



1 in 6

Americans get sick each year from food-borne germs.

U.S. Requiring New Food Safety Action

The Food and Drug Administration now requires food companies to develop written safety plans that assess possible problems and detail preventive steps. Food makers must also monitor their facilities, spot potential hazards and mitigate them. The new rules, which apply to human and animal food, are the first two sets of a series of seven the FDA will develop under the Food Safety Modernization Act signed in 2011. Guidelines for farms and new FDA enhancements to its oversight of food imports are scheduled for release before the end of the year.

REGULATION > SCOTT SINDER, MARA GIORGIO, MICAH GREEN, RICK SHILTS AND CAROLYN WALSH

Unseen Danger

A new definition of “swaps” could put brokers and their clients in peril.

Every year, I get calls seeking an opinion that a new product is not subject to any regulatory oversight. The hope of the caller is that through some careful engineering the product can avoid being classified as “insurance” or a “security” or as anything else that might subject it or its provider to expensive regulatory burdens. A classic example was credit default swaps, which were once the non-regulated product at the heart of the AIG meltdown.

The Dodd-Frank Act responded to swap issues by vastly expanding the authority of the Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC). Although insurance generally is exempt from the new swaps regime, the exemption is not 100%.

Some new products may be subject to the new CFTC and SEC regulations. They include: margin and capital requirements; mandatory clearing and trade execution requirements; recordkeeping and real-time data reporting; and adherence to internal and external business conduct standards.

Brokers selling these swap-like products are subject to separate recordkeeping and reporting requirements. They likely need to register with the relevant commission and conduct activities on a Swap Execution Facility (SEF) to avoid fines for selling a product that is a swap without satisfying the regulatory requirements. These fines can be significant for intermediaries, and the sale of one creates a rescission risk.

The commissions have broadly defined a swap to include any contract that provides for any payment that depends on “a potential financial, economic, or commercial consequence.” This definition includes all insurance products.

Congress did not intend to sweep insurance under the new swaps regime. The SEC and CFTC, however, recognize some swaps “might be characterized as insurance products to evade the [Dodd-Frank swaps] regulatory regime...” As such, the commissions use a “facts and circumstances” test to determine whether an insurance product is sufficiently “insurance” to be exempt from the swaps regulations. This gives the regulatory agencies broad discretion to decide whether a product is insurance and qualifies for the exemption.

The regulations also create a safe harbor that should ensure most, if not all, current insurance products are exempt from the swaps regime. To >>

REGULATORY NEWS TICKER

ARKANSAS Enacts state law barring local protections based on sexual orientation or gender identity, sending clear message that local measures that expanded anti-discrimination protections to LGBT people cannot be enforced. State law provides anti-discrimination protection to certain classes of people but not LGBT. Officials in local governments with the protective ordinances say they’ll ignore state law. www.insurance.arkansas.gov

CONNECTICUT National Council on Compensation Insurance files workers comp loss cost reduction of 3.9% and assigned risk decline of 6.3%, effective Jan. 1. Average voluntary loss cost change by industry: manufacturing, down 3.5%; contracting, down 6%; office and clerical, down 6.3%; goods and services, down 3%; miscellaneous, down 1.4%. www.ct.gov/cid/site

DELAWARE Compensation Rating Bureau submits revised filing for workers

compensation rates to state’s Residual Market Plan with proposed effective date of Dec. 1. Contains overall increase of 14.92%. Proposed overall increase for voluntary market is 15.03%. Number of lost-time claims and indemnity severity have increased. www.delawareinsurance.gov

FLORIDA Sets 2016 commercial lines rate increases for Citizens Property Insurance for new and renewal business in commercial lines and coastal accounts effective

Feb. 1. Commercial property residential multiperil (ex-condo association), 3%; commercial property multiperil (condo association), 3%; commercial property non-residential multiperil, 9.1%; commercial property residential wind only (ex-condo association) coastal, 9.5%; commercial property residential wind only (condo association) coastal, 9.5%; commercial property non-residential wind only coastal, 10%. www.floir.com

REGULATION

» satisfy the safe harbor, a policy must be provided by a carrier that satisfies a “provider test” and must either be included on a list of products pre-approved by the two commissions or must satisfy a separate “products test.”

To satisfy the provider test, the provider must be subject to supervision by an insurance regulator, and the agreement or contract must be regulated as insurance. The provider test specifically allows non-admitted carriers that are approved to offer surplus lines or are included on the NAIC Alien Insurer White List. Foreign carriers that do not satisfy one of these criteria do not satisfy the test, and any products they offer may be considered swaps because they are beyond the purview of state regulators. If you have clients accessing these markets on a direct placement basis, they might inadvertently be subjecting themselves to the new regulations.

The provider test regulations do not really grapple over surplus lines insurance being essentially unregulated. The following types of policies, however, are pre-approved as insurance because they are subject to regulatory supervision:

- ▶ Surety bonds
- ▶ Fidelity bonds
- ▶ Life insurance
- ▶ Health insurance
- ▶ Long-term care insurance
- ▶ Title insurance
- ▶ Property and casualty insurance
- ▶ Annuities
- ▶ Disability insurance
- ▶ Insurance against default on individual residential mortgages (commonly known as private mortgage insurance, as distinguished from financial guaranty of mortgage pools)
- ▶ Reinsurance (including retrocession) of any of the foregoing.

The SEC and CFTC declined to extend the pre-approval status to mortgage insurance at the financial institution level; guaranteed investment contracts; funding agreements; structured settlements; deposit administration contracts; industry loss warrants; and catastrophe bonds.

Insurance contracts or agreements not included on the pre-approval list may still qualify for the insurance safe harbor if they meet the following product test:

- ▶ The contract beneficiary has an insurable interest that is the subject of the contract and the beneficiary carries that

risk of loss continuously throughout the duration of the agreement

- ▶ Payment is limited to the value of any such interest if there is a loss and
- ▶ The insurance contract is not traded.

The regulations include a sweeping anti-evasion provision stating the form, label and written documentation of an

insurance policy will not insulate it from regulation as a swap if the product was “willfully structured” to evade swaps regulations. The SEC and CFTC want to ensure swap-like instruments are regulated as swaps. At the same time, they recognize it may be difficult to discern the difference. So they encourage submitting requests for SEC

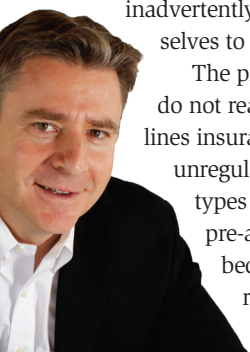
and CFTC determinations.

As always, when in doubt, you can call us now...or you can call us later and risk the consequences.

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Labor Day Dictate

President Obama signed an executive order on Labor Day requiring all federal contractors to allow employees to earn up to seven days of paid sick leave each year.

Nelson Stepping Down from NAIC



Former Nebraska Sen. Ben Nelson plans to step down as CEO of the National Association of Insurance Commissioners (NAIC) when his

term expires in January 2016. He says he will return to private law practice.

Several commissioners privately have expressed concern about Nelson's tenure in recent years and his engagement in the CEO's position. There were rumblings he was being forced out.

Being a former senator, Nelson brought prestige to the position and political acumen, which enabled him to open doors on Capitol Hill for the organization.

REGULATORY NEWS TICKER

GEORGIA Owner of Peanut Corporation of America Stewart Parnell sentenced to 28 years in prison for salmonella outbreak that killed nine people and caused one of nation's largest food recalls. His sentence is harshest ever doled out to a producer in a foodborne illness case, and the case was the first criminal trial for a U.S. food producer on food-poisoning charges. Jury found Parnell knew peanut butter was contaminated and faked lab test results for salmonella. Brother Michael Parnell

and plant quality control manager Mary Wilkerson were sentenced to 20 and five years, respectively. Defendants were not charged for the deaths—only for fraud-related charges and obstruction of justice. www.inscomm.state.ga.us

LOUISIANA State regulators take over Louisiana Health Cooperative, an HMO formed under ACA, due to financial problems. Insurance Commissioner Jim Donelon says it will be able to pay claims

owed to healthcare providers with the help of the Centers for Medicare and Medicaid Services. www.idi.state.la.us

MARYLAND Former commissioner Therese Goldsmith joins law firm Hogan Lovells in health practice and insurance industry sector group as partner in Baltimore office. Will focus on regulatory matters and health insurer compliance. www.mdinsurance.state.md.us/

MISSOURI NCCI files 2.4% drop in loss costs for workers comp. Contracting led decrease with proposed reduction of 4.9% in loss costs. Fewer accidents and injuries drove improvement. » Appoints John Rehagen as director for company and captive regulation. He set up the captive insurance program in the Department of Insurance in 2007. » DOI also hires Angela Nelson as director of market regulation and names Carrie Couch director of consumer affairs and Leslie Nehring as chief financial examiner. www.insurance.mo.gov