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NASAA

November 2, 2012

Senator Joe Lieberman
Chairman
Committee on Homeland Security
and Governmental Affairs
340 Dirksen Senate Office Building
Washington, DC 20510

Senator Susan Collins
Ranking Member
Committee on Homeland Security
and Governmental Affairs
344 Dirksen Senate Office Building
Washington, DC 20510

Re: The Independent Agency Regulatory Analysis Act (S. 3468)

Dear Chairman Lieberman and Ranking Member Collins:

On behalf of the North American Securities Administrators Association (NASAA)[1], I am writing to express my opposition to S. 3468, the "Independent Agency Regulatory Analysis Act of 2012." In its present form, this legislation could compromise the ability of independent federal agencies to effectively serve the public by requiring them to submit proposed rules to the White House Office of Management and Budget's Office of Information & Regulatory Affairs (OIRA) for review prior to their being finalized. By empowering OIRA in this manner, S. 3468 could have profound, chilling affects on the ability of independent regulatory agencies to adopt rules that effectively protect the investing public.

State securities regulators are considered the first line of defense for investors because we are at the forefront of protecting investors from fraud and abuse. While state securities regulators appreciate the importance of objective regulatory analysis, we are concerned S. 3468 would severely impair the ability of independent federal agencies, such as the Securities and Exchange Commission (SEC) and the Consumer Financial Protection Bureau (CFPB), to implement the Dodd-Frank Act and other statutes that are vital to the effective protection of investors and the public.

The rulemaking process for federal agencies and departments is set forth in the Administrative Procedure Act[2] and other statutes.[3] In addition, since 1981, Presidents have

1 The oldest international organization devoted to investor protection, the North American Securities Administrators, Inc. was organized in 1919. Its membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.
2 Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§551 et seq.).

maintained a centralized review process for "significant" regulatory actions, which requires many rules to be approved by OIRA at the Office of Management and Budget (OMB) prior to being finalized.[4] Currently, Executive Order (EO) 12866, issued by President Clinton, requires that Executive branch departments submit proposed regulations to OIRA to "ensure that regulations are consistent with…the President's priorities."[5]

Critically, rules promulgated by Independent Regulatory Commissions (IRCs), such as the SEC, CFPB, and Commodities Futures Trading Commission (CFTC), are expressly exempt from EO 12866's required OIRA review.

The exemption that IRC rules enjoy from OIRA review under EO 12866 reflects the recognition by Presidents of both political parties that traditional Executive branch agencies ("Executive agencies"), and IRCs are fundamentally different. Unlike Executive agencies, which are accountable directly to the President, IRCs are independent federal agencies that exercise authority delegated directly to them by Congress under statute. Congress typically creates IRCs when it judges that a policy area should be insulated from the political interference of the President, and where the Constitution vests primary responsibility for the area in question with Congress. Because IRC regulatory authority derives primarily from Congress, IRCs are considered primarily accountable to Congress.[6] It should also be noted that IRCs are repositories of significant substantive expertise and experience; they employ professional, non-partisan subject matter experts who understand and work extensively on specific and complicated issues under IRC jurisdiction.

By contrast, OIRA is an "extraordinarily tiny office" of less than 50 employees that is primarily and directly accountable to the President.[7] However, this small agency exerts extraordinary power over nearly all significant Executive agency rules intended to protect the public. Between October 16, 2001, and June 1, 2011, OIRA reviewed 6,194 separate draft rules.[8] Essentially, no policy promulgated by any Executive agency that might affect an influential industry can go into effect without OIRA approval.

OIRA is headed by a political appointee who, though subject to Senate confirmation, is a member of the White House staff and, in the words of one former OIRA Administrator,

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3 The National Environmental Protection Act (NEPA), the Regulatory Flexibility Act (RFA), the Congressional Review Act (CRA), and the Paperwork Reduction Act (PRA) establish additional procedures and practices that federal agencies must follow prior to establishing a finalized rule.

4 President Reagan first authorized OIRA review of federal rulemakings on February 17, 1981, when he issued E.O. 12291, which required federal department to have proposed and final rules reviewed by OIRA prior to publication.
5 Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). P-3.
6 See "CRS Report to Congress: Presidential Review of Independent Regulatory Commission Rulemaking: Legal Issues." By Vivian S. Chu, Legislative Attorney, and Daniel T. Shedd, Legislative Attorney. September 10, 2012, P-3. Accessed 10-22-12. http://www.fas.org/sgp/crs/misc/R42720.pdf
7 As described by University of Pennsylvania Professor Cary Coglianese. "*On Regulation: Presidential Oversight: A Panel Discussion with Regulatory 'Czars' from Reagan to Bush*." The University of Pennsylvania Law School. December 6, 2006. Accessed 10-22-2012. P-2.
https://www.law.upenn.edu/institutes/regulation/conferences/OIRAPanelTranscript.pdf
8 The Center for Progressive Reform. November 2011. "Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment." Accessed 10-24-2012
http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf

functions as "the President's representative, trying to figure out how to implement the President's policy."[9] Further, because OIRA is housed in the Executive Office of the President, its activities are not transparent, not subject to regulatory oversight by Congress, and may even be rendered totally immune from Congressional oversight through a claim of Executive privilege.[10] Moreover, while EO 12866 includes provisions that are intended to afford the public some degree of transparency regarding OIRA's activities, these provisions have proven largely ineffective. Indeed, as the Project on Government Oversight noted in a recent letter to President Obama regarding EO 12866, "the requirements for [OIRA] transparency, though spelled out in the Executive Order...appear to have been systematically ignored, thus hiding the influence of competing interests on new regulations that affect the public health and welfare."[11]

Given that one express purpose of OIRA review is "to ensure that regulations are consistent with the President's priorities…,"[12] there is little doubt that, by subjecting IRC rulemakings to OIRA review, S. 3468 would enhance the ability of the President to influence IRC rulemaking. The policy implications of this shift in the regulatory balance of power is illustrated by the long history of OIRA quietly thwarting regulations issued by federal agencies, which continues today. For example:

- On May 12, 2010, the Environmental Protection Agency (EPA) sent the White House a proposal to establish a list of "chemicals of concern." As of October 2012, the rule is still pending with OIRA, despite the fact that the OIRA review is limited to 90 days[13] by EO 12866.[14]

- On July 11, 2011, the EPA submitted to OIRA a final draft rule on National Ambient Air Quality Standards for Ozone. On September 2, 2011, OIRA returned the proposal to the EPA stating that the President did not support the final ruling, and as a consequence, as of October, 2012, this proposed rulemaking is considered similarly stalled.[15]

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9 According to John Spotila, who served President Clinton as OIRA Administrator from 1999-2000. Ibid. P-4.
10 In May 2008 the Bush Administration asserted Executive privilege with respect to a subpoena issued to OIRA by the House Oversight and Government Reform Committee seeking documents related to the EPA's promulgation of a regulation revising national ambient air quality standards for ozone. See "CRS Report to Congress: Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments." By Morton Rosenberg, CRS Specialist in American Public Law. August 21, 2008, P-34. Accessed 10-23-2012.
http://www.fas.org/sgp/crs/secrecy/RL30319.pdf
11 Letter from the Project on Government Oversight to President Barack Obama. "RE: OMB Violates Presidents Executive Order on Transparency in Rulemaking." March 26, 2012. Accessed October 24, 2012
http://www.pogo.org/pogo-files/letters/government-secrecy/gs-og-20120326-pogo-letter-omb-violates-presidents-executive-order.html
12 Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). P-2.
13 EO 12866 provides that OIRA regulatory review of Executive agency rules shall be completed "within 90 calendar days after the date of submission", but allows that "the review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head."
14 Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). P-3.
15 Cass R. Sunstein (Administrator of the White House Office of Information and Regulatory Affairs). Letter to: Lisa Jackson (Administrator of the Environmental Protection Agency). Sept. 2, 2011.
http://www.whitehouse.gov/sites/default/files/ozone_national_ambient_air_quality_standards_letter.pdf

- In January 2012, 300 scientists, physicians and public health experts sent President Obama a letter urging him to direct OIRA to complete its review of proposed crystalline silica regulations proposed by the Occupational Hazard Safety Administration (OSHA). At that point, OIRA had already been reviewing the proposed rule for nearly a year, despite the fact that EO 12866 limits OIRA's authority for such review to a four-month maximum.[16] As of October, 2012, OIRA's review of OSHA's proposed crystalline silica rules remains pending.

- In March 2012, the Center for Progressive Reform (CPR) identified seven "crucial health, safety and environmental regulations" that it asserts are stalled due to OIRA review. These rules "include both major, albeit controversial undertakings with significant potential to save lives--e.g., the EPA's rule to limit toxic air pollution from industrial boilers and process heaters--as well as more minor, but straightforward and long overdue proposals--e.g., the Mine Safety and Health Administration's (MSHA) Pattern of Violations and the Food and Drug Administration's (FDA) Good Manufacturing Practices for infant formula."[17]

The considerable influence that OIRA exercises over the rulemakings of agencies and departments whose rules are subject to its review is made all the more troubling by its opaque nature and failure to meet even its own professed goals for transparency and accountability. For example:

- A 2009 study by the Government Accountability Office (GAO) affirmed OIRA's substantial influence in the rulemaking process, concluding that "OIRA's reviews of agencies' draft rules often resulted in changes." Of the 12 "case-study rules subjected to OIRA review," which GAO used as its sample in the study, "10 resulted in changes, about half of which included changes to the regulatory text."[18] The GAO report also lamented the absence of transparency which remains endemic to OIRA's regulatory review process, noting that "out of eight prior GAO recommendations to improve the transparency OIRA has implemented only one."[19]

Also troubling is that, in practice, OIRA frequently operates as a sort of "court of last resort" for lobbying efforts that fail to convince Executive agencies to weaken or change their pending rules.[20] In fact, according to an extensive study conducted by the Center for Progressive Reform, industry lobbyists were consulted by OIRA officials on over 3,760 occasions during the nearly 10-year period covered by the study.[21]

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16 Letter to the President regarding OIRA review of OSHA regulations on the use of Crystalline Silica. January 25, 2012. Accessed 10-24-2012. http://www.ucsusa.org/assets/documents/scientific_integrity/obama-letter-on-silica-1-25-12.pdf

17 The Center for Progressive Reform. Issue Alert, March 2012. "Opportunity Wasted: The Obama Administration's Failure to Adopt Needed Regulatory Safeguards in a Timely Way is Costing Lives and Money." Accessed 10-24-2012 http://www.progressivereform.org/12RulesIssueBrief.cfm

18 GAO-09-205. "Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews." Accessed 10-24-12 http://www.gao.gov/highlights/d09205high.pdf

19 GAO-09-205, Ibid.

20 The Center for Progressive Reform. November 2011. "Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment." Accessed 10-24-2012 http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf

As a matter of principle, NASAA believes it is essential to insulate IRCs to the greatest practical degree from the political influence of the White House. By preserving the independence of IRC rulemaking, Congress can best ensure that IRCs are able to pursue their statutory mandates even when these mandates conflict with presidential priorities. In the absence of such safeguards, it is not difficult to envision a situation in which Presidents utilize OIRA reviews to weaken, delay, or altogether undermine IRC efforts to implement statutes to which the President is opposed.

On an immediate level, NASAA is specifically concerned that the authorities authorized for OIRA by S. 3468 could be leveraged to undermine the ongoing implementation of the Dodd-Frank Act. Though S. 3468 does not empower OIRA to unilaterally block an IRC from adopting a rule to which the President is opposed, **by permitting OIRA to perform its own economic analyses of proposed IRC rules, including cost-benefit analysis, S. 3468 would unquestionably make it more difficult for IRCs to proceed with many rulemakings.** Moreover, by deeming OIRA analyses of IRC rules "part of the whole record of agency action" for judicial review, the bill would invite the use of OIRA analyses to second-guess IRC determinations in litigation, thus potentially increasing frequency of legal challenges to IRC rules.[22]

State securities regulators support efficient regulation, and appreciate the role that objective analyses of proposed rules can play in promoting this aim, however we also firmly believe that, in the case of IRC rules, such analyses should be performed by the agency in which Congress has vested rulemaking authority. By authorizing Presidents to subject IRC rulemaking activities to OIRA review, S. 3468 threatens to give Presidents, and special interests, new leverage that may compromise the political independence of IRC rulemakings and undermine their ability to effectively protect the investing public.

Despite S. 3468's potentially profound implications, Congress to date has not held a single hearing on the legislation. In view of the bill's sweeping scope, uncertain effect, and potential to harm the investing public, I respectfully urge you not to support S. 3468 should it come up for a vote.

Thank you for your consideration of my concerns. If I may be of any assistance, please do not hesitate to contact Michael Canning, NASAA's Director of Policy, at (202) 737-0900.

Sincerely,

A. Heath Abshure
NASAA President and Arkansas Securities Commissioner

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21 The Center for Progressive Reform, Ibid.
22 The Independent Agency Regulatory Analysis Act (S. 3468), Section 4. 112th Congress.