

Regulation Digest Weekly

January 23rd, 2013

Vol. 2 No. 4

Opinion

- The EPA's Stormy Weather
- A president of regulation and litigation
- Geithner's Bailouts Didn't Create Our Mess
- Opponents of financial regulation must be joking

Marketplace of Ideas

American Action Forum

- The Week in Regulation: January 14-18, *Sam Batkins*

American Enterprise Institute

- Bad History, Worse Policy: How a False Narrative about the Financial Crisis Led to the Dodd-Frank Act, *Peter Wallison*

Center for Effective Government (Formerly OMB Watch)

- CEO of Alcoa Embraces Regulations as Good for Business, the Economy

Competitive Enterprise Institute

- CEI's Battered Business Bureau: The Week In Regulation, *Ryan Young*
- Federal Regulation Update: 224 Economically Significant Rules In The Pipeline, *Wayne Crews*

Consumer Financial Protection Bureau

- Prepared remarks of Richard Cordray at a mortgage servicing field hearing, *Richard Cordray*

Federal Regulations Advisor

- Monday Morning Regulatory Review – 1/21/13, *Leland Beck*

Federal Trade Commission

- Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003

Feature Story

GAO Report: Agencies Can Do More to Seek, Respond to Public Comments on Rulemakings

The Government Accountability Office published a [report](#) finding that federal agencies published about 35 percent of the major rules issued between 2003 and 2010 without seeking public comment through a notice of proposed rulemaking (NPRM). In 2009 and 2010, agencies issued the largest numbers of major rules without an NPRM (34 in each year). Two agencies, HHS and the Department of Agriculture (USDA), published the majority (roughly 62 percent) of the major rules without an NPRM in GAO's sample.

The Administrative Procedure Act (APA) of 1946 generally requires agencies to (1) publish an NPRM in the Federal Register; (2) allow interested persons an opportunity to comment on the rulemaking process by providing "written data, views, or arguments;" and (3) issue a final rule accompanied by a statement of its basis and purpose (including the agency's response to comments received on the NPRM). The APA provides a "good cause" exemption to these notice and comment procedures when they are "impracticable, unnecessary, or contrary to the public interest." GAO found that agencies invoke the APA good cause exemption as well as other statutory exceptions, such as when a "statute: (1) either required or authorized them to issue the rule without an NPRM, (2) prescribed the content of the rule, or (3) set a deadline for a rule or program which the agency stated did not allow sufficient time to issue an NPRM." GAO also found that "agencies, though not required, often requested comments on major final rules issued without an NPRM, but they did not always respond to the comments received."

In the News

1/16/13

[Obama's nomination of ATF director signals battle to strengthen agency](#), *Washington Post*

[SEC's Republicans won't back political disclosure rule](#), *Chicago Tribune*
[On first day in office, Gov. Pence imposes regulatory moratorium in Indiana](#), *The Hill*

[F.D.A. Seeks to Tighten Regulation of All-Metal Hip Implants](#), *New York Times*

1/17/13

[Consumer bureau hands down stricter rules for mortgage servicers](#), *Washington Post*

[New regulations shed light on looming health-care reform costs for businesses](#), *Washington Post*

[FAA Grounds Boeing's Entire 787 Dreamliner Fleet](#), *Bloomberg TV*

[Dish Network Asks FCC to Pause Sprint-Softbank Merger Review](#), *Bloomberg*
[Doctors Weigh Risks of Metal Hips as FDA Tightens Reviews](#), *Bloomberg*

[Feds OK rules for pattern violators that officials say will improve safety at US](#)



The George Washington University Regulatory Studies Center

- EPA Claims Implausible Returns on Investment from its PM NAAQS, *Susan Dudley*
- Questionable Benefits: NHTSA Proposed Rule Mandates Noisy Cars, *Sofie Miller*
- Races, Rushes, and Runs: Taming the Turbulence in Financial Trading, *Brian F. Mannix*

Government Accountability Office

- DOE Needs to Take Action to Resolve Technical and Management Challenges, *David Trimble*
- OMB and Agencies Need to Fully Implement Major Initiatives to Save Billions of Dollars, *David Powner*
- Agencies Could Take Additional Steps to Respond to Public Comments, *Melissa Emrey Arras & Robert Cramer*
- Regulators Have Faced Challenges Finalizing Key Reforms and Unaddressed Areas Pose Potential Risks, *Angela Clowers*

Penn Program on Regulation

- Is the Rulemaking Process Really a Quagmire?, *James Hobbs*
- The Regulatory Week in Review: January 18, 2013, *Mima Mohammed*
- The Administrative President, *Cary Coglianese*
- The Benefits of Public Advisory Committees at the FDA, *RegBlog Staff*
- FDA Proposes Food Safety Rules, *Alix McKenna*
- Empowering the SEC to Stop Corporate Fraud, *Aaron Ellias*
- Is Class Action Litigation a Response to Regulatory Capture?, *RegBlog Staff*

Securities and Exchange Commission

- Remarks before the U.S. Chamber Center for Capital Markets Competitiveness, *Commissioner Daniel M. Gallagher*

Contact Us

www.regulatorystudies.gwu.edu

Twitter: @RegStudies

Email: regulatorystudies@gwu.edu

[mines](#), *Washington Post*

[Metal Hip Implants Face Tighter Controls](#), *Wall Street Journal*

1/18/13

[SEC Chairman Walter Says Cross-Border Swaps Rules Top Agenda](#), *Bloomberg*

[J&J Said to Offer Implant Pact That May Reach \\$2 Billion](#), *Bloomberg*

[FAA Studying Bad Batteries as Possible Cause of 787 Fault](#), *Bloomberg*

[FTC, DuPont, Microsoft, TJX, RIM: Intellectual Property](#), *Bloomberg*

[Housing Industry Awaits Down-Payment Rule for Mortgages](#), *Bloomberg*

[Retirement Savings Accounts Draw U.S. Consumer Bureau Attention](#), *Bloomberg*

[Regulators shut down small lender in Minnesota, representing 2nd bank failure of 2013](#), *Washington Post*

[IRS loses lawsuit filed by tax preparers opposed to new regulations, competency exam](#), *Washington Post*

[FAA Studying Bad Batteries as Possible Cause of 787 Fault](#), *Bloomberg*

[Finra Scrutinizes Options Firms Over Possible Order Mismarking](#), *Wall Street Journal*

[FTC Report Indicates Pay-for-Delay Deals on the Rise](#), *Regulatory Focus*

[All-metal hip implants can damage soft tissue](#), *FDA says*, *Fox News*

[Obama officials delay 'fracking' rules](#), *The Hill*

[New rules designed to protect borrowers from taking out risky mortgages](#), *The Hill*

1/21/13

[FAA tries to keep pace as new materials, complex systems and advanced batteries enter airspace](#), *Washington Post*

[Brainsway Sees Partnership as FDA Backs Depression Device](#), *Bloomberg*

[Racehorses in Running as Regulators Debate Loose Liquidity Rules](#), *Bloomberg*

[Red Tape Takes Bigger Toll on Small Canadian Firms than U.S. Peers](#), *Wall Street Journal*

[Dodd-Frank, Seen from Missouri](#), *Wall Street Journal*

[Likely Pick to Head SEC Is Veteran Prosecutor and Litigator](#), *Wall Street Journal*

[Consumer groups warn of loopholes in food-safety rules](#), *The Hill*

1/22/13

[Rep. Anna Eshoo promises FCC bill if net neutrality rules overturned](#), *Washington Post*

[Supreme Court won't hear challenge to EPA rulemaking on sulfur dioxide](#), *Washington Post*

[FTC study taking aim at online marketing of booze](#), *Reuters*

[Supreme Court won't hear challenge to EPA rulemaking](#), *Reuters*

[New FDA Draft Guidance Clarifies Postapproval Modifications Process for Combo Products](#), *Regulatory Focus*

[Long-Sought-After Rule on CGMPs for Combination Products Released by FDA](#), *Regulatory Focus*

[Liberal Dem: EPA should flex its powers on climate change](#), *The Hill*

[Corker presses for synching up mortgage rules](#), *The Hill*

[Consumers herald new mine safety rule](#), *The Hill*

1/23/13

[Senate to scrutinize FAA's approval of battery for Dreamliner](#), *Chicago Tribune*

[GAO suggests regulators needs to improve response data on natural gas pipeline incidents](#), *Washington Post*

[Tax Preparer Rules Vanish on Filing Eve After Court Loss](#), *Bloomberg*

[Dimon Backs Shadow Banking as Necessary Service Providers](#), *Bloomberg*

[Bank Funding Threatened by Basel III and Solvency II](#), *Thiam Says*, *Bloomberg*

[GOP lawmaker pushes bill to erase 'unnecessary' regulations](#), *The Hill*

[White House starts review of revised gas 'fracking' rule](#), *The Hill*



Rulemaking

Federal Trade Commission

FTC Finalizes Children's Online Privacy Protection Rule

The Federal Trade Commission published a [final rule](#) amending an existing child privacy rule to strengthen online protection for children's personal information, and to clarify the scope of the rule pursuant to the Children's Online Privacy Protection Act. "The final Rule amendments modify the definitions of *operator* to make clear that the Rule covers an operator of a child-directed site or service where it integrates outside services, such as plug-ins or advertising networks, that collect personal information from its visitors; *Web site or online service directed to children* to clarify that the Rule covers a plug-in or ad network when it has actual knowledge that it is collecting personal information through a child-directed Web site or online service; *Web site or online service directed to children* to allow a subset of child-directed sites and services to differentiate among users, and requiring such properties to provide notice and obtain parental consent only for users who self-identify as under age 13; *personal information* to include geolocation information and persistent identifiers that can be used to recognize a user over time and across different Web sites or online services; and *support for internal operations* to expand the list of defined activities." FTC estimates a cumulative disclosure burden of 11,640 hours and an annual burden of 58,200 recurring hours, with labor costs at over \$21 million to implement the legal requirements of the new rule.

Department of Labor

MSHA Final Rule Cracks Down on Repeat Violators of Safety, Health Standards

The Mine Safety and Health Administration published a [final rule](#) amending the Agency's existing regulation for patterns of violation (POV), an enforcement tool the Agency employs when mines have recurring safety or health violations. The rule is in response to the 2010 explosion at Upper Big Branch mine, a repeat health and safety violator, which resulted in 29 fatalities. "The POV final rule is one of MSHA's highest priority regulatory initiatives. It strengthens MSHA's ability to focus on those mine operators who demonstrate a disregard for the health and safety of miners through a recurring pattern of significant and substantial (S&S) violations. This final rule allows MSHA to focus on the most troubling mines, provide those operators with notice that they are out of compliance, and review their health and safety conditions until they are improved. This rule will not affect the vast majority of mines that operate in compliance with the Federal Mine Safety and Health Act of 1977 (Mine Act)." The rule retains the existing requirement that MSHA annually review all mines for a pattern of violations, and establishes the criteria that will be used to evaluate whether a mine has a pattern of violations.

Consumer Financial Protection Bureau

CFPB Final Rule Amends Escrow Requirements under the Truth in Lending Act (Regulation Z)

The Consumer Financial Protection Bureau published a [final rule](#) amending Regulation Z, which implements the Truth in Lending Act by requiring creditors to establish escrow accounts for higher-priced mortgage loans secured by a first lien on a principal dwelling. Amendments to this rule are necessitated by the Dodd-Frank Act, which requires the Bureau to "lengthen the time for which a mandatory escrow account established for a higher-priced mortgage loan must be maintained. The rule also exempts certain transactions from the statute's escrow requirement. The primary exemption applies to mortgage transactions extended by creditors that operate predominantly in rural or underserved areas, originate a limited number of first-lien covered transactions, have assets below a certain threshold, and do not maintain escrow accounts on mortgage obligations they currently service." The Bureau does not expect that this rule will materially reduce consumers' access to consumer financial products or services overall; in the analysis, the Bureau [states](#) that these escrow changes may cause some consumers to buy a house they cannot afford, but the Bureau does not have data to estimate the cost of such effects.

Food and Drug Administration

FDA Proposes Rule Requiring Premarket Approval for Metal Hip Implants

The Food and Drug Administration published a [proposed rule](#) that would require manufacturers to gain premarket approval from FDA before selling metal-on-metal hip implants, which can cause damage to soft tissue and lead to additional surgeries. This approval would require manufacturers to file with FDA either a premarket approval application or a notice of completion of a product development protocol for two types of hip implants: hip joint metal/metal semi-constrained, with a cemented acetabular component, prosthesis; and hip joint metal/metal semi-constrained, with an uncemented acetabular component, prosthesis. Despite the fact that metal hip implants are



class III medical devices, which are typically already subject to FDA premarket approval, metal hip implants are preamendment devices, meaning they were (or are substantially similar to another product) on the market prior to the medical device amendments in 1976 requiring premarket approval. Thus, metal hip implants have had grandfathered FDA approval without being subject to the same tests as other class III medical devices. Recent device recalls and studies on metal-on-metal hip implants suggest to the Agency that “preclinical testing currently used to support marketing clearance of these devices has not been sufficient to mitigate the risks associated with these devices and identify potential clinically-relevant failure modes. These reports suggest that additional study is necessary before special controls can be identified and these devices can be reclassified.” [Comments](#) are due on April 18th.

Commodity Futures Trading Commission

CFTC Extends Comment Deadline for Proposed Futures Risk Management Rule

The Commodity Futures Trading Commission published a [proposed rule](#) announcing that the Commission is extending the comment period for the CFTC’s proposed rule establishing enhanced consumer protections and risk management programs for futures commission merchants. The original [proposed rule](#), published on November 14th, 2012, would “require enhanced customer protections, risk management programs, internal monitoring and controls, capital and liquidity standards, customer disclosures, and auditing and examination programs” for futures commission merchants (FCMs). FCMs are already required to submit monthly financial reports to the Commission; the proposed rule would require the reporting of FCM balance sheet leverage ratios on a monthly basis as well. FCMs would also be required to segregate and secure a certain ratio of customer funds to prevent funds from becoming undersecured in the case of an account withdrawal. “Each FCM is required under proposed §1.11 to compute or determine the necessary target of residual interest based upon appropriate due diligence and consideration of various factors relating to the nature of the FCM’s business, including the type and general creditworthiness of the customer base, the amount of the undermargined customer accounts on any given day, and the volatility and liquidity of the markets and products traded by customers.” [Comments](#) are now due on February 15th.

Financial Stability Oversight Council

FSOC Extends Comment Deadline for Proposed Money Market Mutual Fund Recommendations

The Financial Stability Oversight Council published a [notice](#) indicating that the Council is extending the comment period for the FSOC’s proposed recommendations on money market mutual funds (MMFs). Pursuant to the Dodd-Frank Act, the FSOC may “issue recommendations to the appropriate primary financial regulatory agencies to apply new or heightened standards and safeguards for such financial activity or practice.” On November 19th, 2012, the FSOC published in the Federal Register [proposed recommendations](#) that the Securities and Exchange Commission promulgate structural reforms to MMFs, with public comments due on January 18th, 2013. “The Council notes that SEC staff issued a report on November 30, 2012, regarding MMFs (SEC Report). To allow the public more time to review, consider, and comment on the proposed recommendations, and to allow the public to consider the information in the SEC Report in conjunction with the proposed recommendations, the Council believes it is appropriate to extend the comment period.” [Comments](#) are now due on February 15th.

National Credit Union Administration

NCUA Final Rule Amends Definition of What Constitutes a “Troubled Condition” for Credit Unions

The National Credit Union Administration published a [final rule](#) amending the definition of a federally insured, state-chartered credit union (FISCU) that is in a “troubled condition” and subject to NCUA oversight. “Generally, the current definition allows only a state supervisory authority (SSA) to declare a federally insured, state-chartered credit union (FISCU) to be in “troubled condition.” The final rule amends the definition to allow either NCUA or an SSA to declare a FISCU in “troubled condition”... The rule narrowly addresses the definition of a FISCU in “troubled condition” for the sole purpose of better enabling NCUA to administer and protect the NCUSIF. The rule fully recognizes an SSA's primary regulatory and supervisory authority over its FISCU. The rule creates a cooperative partnership between primary regulator (SSA) and insurer (NCUA) and in no way diminishes an SSA's power or authority.” Pursuant to the Regulatory Flexibility Act, NCUA found that this final rule will not have a significant economic impact on a substantial number of small credit unions.



Securities and Exchange Commission

SEC Final Rule Addresses Lost Securityholders and Unresponsive Payees

The Securities and Exchange Commission published a [final rule](#) implementing section 929W of the Dodd-Frank Act, which amended the Commission's Rule 17Ad-17, *Transfer Agents' Obligation to Search for Lost Securityholders*. In 1997, Commission staff estimated that 1.34% of total accounts held by the transfer agents subject to this rule were lost, representing around \$450 million in lost assets. Implementation of the Dodd-Frank amendments will "extend the requirements of Rule 17Ad-17 to search for lost securityholders from only recordkeeping transfer agents to brokers and dealers as well; add a requirement that "paying agents" notify "unresponsive payees" that a paying agent has sent a securityholder a check that has not yet been negotiated; and add certain other provisions. The Commission also is adopting a proposed conforming amendment to Rule 17Ad-7(i) and new Rule 15b1-6, a technical rule to help ensure that brokers and dealers have notice of their new obligations with respect to lost securityholders and unresponsive payees."

SEC Extends Comment Deadline for Rule Establishing Requirements for Security-Based Swap Dealers

The Securities and Exchange Commission published a [proposed rule](#) announcing that the Commission is extending the public comment period for the SEC's 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 [proposed rule](#), initially published on November 23rd, 2012, also proposed 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." [Comments](#) are now due on February 22nd.

Agencies

Department of Commerce

NOAA Seeks Comments on Draft Climate Assessment Report

The National Oceanic and Atmospheric Administration published a [notice](#) announcing the availability of a Draft Climate Assessment Report on which the Agency is accepting public comments. "The NCA aims to incorporate advances in the understanding of climate science into larger social, ecological, and policy systems, and with this provide integrated analyses of impacts and vulnerability on sectors and regions of the U.S. The NCA discusses the effectiveness of mitigation and adaptation activities and identifies economic opportunities that may arise as the climate changes. It also serves to integrate scientific information from multiple sources and highlights key findings and significant gaps in knowledge." [Comments](#) are due on April 12th.

