



Via Hand Delivery

September 21, 2012

The Honorable Joseph I. Lieberman
United States Senate
706 Senate Hart Office Building
Washington, DC 20510

The Honorable Susan M. Collins
United States Senate
413 Senate Dirksen Office Building
Washington, DC 20510

Dear Chairman Lieberman and Ranking Member Collins:

On behalf of the Council of Institutional Investors (“Council”), a nonprofit, nonpartisan association of public, corporate, and union employee benefit funds who are major long-term shareowners with a duty to protect the assets of millions of American workers and retirees,¹ I write today to share our concerns about S. 3468, the Independent Agency Regulatory Analysis Act of 2012 (“S. 3468” or “Bill”).²

As you are aware, S. 3468 was introduced and referred to the Committee on Homeland Security and Government Affairs (“Committee”) on August 1, 2012. It is our understanding per discussion with Committee staff that the Committee may schedule a mark-up of the Bill in November.

The purpose of this letter is to respectfully request that the Committee not mark-up S. 3468 until after it has held one or more public hearings to educate the Committee, other members of the United States (“U.S.”) Senate, and the general public about the potential implications of the Bill. The Council is particularly concerned about how S. 3468 might impact the rulemaking process of the U.S. Securities and Exchange Commission (“SEC” or “Commission”)—the only independent federal agency whose mission includes the protection of investors.

¹ For more information about the Council of Institutional Investors (“Council”), including its members, please visit the Council’s website at <http://www.cii.org/CouncilMembers>.

² Independent Agency Regulatory Analysis Act of 2012, S. 3468, 112th Cong. (Aug. 1, 2012), <http://www.govtrack.us/congress/bills/112/s3468/text>.

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As long-term shareowners interested in maximizing share values, we generally agree that it is vital to avoid unnecessary regulatory costs and distractions that could hinder corporate profitability.³ We, however, also generally agree that, at best, it is unclear how the provisions of S. 3468 would improve the cost-effectiveness of SEC rulemaking to the benefit of long-term investors and the capital markets.⁴

The Commission's rulemaking process is governed by a number of legal requirements, including those under the federal securities laws, the Administrative Procedure Act, the Paperwork Reduction Act of 1980, the Small Business Regulatory Enforcement Fairness Act of 1996, and the Regulatory Flexibility Act.⁵ Moreover, under the federal securities laws the SEC is generally required to consider whether its rulemakings are in the public interest and, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.⁶

Since the 1980's, the Commission has conducted, to the extent possible,⁷ a systematic analysis of the costs and benefits of its proposed rules.⁸ That analysis was recently positively reviewed by the U.S. Government Accountability Office and the SEC's Office of Inspector General.⁹ Moreover, in response to comments received from those reviews, recent court decisions, and communications with Members of Congress, the Commission, under Chairman Schapiro's able leadership, has continued to make further enhancements to the SEC's rulemaking process—a process that is, and has long been, far more extensive than that of any other financial regulator.¹⁰

³ Brief of Council of Institutional Investors et al. as Amici Curie Supporting Respondent at 6, *BRT v. SEC* (2011) (No. 10-1305), <http://www.cii.org/UserFiles/file/CII%20TIAA-CREF%20et%20a%20%20amicus%20brief%2001-27-11.pdf>.

⁴ We note that S. 3468 does not include any provisions that would explicitly require independent federal agencies to consider the costs and benefits of a proposed rule from the perspective of long-term investors.

⁵ Financial Services and Bailouts of Public and Private Programs: Hearing Before the H. Comm. on Oversight and Gov't Reform, 112th Cong. 2 (2012) (testimony of Chairman Mary L. Schapiro, U.S. SEC), <http://www.sec.gov/news/testimony/2012/ts041712mls.htm> [hereinafter Hearing].

⁶ *Id.*

⁷ As the U.S. Government Accountability Office has recently indicated, it is well recognized that there currently exists no generally accepted method for reliably estimating the costs of proposed rules that impact the capital markets, “and the benefits of [those proposals] generally are regarded as even more difficult to measure.” GAO Report to Congressional Addressees, DODD-FRANK ACT REGULATIONS, Implementation Could Benefit from Additional Analyses and Coordination 19 (Nov. 2011), <http://www.gao.gov/new.items/d12151.pdf>.

⁸ Hearing, *supra* note 5, at 2.

⁹ *See id.*

¹⁰ *Id.* at 1; 6-8.

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As indicated, we believe that it would be appropriate for the Committee to hold one or more public hearings prior to a Committee mark-up of the Bill. In our view, those hearings should, at a minimum, provide the opportunity for representatives from the SEC, and other third party experts familiar with the Commission's rulemaking process, to explore whether it would be in the best interests of long-term investors and the capital markets for the SEC to be explicitly exempt from the requirements of the Bill. We stand ready to assist the Committee in identifying qualified third party experts as potential witnesses for such a hearing.

Thank you for consideration of our views on this important issue. If we can answer any questions or provide additional information on this matter, please do not hesitate to contact me at 202.261.7081 or jeff@cii.org.

Sincerely,

A handwritten signature in cursive script that reads "Jeff Mahoney".

Jeff Mahoney
General Counsel

cc: The Honorable Harry Reid, Majority Leader
The Honorable Mitch McConnell, Minority Leader
The Honorable Richard J. Durbin, Majority Whip
The Honorable Jon Kyl, Minority Whip
The Honorable Tim Johnson, Chairman, Committee on Banking, Housing, and Urban Affairs
The Honorable Richard C. Shelby, Ranking Member, Committee on Banking, Housing, and Urban Affairs