

Regulation Digest Weekly

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Vol. 2 No. 13

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- The Unknown Costs of Dodd-Frank Banking Regulations
- Financial Regulators Are Drowning in Data
- Wal-Mart's tired argument against regulation
- Is it already time to weaken Dodd-Frank?
- Why Old Regulations Never Seem to Disappear
- He Who Makes the Rules
- The FAA moves toward ending asinine electronics bans — although we might regret it
- Biofuels Mandate: Defend, Reform or Repeal?
- The White House's dangerous stance on 'too big to fail'
- Do You Think 'Biosimilars' Will Reduce Healthcare Expenditures? Think again.

Marketplace of Ideas

American Action Forum

- The Affordable Care Act at 3: Big Cost Burden, Big Consumer Impact, *Sam Batkins*

Center for Effective Government (Formerly OMB Watch)

- UPDATED: Three Reasons the REINS Act Must Be Stopped (Again), *Katie Greenhaw*
- The Small Business Administration's Office of Advocacy Exaggerates Its Influence

Center for Progressive Reform

- Taking ACUS to Task for Industry Bias in 'International Regulatory Cooperation' Project, *Michael Patoka*
- Bias toward Industry in ACUS Project on International Regulatory Cooperation, *Rena Steinzor & Thomas McGarity*
- A Victory for American Coal Miners; A Small Measure of Justice for the Victims of the Upper Big Branch Mine Disaster, *James Goodwin*

Feature Story

FDIC, OCC, Fed Board Release Final Interagency Guidance on Leveraged Lending

The Federal Deposit Insurance Corporation, in conjunction with the Office of the Comptroller of the Currency and the Federal Reserve Board, [released](#) an interagency guidance on leveraged lending. “This guidance outlines for agency-supervised institutions high-level principles related to safe-and-sound leveraged lending activities, including underwriting considerations, assessing and documenting enterprise value, risk management expectations for credits awaiting distribution, stress-testing expectations, pipeline portfolio management, and risk management expectations for exposures held by the institution. This guidance applies to all financial institutions supervised by the OCC, Board, and FDIC that engage in leveraged lending activities. The number of community banks with substantial involvement in leveraged lending is small; therefore, the agencies generally expect community banks to be largely unaffected by this guidance.”

The guidance will require the annual submission of paperwork in the form of underwriting policies, stress-testing procedures, and risk management policies. FDIC, OCC, and the Federal Reserve System estimate that a total of 75 respondents will be required to complete 78,334 hours of paperwork annually to fulfill the requirements of this guidance, along with a 78,288 hours to initially establish the paperwork system for financial reporting. Using these estimates, the average respondent will spend 130 8-hour workdays establishing the paperwork system, and 130.5 8-hour workdays annually to file the appropriate paperwork with the Agencies.

In the News

3/20/13

[Tech, telecom groups react to resignation of FCC's McDowell](#), *Washington Post*
[At FCC, GOP commissioner's departure clears way for Genachowski's exit](#),

Washington Post

[Supreme Court throws out ruling classifying logging road runoff as industrial pollution](#), *Washington Post*

[U.S. top court rules for timber industry over road runoff](#), *Reuters*

[U.S. FCC commissioner Robert McDowell to step down](#), *Reuters*

[U.S. Chamber of Commerce wants more disclosures from proxy advisors](#), *Reuters*

[Dem reaches out for support on regulation on dietary supplements](#), *The Hill*

[Bank regulators told they are 'bayoneting the wounded' with rules](#), *The Hill*

[Chamber of Commerce wants more proxy advisor disclosures](#), *Reuters*

[U.S. sharpening tools to dig out of impending sugar mountain](#), *Reuters*

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[Big banks engaging in payday lending, report says](#), *Washington Post*

[FDA: Healthcare law's device tax won't apply to smartphones](#), *The Hill*



Center for Responsible Lending

- Triple-Digit Danger: Bank Payday Lending Persists, *Rebecca Borné & Peter Smith*

Competitive Enterprise Institute

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

Federal Regulations Advisor

- SCOTUS Reverses 9th Circuit on Logging Road Culverts – New Rule Irrelevant, *Leland Beck*

- Monday Morning Regulatory Review – 3/25/13, *Leland Beck*

- Letters to a Senator: 8th Cir. says EPA violated APA Requirements, *Leland Beck*

Free State Foundation

- A Chairman – or Chairwoman – of Restraint, *Deborah Taylor Tate*

The George Washington University Regulatory Studies Center

- Renewable Fuels Mandates Harm the Environment, Consumers, and Taxpayers, *Susan Dudley*

Government Accountability Office

- USDA Office of Inspector General Resources, Accomplishments, Coverage, and Quality, *Beryl Davis*

Heritage Foundation

- Environmentalists and Energy Experts Working Together for Fracking Solutions?, *Katie Tubb*

The Mercatus Center

- The CFPB Has a Partial Epiphany, *Hester Peirce*

Penn Program on Regulation

- The Regulatory Week in Review: March 22, 2013
- Active Choosing versus Default Rules, *Brian Ryo*

- USDA Takes Tough Stance on Nutrition Program Fraud, *Bianca Nunes*

U.S. Senator Ron Johnson

- Victims of Government: The Case of Steve Lathrop
- Victims of Government Feedback Form

Contact Us

www.regulatorystudies.gwu.edu

Twitter: @RegStudies

Email: regulatorystudies@gwu.edu

[Feds OK expansion of W. Va. coal slurry impoundment; citizens fear a failure](#), *Washington Post*

[FDA seeks to damp criticism over mobile health app proposals](#), *Reuters*

[US meat inspector furloughs avoided as Congress approves funding](#), *Reuters*

[Consumer bureau shines light on discriminatory auto lending](#), *The Hill*

[FDA: No 'iPhone tax' from health law](#), *The Hill*

[Biased Loans by Auto Dealers to Bring Bank Suits by CFPB](#), *Bloomberg*

[Regulators Caution Banks to Boost Standards on Leveraged Loans](#), *Bloomberg*

[Freddie Mac and Its Regulator Faulted on Servicer Complaints](#), *Bloomberg*

[Web Money Gets Laundering Rule](#), *Wall Street Journal*

[US Drug Regulations May be Revised to Accommodate Medical Gases](#),

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3/22/13

[F.D.A. Seeks to Toughen Defibrillator Regulations](#), *New York Times*

[SEC Favors Pilot to Vary Tick Sizes for Small Stocks](#), *Bloomberg*

[FCC Chairman Genachowski Said to Be Leaving U.S. Agency](#), *Bloomberg*

[SS Badger to stop dumping coal ash into Lake Michigan in 2 years under deal](#)

[reached with EPA](#), *Washington Post*

[FCC Chairman Julius Genachowski announces resignation](#), *Washington Post*

[Federal regulators nix request for ruling to clear way for North Dakota oil pipeline](#)

[extension](#), *Washington Post*

[Appeals court backs FDA in rejecting fast-track approval for Cytori's stem cell](#)

[devices](#), *Washington Post*

[SEC, industry face off in court over resource extraction rule](#), *Reuters*

[Dem amendment would block regulations on power plant emissions](#), *The Hill*

[Cordray vows to soldier on at consumer bureau](#), *The Hill*

[Grassley pushes for consumer bureau watchdog in budget amendment](#), *The Hill*

[Birth control rules drawing record comments, analysis finds](#), *The Hill*

[Regulators issue court-mandated rules on airport body scanners](#), *The Hill*

[What's the Impetus for Genachowski's Departure?](#), *Bloomberg TV*

[TSA to Ask Public About Naked-Image Scanners, Pat-Downs](#), *Bloomberg*

[All AEDs Would Require a Premarket Approval Under New Rule Proposed by](#)

[FDA](#), *Regulatory Focus*

[Industry Gives Cautious Praise to FDA Proposal to Create Limited Use Pathway](#),

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3/23/13

[Cigars expected to be targeted by FDA regulation](#), *Washington Post*

[Fed Official Chastises Fellow Regulators](#), *Wall Street Journal*

3/24/13

[High court weighs drug companies' payments to delay release of cheaper generic](#)

[drugs](#), *Washington Post*

[Middle Ground on Cross-Border Swaps Rule Sought by SEC's Walter](#), *Bloomberg*

3/25/13

[SEC's Walter urges "maximum" reliance on foreign swaps rules](#), *Reuters*

[Lawmakers want gray wolf off endangered list](#), *The Hill*

[Banks given the go-ahead to pull down ATM signs](#), *The Hill*

[Advocates report decline in food-borne illnesses](#), *The Hill*

[Workers Die Awaiting U.S. Justice as Companies Make Limbo](#), *Bloomberg*

[SEC Approves Nasdaq's \\$62 Million Settlement for Facebook](#), *Bloomberg*

[Video game ratings are widely enforced in stores, FTC finds](#), *The Hill*

[Oil and electricity: A compare-and-contrast tale of 2 regulators](#), *Miami Herald*

[Yellowstone Oil Spill: Regulators Propose Penalty For Exxon Pipeline Rupture In](#)

[Montana River](#), *Huffington Post*

[New panel to advise EPA on 'fracking'](#), *Huffington Post*



THE GEORGE WASHINGTON UNIVERSITY

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REGULATORY STUDIES CENTER

[EPA Clean Water Act Rules Invalidated by Appeals Court](#), *Bloomberg*

3/26/13

[U.S. Sen. Johnson: Announces Victims of Government project](#), *WisPolitics*

[Wal-Mart and Amex prepaid card gets FDIC insurance](#), *Washington Post*

[Study estimates state-by-state change in medical claims costs under Obama health overhaul law](#), *Washington Post*

[FDA: Beware of 'black henna' tattoos](#), *Washington Post*

[Housing regulator targets costly 'forced' insurance practices](#), *The Hill*

[FHFA Seeks Curbs on Force-Placed Homeowner's Insurance](#), *Bloomberg*

[Banks May Face Tougher Basel Risk-Concentration Limits](#), *Bloomberg*

[EPA finds 55 percent of rivers and streams in US in poor condition; situation worse in East](#), *Washington Post*

[American Express prepaid debit cards get FDIC insurance](#), *Washington Post*

[JPMorgan Chase Faces Full-Court Press of Federal Investigations](#), *New York Times*

[Sebelius: Some Could See Insurance Premiums Rise](#), *Wall Street Journal*

[Automakers, at White House, parry oil industry on EPA rule](#), *The Hill*

[FDA under more pressure to regulate painkillers](#), *The Hill*

[Utility Group, Virginia Appeal Decisions Upholding CO2 Regulation](#), *Bloomberg BNA*

[FDA Enforcement Efforts Target Therapeutic Massagers Masquerading as Unapproved Devices](#), *Regulatory Focus*

[Compounding Pharmacy Recalls Continue as FDA Inspection Finds Still More Deficiencies](#), *Regulatory Focus*

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[Environmentalists oppose push to end federal wolf protections to prevent expanded range](#), *Washington Post*

[Consumer bureau eases limits on credit card fees](#), *The Hill*

[Obama moves rule to tighten background checks on gun buys](#), *The Hill*

Rulemaking

Food and Drug Administration

FDA Proposes Rule Requiring Premarket Approval Applications for Defibrillators

The Food and Drug Administration published a [proposed rule](#) that would require manufacturers of automated external defibrillators (AEDs) to file a premarket approval application (PMA) or a notice of completion of a product development protocol (PDP). Because products substantially similar to AEDs were being commercially used before 1976, AED manufacturers did not need their devices to undergo premarket approval from FDA previous to this proposed rule. "FDA is proposing to require that a PMA be filed with the Agency for AED devices and accessories within 90 days after issuance of any final order based on this proposal. An applicant whose device was legally in commercial distribution before May 28, 1976, or whose device has been found to be substantially equivalent to such a device, will be permitted to continue marketing such class III devices during FDA's review of the PMA provided that a PMA is timely filed. FDA intends to review any PMA for the device within 180 days. FDA cautions that under section 515(d)(1)(B)(i) of the FD&C Act, the Agency may not enter into an agreement to extend the review period for a PMA beyond 180 days unless the Agency finds that 'the continued availability of the device is necessary for the public health.'" [Comments](#) are due on June 24th.

Department of Homeland Security

TSA Seeks Comment on Passenger Screening Using Advanced Imaging Technology ("Naked Scanners")

The Transportation Security Administration published an economically significant [proposed rule](#) clarifying that TSA may use advanced imaging technology (AIT), such as the full-body scanner machines used in airports, to screen individuals at security screening checkpoints. "TSA is proposing to amend its regulations to specify that screening and inspection of an individual conducted to control access to the sterile area of an airport or to an aircraft may include the use of advanced imaging technology (AIT), also referred to as whole body imaging, as a screening method. Terrorists have repeatedly attempted to cause harm with the aid of weapons and devices



smuggled aboard aircraft. It is the primary mission of DHS to prevent terrorist attacks within the United States and to reduce the vulnerability of the United States to terrorism. The use of AIT is an important tool in accomplishing that mission.

This NPRM is being issued to comply with the decision rendered by the U.S. Court of Appeals for the District of Columbia Circuit in *Electronic Privacy Information Center v. U.S. Department of Homeland Security*. In that case, the U.S. Court of Appeals directed TSA to conduct notice-and-comment rulemaking on the use of AIT as a screening method for passengers. The Court did not require TSA to stop using AIT to screen passengers, explaining that ‘vacating the present rule would severely disrupt an essential security operation,’ and that the rule is ‘otherwise lawful.’” [Comments](#) are due on June 24th.

Consumer Financial Protection Bureau

CFPB Final Rule Removes ATM Requirement to Post Notice of Fees without Accepting Public Comment

The Consumer Financial Protection Bureau published a [final rule](#) removing the requirement that automated teller machines (ATMs) display a fee notice on the ATM informing consumers that they may be subjected to fees for use of the machine. However, ATMs are still required to display fee notices on the screen of the ATM or on paper issued from the ATM. When using an ATM that is not provided by their financial institution, consumers can be hit with two separate fees: one fee, averaging about \$2.40, is charged on the consumer by the ATM, and the second fee (averaging about \$1.40) is charged by the consumer’s bank. Since promulgation of the rule requiring ATM notices, the Electronic Fund Transfer Act (EFTA) has been amended to delete the requirement that CFPB require a notice on the ATM itself.

“The final rule deletes a requirement that an ATM operator post a notice on or at an ATM machine informing consumers that a fee will or may be charged for use of the machine. Because this final rule merely conforms a regulation to a mandatory statutory amendment, and does not involve any exercise of agency discretion, the Bureau does not believe that the rule itself will have any benefits, costs, or impacts beyond those caused by the statute. In addition, the Bureau does not expect the final rule to cause a reduction in consumer access to credit.” CFPB promulgated this rule without accepting comments from the public or publishing a notice of proposed rulemaking, because the rule is in direct response to changes in statutory requirements and “the Bureau has determined that publishing a notice of proposed rulemaking and providing opportunity for public comment are unnecessary and contrary to the public interest.”

Securities and Exchange Commission

SEC Proposes Rule Setting Standards for Automated Trading Systems

The Securities and Exchange Commission published a [proposed rule](#) codifying regulatory systems compliance and integrity for self-regulatory organizations (including registered clearing agencies), alternative trading systems, and plan processors. The rule is intended to address issues resulting from automated systems for conducting trades, which were previously addressed by the Commission’s ARP inspections program. “In the Commission’s view, the convergence of several developments—the evolution of the markets to become significantly more dependent upon sophisticated automated systems, the limitations of the existing ARP Inspection Program, and the lessons of recent events—highlight the need to consider an updated and formalized regulatory framework for ensuring that the U.S. securities trading markets develop and maintain systems with adequate capacity, integrity, resiliency, availability, and security, and reinforce the requirement that such systems operate in compliance with the Exchange Act. The Commission is proposing new Regulation SCI because the Commission preliminarily believes that it would further the goals of the national market system and reinforce Exchange Act obligations to require entities important to the functioning of the U.S. securities markets to carefully design, develop, test, maintain, and surveil systems integral to their operations.” [Comments](#) are due on May 24th.

Department of Justice

DOJ Seeks Comment on Final Retrospective Review Plan

The Department of Justice published a [proposed rule](#) implementing Executive Orders 13563 and 13610, which require agencies to make plans for the retrospective review of existing rules and “invite, on a regular basis... public suggestions about regulations in need of retrospective review and about appropriate modifications to such regulations.” This proposed rule solicits comments from the public on the Department’s [final retrospective review plan](#) that can be used to prioritize regulatory actions implementing these Executive Orders. “The Department of Justice recognizes that valuable information as to the consequences of a rule, including its costs and benefits,



comes from practical real-world experience (both on the part of the public and on the part of the Department) after the rule has been implemented. Consistent with the Department's commitment to public participation, the Department is seeking views from the public that identify specific rules or obligations that should be prioritized for review, including candidates for modification, streamlining, expansion or repeal. Comments should specifically describe how existing rules may be outmoded, ineffective, insufficient, or excessively burdensome.” [Comments](#) are due on May 24th.

Department of Transportation

NHTSA Proposes Rule Establishing Process for Direct Final Rulemaking

The National Highway Traffic Safety Administration published a [proposed rule](#) establishing procedures for the promulgation of direct final rules, which become effective unless the Agency receives adverse public comment. “Under these procedures, NHTSA would issue a direct final rule adopting amendments that become effective a number of days (specified in the rule) after the date of publication of the rule in the Federal Register, unless NHTSA receives written adverse comment(s) or written notice of intent to submit adverse comment(s) by the specified date. Adoption of these new procedures would expedite the promulgation of routine and noncontroversial rules by reducing the time and resources necessary to develop, review, clear and publish separate proposed and final rules. NHTSA would not use direct final rule procedures for complex or controversial issues.” NHTSA notes that it will not consider “frivolous or irrelevant” comments to be adverse for the purposes of withdrawing a direct final rule. Under this proposed rule, all direct final rules promulgated by NHTSA will go into effect 60 days following publication in the Federal Register if no adverse comments are received. [Comments](#) are due on May 28th.

Environmental Protection Agency

EPA Releases Draft Guidance to Auto Manufacturers on E85 Flexible Fuel Vehicle Weighting Factor

The Environmental Protection Agency is [seeking comments](#) on a draft guidance to auto manufacturers on a weighting factor to calculate greenhouse gas emissions under EPA’s greenhouse gas (GHG) program for passenger automobiles and light trucks. “EPA is requesting comment on draft EPA guidance to auto manufacturers for weighting the greenhouse gas (GHG) emissions of a flexible fuel vehicle operating on E85 with the GHG emissions of the vehicle operating on conventional gasoline, when calculating the compliance value to use for EPA’s GHG emissions standards. EPA also invites comment on the analysis used by EPA to determine the weighting factor.” [Comments](#) are due on April 22nd.

Agencies

Department of State

State Dept. Announces Public Meeting Following Release of Keystone XL Supplemental Impact Statement

The State Department [announced](#) an April 18th public meeting in Grand Island, Nebraska, following the March 1st release of the Department’s draft [Supplemental Environmental Impact Statement](#) (SEIS) for the Presidential Permit application of the proposed Keystone XL pipeline. “The document is a draft technical review of potential environmental impacts. It does not make any recommendations on whether the pipeline border crossing should be approved or denied. Consistent with the National Environmental Policy Act (NEPA), the Department of State (the Department) is holding a public comment period. The 45-day public comment period began on March 8. The Department has decided to hold a public meeting in conjunction with the public comment period. The Department will take into account public comments before the Draft SEIS is finalized. Once final, the document will help inform the U.S. government's decision on whether the Keystone XL pipeline serves the national interest.” [Comments](#) on the SEIS are due April 22nd.

Department of Commerce

NOAA Renews Charter for National Climate Assessment and Development Advisory Committee

The National Oceanic and Atmospheric Administration published a [notice](#) announcing that NOAA has renewed the charter for the National Climate Assessment and Development Advisory Committee (NCADAC) through July 10, 2013. According to a website for the NCADAC, the Committee “was established under the Department of Commerce in December 2010 and is supported through the National Oceanic and Atmospheric Administration (NOAA). It is a federal advisory committee established as per the Federal Advisory Committee Act of 1972. The Committee serves to oversee the activities of the National Climate Assessment. Its members are diverse in



background, expertise, geography and sector of employment.” The NOAA notice states that renewal of the NCADAC charter is “critical to the success of the national climate assessment.”

Environmental Protection Agency

EPA Seeks Nominations for National Environmental Education Advisory Council Candidate

The Environmental Protection Agency is [seeking](#) nominations for a candidate to fill an empty position on the Agency’s National Environmental Education Advisory Council (NEEAC). The empty position pertains to the State Department of Education and Natural Resources function of NEEAC. “The National Environmental Education Act requires that the Council be comprised of eleven (11) members appointed by the Administrator of EPA. Members represent a balance of perspectives, professional qualifications, and experience. The Act specifies that members must represent the following sectors: Primary and secondary education (one of whom shall be a classroom teacher)—two members; colleges and universities—two members; business and industry—two members; non profit organizations involved in environmental education—two members; state departments of education and natural resources—one member each; senior Americans—one member. Members are chosen to represent various geographic regions of the country, and the Council strives for a diverse representation. The professional backgrounds of Council members should include education, science, policy, or other appropriate disciplines.” [Applications](#) and nominations are due by April 15th.

