘financial entity’ means--
  - (I) a swap dealer;
  - (II) a security-based swap dealer;
  - (III) a major swap participant;
  - (IV) a major security-based swap participant;
  - (V) a commodity pool;
  - (VI) a private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80-b-2(a));
  - (VII) an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);
  - (VIII) a person predominantly engaged in activities that are in the business of banking, or in activities that are financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956.
- (ii) EXCLUSION- The Commission shall consider whether to exempt small banks, savings associations, farm credit system institutions, and credit unions, including--
  - (I) depository institutions with total assets of \$10,000,000,000 or less;

proposed rule's definition of "financial company." The CCMC is concerned that the narrow definition of "financial entity" in Title VII may become a proxy regulators could use to define "financial entities" protected by the post-employment restriction implemented by the proposed rule. To avoid this, the proposed rule should be amended to define "financial entities" as used in section 152(g). This definition should not unduly limit the range of reporting entities safeguarded by section 152(g) and the regulations implementing it.

This can be achieved by amending the proposed rule to define the term "financial entities" in the same manner as it is used in section 154(b)(1) of Dodd-Frank. This is the section of the bill that explains the organizational structure of OFR and its programmatic units. Subparagraph A of section 154(b)(1) explains that the Data Center at OFR may collect data from various sources, including "financial entities under subparagraph (B)." Subparagraph B, in turn, refers only to obtaining reports and information from "any financial company." Thus, it appears that for purposes of the Subtitle of Dodd-Frank related to OFR, and that contains section 152(g), Congress deemed "financial entities" as synonymous and co-extensive with "any financial company" from which the OFR Data Center is authorized to collect information. Accordingly, CCMC respectfully requests that Treasury adopt a seventh definition in §1600.1 of the proposed rule stating: "(7) 'Financial entities' has the same meaning as the term 'financial company' in §1600.1(a) (6)."

## **II. Treasury Should Not Exercise its Discretion to Implement a Waiver Process**

Dodd-Frank states that for OFR employees "whose access to business confidential information was limited" the regulations implementing section 152(g) "may provide, on a case-by-case basis, for a shorter period of post-employment prohibition." This discretionary authority is subject to the caveat that "the shorter

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- (II) farm credit system institutions with total assets of \$10,000,000,000 or less; or
  - (III) credit unions with total assets of \$10,000,000,000 or less.

(iii) LIMITATION- Such definition shall not include an entity whose primary business is providing financing, and uses derivatives for the purpose of hedging underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company.

period *does not* compromise business confidential information.”<sup>5</sup> The proposed rule exercises this statutory discretion to implement a waiver process. CCMC respectfully requests that Treasury reconsider exercising this discretion for the time being and remove the waiver process when the rule is issued in final form.

Section 152(g) is different from many other post-employment restrictions applicable to government employees. Most such restrictions are intended to protect the government from recently-separated public servants using confidential information acquired during government service and their relationships with former colleagues to the disadvantage of the government. They also prevent the appearance of impropriety such “cashing-in” on government service creates. The post-employment restrictions on OFR employees in Dodd-Frank, however, serve a different purpose. They are intended as a substantive protection for companies that must submit sensitive, non-public data to OFR. This is necessary to protect these businesses from facing unfair competition by means of their rivals engaging OFR staff who have had access to their most confidential and sensitive information. Such protection is warranted given the OFR’s “unprecedented authority, including abilities to obtain virtually any type of data it wants from financial companies.”<sup>6</sup>

The conclusion that Section 152(g) is not simply for the benefit of the government is reinforced by the fact that the Senate-passed version of Dodd-Frank in which the post-employment restriction originated gave the section the heading of “Non-compete.”<sup>7</sup> The proposed rule refuses to acknowledge this aspect of section 152(g). It minimizes the significance and purpose of this provision by characterizing it as a matter relating to just agency management or personnel that is exempt from the requirements of the Administrative Procedures Act (APA) under 5 U.S.C. 553(a)(2). The CCMC disagrees with this characterization and the waiver of APA requirements.<sup>8</sup> And we urge Treasury to recognize that the primary stakeholders affected by the

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<sup>5</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 152(g), Pub. L. No. 111-203, 124 Stat. 1376 (2010). (Emphasis added).

<sup>6</sup> 156 Cong. Rec. S2774 (2010) (statement of Sen. Richard Shelby describing the OFR).

<sup>7</sup> Restoring American Financial Stability Act of 2010 (Engrossed Amendment Senate), H.R. 4173, 111th Cong. (2010).

<sup>8</sup> By way of contrast, we note that the Office of Government Ethics recent rulemaking on the application of the President’s “lobbyist gift ban” to career civil servants was not excepted from the requirements of the APA under 5 U.S.C. §553(a)(2). *See* Standards of Ethical Conduct for Employees of the Executive Branch; Proposed Amendments Limiting Gifts from Registered Lobbyists and Lobbying Organizations, 76 Fed. Reg. 56330 (proposed September 13, 2011).

implementation of section 152(g) are regulated companies, not a government agency and its employees.

Given this, Treasury should wait to implement any waiver process until it is clear how OFR will actually operate, how much and what types of data it will collect, and the analysis it will perform on such information. The applicability of these restrictions will certainly vary based on the nature of employees' work and the division of responsibilities among staff at OFR. The proposed rule's examples concerning the application of the waiver process seems to make assumptions about different functional assignments OFR employees are likely to have. Treasury should not, however, base procedures to waive protections for regulated actors based on assumptions. It should instead wait until these important details become clear as a matter of actual practice over time. Then it can inaugurate a waiver process based on how OFR actually comes to operate, which will better ensure adequate protection for the regulated community.

### **III. Waiver Process and the Application of Criteria to be Considered**

If Treasury declines to wait to promulgate a waiver process until it is clear how OFR will operate in practice and is determined to "relieve[ ] certain restrictions placed on OFR employees"<sup>9</sup> from the outset, then CCMC requests that it at least make material changes to the waiver process outlined in the proposed rule. In exercising its discretion to institute this waiver regime, Treasury must at least follow the statutory command of section 152(g) that a waiver or shortened period of post-employment restriction may be granted "provided that the shorter period *does not* compromise business confidential information." (Emphasis added). The waiver process in the proposed rule does not meet this standard.

Instead of following this mandate, the proposed rule re-frames the assessment for granting a waiver as predicated merely on determining that such a waiver is "unlikely" to disadvantage a reporting company or compromise its data. This terminology injects a very loose and undefined element of probability that is at odds with the clear statutory command that a waiver can be issued only if it "does not" compromise business confidential information. To comport with this limitation on

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<sup>9</sup> *Supra* note 1 at 60708.

any waiver process implemented under section 152(g), CCMC requests that the second clause of §1600.1(c)(1) be amended to state that the Agency Ethics Official cannot grant a waiver unless he or she “determines in writing there is no risk such waiver could compromise any business confidential information of a company required to report to the Office.” The examples in the proposed rule should be adjusted to reflect this modified formulation of the assessment the Agency Ethics Official is required to undertake prior to granting a waiver.

CCMC also requests that Treasury reconsider the criteria that it uses to determine that a waiver “does not” compromise business confidential information. Generally, all of the criteria should make clear that the query is not predicated on what information the former employee actually acquired, but rather what information they were conceivably able to access. It is impossible for the government to accurately and efficiently ascertain with certainty what data an employee has *actually* acquired or accessed during their final year of employment. The government should, however, be able to objectively and efficiently define the range of information an OFR employee was authorized to access during his or her last year of employment. Using this measure protects companies providing data to OFR from former OFR employees who may have used otherwise lawful access to review data that may have been outside the parameters of particular projects they were assigned during their final year at the Agency. Accordingly, all references, including in the examples, to information actually “acquired,” or information OFR employees in fact “accessed” should be removed. They should be replaced with more general references to information former employees were “authorized or able to access during the last year of their employment with the Office” without regard to whether they in fact did so.

In addition, the CCMC requests the elimination of several criteria that are inconsistent with the requirement that a waiver “does not” in fact compromise business confidential information. These include the criteria at sections 1600.1(c)(2)(iii), (vi), and (vii). Section 1600.1(c)(2)(iii) relates to the probability of whether the data to which an OFR employee had access remains sensitive due to “changing circumstances or the passage of time.” Section 1600.1(c)(2)(vi) has the Agency Ethics Official assessing whether “the information to which the [OFR] employee had access would provide” his or her new employer with “a competitive commercial advantage.” Section 1600.1(c)(2)(vii) allows consideration of whether a former OFR employee’s new employer “has made satisfactory representations” that it

has put in “screening measures which will effectively prevent” a new hire out of OFR from sharing position data or other business confidential information with his or her new colleagues.

All of these criteria are far too vague and accepting of a degree of inchoate risk that is inconsistent with the amended formulation of the waiver inquiry that the CCMC asks to have reflected in section 1600.1(c)(1). These criteria ask the Agency Ethics Official to make judgments regarding matters beyond his or her expertise. In doing so, they may even rely on the “representations” of self-interested parties and their own subjective views concerning the continuing value and relative competitive impact of data and information to which a departing OFR employee had access. This is ill-suited to ensuring that the waiver process “does not” in fact compromise business confidential information as mandated by section 152(g).

#### **IV. The Apparent Lack of Authority to Enforce These Post-Employment Restrictions on OFR Staff**

The proposed rule states that it is in addition to ethical restrictions applicable to all Department of Treasury employees under “5 CFR 3101.101-104, and 31 CFR Part 0.”<sup>10</sup> The proposed rule is not, however, incorporated into these supplemental agency ethical restrictions, which are promulgated pursuant to clear enforcement authorities and related penalties. Instead, the proposed rule is part of a new Chapter XVI of Title 12 of the Code of Federal Regulations. Title 12 pertains to “Banks and Banking” rather than the conduct of current and former employees of the Treasury Department. Additionally, the proposed rule also makes no reference to the statutory restrictions and associated enforcement and penalty provisions applicable to former government employees under 18 U.S.C. §207. The proposed rule is simply devoid of any discussion concerning enforcement of the restrictions it sets forth and penalties for violating them.

The CCMC respectfully requests that any final regulations specifically address the enforcement mechanisms and penalties for violating the post-employment restrictions in section 152(g) as Treasury envisions and understands them. To this end, it would clarify matters if these regulations were incorporated into the Treasury

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<sup>10</sup> *Supra* note 1 at 60708.

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Department's supplemental ethics regulations under Title 31 of the Code of Federal Regulations. The regulated community must know if Treasury views the restrictions of section 152(g) as enforceable. By what mechanisms does Treasury plan to enforce these post-employment restrictions? Or does Treasury simply view section 152(g) as a hortatory declaration providing no real constraint on OFR employees after they leave the government? Treasury should be clear as to its views on this matter. Both the companies that may be asked to provide sensitive data to OFR and the Members of Congress who sought to protect them from the Agency's unprecedented authorities have a right to know Treasury's views on this point.

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The CCMC appreciates the opportunity to comment on the proposed rule. We respectfully request that Treasury clarify and amend the proposed rule as described above. These changes are necessary to ensure that any final regulations protect as prescribed by section 152(g) of Dodd-Frank the entities that may have to provide position data or other business confidential information to OFR.

Sincerely,

A handwritten signature in black ink, appearing to read 'TK' with a long horizontal flourish extending to the right.

Tom Quaadman