

Regulation Digest Weekly

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Marketplace of Ideas

American Action Forum

- The Week in Regulation: November 12-16, *Sam Batkins*
- The Week in Regulation: November 19-23, *Sam Batkins*
- Lame Duck Regulatory Deluge Could Top \$100 Billion, *Sam Batkins*

Committee on Financial Services, Subcommittee on Oversight & Investigations

- Staff Report Prepared for Rep. Randy Neugebauer, Chairman

Competitive Enterprise Institute

- CEI's Battered Business Bureau: The Week In Regulation, *Ryan Young*

Dēmos

- Against the Rules: The Senate's New Attack on Regulation, *Ben Peck*

Federal Regulations Advisor

- Monday Morning Regulatory Review – 11/26/12, *Leland Beck*

Feature Story

Treasury Exempts Foreign Exchange Swaps and Forwards from Domestic Swaps Regulations

The Treasury Department gave [notice](#) that foreign exchange swaps and foreign exchange forwards will be exempted from the regulatory definition of a “swap” for regulations implementing of the Dodd-Frank Act. “After considering the statutory factors and the comments on the NPD, the Secretary is issuing this determination to exempt foreign exchange swaps and forwards because of the distinctive characteristics of these instruments. Unlike most other swaps, foreign exchange swaps and forwards have fixed payment obligations, are settled by the exchange of actual currency, and are predominantly short-term instruments. Counterparty credit risk prior to settlement is significantly reduced by the structure of a foreign exchange swap or forward transaction, particularly because the term for each type of transaction generally is very short...”

“Treasury believes, as do several commenters, that requiring central clearing and trading under the CEA on foreign exchange swaps and forwards would potentially introduce operational risks and challenges to the current settlement process. If central clearing were to be required, the central clearing facility would be effectively guaranteeing both settlement and market exposure to replacement cost. As a result, combining clearing and settlement in a market that involves settlement of the full principal amounts of the contracts would require capital backing, in a very large number of currencies, well in excess of what will be required for swaps that are settled on a “net” basis. Treasury believes that requiring foreign exchange swaps and forwards to be cleared and settled through the use of new systems and technologies could introduce new, unforeseen risks in this market.” This exemption was effective on November 20th.

In the News

11/21/12

[Maker of controversial strawberry fumigant agrees to end US EPA registration and sales](#), *Washington Post*

[FTC said to waver on Google antitrust search case](#), *Washington Post*

[Public pricing of U.S. derivatives nears, threatening bank dominance](#), *Reuters*

[COMPLY-FINRA reignites efforts to oversee investment advisers](#), *Reuters*

[TMX Sees Dodd-Frank Pushing Debt to Exchanges](#), *Bloomberg*

[CFTC Eases Swap Pay-to-Play Rules With Government Pension Plans](#), *Bloomberg*

[Watchdog Wants EPA Chief's Use of Alias E-Mail Probed](#), *Bloomberg*

[Dodd-Frank Foes Can't Show Credible Threat, U.S. Says](#), *Bloomberg*

[Focus on OIRA, Regulator of Regulatory Agencies, as Obama Prepares for Second Term](#), *Regulatory Focus*

[Top Treasury Official Eyed as Possible SEC Chairman](#), *Wall Street Journal*

[Effort to Curb Coolant Falters, Sometimes at Home](#), *New York Times*



Free State Foundation

- City of Arlington v. FCC: Questioning an Agency's Authority to Determine Its Own Jurisdiction, *Jonathan Adler*
- Why Broadband Pricing Freedom Is Good For Consumers, *Daniel Lyons*

Government Accountability Office

- Incentives, Opportunities, and Testing Needed to Enhance Spectrum Sharing, *Mark Goldstein*
- Bureau of Consumer Financial Protection's Fiscal Years 2012 and 2011 Financial Statements, *J. Lawrence Malenich*
- Securities and Exchange Commission Fiscal Years 2012 and 2011 Financial Statements, *James Dalkin*
- FCC's Licensing Approach in the 11, 18, and 23 Gigahertz Bands Currently Supports Spectrum Availability and Efficiency, *Mark Goldstein*
- Strengthening Efforts to Combat Elder Financial Exploitation, *Kay Brown*

Heritage Foundation

- Thankless Regulations an Affront to Pilgrims, *Diane Katz*

The Mercatus Center

- Reducing Debt and Other Measures for Improving U.S. Competitiveness, *Jason J. Fichtner & Jakina Debnam*
- Regressive Effects of Regulation, *Diana Thomas*

National Academies Press

- Science for Environmental Protection: The Road Ahead

OMB Watch

- The Future of Long-Awaited Public Protections in Obama's Second Term

Penn Program on Regulation

- CFPB Examines Obstacles to Repayment of Private Student Loans, *Damini Ghosh*
- The Regulatory Week in Review: November 16, 2012, *RegBlog Staff*
- Regulation's Impact on Jobs, *Donald Arbuckle*
- The Regulatory Week in Review: November 23, 2012, *RegBlog Staff*
- Extending White House Review over Independent Agencies, *Cailin Lechner*
- Regulating the Cranberry, *RegBlog Staff*

11/23/12

[The demise of coal-fired power plants](#), *Washington Post*
[Coal market to face dropping quality, rising costs](#), *Reuters*

11/25/12

[Outdoors bill angers some environmentalists](#), *Washington Post*

11/26/12

[Schapiro, Head of S.E.C., Announces Departure](#), *New York Times*
[Mary Schapiro leaving SEC after helping oversee regulatory response to 2008 financial crisis](#), *Washington Post*
[Mary Schapiro Will Step Down as SEC'S Chairman Next Month](#), *Bloomberg*
[New Guidance Seeks to Inform Development of Anti-HIV Product Class](#), *Regulatory Focus*
[FDA Publishes List of all Device Guidance Documents Planned for 2013](#), *Regulatory Focus*
[SEC's Mary Schapiro to Step Down](#), *Wall Street Journal*
[Salmonella poisoning causes FDA to halt operations at peanut butter plant](#), *Washington Post*
[Obama picks SEC official Elisse Walter to lead agency after Schapiro departs in December](#), *Washington Post*
[Commissioner Elisse Walter to head Securities and Exchange Commission after Schapiro exit](#), *Washington Post*
[Morgan Keegan Trial Judge to Decide SEC Case He Dismissed](#), *Bloomberg*
[Three Unfinished Tasks From the Schapiro Era](#), *Deal Journal*
[With The Election Over, Regulators Sue Intrade](#), *WSJ Corporate Intelligence*
[Obama to Designate Elisse Walter as New SEC Head](#), *WSJ Law Blog*

11/27/12

[Neil Barofsky on SEC, Banking Regulatory Outlook](#), *Bloomberg TV*
[Elisse Walter Steps Out of Schapiro Shadow Into SEC Chairmanship](#), *Bloomberg*
[Intrade Tells U.S. Users to Shut Accounts After CFTC Sues](#), *Bloomberg*
[Bitter struggle over Internet regulation to dominate global summit](#), *Reuters*
[Infamous Drug Focus of New FDA Enforcement Effort](#), *Regulatory Focus*
[Consumer Bureau to Revise Money-Transfer Rules Faulted by Banks](#), *Bloomberg*
[Barclays Says Credit Union Regulator Filed Suit Too Late](#), *Bloomberg*
[Energy Drinks' Health Danger Being Probed by U.S.](#), *Bloomberg*
[SEC leadership change could further delay crowdfunding](#), *Washington Post*
[New SEC Chief Inherits Stalled Adviser Reform](#), *Wall Street Journal*
[Rules are first reforms of tribal land leasing regulations in 50 years](#), *Washington Post*
[SEC's Walter may take similar path to ally Schapiro](#), *Reuters*
[U.S. Said to Weigh Tightening Rules for Foreign Lenders](#), *Bloomberg*
[An Ally of the Old Boss Also Goes Her Own Way](#), *Wall Street Journal*

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[FCC chief's painstaking approach earns mixed reviews in turbulent times for telecom industry](#), *Washington Post*
[SEC Chairman Mary Schapiro is Stepping Down](#), *RegBlog*
[More Fire Protection for Cargo Planes to Be Urged by NTSB](#), *Bloomberg*
[Group Signals Plan To Sue EPA To Force Cap-And-Trade Scheme For Vehicle Emissions](#), *Huffington Post*
[EPA suspends BP from new federal contracts](#), *Washington Post*
[Reports: Hedge fund warns clients of SEC probe](#), *Washington Post*
[Fed mulls new rules for foreign banks' U.S. operations](#), *Reuters*



Rulemaking

Securities and Exchange Commission

SEC Proposes Rule Establishing Capital, Margin Requirements for Security-Based Swap Dealers

The Securities and Exchange Commission published a [proposed rule](#) establishing capital and margin requirements for security-based swap dealers and major security-based swap participants, along with segregation requirements for security-based swap dealers. The Commission is also proposing an increase in the minimum net capital requirements for broker-dealers. “The minimum financial and customer protection requirements proposed today—like other financial tests that market participants use in the ordinary course of business to manage risk or to comply with applicable regulations—incorporate many specific numerical thresholds, limits, deductions, and ratios. The Commission recognizes that each such quantitative requirement could be read by some to imply a definitive conclusion based on quantitative analysis of that requirement and its alternatives.”

“The Commission notes in this regard that the specific quantitative requirements included in this proposal have not been derived directly from econometric or mathematical models, nor has the Commission performed a detailed quantitative analysis of the likely economic consequences of the specific quantitative requirements being included in this proposal... Accordingly, the selection of a particular quantitative requirement proposed below reflects a qualitative assessment by the Commission regarding the appropriate financial standard for an identified issue.” [Comments](#) are due on January 22nd.

SEC Finalizes Rule Establishing Standards of Credit-Worthiness to Replace Credit Ratings

The Securities and Exchange Commission published a [final rule](#) establishing a standard of credit-worthiness to replace a statutory reference to credit ratings that was removed by the Dodd-Frank Act. “The rule will establish the standard of credit quality that must be met by certain debt securities purchased by entities relying on the Investment Company Act exemption for business and industrial development companies.” The rule replaces credit ratings with essentially the same measurement: “We do not understand that the statutory amendment was intended to change the standard of credit quality represented by an investment grade rating. Accordingly, we are adopting rule 6a-5, as proposed, to establish a standard of credit-worthiness designed to achieve the same degree of risk limitation as the credit rating it replaces.”

Treasury Department

OCC Releases Interim Guidance Establishing Principles for Development of Stress Test Scenarios

The Office of the Comptroller of the Currency released an [interim guidance](#) establishing the processes and factors that will be used by OCC to develop and distribute stress test scenarios for the annual stress test statutorily required by the Dodd-Frank Act and implemented by the recent Stress Test Rule. “Under the Stress Test Rule national banks and Federal savings associations with total consolidated assets of more than \$10 billion (covered institutions) are required to conduct annual stress tests using a minimum of three scenarios (baseline, adverse and severely adverse) provided by the OCC.” In the guidance, OCC states that the different agencies presiding over the annual stress testing requirements may have differing perceptions of the risks that should be reflected in the tests: “The OCC may distribute scenarios to covered institutions that differ in certain respects from those distributed by the FDIC and the Board if necessary to better reflect specific OCC concerns. The OCC expects such situations to be extremely rare, however, and anticipates making every effort to avoid differences in the scenarios required by each agency.” The interim guidance was effective beginning November 15th. [Comments](#) on the interim guidance are due on January 14th, 2013.

Department of Transportation

NHTSA Seeks Comments on Economic Impact of its Rules on Small Businesses

The National Highway Traffic Safety Administration published a [proposed rule](#) seeking comments from the public on the economic impact of NHTSA regulations on small entities. “As required by Section 610 of the Regulatory Flexibility Act, we are attempting to identify rules that may have a significant economic impact on a substantial number of small entities. We also request comments on ways to make these regulations easier to read and understand. The focus of this notice is rules that specifically relate to passenger cars, multipurpose passenger vehicles, trucks, buses, trailers, motorcycles, and motor vehicle equipment.” [Comments](#) are due on January 22nd.



Federal Deposit Insurance Corporation

FDIC Releases Interim Guidance Establishing Principles for Development of Stress Test Scenarios

The Federal Deposit Insurance Corporation published an interim guidance as a [final rule](#) for public comment establishing the processes and factors that will be used by FDIC to develop and distribute stress test scenarios for the annual stress test statutorily required by the Dodd-Frank Act and implemented by the recent Stress Test Rule. In the guidance FDIC lays out the variables that will act as measures of financial market conditions in the United States and key foreign countries. “The FDIC anticipates that the path of the unemployment rate in particular will be a key variable indicating the severity of economic stress, as this variable provides a simple and widely noted gauge of the state of the U.S. economy...Other variables may represent asset prices and financial market conditions, including interest rates. The FDIC expects to specify scenarios using a standard core set of variables, although variables may be added or deleted as the U.S. and global economic environment evolves.” [Comments](#) on the interim guidance are due on January 22nd.

Federal Reserve System

Fed Board Issues Policy Statement Governing Principles for Development of Stress Test Scenarios

The Federal Reserve Board issued a policy statement as a [proposed rule](#) establishing the processes and factors that will be used by the Fed Board to develop and distribute stress test scenarios for the annual stress test statutorily required by the Dodd-Frank Act and implemented by the recent Stress Test Rule. “The proposed Policy Statement outlines the characteristics of the stress test scenarios and explains the considerations and procedures that underlie the formulation of these scenarios... While the Board generally expects to use the same scenarios for all companies subject to the final rule, it may require a subset of companies—depending on a company's financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy—to include additional scenario components or additional scenarios that are designed to capture different effects of adverse events on revenue, losses, and capital. One example of such components is the market shock that applies only to companies with significant trading activity. Additional components or scenarios may also include other stress factors that may not necessarily be directly correlated to macroeconomic or financial assumptions but nevertheless can materially affect companies' risks, such as the unexpected default of a major counterparty.” [Comments](#) on the necessary improvements in scenario design are due to the Fed Board on February 15th.

Agencies

Food and Drug Administration

FDA Announces Public Meeting on Regulatory Framework for Compounding Pharmacies

The Food and Drug Administration announced a [public meeting](#) on December 19th from 3:00pm – 5:00pm to address forming a framework for state and federal regulatory roles as they pertain to compounding pharmacies. A recent outbreak of fungal meningitis, which has caused 29 deaths, was linked to contaminated steroid injections that were manufactured in a Massachusetts compounding pharmacy that FDA does not regulate. “Historically, regulation of pharmacy compounding has focused on drawing a line between traditional pharmacy compounding and other manufacturing. Generally, day-to-day oversight of traditional pharmacy compounding has been seen as the primary responsibility of the States, which license pharmacies and regulate the practice of pharmacy, while other manufacturing falls under the purview of FDA. Going forward, FDA believes the focus should be shifted from attempting to draw a bright line between traditional pharmacy compounding and other manufacturing to clearly defining traditional pharmacy compounding that should be primarily overseen by the States and higher risk non-traditional pharmacy compounding that would require compliance with Federal standards. In addition, there are open questions about whether, and to what degree States should enforce Federal standards, what that oversight should look like, and the appropriate level of communication and coordination required to make the system of State and Federal oversight seamless and effective.”

The meeting will focus on the following questions: 1) Given existing authorities and resources, are the States currently able to provide the needed oversight of pharmacy compounding and consumer protection? 2) What should the Federal role be in regulating higher risk pharmacy compounding such as compounding high-volumes of drugs for interstate distribution? 3) Is there a role for the States in enforcing a Federal standard for “non-traditional” compounding? [Comments](#) from the public are being accepted on these questions, and are due on January 18th, 2013.



FDA Announces Public Meeting Seeking Input on Pathogen List Methodology

The Food and Drug Administration [announced](#) a public meeting on December 18th to solicit public input on the establishment of a list of pathogens posing a serious threat to public health. “This public hearing is being held to obtain comments from the public to determine the methodology that should be used in developing the list of qualifying pathogens, and to elicit suggestions for adding specific pathogens to the list.” [Comments](#) are due on December 3rd.

Environmental Protection Agency

EPA Denies States’ Request for Renewable Fuel Standard Waivers in Wake of Drought

The Environmental Protection Agency published a [notice](#) denying certain petitioners a waiver from the renewable fuel standard (RFS), which requires the manufacture of a minimum amount of renewable fuels on an annual basis. “Broadly summarized, the States requesting a waiver (requesting States) assert that the RFS program is having a negative impact on their respective State economies based on this period of severe drought conditions by diverting corn from other markets to production of ethanol to meet volumes required under the RFS, leading to increased corn prices and resultant negative impacts on the livestock industry and food prices... After weighing all of the evidence before it, EPA found that the evidence does not support a determination that implementation of the RFS over the time period in question would severely harm the economy of a State, region, or the United States, the high statutory threshold for a waiver. The body of information shows that it is very likely that the RFS volume requirements will have no impact on ethanol production volumes in the relevant time frame, and therefore will have no impact on corn, food, or fuel prices. In addition, the body of the evidence also indicates that even in the unlikely event that the RFS mandate would have an impact on the corn and other markets during the 2012-2013 time frame, its nature and magnitude would not be characterized as severe.”

Export-Import Bank

Ex-Im Bank Announces Application for \$100 Million to Fund Export of Gas Plant Equipment to Australia

The Export Import Bank published a [notice](#) announcing the receipt of an application for a long-term loan or financial guarantee in excess of \$100 million to fund the export of U.S. services and equipment for the construction of a liquefied natural gas plant in Australia. Among the services and equipment intended for export are “[e]ngineering, procurement and constructions services, various chiller systems, valves, pumps, vessel, compressors and monitoring equipment.” [Comments](#) are due on December 11th.

Ex-Im Bank Announces Application for \$100 Million to Fund Boeing Exports to the United Arab Emirates

The Export-Import Bank published a [notice](#) announcing the receipt of an application for a long-term loan or financial guarantee in excess of \$100 million to fund the export of commercial Boeing aircraft to the United Arab Emirates. The exports would be intended to be used for long-haul passenger air service between the United Arab Emirates and other international destinations. [Comments](#) are due on December 14th.

Ex-Im Bank Announces Application for \$135 Million Loan to Fund Exports to the United Arab Emirates

The Export Import Bank published a [notice](#) announcing the receipt of an application for a \$135 million direct loan to fund the export of aluminum manufacturing equipment and services to the United Arab Emirates. “The U.S. exports will enable the foreign buyer to increase its production capacity of aluminum by about 574,000 metric tons of aluminum per year. Available information indicates that the majority of this new foreign production will be sold in the following markets: Netherlands, Japan, United Arab Emirates, United States, South Korea, and Thailand. The balance of the foreign production will be sold to China, Cyprus, Egypt, France, Germany, Greece, Hungary, Indonesia, Italy, Kenya, Malaysia, Philippines, Poland, Romania, Slovakia, South Africa, Spain, Sri Lanka, Taiwan, Turkey, and United Kingdom.” [Comments](#) are due on November 30th.

Ex-Im Bank Announces Application for \$100 Million to Fund Boeing Exports to South Korea and China

The Export-Import Bank published a [notice](#) announcing the receipt of an application for a long-term loan or financial guarantee in excess of \$100 million to fund the export of commercial Boeing aircraft to South Korea and China. The exports would be intended to be used for regional and domestic airline service from and within South Korea and China. [Comments](#) are due on December 18th.

