

Regulation Digest Weekly

February 6th, 2013

Vol. 2 No. 6

Opinion

- Changing the Conversation on Climate Change
- Is it time to get rid of the EPA?
- Susan Crawford for FCC chairman
- Setback on tax preparer regulations
- Small Business Regulations Surge Under Obama

Marketplace of Ideas

American Action Forum

- The Week in Regulation: January 28 - February 1, *Sam Batkins*

American Enterprise Institute

- Regulatory failures undermine tuberculosis treatments, *Julissa Milligan*

Center for Effective Government (Formerly OMB Watch)

- EPA's New Soot Rule Will Save Lives, Health Care Costs, and the Environment (Updated)

Center for Progressive Reform

- The Precarious Legality of Cost-Benefit Analysis, *Daniel Farber*
- Climate Progress Possible With Energy Efficiency Standards for Appliances -- Under Laws Congress Already Passed, *Alexandra Klass*

Competitive Enterprise Institute

- The Cost Of Enforcing Government Regulation, *Wayne Crews*
- Herbicide Poses No Cancer Risk In Drinking Water, *Angela Logomasini*
- CEI's Battered Business Bureau: The Week In Regulation, *Ryan Young*

Consumer Financial Protection Bureau

- Steven Antonakes named Acting Deputy Director of the Consumer Financial Protection Bureau

Feature Story

FWS Proposes Designating Wolverines as Threatened Species from Habitat Loss Due to Climate Change

The Fish and Wildlife Service published a [proposed rule](#) that would designate the Wolverine as a threatened species under the Endangered Species Act (ESA). In 1995, 2003, and 2008, FWS found that it was not warranted to list the wolverine as a threatened species under the ESA. Operating under a 2009 court settlement with Earthjustice, FWS was required to reevaluate its findings, and has concluded that designation as a threatened species is now warranted. Wolverines require a cold and snowy habitat with persistent spring snow cover in order to successfully reproduce. "We have determined that habitat loss due to increasing temperatures and reduced late spring snowpack due to climate change is likely to have a significant negative population-level impact on wolverine populations in the contiguous United States. In the future, wolverine habitat is likely to be reduced to the point that the wolverine in the contiguous United States is in danger of extinction."

"Snowpack changes as well as concomitant changes to wolverine habitat suitability result from both changes in temperature (negative relationship) and changes in snowfall (positive relationship). Because many climate models predict higher precipitation levels associated with climate warming, the interaction between these two variables can be quite complex. Consequently, predictions about snow coverage that rely only on temperature projections are less reliable than those that rely on both temperature and precipitation." FWS is seeking comments from the public on the projected and reasonably likely impacts of climate change on the wolverine and its habitat, among other things. [Comments](#) are due on May 6th and the FWS Draft Recovery Outline for the wolverine can be found [here](#).

In the News

1/30/13

[New England fishermen: Industry facing ruin after regulators approve cuts in cod catch limits](#), *Washington Post*

[100 banks end reporting to SEC under new law](#), *Washington Post*

[New England regulators OK steep cuts in catch limits that fishermen say will trigger collapse](#), *Washington Post*

[At end of tenure as secretary of labor, Hilda Solis reflects on leadership](#), *Washington Post*

[GOP bill aims to cut red tape on pesticide permitting](#), *The Hill*

[EPA moves to pull rat poison from shelves](#), *The Hill*

[Business group jumps to defense of disparaged SBA office](#), *The Hill*

[FAA 787 Inspections Reveal Checks Were Left to Boeing](#), *Bloomberg*

1/31/13

[Blumenthal to lead oversight subcommittee on regulations](#), *The Hill*



Federal Regulations Advisor

- Monday Morning Regulatory Review – 2/4/12, *Leland Beck*

U.S. Fish and Wildlife Service

- U.S. Fish and Wildlife Service Proposes to List Wolverines as Threatened under the Endangered Species Act

Free State Foundation

- Reforming the FCC's Processes for Digital Age Effectiveness and Efficiency, *Deborah Taylor Tate*

The George Washington University Regulatory Studies Center

- 2012 Unified Agenda Less Informative, *Susan Dudley*

Government Accountability Office

- Federal Communications Commission Needs to Strengthen Controls over Enhanced Secured Network Project, *Gregory Wilshusen & Valerie Melvin*

Heritage Foundation

- The Consumer Financial Protection Bureau and Its Non-Director: What Now?, *James Gattuso*

House Ways and Means, Education and the Workforce, and Energy and Commerce Committees

- Obamacare Burden Tracker, *Committee Report*

The Mercatus Center

- The Failure of Risk-Based Capital Regulation, *Thomas L. Hogan, Neil Meredith, & Xuhao Pan*
- Obama's Nominations Signal Regulation By Enforcement, *Hester Peirce*

Penn Program on Regulation

- FCC Considers Regulating Interstate Inmate Calling Service, *Wistar Wilson*
- The Regulatory Week in Review: February 1, 2013, *RegBlog Staff*
- Often Forgotten Actors in Environmental Regulation, *Michelle Pautz & Sara Rinfret*
- Trust & Verify: How the CPSC Gets the Information It Needs, *Nancy A. Nord & Nathan Cardon*

Roosevelt Institute

- Why the Republican CFPB Arguments Are Wrong, *Mike Konczal*

[Republican lawmaker launches website to help small businesses track onerous regs](#), *The Hill*

[EU's Barnier says U.S. should respect Basel III](#), *Reuters*

[Wall Street versus commodity traders at U.S. swaps hearing](#), *Reuters*

[Validity of Consumer Bureau at Stake in Legal Challenge](#), *Bloomberg*

[Netflix CEO Says Won't Retreat From SEC on Facebook Posts](#), *Bloomberg*

[Senate's Warren Seeks Regulator Records on Foreclosure Deal](#), *Bloomberg*

[U.S. Rules Scrutinized as Energy Futures Swapped for Swaps](#), *Bloomberg*

[Banks Chided by Basel Group Over Trading-Book Capital Disclosure](#), *Bloomberg*

[Biofuel-blending battle rages on as EPA releases new projections](#), *The Hill*

[In spite of court ruling, Obama administration raises production estimate for biofuels](#), *Washington Post*

2/1/13

[Senate GOP tries to force Obama's hand on regulatory review](#), *The Hill*

[Soda, candy out under USDA's proposed school snack rules](#), *The Hill*

[Consumer groups call for stronger regulation, send Obama second term wish list](#), *The Hill*

[House Republicans threaten to subpoena FDA over key documents in meningitis outbreak](#), *Washington Post*

[Government says warming climate threatens survival of snow-loving wolverine](#), *Washington Post*

[GOP senators warn Obama they will oppose confirmation of consumer financial office nominee](#), *Washington Post*

[Judge rejects IRS request to allow new regulations on tax preparers to take effect](#), *Washington Post*

[USDA proposes new standards for school snacks](#), *Washington Post*

[Judge puts U.S. IRS tax preparer regulation on hold](#), *Reuters*

[IRS Loses Bid for Power Over Tax Preparers Pending Appeal](#), *Bloomberg*

[Regulators Won't Rush to Clear Boeing's 787](#), *LaHood Says*, *Bloomberg*

[SEC's Walter Calls Designated Successor White a Quick Study](#), *Bloomberg*

2/2/13

[New federal rules aim to make all foods in schools healthful, get rid of junk food](#), *Washington Post*

[Medical Industry Must Disclose Doctor Payments, U.S. Says](#), *Bloomberg*

2/3/13

[Coal-burning utilities seek a role in EPA rule-making on greenhouse gas emissions](#), *Washington Post*

[Small mortgage firms in D.C. area are wary of new rules](#), *Washington Post*

[New measures to lift veil on banks' capital ratios](#), *Reuters*

2/4/13

[ACA premium sticker shock could fuel foes](#), *Politico*

[Report: FAA is lagging on fulfilling airline safety law nearly 4 years after deadly air crash](#), *Washington Post*

[AP Exclusive: Rule exemption means batteries that led to Dreamliner grounding can fly as cargo](#), *Washington Post*

[OCC Said to Admit Missing JPMorgan's VaR Change in Probe](#), *Bloomberg*

[FDA OKs first generic version of J&J cancer drug Doxil, says it'll ease lingering shortage](#), *Washington Post*

[New rules aim to get rid of junk foods and high-calorie drinks in schools](#), *Washington Post*

[Herbalife shares fall after FTC discloses law-enforcement probe](#), *Washington Post*

[Outgoing EPA chief convinced Obama serious on climate change](#), *Reuters*

[White House regs chief says cooperation with Canada is paying off](#), *The Hill*

[Sen. Murkowski backs calls to reevaluate biofuel mandate](#), *The Hill*



Speaker of the House John Boehner

▪ House Small Business Committee Unveils
Small Biz Reg Watch Initiative

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[HHS begins purge of 'excessively burdensome' healthcare rules](#), *The Hill*
[Community banks to regulators: Carve us out of new rules](#), *The Hill*
[Seeking billions from S&P for inflated ratings, US seeks to cast blame for financial crisis](#), *Washington Post*

2/5/13

[FAA evaluating Boeing request to conduct test flights of grounded 787](#)

[Dreamliners](#), *Washington Post*

[U.S. banks' commodities revenue drops by a third](#), *Reuters*

[Fed's Duke: No sign deposits shifting from small to bigger banks](#), *Reuters*

[GOP lawmaker threatens battle over EPA regulation](#), *The Hill*

[In lawsuit against S&P, tales of subprime songs and worries over market share: company objects](#), *Washington Post*

[White House Weighs Emission Rules](#), *Wall Street Journal*

[Boeing Asks FAA to Approve Test Flights With Dreamliner](#), *Bloomberg*

[Stock Ticks Focus of SEC Aid Meeting for Small Firms](#), *Bloomberg*

[Murdoch Coveting Papers Must Wait as Rift Stalls Media Rules](#), *Bloomberg*

2/6/13

[Entrepreneurs' regulatory concerns start \(but don't end\) with crowdfunding rules](#), *Washington Post*

[Report: Obama to signal executive action on climate change in SOTU](#), *The Hill*

[Labor unions push White House on stalled worker safety rule](#), *The Hill*

[S&P Lawsuit Undermined by SEC Rules That Impede Competition](#), *Bloomberg*

[Fracking Seen by EPA as No. 2 Emitter of Greenhouse Gases](#), *Bloomberg*

[Obama nominates REI chief executive as secretary of the interior](#), *Washington*

Post

[NTSB chief: 'Dreamliner' probe 'weeks away' from completion](#), *The Hill*

[House GOP launches 'ObamaCare Burden Tracker'](#), *The Hill*

Rulemaking

Department of Health and Human Services

HHS, IRS, & DOL Propose Rule Exempting Religious Employers from PPACA Contraceptives Coverage

The Department of Health and Human Services, in conjunction with the Internal Revenue Service and the Department of Labor's Employee Benefits Security Administration, published a [proposed rule](#) exempting group health plans established or maintained by religious employers from PPACA requirements to cover contraceptive preventive services without cost-sharing. The PPACA amended the Public Health Service Act to require coverage of certain preventive health services—including contraceptive services—without cost-sharing.

“The proposed rules would make two principal changes to the preventive services coverage rules to provide women contraceptive coverage without cost sharing, while taking into account religious objections to contraceptive services of eligible organizations, including eligible organizations that are religious institutions of higher education, that establish or maintain or arrange health coverage. First, the proposed rules would amend the criteria for the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths. Second, the proposed rules would establish accommodations for health coverage established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education, with religious objections to contraceptive coverage.” This rule would make the existing temporary “safe harbor” for religious entities permanent, and expand the definition of which organizations will be considered religious entities for the purposes of this rule. [Comments](#) are due on April 8th.

HHS Proposes Rule Designating Minimum Essential Health Coverage

The Department of Health and Human Services published a [proposed rule](#) implementing certain functions of the Affordable Insurance Exchanges of the PPACA and designating some health coverage as minimum essential health coverage required by law. The provisions of the PPACA require that nonexempt individuals maintain minimum essential health insurance coverage, or pay a fee. “Under section 5000A(f)(1)(E) [of the Internal Revenue Code],



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the Secretary of Health and Human Services, in coordination with the Secretary of the Treasury, may designate other health benefits coverage as minimum essential coverage. This proposed rule provides standards for determining whether certain other types of health insurance coverage constitute minimum essential coverage and procedures for sponsors to follow for a plan to be identified as minimum essential coverage under section 5000A. This rule proposes to designate certain types of existing health coverage as minimum essential coverage. Other types of coverage, not statutorily specified and not designated as minimum essential coverage in this regulation, may be recognized as minimum essential coverage if certain substantive and procedural requirements are met as proposed in this rule.” [Comments](#) are due on March 18th.

Department of Labor

DOL Finalizes Rule Amending Family and Medical Leave Act Regulations to Include Military Exigencies

The Department of Labor’s Wage and Hour Division published a [final rule](#) amending the Division’s previous Family and Medical Leave Act (FMLA) regulations. The final rule implements the provisions of the National Defense Authorization Act (NDAA) for Fiscal Year 2010 and extends the availability of FMLA leave to family members of those serving in the Regular Armed Forces for issues arising from deployment. “To implement the amendments made to the FMLA by the FY 2010 NDAA, this Final Rule revises the FMLA regulations to reflect the expansion of qualifying exigency leave to include eligible employees with family members serving in the Regular Armed Forces and the addition of the foreign deployment requirement. It also increases the length of time an eligible family member may take for the qualifying exigency leave reason of Rest and Recuperation from five days to up to a maximum of 15 days and creates a new qualifying exigency leave category for *parental care*.”

Food and Drug Administration

FDA Final Rule Adopts Interim Final Rule on Criteria for the Detention of Food for Consumption

The Food and Drug Administration published a [final rule](#) adopting, without change, an interim final rule published in 2011 dealing with the criteria that the Agency will use to order the detention of food for human or animal consumption. FDA retained the criteria from the interim final rule, under which FDA can order an administrative detention of food for human or animal consumption if there is “reason to believe” that the article of food is adulterated or misbranded. In response to public comments requesting clarification of what constitutes “reason to believe,” the Agency responded that “decisions regarding whether FDA has “reason to believe” that food is adulterated or misbranded will be made on a case-by-case basis because such decisions are fact specific. The Agency will consider the individual facts in each particular situation to inform its reason to believe that an article of food is adulterated or misbranded. Because such decisions are fact specific, FDA has not, therefore, amended the regulation to provide additional explanation of the criteria for ordering administrative detention.”

Environmental Protection Agency

EPA Responds to Petition on NESHAPs Rule for Industrial, Commercial, & Institutional Boilers

The Environmental Protection Agency published a [final action](#) on petitions to reconsider the EPA’s March, 2011 National Emission Standards for Hazardous Air Pollutants (NESHAPs) rule for major industrial, commercial, and institutional boilers and process heaters. “Recognizing the diversity of this source category and the multiple sectors of the economy this final rule effects, the EPA is revising certain subcategories for boilers and process heaters in this action that were established in the March 2011 final rule, based on the design of the combustion equipment. These revisions result in 19 subcategories for the boilers and process heaters source category. Numerical emission limits are established for most of the subcategories for five pollutants, CO, HCl, Hg, and PM or TSM. The review of existing data and consideration of new data have resulted in changes to some of the emission limits contained in the March 2011 final rule. Overall, for both new and existing affected units, about 30 percent of the emission limits are more stringent, half are less stringent, and 20 percent unchanged as compared to the March 2011 final rule.” EPA also published the next day a [final action](#), *National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers*, which made technical corrections to the final rule in response to petitions for reconsideration to clarify definitions, references, applicability, and compliance issues.

EPA Requests Comments on New Methods to Measure Lead Amounts in Total Suspended Particulate Matter

The Environmental Protection Agency published a [proposed rule](#) to establish a new federal reference method (FRM) for measuring lead (Pb) in ambient air total suspended particulate matter (TSP) for the enforcement of the National Ambient Air Quality Standards (NAAQS) for lead. In 2008, the Agency strengthened the NAAQS for lead by reducing the allowable concentrations in ambient air from 1.5 micrograms per cubic meter (µg/m) of Pb to



µg/m 0.15. The previous standard of 1.5 µg/m was set in 1978, when a different method was widely used to measure the prevalence of Pb in TSP. “A new Pb in TSP FRM is needed to: (1) Take advantage of improved extraction methods that are now available with improved precision, sample throughput, and extraction efficiency; (2) address advances in measurement technology that have occurred since promulgation of the original FRM; and (3) address the improved measurement sensitivity (detection limits) needed in response to the tightened Pb NAAQS.” [Comments](#) are due on March 7th.

Department of Energy

DOE Seeks Comment on Updates to Commercial Air Conditioning and Heating Equipment Efficiency

The Department of Energy published a [proposed rule](#) seeking comment from the public on whether to pursue a more stringent energy standard for certain commercial air-conditioning and heating equipment. “This notice seeks to solicit information from the public to help DOE determine whether national standards more stringent than those that are currently in place would result in a significant amount of additional energy savings and whether those national standards would be technologically feasible and economically justified. Separately, DOE also seeks information from the public on the merits of adopting the integrated energy efficiency ratio (IEER) as the energy efficiency descriptor for small, large, and very large air-cooled commercial air conditioners and heat pumps... In assessing the appropriateness of amending the standards that are currently in place for small, large, and very large commercial air-cooled air conditioners and heat pumps, DOE is planning to conduct in-depth technical analyses in the following areas to meet the statutory criteria for prescribing amended standards: (1) Engineering; (2) energy use; (3) markups; (4) life-cycle cost and payback period; (5) national impacts; (6) manufacturer impacts; (7) emission impacts; (8) utility impacts; (9) employment impacts; and (10) regulatory impacts... DOE is specifically publishing this notice as the first step in the analysis process and is specifically requesting input and data from interested parties to aid in the development of the technical analyses.” [Comments](#) are due on March 4th.

Securities and Exchange Commission

SEC Extends Exemptions for Security-Based Swaps to 2014

The Securities and Exchange Commission published a [final rule](#) extending the exemption dates for security-based swaps, as defined in the Dodd-Frank Act and outlined in the Commission’s 2011 interim final rules, until February 2014. The Commission’s interim final rules exempted security-based swap agreements, which became “securities” after implementation of Dodd-Frank, from certain registration requirements applicable to securities. The interim final rules were scheduled to expire on February 11th, 2013. “Title VII amended the Securities Act and the Exchange Act to include “security-based swaps” in the definition of “security” for purposes of those statutes. As a result, “security-based swaps” became subject to the provisions of the Securities Act and the Exchange Act and the rules and regulations thereunder applicable to “securities.” The interim final rules were intended to allow security-based swap agreements that became security-based swaps on the Title VII effective date to continue to trade as they did so prior to the enactment of Title VII. We were concerned about disrupting the operation of the security-based swaps market until the compliance date for final rules that we may adopt further defining the terms “security-based swap” and “eligible contract participant.” We recognized that until we further defined such terms, market participants may be uncertain as to how to comply with the registration requirements of the Securities Act applicable to securities transactions, the registration requirements of the Exchange Act applicable to classes of securities, and the indenture provisions of the Trust Indenture Act.”

Consumer Financial Protection Bureau

CFPB Finalizes Rule Amending Regulation X and Regulation Z

The Consumer Financial Protection Bureau published a [final rule](#) amending Regulation Z (Truth in Lending) and Regulation X (Real Estate Settlement Procedures Act) pursuant to the Dodd-Frank Act. “The final rule amends Regulation Z (Truth in Lending) by expanding the types of mortgage loans that are subject to the protections of the Home Ownership and Equity Protections Act of 1994 (HOEPA), revising and expanding the tests for coverage under HOEPA, and imposing additional restrictions on mortgages that are covered by HOEPA, including a pre-loan counseling requirement. The final rule also amends Regulation Z and Regulation X (Real Estate Settlement Procedures Act) by imposing certain other requirements related to homeownership counseling, including a requirement that consumers receive information about homeownership counseling providers.”



CFPB Finalizes Rule Amending Regulation B

The Consumer Financial Protection Bureau published a [final rule](#) amending both Regulation B, which implements the Equal Credit Opportunity Act (ECOA), and the official interpretation of Regulation B. “In general, the revisions to Regulation B require creditors to provide to applicants free copies of all appraisals and other written valuations developed in connection with an application for a loan to be secured by a first lien on a dwelling, and require creditors to notify applicants in writing that copies of appraisals will be provided to them promptly.”

Agencies

Environmental Protection Agency

EPA Seeks Experts for Office of Research and Development's Board of Scientific Counselors

The Environmental Protection Agency published a [notice](#) announcing that the Agency is seeking nominations for experts to serve on the Board of Scientific Counselors (BOSC) of its Office of Research and Development (ORD). “The BOSC is a chartered Federal Advisory Committee that was established by the EPA to provide independent scientific and technical peer review, advice, consultation, and recommendations about ORD... The BOSC is comprised of an Executive Committee and six supporting subcommittees currently being formed. Each of these subcommittees will focus on one of ORD's research programs: Air, Climate, and Energy Research Program; Chemical Safety for Sustainability Research Program; Homeland Security Research Program; Human Health Risk Assessment Research Program; Safe and Sustainable Water Resources Research Program; and Sustainable and Healthy Communities Research Program.” [Nominations](#) are due on April 1st.

Department of Energy

DOE Announces March 7th Public Meeting of the National Coal Council

The Department of Energy [announced](#) a public meeting of the National Coal Council on Thursday, March 7th, from 9:00am – 12:00pm. The agenda for the meeting includes the U.S. Energy Outlook, a presentation by the American Coalition for Clean Coal Electricity, and a presentation entitled “Mercury Emissions Control at Coal-Based Generation Plants.” The general public can file statements with the Council before or after the meeting, and can also make oral statements at the meeting by giving notice 5 business days in advance of the meeting.

Export-Import Bank

Ex-Im Bank Receives Application for \$100+ Million to Fund Boeing Exports to Israel

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 Israel. These exports would be used to facilitate short-haul passenger air service between Israel and Europe. [Comments](#) are due on March 4th.

Ex-Im Bank Receives Application for \$100+ Million to Fund Boeing Exports to Morocco

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 Morocco. These exports would be used to facilitate medium-haul passenger air service between Morocco and destinations in Europe, Africa and the Middle East. [Comments](#) are due on March 4th.

Ex-Im Bank Receives Application for \$100+ Million to Fund Boeing Exports to Dubai

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 Boeing cargo aircraft to Dubai, the United Arab Emirates. These exports would be used to facilitate cargo services globally. [Comments](#) are due on March 4th.

