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Agency Publicity in the Internet Era

Nathan Cortez
Southern Methodist University, Dedman School of Law

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Administrative Conference of the United States (ACUS)

REPORT

This report was prepared for the consideration of the Administrative Conference of the United States. The opinions, views, and recommendations expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.

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Consultant:

NATHAN CORTEZ

Adelfa Botello Callejo Endowed Professor
of Law in Leadership & Latino Studies,
Associate Dean for Research

Southern Methodist University
Dedman School of Law

ncortez@smu.edu

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I. EXECUTIVE SUMMARY

A. Traditional Publicity and Conference Recommendation 73-1

In June 1973, the Administrative Conference of the United States (ACUS) adopted Recommendation No. 73-1, Adverse Agency Publicity.[1] The Recommendation responded to several well-known incidents in which a press release or other agency announcement caused significant damage to a product, company, or even an entire industry. ACUS called for each agency to adopt published rules that "balance the need for adequately serving the public interest and the need for adequately protecting persons affected by adverse agency publicity."[2] These rules, according to the recommendation, should require that publicity (1) be accurate and not disparaging, (2) announce investigations and other pending actions only in carefully prescribed circumstances, (3) fulfill an authorized purpose, (4) disclose when any information has a limited basis and give parties advanced notice when practicable, and (5) be corrected or retracted when erroneous or misleading.[3] By the late 1970s, only three agencies had created such rules—the Federal Power Commission (FPC), the Securities and Exchange Commission (SEC), and the Department of Health, Education, and Welfare (HEW).[4] Nine other agencies claimed that their internal procedures complied with the "spirit" of Recommendation 73-1, though they did not adopt rules.[5] Two agencies, the Environmental Protection Agency (EPA) and the Nuclear Regulatory Commission (NRC), took the position that their practices accorded with the Recommendation 73-1, but objected to some of the recommendations and otherwise refused to implement the recommendation.[6] Implementation by other agencies was undetermined at the time.

Decades later, I renewed the call for standards after finding that many of the same risks reported by Professor Ernest Gellhorn still persisted.[7] Agency announcements can be essential to protect consumers and allow consumers to make smarter, more informed decisions. And agencies are often authorized, or even required, by statute to issue publicity. However, like agencies in the 1960s and 1970s, modern agencies occasionally issue publicity that is inaccurate, misleading, premature, excessive, or used to sanction regulated parties rather than inform the public. Moreover, like Gellhorn, I found that agency practices were not subject to many meaningful external constraints by courts or by Congress, though many agencies themselves have adopted internal procedures governing their practices.

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[1] 38 Fed. Reg. 16,839 (Jun. 27, 1973); codified at 1 C.F.R. § 305.73-1(a).

[2] *Id.*

[3] *Id.*

[4] 18 C.F.R. §§ 1.6, 1.36; SEC Administrative Regulations §§ 161 *et seq.*; 45 C.F.R. pt. 17.

[5] Letter from G. William Frick, EPA General Counsel, to Robert A. Anthony, ACUS Chairman, of June 9, 1977 (on file with ACUS); Letter from Marcus A. Rowden, NRC Chairman, to Robert A. Anthony, ACUS Chairman (May 31, 1977) (on file with ACUS).

[6] *Id.* at 27.

[7] Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 B.Y.U. L. REV. 1371 (2011); Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380 (1973).

B. Modern Challenges

My research also identified a number of challenges posed by modern agency publicity. Though agencies continue to issue traditional press releases, agencies now also rely heavily on modern, Internet-based disclosures. Today, agencies publish massive amounts of adverse information about regulated parties or products on their web sites, and increasingly use social media and searchable online databases to amplify this information. Encouraged by recent "open government" initiatives,[8] agencies use information disclosure not just to enhance government transparency, but to pursue regulatory aims. Thus, my research finds that agencies have many more ways and perhaps more incentives to issue publicity than in 1973. I also find that modern forms of publicity are, in some instances, written, presented, and disseminated in ways that could increase the risk that audiences will misinterpret the information. Moreover, hyper-responsive capital markets now respond more swiftly and perhaps more hastily to agency announcements, regardless of whether the information is accurate or interpreted correctly. Very few statutes address modern agency disclosures, and it is unclear how laws like the Information Quality Act (IQA)[9] might apply. As such, old problems with agency publicity are occurring in new forms.

C. Methodology

The findings and recommendations in this Report are the product of a methodology developed in conjunction with Conference staff. The foundation is my 2011 article, *Adverse Publicity by Administrative Agencies in the Internet Era*,[10] which itself owes much to Gellhorn's 1973 study.[11] Added to this foundation was the following research:

• A literature review for articles published since my 2011 article.
• A review of Conference files related to Recommendation 73-1.
• A survey of federal judicial opinions involving challenges to agency publicity. My 2011 article identified 26 relevant opinions since 1973.[12] Appendix C, attached, includes a list of 33 such opinions published between 1974 and 2014, representing 30 unique cases. The chart features a description of the relevant facts and holdings in each case.
• A survey of agency databases that contain negative information about identified products or parties, compiled with the help of Conference staff, at Appendix E.
• A survey of agency publicity policies and practices, culled from the literature, from case law, and from agency publications and web sites.

[8] *See, e.g.*, Presidential Documents, Memorandum on Transparency and Open Government, 74 Fed. Reg. 4683, 4685 (Jan. 21, 2009).

[9] Treasury and General Government Appropriations Act for Fiscal Year 2001 § 515, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153-54 (2001), *codified at* 44 U.S.C. § 3516.

[10] Cortez, *supra* note 7.

[11] Gellhorn, *supra* note 7.

[12] Cortez, *supra* note 7, at 1375.

• Detailed case studies of three agencies, the Food and Drug Administration (FDA), the Federal Trade Commission (FTC), and the Consumer Financial Protection Bureau (CFPB).
• Interviews of 18 individuals, including officials from all three agencies, and representatives from both industry and consumer groups, as listed in Appendix B.
• A survey of agency guidelines promulgated pursuant to OMB's guidelines implementing the Information Quality Act (IQA), compiled with the help of Conference staff, attached as Appendix G.

Yet, despite these efforts, we were not able to survey all agencies or all publicity practices. The sheer number of agencies and the number and complexity of the issues prohibit a comprehensive survey. The three case studies were chosen to represent a range of agency practices, given their discrete regulatory missions. Of course, these agencies may not capture the full range of practices by all agencies. We did survey a much broader range of agencies wherever practicable. For example, Appendix E (Sample of Agency Databases) and Appendix G (Agency IQA Guidelines) were created after surveying nearly all federal agencies.

D. Findings

From this research emerge several key findings that inform the recommendations below:

Publicity is more voluminous and varied now. Although agencies still rely on press releases and other traditional forms of publicity, the volume of such announcements is dwarfed by the volume of information about regulated parties that agencies publish online, using their web sites, social media, searchable databases, and other electronic means. In fact, the use of massive, searchable, online databases has become increasingly popular in recent years, and may soon eclipse other forms of disclosure as the preferred tool for agencies. Thus, what I call "modern publicity" tends to be written, presented, and disseminated in ways that could magnify the issues associated with traditional publicity.

Agency rationales have evolved. Although agencies still use publicity to inform and warn the public, and infrequently to sanction a regulated party, agency rationales have evolved. Both agencies and open government initiatives invoke transparency as a dominant justification. Some agencies even cite the First Amendment concept of "the marketplace of ideas" as a justification for broad disclosures. Thus, agencies today seem to use modern forms of publicity less as a targeted sanction and more as a diffuse tool to encourage industry-wide compliance and achieve other regulatory aims. The burdens of disclosure tend to be much more marbled and less concentrated on a specific party.

Challenges have evolved. Modern publicity still raises the same concerns as in 1973. Although not frequently abused, agency publicity still can be premature, excessive, misleading, inaccurate, or used in coercive ways. Today, modern publicity is more voluminous, more varied, and more likely to be misprocessed by Internet audiences, including capital markets. Thus, as information disclosure has become a preferred

method among agencies, it has also become more difficult to manage. Many agencies must maintain multiple internal organizations dedicated to public affairs, media relations, social media, and FOIA. Many also maintain Chief Information Officers (CIOs).[13] Given emerging agency capabilities, and given the longstanding concerns with agency publicity, it is more important than ever for agencies to maintain clear policies and procedures.

Agency practices. My research shows that agencies seem to be sensitive to the power of agency publicity and the need to ensure accuracy. The three agencies examined all have multiple layers of review and approval for traditional announcements, and these layers are designed to ensure accuracy above all else. Not all agencies publish their internal policies and procedures, however. Agency practices vary on announcing investigations, complaints, and other pending agency actions, though most agencies acknowledge the problems with announcing that an agency has initiated an investigation (as opposed to concluding one). Finally, agencies report receiving few objections to their press releases or similar announcements, though perhaps this is due to the lack of clear procedures for registering objections. (Moreover, instances rarely are documented by the media or via litigation, but off-the-record conversations indicate that regulated parties still view some agency announcements as problematic or unfair.) Most agencies do not have clear procedures for requesting corrections or retractions to publicity, for example.

Informal customs predominate. Although some agencies have robust written policies and procedures governing their publicity practices, other agencies rely on informal custom and tradition. However, informal customs can break down, and even agencies staffed with professionals of immense goodwill can benefit from clear written policies and procedures. Moreover, many agencies fail to publish their policies or otherwise explain how the subjects of publicity can seek recourse. Again, these problems predate (and partially motivated) Recommendation 73-1. There seem to be few written policies and procedures governing agency databases (with the notable exception of the CFPB's Consumer Complaint Database), even if the database is authorized by statute. Moreover, although agency use of social media is subject to dozens of federal guidelines published by the Office of Management and Budget (OMB) and the General Services Administration (GSA),[14] these guidelines largely ignore the longstanding problems posed by agency publicity, focusing instead on privacy, security, and technical considerations.

E. Recommendations for Reform

I considered recommendations directed to all three branches—executive, legislative, and judicial. Most important are the recommendations to agencies. I urge agencies to make their publicity practices more transparent and to conform not only to existing law, but also to principles of good governance. The recommendations to Congress are mostly to

[13] *See* CIO.gov, *Members*, https://cio.gov/about/members/ (displaying almost 50 different agency Chief Information Officers (CIOs) that are members of the U.S. Chief Information Officer and Federal CIO Council, established by Executive Order 13011 and codified by the E-Government Act of 2002) (last visited Aug. 7, 2015).

[14] General Services Administration, DigitalGov, Checklist of Requirements for Federal Websites and Digital Services, http://www.digitalgov.gov/resources/checklist-of-requirements-for-federal-digital-services/ (last visited June 11, 2015).

clarify existing law, particularly the scope of the Information Quality Act. Finally, after much careful thought, and a change of opinion,[15] I do not recommend judicial review of agency publicity absent the exceptional circumstances already recognized by courts.

Improving agency practices. Several groups, both in and out of agencies, said they would support the Conference recommending best practices for agencies.[16] Based on my research, and based on these discussions, I recommend the following ten best practices:

1.	*Written policies*. Agencies should adopt written policies that address the content of agency announcements and the procedures for issuing them.
2.	*Publication of policies*. Agencies should publish their written policies online.
3.	*Advanced notice*. Agencies should give advanced notice to subjects identified in publicity, but only when the subject is not already aware of an ongoing agency action, unless such notice would be impracticable or inconsistent with the nature of the proceeding.
4.	*Corrections and retractions*. Agencies should adopt procedures for correcting and retracting materially inaccurate statements, subject to exceptions in the public interest.
5.	*Publicizing investigations, complaints, and other preliminary actions*. Agencies should not publicize investigations except in rare circumstances as required by the public interest, and should publicize complaints and other preliminary actions only with a clear explanation that the action is tentative and non-final.
6.	*Capital market reactions*. Agencies should consider the potential capital market reactions to their announcements and should, when practicable and subject to exceptions in the public interest, try to minimize potential capital market shocks.
7.	*Social media*. Agencies should incorporate into their social media policies best practices and procedures that apply to traditional types of agency publicity, such as clear lines of responsibility for publishing information via agency accounts and safeguards to ensure the accuracy of statements.
8.	*Database disclosures*. Agencies should adopt written policies governing online databases that contain adverse information about identified parties. Those policies should ensure that (i) the data are accurate, (ii) that users are informed of the source(s), context, and any limitations of the data, and (iii) that subjects are given the chance to post responses or request corrections or retractions, subject to reasonable exceptions in the public interest.
9.	*Clarifying the Information Quality Act*. The OMB should clarify that the Information Quality Act applies to new substantive information in press releases that is not covered by previous information dissemination subject to the Act. The OMB should also consider updating its guidelines to account for the different types of databases published by agencies.
10.	*Fielding objections*. Agencies that are not subject to the Information Quality Act, and do not otherwise have post-publication procedures for requesting corrections to information should direct objections to the agency's announcement to the Ombudsman or Inspector General, as appropriate.

[15] Cortez, *supra* note 7, at 1441-53 (arguing for judicial review of agency publicity).

[16] *See, e.g.*, Interview with Sean Moulton, Director, Open Government Policy, and Scott Klinger, Director, Revenue and Spending Policies, Center for Effective Government (formerly OMB Watch) (May 27, 2015); Interview with officials from the FTC Office of General Counsel (May 27, 2015).

Statutory reforms. Due to the challenges of legislating agency-by-agency, I recommend that Congress consider amending the Administrative Procedure Act (APA) or the Information Quality Act (IQA) to require agencies to publish written procedures governing their use of publicity, including procedures tailored to social media, online databases, and other new forms of agency disclosure.

Judicial review reforms. Given significant doctrinal and practical barriers to meaningful judicial review, I do not recommend judicial review of agency publicity outside the "compelling" circumstances envisioned (but yet to be encountered) by courts.

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II. TRADITIONAL PUBLICITY AND RECOMMENDATION 73-1

At the June 1973 Plenary Session of the Administrative Conference, the Conference adopted Recommendation 73-1, Adverse Agency Publicity.[17] The recommendation responded to several well-known incidents in which a federal agency issued a press release or other public announcement that caused significant harm to the product, company, or industry identified. In this part, I briefly revisit why agencies issue publicity, why such publicity can be problematic, and what the Conference recommended in 1973. But first, I consider the scope of what counts as "agency publicity."

A. Defining "Agency Publicity"

Recommendation 73-1 defined "adverse agency publicity" as "statements made by an agency or its personnel which invite public attention to an agency's action or policy and which may adversely affect persons identified therein."[18] The Conference distinguished such publicity "from the mere decision to make records available to the public rather than preserve their confidentiality," as the latter is governed by the Freedom of Information Act (FOIA).[19]

Of course, the Conference drew this distinction well before agencies created public web sites that contain voluminous materials about regulated parties.[20] Today, agencies draw attention to their online materials to varying degrees. The most salient documents usually are accompanied by agency press releases and more traditional announcements. However, even when agencies "passively" post information to their web sites, this information can be picked up quickly by the media, the trade press, industry lawyers, and by bloggers—making the distinction between "actively" publicizing information and "passively" releasing it more murky.[21] The distinction is blurred further by recent "open

[17] 38 Fed. Reg. 16,839 (Jun. 27, 1973); codified at 1 C.F.R. § 305.73-1(a).

[18] 1 C.F.R. § 305.73-1(a); 38 Fed. Reg. 16,839 (Jun. 27, 1973).

[19] *Id.*; Freedom of Information Act, 5 U.S.C. § 552.

[20] Cortez, *supra* note 7, at 1392-93 (citing federal laws that required and encourages agencies to post documents and other information online).

[21] *Id.* at 1438-39. Note also that the Supreme Court rejected the distinction between active and passive disclosures of information by the CPSC under the Consumer Product Safety Act. CPSC v. GTE Sylvania,

government" and "smart disclosure" initiatives, which encourage agencies to publish large amounts of information online, including large datasets about regulated parties.

However, there remains a meaningful distinction between information that agencies believe "to be true and that the public should rely on," and information released by agencies without any express or implicit endorsement.[22] For example, information released in response to a FOIA request does not carry the same "government imprimatur on the document" as an affirmative statement by the agency.[23]

Although my previous research focused on information that the government specifically endorses in some way and takes some affirmative step to publicize,[24] this Report considers both discrete public announcements identifying a particular product and/or company, and modern agency databases that release large swaths of information about multiple products and/or companies.

B. Why Agencies Issue Publicity

Agencies have several motivations for issuing adverse publicity, and these motivations have not changed much since Ernest Gellhorn's study was published in 1973.[25] The three primary agency motivations are to inform, to warn, or to sanction.

1. To Inform or Warn

Agency use of publicity to inform or warn the public is relatively common and noncontroversial. Recommendation 73-1 emphasized that agency publicity is often necessary "to warn of a danger to public health or safety or a threat of significant economic harm, or to serve other legitimate public purposes."[26] Indeed, most agencies must inform or warn the public, often by statutory mandate. For example, the CPSC must "protect the public against unreasonable risks of injury" and "assist consumers in evaluating the comparative safety of consumer products."[27] The FDA must alert the public to an "imminent danger to health, or gross deception of the consumer."[28] The FTC is given discretion to "make public" information obtained by it "in the public interest" and to publish its reports and decisions "as may be best adapted for public information and use,"[29] which has long been interpreted to authorize news releases.[30] Congress even authorizes the U.S. Patent and Trademark Office (PTO) to publicize *complaints* made

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Inc., 447 U.S. 102, 107-08 (1980).

[22] Cortez, *supra* note *7*, at 1439 (citing CPSC v. GTE Sylvania, 447 U.S. at 107).

[23] *Id.* (citing Pierce & Stevens Chem. Corp. v. CPSC, 585 F.2d 1382, 1388 (2d Cir. 1978)).

[24] *Id*.

[25] Gellhorn, *supra* note 7, at 1381.

[26] 1 C.F.R. § 305.73-1(a); 38 Fed. Reg. 16,839 (Jun. 27, 1973).

[27] 15 U.S.C. § 2051(b).

[28] 21 U.S.C. §§ 301, 375(b).

[29] 15 U.S.C. § 46(f).

[30] FTC v. Cinderella Career & Finishing Sch., Inc., 404 F.2d 1308, 1314 (D.C. Cir. 1968); FTC v. Freecom Commc'ns, Inc., 966 F. Supp. 1066, 1067 (D. Utah 1997).

against invention promoters.[31] In fact, information disclosure may be a raison d'être for the SEC.[32] Agencies also defend their use of publicity as necessary to prevent rumors or confusion and to ensure that media coverage is accurate.[33] In my recent interviews with officials from the CFPB, FDA, and FTC, the agencies cited similar justifications.[34]

These uses confer clear public benefits and must not be taken for granted. Recent initiatives promoting "open government" and "smart disclosure" are only the most recent manifestations of what most people expect of federal agencies.

2. To Pressure or Sanction

More controversially, agencies sometimes use publicity to pressure or sanction alleged regulatory violators. As Gellhorn noted, publicity can serve as a form of sanction (intended or not) when it punishes, deters, or coerces the parties identified therein.[35] The effect can be severe on companies sensitive to public disapproval, particularly publicly-traded companies.[36] Indeed, because agency announcements can have such a quick and dramatic effect on company stock prices, the threat of publicity has been referred to as a "guerilla" tactic, "arm-twisting," or a lesser form of "blackmail."[37] Long ago, the SEC and other agencies used to be notorious for sanctioning companies via publicity.[38]

Perhaps more commonly, agencies sometimes use publicity not as a standalone sanction, but as an extrastatutory method to amplify sanctions.[39] Publicity can be a convenient, low-cost way to enhance sanctions, pressure targets into compliance or settlement, or make up for limited statutory enforcement authority or even difficulties in proving violations.[40] It is not unusual for enforcement agencies, for example, to publicize investigations, complaints, or successful settlements or judgments. In 1973, the Conference encouraged agencies not to use publicity when it is "excessive or it serves no

[31] Inventors' Rights Act of 1999, *codified at* 35 U.S.C. 297(d). PTO's implementing regulations are at 37 C.F.R. § 4.1.

[32] Gellhorn, *supra* note 7, at 1394.

[33] Cortez, *supra* note 7, at 1379 (citing SEC Office of Inspector Gen., Report of Investigation No. OIG-534: Allegations of Improper Coordination Between the SEC and Other Governmental Entities Concerning the SEC's Enforcement Action Against Goldman Sachs & Co. 62 (Sep. 30, 2010), http://www.sec.gov/foia/docs/oig-534.pdf; FDA Administrative Practices and Procedures, 42 Fed. Reg. 12,436, 12,439 (Mar. 4, 1977) (to be codified at 21 C.F.R. pt. 2)).

[34] Interview with Officials in the FTC's Office of Public Affairs (May 27, 2015); Interview with Jennifer Howard, Assistant Director, CFPB Office of Communications (May 28, 2015); Interview with Heidi Rebello, Acting Assistant Commissioner for Media Affairs, FDA Office of External Affairs (August 5, 2015).

[35] Gellhorn, *supra* note 7, at 1383.

[36] *Id.*; Cortez, *supra* note 7, at 1379.

[37] James T. O'Reilly, *The 411 on 515: How OIRA's Expanded Information Roles in 2002 Will Impact Rulemaking and Agency Publicity Actions*, 54 ADMIN. L. REV. 835, 836 (2002); Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 874.

[38] Gellhorn, *supra* note 7, at 1406, n.107.

[39] Gellhorn, Noah, and I all pursue this issue. *See* Gellhorn, *supra* note 7, at 1398-1401; Noah, *supra* note 37, at 876; Cortez, *supra* note 7, at 1379.

[40] Cortez, *supra* note 7, at 1379; Gellhorn, *supra* note 7, at 1398-99 (citing the EEOC as an early example, which has a "broad mandate and limited enforcement powers").

authorized agency purpose."[41] As I discuss below,[42] modern agencies may still find publicity to be efficient and attractive compared to other, more formal actions.

C. Problematic Publicity

Recommendation 73-1 observed that "adverse agency publicity is undesirable when it is erroneous, misleading or excessive or it serves no authorized agency purpose."[43] Gellhorn documented extensively these problems in his 1973 report, and my 2011 article found that many of the same problems remain.[44] The core problems fall into four general categories.

1. Premature Publicity

Publicity can be premature, such as when an agency publicizes that it has begun investigating a party without also clarifying that the allegations have not been proven or fully adjudicated. Since 1973, numerous parties have sued agencies for publicizing investigations or complaints (though none of the suits have been successful).[45]

Congressional statutes and White House directives have not been consistent on whether agencies should publicize investigations and complaints. On one hand, Congress has specifically authorized agencies to publicize complaints against certain parties,[46] and recent "open government" initiatives by the White House have led several agencies to create online databases of consumer complaints.[47] On the other hand, Congress has banned other agencies from publicizing their investigations because it decided that publicity in those circumstances may be premature and unfair.[48]

Second, many agencies must also alert the public to health or consumer risks in the face of incomplete information and scientific uncertainty. But even these announcements can be premature.[49] For example, in 2008 the FDA and Centers for Disease Control and

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[41] 1 C.F.R. § 305.73-1(a); 38 Fed. Reg. 16,839 (Jun. 27, 1973).

[42] *See* Part III.B.1, *infra* ("More Agency Incentives to Use Adverse Publicity").

[43] 1 C.F.R. § 305.73-1(a); 38 Fed. Reg. 16,839 (Jun. 27, 1973).

[44] Cortez, *supra* note 7, at 1380-88.

[45] In Appendix C (Table of Federal Cases, 1974-2014), *see* Wilson v. McHugh, 842 F. Supp. 2d 310 (D.D.C. 2012); Barry v. SEC, 2012 WL 760456 (E.D.N.Y. 2012); Invention Submission Corp. v. Rogan, 357 F.3d 452 (4th Cir. 2004); Doe v. United States, 83 F. Supp. 2d 833 (S.D. Tex. 2000); FTC v. Freecom Comm., Inc., 966 F. Supp. 1066 (D. Utah 1997); First Jersey Securities, Inc. v. SEC, 553 F. Supp. 205 (D.N.J. 1982); EEOC v. Sears, Roebuck & Co., 1980 WL 108 (N.D. Ga. 1980); Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977); Relco, Inc. v. CPSC, 391 F. Supp. 841 (S.D. Tex. 1975).

[46] The Inventors' Rights Act of 1999 authorizes the PTO to publicize complaints against invention submission promoters.

[47] *See* Part II.D.5, *infra* (describing the CFPB's database of consumer complaints against certain consumer finance companies, and OSHA's proposal to publish workplace injury records).

[48] The Federal Election Campaign Act prohibits the FEC from publicizing investigations for campaign finance violations. 2 U.S.C. § 437g(a); *see also* Common Cause v. FEC, 83 F.R.D. 410, 411 (D.D.C. 1979) (citing the legislative history to 2 U.S.C. § 437).

[49] Administrative Conference of the United States (ACUS), Conference Recommendation 73-1 ¶ 3 (adopted June 8, 1973); 38 Fed. Reg. 16,389 (Jun. 27, 1973); 1 C.F.R. § 305.73-1 (recommending that

Prevention (CDC) incorrectly identified tomatoes as the source of a salmonella outbreak, costing the tomato industry an estimated $200 million.[50] More broadly, my 2011 article surveyed 1,542 FDA "press announcements" released between 2004 and 2010, finding that 74% of the announcements that identified a specific product or party and were adverse in some way also announced a pending or preliminary determination. Undoubtedly, many of these announcements were necessary to protect public health, and agencies like FDA should not be deterred from warning the public. But because premature publicity can be incredibly damaging, it is worth considering procedural protections that limit the risk of premature publicity.

2. Excessive Publicity

Publicity can be excessive when an agency uses unnecessary or pejorative language, or goes beyond factual reporting. The most commonly cited example is the infamous 1959 press conference during which the Secretary of Health, Education, and Welfare (HEW, the precursor to HHS) warned the public to not eat potentially-carcinogenic cranberries, punctuating the statement by noting that he, personally, would be avoiding cranberries that Thanksgiving.[51] The Secretary failed to clarify that only cranberries from Washington and Oregon might be unsafe, costing the industry $21.5 million in lost surplus that year—$8.5 million of which was indemnified by a private bill in Congress.[52]

Recommendation 73-1 directed agencies to limit adverse publicity to factual content that is accurate and does not contain disparaging terminology.[53]

3. Publicity as a Sanction

There is also a long history of agencies using publicity to punish or pressure alleged regulatory violators.[54] Indeed, the D.C. Circuit has suggested repeatedly that agency publicity is only reviewable under the APA if it is intended to penalize or sanction the target, or is false.[55] The legislative history to the APA includes a House Report suggesting that the unauthorized use of adverse publicity as a sanction was viewed as a

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adverse publicity, except in certain limited circumstances described in paragraph 2, "should issue only after the agency has taken reasonable precautions to assure that the information stated is accurate and that the publicity fulfills an authorized purpose.").

[50] Denis G. Maki, *Coming to Grips with Foodborne Infection—Peanut Butter, Peppers, and Nationwide Salmonella Outbreaks*, 360 NEW ENG. J. MED. 949 (2009).

[51] Gellhorn, *supra* note 7.

[52] *Id.* at 1409-10 n.118.

[53] Recommendation 73-1, *supra* note 2, at ¶ 1. 38 Fed. Reg. 16,839 (Jun. 27, 1973), codified at 1 C.F.R. § 305.73-1(a).

[54] The example cited in a 1941 report of the Attorney General's Commission on Administrative Procedures alleged that the Federal Alcohol Administration abused its power by threatening to issue adverse publicity as an extra-legal sanction "even when the validity of its dictates was not free from doubt." FINAL REPORT OF THE ATT'Y GEN.'S COMM'N ON ADMIN. PROCEDURES, S. DOC. NO. 77-8, at 135 (1941). Lars Noah also examined the use of publicity as an extra-statutory tactic. *See* Noah, *supra* note 37.

[55] *See, e.g.*, Industrial Safety Equipment Ass'n, Inc. v. EPA, 837 F.2d 1115, 1119 (D.C. Cir. 1988).

"troublesome subject" at the time.[56] In several cases, parties have alleged that an agency used publicity to sanction them,[57] but courts have yet to sustain such a challenge.

Despite the dearth of published judicial opinions on this issue, there are several notable examples of agency publicity causing significant damage. In 2003, the FDA publicly reprimanded a company for misrepresenting the benefits and risks of its cancer drug, but did not inform the company of its objections before publishing them.[58] The company's stock price reportedly dropped 25% within hours of trading.[59] The 1959 cranberry scare cost the industry $21.5 million, and became known throughout the industry as "Black Monday."[60] More recent incidents have been even more costly. In 2008, the tomato industry lost $200 million after press releases by the FDA and CDC incorrectly identified tomatoes rather than peppers as the source of a salmonella outbreak.[61] Publicly available documents suggest that the FDA and CDC were simply responding to a public health crisis without intending to sanction the industry. Nevertheless, the episode demonstrates that the damage from agency publicity can be unavoidably indeterminate and almost impossible to calibrate.

Because it is difficult to determine agency motivations, it is important that agencies not devise novel uses for press releases beyond what is contemplated by statute.[62]

4. Inaccurate Publicity

Finally, agency announcements can be problematic when they are inaccurate, as demonstrated by the 2008 FDA and CDC salmonella press releases,[63] or by the series of inaccurate product safety warnings by the CPSC that led Congress to amend the Consumer Product Safety Act in 1981.[64] Recommendation 73-1 urged agencies to issue retractions or corrections in such cases.[65] In judicial challenges to agency publicity,

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[56] H.Rep. No. 79-1980, 79th Cong., 2d Sess. (1946) (House of Representatives Report on the APA).

[57] Barry v. SEC, 2012 WL 760456 (E.D.N.Y. 2012); Trudeau v. FTC, 384 F. Supp. 2d 281 (D.D.C. 2005); Invention Submission Corp. v. Rogan, 357 F.3d 452 (4th Cir. 2004); Industrial Safety Equipment Ass'n, Inc. v. EPA, 837 F.2d 1115 (D.C. Cir. 1988).

[58] FDA, Talk Paper T03-18: FDA Warns Public About Misrepresentations in Marketing Claims About Drug to Treat Cancer (Mar. 14, 2003). Typically, before the FDA publishes a Warning Letter or similar public notice of alleged regulatory violations, the FDA will contact the party privately to offer a chance to come into compliance. The lack of prior notice may increase the punitive impact of adverse publicity, or perhaps reveal the agency's punitive intent.

[59] William W. Vodra, Nathan G. Cortez, & David E. Korn, The Food and Drug Administration's Evolving Regulation of Press Releases: Limits and Challenges, 61 FOOD & DRUG L.J. 623, 249 (2006); FDA Responds in Kind to SuperGen: Talk Paper Answers Press Release, "THE PINK SHEET," Mar. 17, 2003, at 7.

[60] Gellhorn, *supra* note 7, at 1408, 1409-10, n.118.

[61] Cortez, *supra* note 7, at 1381-82; Denis G. Maki, *Coming to Grips with Foodborne Infection—Peanut Butter, Peppers, and Nationwide Salmonella Outbreak*, 360 N. ENG. J. MED. 949 (2009).

[62] Gellhorn, *supra* note 7, at 1383, 1419-20.

[63] Maki, *supra* note 61.

[64] Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 703 (1981) (amending the Consumer Product Safety Act); *see also* James T. O'Reilly, *Libels on Government Websites: Exploring Remedies for Federal Internet Defamation*, 55 ADMIN. L. REV. 507, 542-43 (2003).

[65] Recommendation 73-1, *supra* note 1, at ¶ 5.

parties often argue that the announcements were inaccurate, perhaps encouraged by the D.C. Circuit's suggestion in *Industrial Safety Equipment* that agency publicity might be reviewable if it is false.[66] Nevertheless, in several cases evaluating the accuracy of agency press releases, courts largely find them to be truthful and not misleading.[67] Moreover, my review of agency practices finds that agencies in general are very careful to ensure the accuracy of their announcements, and that most inaccuracies seem to result from good faith mistakes by agencies that must inform or warn the public with imperfect information. Still, such mistakes can be particularly costly.

D. Recommendation 73-1

In light of such concerns, the Conference recommended in 1973 that agencies publish written rules that contain minimum standards for issuing publicity, and that such rules apply to "investigatory, rulemaking and agency adjudicatory processes as well as informal agency actions."[68] In adopting such rules, the Conference recommended that "each agency should balance the need for adequately serving the public interest and the need for adequately protecting persons affected by adverse agency publicity."[69] The Conference recommended five standards:

1. *Content standards*. The Conference recommended that agency announcements be factual and accurate, and avoid using "disparaging terminology."[70]

2. *Investigations, complaints, and other preliminary actions*. The Conference recommended that agencies issue publicity announcing investigations or pending trial-type proceedings only in limited circumstances, and according to three criteria. First, agencies should use publicity to warn the public of a significant risk to public health or substantial economic harm, unless the party responsible immediately discontinues the offending practice.[71] Second, agencies should announce preliminary actions when necessary to notify parties that might be affected or desire to participate in the proceeding. And third, agencies should announce preliminary actions when the information is already available to the public or subject to media publicity and the agency's purpose is to "foster agency efficiency, public understanding, or the accuracy of news coverage."[72]

3. *Authorized purpose*. The Conference also recommended that announcements that do not qualify under the three criteria above "should issue only after the agency has taken

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[66] Industrial Safety Equipment Ass'n, Inc. v. EPA, 837 F.2d 1115 (D.C. Cir. 1988).

[67] *See, e.g.*, Harkonen v. Dep't of Justice, 2012 WL 6019571 (N.D. Cal. 2012); Wilson v. McHugh, 842 F. Supp. 2d 310 (D.D.C. 2012); United States v. 52,823 Children's Dolls, More or Less, 1989 WL 140250 (S.D.N.Y. 1989).

[68] Recommendation 73-1, *supra* note 1.

[69] *Id.*

[70] *Id.*

[71] *Id.* Note, however, that this specific recommendation was criticized as a form of back-room blackmail, viewed unfavorably after the Watergate scandal. *See, e.g.*, Stanley E. Cohen, *Curbs on Regulatory Press Releases – Would They Hurt or Help Businesses?*, ADVERTISING AGE (June 18, 1973) (on file with ACUS).

[72] Recommendation 73-1, *supra* note 1.

reasonable precautions to assure that the information stated is accurate and that the publicity fulfills an authorized purpose."[73]

4. *Advanced notice*. The Conference recommended that agencies should "prominently" disclose when the information in agency publicity has a limited basis. Moreover, respondents or prospective respondents in agency actions should be given advanced notice of agency publicity and a reasonable opportunity to prepare a response "if practicable and consistent with the nature of the proceeding."[74]

5. *Corrections and retractions*. Finally, the Conference recommended that any person named in an agency announcement that is "shown to be erroneous or misleading" should be allowed to request a correction or retraction, and that such correction or retraction be issued "in the same manner (or as close thereto as feasible) as that by which the original publicity was disseminated."[75]

These five standards, occupying less than a page in the *Federal Register*, represented a much narrower version of the detailed standards recommended by Professor Gellhorn in his report and accompanying law review article—which recommended, among other things, judicial review and several statutory amendments.[76] Nevertheless, these five standards were not widely implemented by agencies.

E. Implementation of Recommendation 73-1

Less than a month after the Conference adopted Recommendation 73-1, ACUS Chairman Antonin Scalia defended it against criticisms in the media, writing:

> [I]t has always seemed to me the most valuable role of wise men to counsel that side of a difficult issue that is currently ignored in the heat of popular concern…. If there is such a thing as news suppression, there is also such a thing as "trial by press release."[77]

Only the Federal Power Commission (now the Federal Energy Regulatory Commission) and SEC promulgated regulations in response to Recommendation 73-1.[78] Nine other agencies took the position that, though they had not adopted formal rules implementing the recommendation, they felt that their procedures embodied the spirit of the recommendation. For instance, the FTC pointed to its 1972 *Public Information Policy Guidebook*, which predated Recommendation 73-1.[79] And in response to the Conferences'

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[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *See, e.g.*, Gellhorn, *supra* note 7.

[77] Letter from Antonin Scalia to Editor, Advertising Age, of June 29, 1973.

[78] Letter from John N. Nassikas, Federal Power Commission Chairman, to Antonin Scalia, ACUS Chairman, of Sep. 24, 1973 (on file with ACUS); Letter from Philip A. Loomis, Jr., SEC Commissioner, to John F. Cushman, ACUS Executive Director, of Jul. 22, 1974 (on file with ACUS).

[79] Letter from Charles A. Tobin, FTC Secretary, to Antonin Scalia, ACUS Chairman, of Jan. 8, 1974 (on file with ACUS).

inquiry, EPA stated that its informal procedure was adequate in dealing with the concerns of the Recommendation but said it would not incorporate the principles of the Recommendation in its published regulation;[80] the NRC opposed the recommendation that agencies balance public and private interests before publicity is released.[81]

Implementation by twelve additional agencies either was undetermined or not applicable, the latter because the agencies did not issue adverse publicity.[82] The CPSC and ITC reported in that they were drafting rules to implement the recommendation,[83] although Congress in 1982 addressed CPSC publicity practices by statute,[84] which the CPSC then implemented by rule.[85]

Both the FDA and its then parent agency (HEW) initially disputed parts of Recommendation 73-1, but HEW subsequently promulgated a rule titled *Release of Adverse Information to News Media* in 1976,[86] and the FDA proposed its own rule in 1977[87] (although it was never finalized).[88] Today, FDA generally follows the HHS rule originally promulgated by HEW.[89]

The three case studies below demonstrate that agencies generally follow the principles of balance and fairness embodied in Recommendation 73-1, though perhaps not the full contours of the recommendation.

III. MODERN PUBLICITY

Contemporary agency "publicity" seems to be much more voluminous and varied than in 1973. Although agencies continue to issue press releases and other traditional forms of publicity, agencies now rely heavily on modern modes of communication, virtually all related to Internet platforms. Indeed, a primary motivation for revisiting Recommendation 73-1 and Professor Gellhorn's work was to reexamine the issues raised by agency publicity in light of modern modes of communication.

My research finds that in the four decades since Recommendation 73-1, five interrelated developments may compound the potential problems with agency publicity: (1) modern

[80] Letter from Robert V. Zener, EPA Acting Deputy General Counsel, to Antonin Scalia, ACUS Chairman, of Oct. 2, 1973 (on file with ACUS).

[81] Letter from James T. Ramey, Commissioner, Atomic Energy Commission, to John F. Cushman, ACUS Executive Director, of Apr. 13, 1973 (on file with ACUS).

[82] Correspondence on file with ACUS.

[83] Letter from Michael A. Brown, CPSC Acting General Counsel, to Antonin Scalia, ACUS Chairman, of Sep. 12, 1973 (on file with ACUS).

[84] 15 U.S.C. § 2055(b).

[85] 16 C.F.R. part 1101.

[86] HEW, Release of Information to News Media, 41 Fed. Reg. 2 (Jan. 2, 1976), *codified at* 45 C.F.R. pt. 17.

[87] FDA, Administrative Practices and Procedures, 42 Fed. Reg. 12,436, 12,440-41 (Mar. 4, 1977) (to be codified at 21 C.F.R. pt. 2).

[88] FDA, Withdrawal of Certain Pre-1986 Proposed Rules, 56 Fed. Reg. 67,440, 67,446 (Dec. 30, 1991).

[89] Interview with Heidi Rebello, *supra* note 34; James T. O'Reilly, Food and Drug Administration § 22.41 (3d ed. 2010).

agencies have many more ways to issue publicity and disseminate information than in the 1970s; (2) modern agencies likely have even more incentives now to use information as a regulatory tool and eschew more formal enforcement actions; (3) new media make it easier for audiences to misinterpret or mischaracterize agency announcements; (4) hyper-responsive capital markets now process agency announcements more swiftly and perhaps more hastily, multiplying the potential damage; and (5) Congress and the White House have specifically considered some agency publication practices, particularly through the Information Quality Act (IQA). This part considers these five developments in turn.

A. More Ways to Issue Publicity

For at least the last 15 years, modern agencies have relied heavily on their web sites to disseminate information to the public. More recently, agencies also have begun to use social media services like Twitter to communicate with the public. And, perhaps even more recently, agencies have begun to publish large online databases on their web sites, making large swaths of potentially adverse information about private parties available in public, searchable, sortable, and machine-readable formats. These three practices raise many of the same issues as traditional publicity, as well as some novel ones. Today, many agencies seem to use online information disclosure not just to increase government transparency, but to pursue regulatory aims.[90] As a former General Counsel for the EPA explained, "Information … can be a supplement, sometimes even an alternative, to regulation. When broadly available, information can change behavior."[91]

1. Agency Websites

The most significant point of departure from 1973 is that virtually all modern agencies operate their own web sites,[92] which endow agencies with a platform to publish information about the thousands of actions or decisions they make each week.[93] For example, agency web sites often publish licensing applications, company reports, product complaints, notices of alleged violations (and company responses), documents obtained during agency investigations, settlement agreements, and other potentially negative information that identifies a specific product or company.[94] In fact, press releases and other traditional announcements by agencies may represent a small fraction of the adverse information that an agency publishes.[95] The information published may come from regulated parties, competitors, consumers, or from the government itself.[96] Agency

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[90] James W. Conrad, Jr., *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?* 12 KAN. J.L. & PUB. POL'Y 521, 527 (2002-03).

[91] ENVIRONMENTAL LAW INSTITUTE, THE ENVIRONMENTAL FORUM 36 (July/August 1998); Conrad, *supra* note 90, at 527.

[92] The federal government website, USA.gov, lists a master index of U.S. government departments and agencies, with links to their web sites. USA.gov, A-Z Index of U.S. Government Departments and Agencies, http://www.usa.gov/directory/federal/ (last visited June 10, 2015); Conrad, *supra* note 90, at 526.

[93] James O'Reilly, *Libels on Government Websites: Exploring Remedies for Federal Internet Defamation*, 55 ADMIN. L. REV. 507, 508 (2003).

[94] Cortez, *supra* note 7, at 1392-93.

[95] *Id.* at 1393; O'Reilly, *Libels on Government Websites*, at 507.

[96] Conrad, *supra* note 90, at 528-29.

web sites thus allow regulators to "publish a staggering amount of freestanding information about companies that is not disclosed as part of rulemaking."[97] As one observer notes, "[v]irtually all new documents released publicly by federal agencies, and many historic documents, are now available on their web sites."[98] Not all of this information is actively publicized by agencies in the way that a traditional press release would be publicized, and agencies seem to draw public attention to these materials to varying degrees. Thus, it can be hard to generalize about information agencies post online.

As commonplace as agency web sites are today, two statutes helped move the trend. In 1996, the Electronic Freedom of Information Act Amendments required agencies to create "electronic reading rooms" to make public important documents, including those frequently requested or likely to be requested by FOIA.[99] And in 2002, the E-Government Act required agencies to solicit and accept public comments online during rulemaking.[100] Agencies have been further encouraged to use their web sites by the Obama Administration. The day after President Obama took office in 2009, he published a *Memorandum on Transparency and Open Government*, calling for the heads of departments and agencies to "harness new technologies to put information about their decisions online and readily available to the public."[101] Thus, agency use of web sites is a well-entrenched and probably underexamined phenomenon.[102]

2. Social Media

Second, modern agencies have embraced social media to communicate with the public. Some of the more frequently used platforms are Facebook, Twitter, YouTube, and Flickr. For example, the EPA's main web page features a "Connect with EPA" section, which includes links to the agency's blogs, Twitter profiles, Facebook pages, YouTube page, Flickr stream, and Pinterest page.[103] A page displaying all EPA social media includes 34 unique Twitter accounts, 31 Facebook profiles, nine blogs, two discussion forums, one YouTube channel, one Flickr photo stream, one Google+ profile, one Instagram feed, one Foursquare page, and links to EPA podcasts and RSS feeds.[104] Other agencies also have multiple profiles with services like Twitter and Facebook.[105] By contrast, a newer agency like the CFPB has comparatively fewer social media pages.[106]

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[97] Cortez, *supra* note 7, at 1392 (citing Conrad, *supra* note 90, at 526).

[98] Conrad, *supra* note 90, at 527.

[99] Pub. L. No. 104-231, 110 Stat. 3048 (1996), *codified at* 5 U.S.C. § 552; Cortez, *supra* note 7, at 1392.

[100] Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915-16 (2002).

[101] Memorandum on Transparency and Open Government, *supra* note 8. Note that later, the Obama Administration limited the scope of this directive to executive agencies rather than independent agencies. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

[102] A few scholars, notably James O'Reilly, have written on agency use of web sites. *See, e.g.*, O'Reilly, *supra* note 64; O'Reilly, *Libels on Government Web Sites*, *supra* note 37; Conrad, *supra* note 90; Cortez, *supra* note 7.

[103] U.S. Environmental Protection Agency, http://www.epa.gov (last visited Dec. 15, 2014). This page does not include a link to the EPA's Pinterest page (https://www.pinterest.com/epagov/).

[104] EPA, Social Media, http://www2.epa.gov/home/social-media.

[105] *See, e.g.*, FDA, Interactive Media, http://www.fda.gov/NewsEvents/InteractiveMedia/default.htm (last visited Dec. 15, 2014); FTC, Stay Connected, https://www.ftc.gov/stay-connected (last visited Dec. 15,

Social media differ in important ways from traditional print and broadcast media. For example, they are much more interactive and generally produce information in much shorter bursts. Twitter, for example, is famous for its 140-character (not word) limit. Social media platforms also tend to encourage users to rely on images and short videos rather than long text-based documents. These features seem designed to maximize quick consumption and wide dissemination—encouraging users to forward, share, repost, retweet, and "like" posts. As such, agency social media announcements tend to be highly condensed, with less room to explain the nuance of complex regulatory actions.[107] Although most social media allow links to full text documents, it is not clear how frequently readers follow these links.

Another departure point for social media is the volume and variety of platforms. The federal web site USA.gov lists 21 different social media services used by the federal government.[108] And many of these services perform very different functions. Flickr is a photo-sharing service.[109] Foursquare is a map-based social network.[110] YouTube hosts videos.[111] Instagram is a photo-based social network.[112] Disqus is an online discussion feature added to web pages.[113] Although not all of these services are used to publish adverse information, some of them are. For example, many agencies use Twitter to announce enforcement actions, product recalls, and other alerts.[114] Social media allow agencies to communicate with the public more quickly and more casually than ever.[115]

3. Agency Databases

A third new tool for agencies since 1973 is the use of searchable online databases.

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[106] Consumer Financial Protection Bureau, http://www.consumerfinance.gov/ (under "Stay Connected" heading, listing just one profile under Facebook, Twitter, YouTube, and Flickr) (last visited Dec. 15, 2014). Note, however, that the CFPB's Office of Servicemember Affairs maintains its own Twitter and Facebook accounts. *See* CFPB, Office of Servicemember Affairs, *Information for Servicemembers*, http://www.consumerfinance.gov/servicemembers/ (last visited Sep. 9, 2015) (listed under "Connect with Us").

[107] Cortez, *supra* note 7, at 1394.

[108] The federal web site USA.gov lists the following 21 social media services used by the federal government: Blip; Disqus; Facebook; Flickr; Foursquare; Github; Google+; IdeaScale; LinkedIn; Meetup; Myspace; Posterous; Scribd; Slideshare; Socrata; Tumblr; Twitter; Uservoice; Ustream; Vimeo; and Youtube. USA.gov, *Federal Government Social Media Registry*, https://www.usa.gov/verify-social-media (last visited July 28, 2015).

[109] FDA, Flickr, http://www.flickr.com/photos/fdaphotos/.

[110] EPA, Foursquare, http://foursquare.com/epagov.

[111] CFPB, YouTube, http://www.youtube.com/user/cfpbvideo.

[112] U.S. Department of Labor, Instagram, http://instagram.com/USDOL.

[113] Disqus, http://disqus.com/.

[114] In July 2010, the SEC tweeted that Goldman Sachs had agreed to pay $550 million to settle charges against it, with a link to the SEC press release. Press Release, SEC, Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO (Jul. 15, 2010), http://www.sec.gov/news/press/2010/2010-123.htm. The FDA has several Twitter feeds dedicated to recalls of drugs, devices, and tobacco products. Cortez, *supra* note 7, at 1394.

[115] Cortez, *supra* note 7, at 1394.

Federal agencies now maintain perhaps thousands of searchable online databases—an undetermined portion of which contain potentially negative information about named products or parties. The precise number of such databases is not clear. The General Services Administration (GSA) runs the federal web site Data.gov, which links to many of these databases. Currently, Data.gov lists 174 different federal, state, and local public organizations that publish "datasets" online.[116] And many of these organizations publish hundreds of datasets each. For example, the Department of Homeland Security is credited with 312 datasets, while the Department of Education is credited with 277 datasets.[117] Other agencies, like the CFPB, are credited with very few datasets, although they are high-profile ones.[118]

The databases of concern to this project are those that contain potentially negative information about an identified private product, person, or firm. Appendix E highlights some of the more notable agency databases of this sort, explaining their purpose(s), any statutory authorization they can claim, and any relevant litigation. For example, the Centers for Medicare and Medicaid Services (CMS) publishes databases with quality ratings of Medicare physicians, hospitals, and nursing homes, including rates of complications and death, and aggregated patient surveys.[119] The CFPB publishes consumer complaints against banks and other financial institutions, with detailed information about the nature of the complaint and the company's response.[120] The CPSC publishes a searchable database of product safety problems and recalls,[121] while the FDA publishes similar databases containing reports of safety problems with drugs and medical devices.[122] As Appendix E shows, several agencies now operate such databases. And more are planned. The Occupational Safety and Health Administration (OSHA) proposes to publish workplace injury records online.[123]

The use of databases as a regulatory tool—to change behavior—is not entirely new. Their use may date back to 1986, when Congress required the EPA to establish a Toxic Release Inventory (TRI) to track chemical releases by facilities nationwide.[124] The Act required

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[116] Data.gov, Organizations, http://catalog.data.gov/organization (last visited June 11, 2015). Note that the list of datasets seems to be incomplete, as it excludes datasets from agencies like the FDA, which publishes multiple adverse event product databases. *See* Appendix E: Sample of Agency Databases.

[117] *Id.* (last visited June 11, 2015).

[118] Data.gov, Organizations, CFPB, http://catalog.data.gov/organization/cfpb-gov (last visited June 11, 2015).

[119] *See, e.g.*, Medicare.gov, Hospital Compare, http://www.medicare.gov/hospitalcompare/search.html (last visited June 11, 2015).

[120] CFPB, Consumer Complaint Database, *http*://www.consumerfinance.gov/complaintdatabase/. *See also* Ian Ayres, Jeff Lingwall, & Sonia Steinway, *Skeletons in the Database: An Early Analysis of the CFPB's Consumer Complaints* (draft), *http*://islandia.law.yale.edu/ayres/CFPB%20paper%20v10.pdf.

[121] CPSC, SaferProducts.gov, http://www.saferproducts.gov/Default.aspx (last visited June 11, 2015).

[122] *See, e.g.*, FDA, Manufacturer and User Facility Device Experience (MAUDE) Database, http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/PostmarketRequirements/ReportingAdverseEvents/ucm127891.htm.

[123] Jenna Greene, *OSHA's Proposed Database Draws Fire*, THE AMERICAN LAWYER (Jan. 27, 2014), *http*://www.americanlawyer.com/id=1202639865807/OSHA's-Proposed-Database-Draws-Fire.

[124] Emergency Planning and Community Right-to-Know Act of 1986, Pub. L. No. 99-499 Subtitle A, *codified at* 42 U.S.C. §§ 11001-11050.

the EPA to maintain the information "in a computer data base … accessible to any person."[125] TRI has been applauded for having a "significant impact on firm-level emissions" and inspiring similar disclosure efforts in the United States and globally.[126]

Interest in using databases for regulatory ends was renewed by the Obama Administration, which has pushed "open government," "smart disclosure," and "open data" initiatives.[127] One of President Obama first's official acts in office was to direct executive departments and agencies to "harness new technologies to put information about their decisions online and readily available to the public."[128] The site Data.gov both is a product of these initiatives and showcases their massive scope.

Agencies' widespread use of databases may blur the traditional distinction between "actively" publicizing negative information and "passively" releasing it. Recommendation 73-1 was careful to distinguish agency statements that "invite public attention … from the mere decision to make records available to the public rather than preserve their confidentiality,"[129] as those decisions are governed by FOIA. Similarly, my 2011 article purposefully excluded "reverse FOIA" cases in which private parties sued to prevent agencies from releasing certain information.[130] Although my article observed that the distinction between active publicity and more passively releasing information was a less meaningful one than in 1973,[131] I found that most courts conclude that FOIA responses by agencies do not carry the same "government imprimatur on the document" as affirmative statements by agencies.[132] However, in a recent case, a district court found that a product safety report posted in the CPSC's SaferProducts.gov database "bears the Government's stamp of approval through its publication on an official website that, by its terms, is a repository of reports regarding 'unsafe products.'"[133] The court sustained the anonymous company's challenge, finding that posting a "materially inaccurate" report on SaferProducts.gov was not only "final agency action" under the APA, but also arbitrary and capricious and in violation of the CPSC's own database regulations.[134]

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[125] 42 U.S.C. § 11023(j); Conrad, *supra* note 90, at 527.

[126] Mark A. Cohen & W. Kip Viscusi, *The Role of Information Disclosure in Climate Mitigation Policy*, 3 (4) CLIMATE CHANGE ECON. 1250020-1, 1250020-2 (2012); Interview with Sean Moulton & Scott Klinger, *supra* note 16.

[127] *See, e.g.*, Memorandum on Transparency and Open Government, *supra* note 8; Executive Office of the President, National Science and Technology Council, Smart Disclosure and Consumer Decisionmaking: Report of the Task Force on Smart Disclosure (May 2013), *http*://www.whitehouse.gov/sites/default/files/microsites/ostp/report_of_the_task_force_on_smart_disclosure.pdf.

[128] Memorandum on Transparency and Open Government, *supra* note 8. Note that later, the Obama Administration limited the scope of this directive to executive agencies rather than independent agencies. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

[129] 1 C.F.R. § 305.73-1(a); 38 Fed. Reg. 16,839 (Jun. 27, 1973).

[130] Cortez, *supra*, note 7, at 1439.

[131] *Id*.

[132] Pierce & Stevens Chem. Corp. v. CPSC, 585 F.2d 1382, 1388 (2d Cir. 1978) (holding that the Consumer Product Safety Act's disclosure procedures did not apply to proactive disclosures pursuant to FOIA requests).

[133] Company Doe v. Tenenbaum, 900 F. Supp. 2d 572, 597 (D. Md. 2012).

[134] *Id.*

An important point is that different agency databases may be populated by different data sources, [135] requiring different standards. For example, there is a reduced risk of publishing inaccurate information if it comes directly from the party identified, as in the case of the EPA's Toxics Release Inventory (TRI). In contrast, the CFPB's Consumer Complaint Database includes information reported by consumers, which is sometimes disputed by companies. As such, the CFPB gives the companies identified in complaints the opportunity to verify a commercial relationship with the complainant and publish a response.[136] Other databases include information generated by agencies as part of their regulatory responsibilities. For example, OSHA maintains a database of agency enforcement inspections, searchable by establishment.[137] Similarly, the FDA maintains a database of Warning Letters, searchable by company, subject, and the like. [138] Information in these databases also is often preliminary and/or disputed. Finally, some databases compile information from a variety of sources. Medicare's Physician Compare, Hospital Compare, and Nursing Home Compare web sites allow users to sift through a massive, searchable database of publicly- and privately-generated information about Medicare providers.[139] In short, although the traditional problems with agency publicity apply to agency databases, mitigating these problems may require responses that are highly tailored depending on the type of database.

Perhaps a model for operating modern agency databases is the CPSC's site, SaferProducts.gov, which features a searchable database of consumer product safety incident reports.[140] In 2008, Congress passed the Consumer Product Safety Improvement Act,[141] which required the CPSC to establish on its web site a searchable product safety database.[142] The Act required the database to include "reports of harm relating to the use of consumer products" as reported by consumers, state and local governments, and by other parties. [143] Each report must describe the product or substance, identify the manufacturer or labeler, describe the harm relating to the product or substance, and report any corrective actions taken.[144] The statute requires the Commission to "provide clear and conspicuous notice to users of the database that the Commission does not guarantee the accuracy, completeness, or adequacy of the contents of the database."[145] The statute

[135] *See, e.g.*, Conrad, *supra* note 90, at 528.

[136] *See*, Consumer Financial Protection Bureau, Part IV.C, *infra*.

[137] OSHA, Establishment Search Page, https://www.osha.gov/pls/imis/establishment.html (last visited June 12, 2015); Conrad, *supra* note 90, at 528.

[138] FDA, Warning Letters, http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/default.htm (last visited June 12, 2015).

[139] *See* Appendix E: Samples of Agency Databases.

[140] Search Recalls and Reports, http://www.saferproducts.gov/Search/default.aspx (last visited September 18, 2015)

[141] Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (codified in scattered sections of 15 U.S.C.).

[142] CPSIA § 212; 15 U.S.C. § 2055a.

[143] 15 U.S.C. § 2055(b)(1)(A).

[144] 15 U.S.C. § 2055(b).

[145] 15 U.S.C. § 2055(b)(5). The web site (SaferProducts.gov) includes a disclaimer that "CPSC does not guarantee the accuracy, completeness, or adequacy of the contents of the Publicly Available Consumer Product Safety Information Database on SaferProducts.gov, particularly with respect to information submitted by people outside of CPSC." *See* SaferProducts.gov, *http*://www.saferproducts.gov (last visited Nov. 6, 2014). Note that the court in *Company Doe v. Tenenbaum* called this "boilerplate" that "would not

also includes procedural requirements. For example, the Commission "shall" provide manufacturers or labelers the chance to comment on reports, and request that these comments be included in the report.[146] It also requires the Commission to consider objections that the information in a report is "materially inaccurate," though the Act allows the Commission to determine when information meets that standard.[147] In implementing regulations, the Commission defines "materially inaccurate" information as information "that is false or misleading, and which is so substantial and important as to affect a reasonable consumer's decision making about the product."[148] In 2012, as noted above, a federal court held that the Commission failed to follow its own regulations in posting "materially inaccurate" information on the site.[149]

As agencies rely more on databases for regulatory purposes, SaferProducts.gov might serve as a model. The database is authorized by statute. The Commission takes pains to notify users that it does not guarantee the accuracy or completeness of the information published. And there are clear standards and procedures, published in the Code of Federal Regulations, that give companies the opportunity to comment on reports or object to them, guided by robust standards ("materially inaccurate").

B. More Agency Incentives to Use Publicity

Agencies today may have more incentives to rely on adverse publicity than agencies in the early 1970s. At that time, most agencies were beginning to rely more on rulemaking and less on case-by-case adjudication.[150] As agencies began to use rulemaking to respond to problems of greater scope and complexity, the legislative, executive, and judicial branches gradually imposed various procedural checks and balances on agency rulemaking, which progressively "ossified" the process and burdened rulemaking initiatives.[151] Although agencies have long relied on informal methods beyond traditional rulemaking and adjudication,[152] the ossification of rulemaking and increasingly aggressive judicial review led agencies with finite resources and expanding

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interest an ordinary consumer." 900 F. Supp. 2d at 598.

[146] 15 U.S.C. § 2055(c)(2).

[147] 15 U.S.C. § 2055(c)(4).

[148] 16 C.F.R. § 1102.26(a)(1).

[149] *Tenenbaum*, 900 F. Supp. 2d 572 (D. Md. 2012).

[150] M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1398-99 (2004).

[151] There is quite a large literature on the ossification of rulemaking. *See, e.g.*, Jerry L. Mashaw & David L. Harfst, *The Struggle for Auto Safety*, (Harvard 1990); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and the Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763; Paul R. Verkuil, *Rulemaking Ossification—A Modest Proposal*, 47 ADMIN. L. REV. 453 (1995); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61 (1997).

[152] Noah, *supra* note 37, at 874.

responsibilities to develop an arsenal of informal tools not specifically authorized by statute and not subject to judicial review.[153]

Although much attention has been focused on agencies' increased use of guidance documents,[154] adverse publicity emerged as one of the most efficient and effective forms of extrastatutory "arm-twisting" that agencies could deploy.[155] Even agencies with robust statutory enforcement authority find adverse publicity (or simply the threat of it) to be more effective than formal enforcement actions that typically require "cumbersome judicial proceedings."[156] Thus, agencies struggling with resource constraints and/or increased regulatory burdens may find that issuing publicity is particularly convenient and effective compared to traditional statutory tools.[157]

The basic calculus that makes publicity attractive to agencies—low marginal cost of publication and almost immediate benefits in the form of increased compliance—remains applicable today. Perhaps not surprisingly, then, agencies continue to make announcements that raise objections from targets. One notable example is the Department of Education, which in 2014 published a list of 55 U.S. colleges and universities that it was investigating for inadequately handling sexual assault allegations.[158] The Department emphasized that the comprehensive list represented a shift from earlier agency practices, when the Department would publicly confirm investigations but not publicize a list of them.[159] The press release quotes a Department official "to make it clear that a college or university's appearance on this list and being the subject of a Title IX investigation in no way indicates at this stage that the college or university is violating or has violated the law."[160] Page views for the press release were "unprecedented" according to the Department, setting an all-time record for visits to the Department's web site and social media views.[161] Finally, in March 2015, the Department published a list of 556 colleges and universities that did not meet the Department's "financial responsibility test,"[162]

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[153] *Id.*at 875; Cortez, *supra* note 7, at 1391.

[154] *See, e.g.*, Peter L. Strauss, Comment, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1468-71 (1992); Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159 (2000); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398 (2007). Indeed, the House Committee on Government Reform investigated the use and potential abuse of guidance documents by agencies. COMM. ON GOV'T REFORM, NON-BINDING LEGAL EFFECT OF AGENCY GUIDANCE DOCUMENTS, H. REP. NO. 106-1009 (2000).

[155] Noah, *supra* note 37, at 874. Noah defines "arm-twisting" as "a threat by an agency to impose a sanction or withhold a benefit in hopes of encouraging 'voluntary' compliance with a request that the agency could not impose directly on a regulated entity."

[156] *Id.*at 888-89; Cortez, *supra* note 7, at 1391-92.

[157] I posit that there is a connection between increased agency responsibilities under stagnant budgets and the use of relatively low-cost tools like adverse publicity. Testing the causal connection empirically, however, may be difficult without a control or a baseline.

[158] DOE, Press Release, *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations* (May 1, 2014), http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i (last visited June 10, 2015); Michael Stratford, *The Government's New List*, INSIDE HIGHER ED (May 2, 2014).

[159] DOE, *supra* note 158.

[160] *Id.* (quoting Assistant Secretary for Civil Rights, Catherine E. Lhamon).

[161] Stratford, *supra* note 158.

[162] Department of Education, Heightened Cash Monitoring, https://studentaid.ed.gov/sa/about/data-

which raised objections that the Department was using a "shaming technique" and had publicly "accused innocent schools of violations and failed to correct its mistakes."[163] (Note, importantly, that the Department had been criticized for keeping the list of colleges "secret" and may have been required to release the information under FOIA.[164]) The Undersecretary of Education responded that the potential risks to institutions were outweighed by the benefits of releasing the information to students and their families.[165]

C. More Opportunities to Misinterpret Publicity

A third reason for updating Recommendation 73-1 is to consider how audiences consume modern agency publicity. My research found that newer forms of publicity are written, presented, and disseminated in a way that potentially increases the risk that audiences will misinterpret the agency's announcement.

To be sure, the traditional agency press release—drafted carefully by public affairs professionals, vetted through various levels of agency and perhaps even legal review, and sent directly to a curated list of media recipients—still seems to be standard practice at most agencies.[166] But even this traditional practice has been transformed by modern media. For example, in addition to sending a traditional press release to a list of recipients, an agency might also publish multiple versions on its web site and write very short blurbs about it on social media platforms. Again, the information release is more voluminous and varied than in 1973, increasing the risk that at least some important facts or nuances will be lost in translation somewhere along the way.

Social media in particular increase the risk that audiences will misread, misunderstand, or mischaracterize agency announcements. Again, most social media are designed to generate information that can be consumed quickly and shared widely. The best example is Twitter, which limits each "tweet" to 140 characters, inclusive of characters used in hyperlinks. Thus, a tweet is more akin to a newspaper headline than the body of the article. For example, the SEC recently used its "SEC Enforcement" account on Twitter to announce an enforcement proceeding to its followers:[167]

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center/school/hcm (click on "List of Institutions on HCM as of March 1, 2015") (last visited June 10, 2015).

[163] Claudio Sanchez, *The Opposite of the Dean's List*, NATIONAL PUBLIC RADIO (Apr. 1, 2015), http://www.npr.org/blogs/ed/2015/04/01/396681248/the-opposite-of-the-deans-list.

[164] *See, e.g.*, Michael Stratford, *U.S. Keeps Scrutiny of Risky Colleges Secret*, INSIDE HIGHER ED (Mar. 26, 2015), https://www.insidehighered.com/news/2015/03/26/education-dept-keeps-secret-names-colleges-found-be-risky-students-taxpayers.

[165] *Id.* (citing discussion with Undersecretary Ted Mitchell).

[166] Interview with Officials from FTC Office of Public Affairs, *supra* note 34; Interview with Heidi Rebello, *supra* note 34; Interview with Jennifer Howard, *supra* note 34.

[167] SEC Enforcement, Twitter (Dec. 16, 2014), https://twitter.com/SEC_Enforcement/status/544901298991419392 ("Admin Proceeding: Paul J. Pollack and Montgomery Street Research, LLC http://ow.ly/2SaAfb").

The hyperlink loads a PDF document of a cease-and-desist order filed by the SEC alleging certain violations of the Securities Exchange Act. The 92-character announcement on Twitter displays the name of a person and his company prominently. The only context it gives is the phrase "Admin Proceeding," which may not be familiar to many readers. However, being posted on the SEC Enforcement account, it is clear that Mr. Pollack and Montgomery Street Research are the targets of SEC enforcement, though the tweet itself does not clarify whether the charges have been proven or are contested. The post was "retweeted" once and "favorited" once by different Twitter users. There were 4,013 posts on the SEC Enforcement Twitter feed as of June 11, 2015, and my review of the last six months suggests that the vast majority were of this nature.

Social media also make it very easy for users to repeat and share the information. Agency Twitter accounts often have thousands or even hundreds of thousands of followers, including reporters for the lay media and trade press. For example, the SEC Enforcement feed had 5,124 followers on June 11, 2015.[168] But this was dwarfed by the EPA's main Twitter account, which had roughly 251,000 followers as of December 16, 2014.[169]

Another interesting problem not present in 1973 is the risk of audiences' not understanding whether a federal agency owns a certain social media profile and thus is responsible for authoring its content. For example, my 2011 article found examples of private citizens creating profiles or pages with federal agency names on Facebook and Twitter.[170] These services now verify accounts for public figures and institutions like federal agencies, usually by displaying a blue or green check mark. But non-government users still appear to be creating social media profiles for agencies.[171] Twitter seems to be particularly problematic. The Twitter profile "@FDAWarning" appears to be run by a non-agency source.[172] In fact, the federal web site USA.gov now offers a site that allows users to verify federal government social media accounts.[173] It is not clear how many

[168] SEC Enforcement, Twitter, https://twitter.com/sec_enforcement (last visited June 11, 2015).

[169] *See* EPA, Twitter, https://twitter.com/epa (last visited Dec. 16, 2014). Of course, not all of these followers are human users—many are automated accounts, or "Twitter bots." *See, e.g.*, Rob Dubbin, *The Rise of Twitter Bots*, NEW YORKER (Nov. 14, 2013), http://www.newyorker.com/tech/elements/the-rise-of-twitter-bots.

[170] Cortez, *supra* note 7, at 1395 (finding a Facebook page for the FDA that was not being run by the FDA).

[171] For example, a recent search found a Facebook profile for the SEC that does not appear to be maintained by the SEC. U.S. Securities and Exchange Commission, Facebook, https://www.facebook.com/pages/US-Securities-and-Exchange-Commission/109531262399131# (last visited Dec. 16, 2014).

[172] FDA Warning, Twitter, https://twitter.com/FDAWarning (last visited Dec. 16, 2014).

[173] USA.gov, Verify U.S. Federal Government Social Media Accounts, http://www.usa.gov/Contact/verify-social-media.shtml (last visited Dec. 16, 2014).

non-agency sources operate social media profiles with agency names in the title, and whether the followers, subscribers, or audience for these announcements appreciate the difference.

My non-exhaustive review finds scattered policies governing social media practices, but most such policies are silent on potential problems caused by adverse agency publicity. The General Services Administration (GSA) runs a web site, www.digitalgov.gov, that serves as a resource for federal agencies operating web sites and social media accounts. The site includes a helpful and quite lengthy list of laws, regulations, and policies that govern "federal public web sites and digital services," including FOIA, the IQA, and various OMB memoranda.[174] Although the GSA does not seem to impose any hard requirements on federal agencies—relying instead of OMB directives and other sources—it seems to be an appropriate vehicle for disseminating best practices.

D. Hyper-Responsive Capital Markets

A fourth reason for updating Recommendation 73-1 is to reconsider agency publicity practices in light of modern capital markets. Internet-powered capital markets seem to respond more swiftly and perhaps more hastily to agency announcements, multiplying the magnitude for potential damage to company reputation and stock price, thus reducing agencies' margin for error. As my 2011 article demonstrated, company stock prices respond rapidly to new information, regardless of whether that information is accurate or interpreted correctly.[175]

Although instances of stock price drops in response to agency announcements rarely are reported in the media or subject to litigation, a few examples demonstrate the stakes. Perhaps the most notable recent example of capital markets over-responding to inaccurate information is the Bloomberg News fiasco with United Airlines. In 2008, Bloomberg's financial news service mistakenly republished an old 2002 story announcing that United would be filing for bankruptcy.[176] That day, United stock lost 76% of its value (roughly $1 billion) in just over thirty minutes before trading was suspended by NASDAQ.[177] Bloomberg had apparently relied on third-party content providers to find current news on publicly-traded companies, and one such provider had reposted the old 2002 story after

[174] DigitalGov, *supra* note 11. The site refers repeatedly to the May 2012 Digital Government Strategy released by the White House. Digital Government: Building a 21st Century Platform to Better Serve the American People, https://www.whitehouse.gov/sites/default/files/omb/egov/digital-government/digital-government.html (last visited June 11, 2015).

[175] Cortez, *supra* note 7, at 1396. The "efficient market hypothesis" (EMH) posits that securities prices rapidly reflect all available information without bias, meaning that stock prices rapidly respond to public information. *Id.*, at 1397-98 (citing the EMH literature). Indeed, "event studies" use econometrics to measure how stock prices respond to certain events, such as corporate or legal announcements, or proposed regulatory actions. *Id.* at 1397-98 (citing Sanjai Bhagat & Roberta Romano, *Event Studies and the Law: Part I: Technique and Corporate Litigation*, 4 AM. L. & ECON. REV. 141, 144 (2002)).

[176] Cortez, *supra* note 7, at 1396.

[177] *Id*. (citing Frank Ahrens, *2002's News, Yesterday's Sell-Off*, Wash. Post, Sep. 9, 2008, at A1; Carlos Carvalho, Nicholas Klagge, & Emanuel Moench, The Persistent Effects of a False News Shock: Fed. Reserve Bank of New York Staff Report No. 374, at 1 (*revised* June 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1408169).

searching for United on Google.[178] Notably, Bloomberg posted a quick correction just 15 minutes later.[179] Although United stock largely rebounded, the news shock persisted for days as United stock traded lower than before the incident.[180]

My research found some examples of stock price responses to agency announcements, although again, news reports seem to be rare. For example, one company lost 35% of its stock value a day after the FDA publicized manufacturing violations, leading the company to suspend manufacturing and lay off 350 employees.[181] Another company lost 25% of its stock value within hours of an FDA announcement that publicized the FDA's objections to the company's own press release.[182] This announcement was notable in that the FDA reportedly did not notify the company of its objections beforehand and considered the approach a novel way to address industry conduct.[183] Finally, Goldman Sachs suffered "the biggest one-day decline in its stock in over a year" after the SEC announced charges against the company,[184] despite the SEC's efforts to temper the media and market reaction by making the announcement on a Friday and combining it with a second announcement.[185]

These incidents demonstrate that "the market apparently reacts to a headline as much as anything else."[186] Responding to this general problem, the New York Stock Exchange (NYSE) asked the SEC either to give it advanced notice of major enforcement announcements or announce them during non-trading hours, so as to minimize the news shock.[187] But the SEC denied the request on the grounds that leaks might compromise the effort and that announcements with a major impact on trading would be rare.[188] However, our research found at least one agency, the Centers for Medicare and Medicaid Services (CMS), with a policy that prohibits agency employees from releasing "market sensitive" information—information that "may have stock or bond market implications"—unless properly authorized.[189] The CMS "Employee Nondisclosure Policy" recommends that the

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[178] Cortez, *supra* note 7, at 1396 (citing Ahrens, *supra* note 177).

[179] *Id.* (citing CARVALHO ET AL., *supra* note 177).

[180] *Id.* (citing CARVALHO ET AL., *supra* note 177).

[181] *Id.* at 1404 (citing James G. Dickinson, *Publicity as Punishment*, MED. DEVICE & DIAGNOSTIC INDUSTRY 24 (Jan. 1992); O'REILLY, *supra* note 89, at § 22.42).

[182] Cortez, *supra* note 7, at 1404-05 (citing FDA, Talk Paper T03-18: FDA Warns Public About Misrepresentations in Marketing Claims About Drug to Treat Cancer (Mar. 14, 2003); William W. Vodra, Nathan G. Cortez, & David E. Korn, *The Food and Drug Administration's Evolving Regulation of Press Releases: Limits and Challenges*, 61 FOOD & DRUG L.J. 623, 649 (2006); *FDA Responds in Kind to SuperGen: Talk Paper Answers Press Release*, "THE PINK SHEET," Mar. 17, 2003 at 7).

[183] *Id.* at 1404-05.

[184] *Id.* at 1424 (quoting SEC OIG, *supra* note 33, at 65).

[185] *Id.* (citing SEC OIG, *supra* note 33, at 49, 51, 55).

[186] *Id.* at 1396 (citing Ahrens, *supra* note 177).

[187] *Id.* at 1396-97 (citing SEC Office of Inspector Gen., Report of Investigation No. OIG-534: Allegations of Improper Coordination Between the SEC and Other Governmental Entities Concerning the SEC's Enforcement Action Against Goldman Sachs & Co. 62 (Sep. 30, 2010), http://www.sec.gov/foia/docs/oig-534.pdf).

[188] *Id.* at 1397 n.151 (citing SEC OIG, *supra* note 33, at 65-71).

[189] Memorandum on Employee Nondisclosure Policy from James Webber, Director, Office of Operations Management, Centers for Medicare and Medicaid Services, to "All CMS Employees" of Sep. 7, 2010 (on file with author).

even when properly authorized, release of market-sensitive information be performed only during non-trading hours to "err on the side of caution."[190]

Roughly a year later, media reports suggested that CMS had failed to adhere to this policy.[191] In February 2011, CMS sent a memorandum during trading hours to roughly 6,500 private insurers that operate Medicare Advantage Plans.[192] The memo announced that CMS would rethink its plan to increase government audits of the Medicare payments to these insurers, which might result in massive repayments from the insurers to the government. Shortly after an investment analyst flagged the memo, stock prices for the publicly-traded companies shot up, creating billions in new equity for the companies.[193] CMS officials called the announcement "routine," but the analyst emphasized that CMS rarely announces major changes outside of publishing proposed and final rules in the Federal Register.[194] In the face of media scrutiny, a CMS spokesman defended the memo as a "standard communication," noting that the agency "can't control how people react to a memo like this."[195] This episode highlights, again, how quickly capital markets can react to agency announcements, and how even written agency policies like CMS's may not prevent all lapses. Still, it is not clear how often stock prices change dramatically in response to agency announcements, as reports of such instances remain rare.

E. Information/Data Quality Act

Finally, agency practices are also worth revisiting since 1973 in light of congressional action, particularly the Information Quality Act of 2001, sometimes referred to as the Data Quality Act.[196] The Act required the Office of Management and Budget (OMB) to issue government-wide guidelines for "ensuring and maximizing the quality, objectivity, utility, and integrity of information … disseminated by the government."[197] It also required the OMB to "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency" that does not meet those standards.[198] In 2002, the OMB finalized guidelines

[190] *Id*. The 2010 memorandum discusses making disclosures during non-trading hours, but the attached CMS Employee Nondisclosure Policy is largely silent on this specific issue, focusing instead on employee disclosure of non-public information more generally. The CMS memorandum and policy came to light after the Center for Public Integrity sued CMS in 2014 for failing to respond to a FOIA request for documents relating to the Medicare Advantage Program. Complaint, Center for Public Integrity v. HHS, Civil Action No. 14-887 (D.D.C., May 27, 2014).

[191] Fred Schulte, How Medicare Advantage Investors Profited from Loose Government Lips, NPR NEWS (May 19, 2015).

[192] *Id*.

[193] *Id*.

[194] *Id*. (quoting first a statement by CMS officials, and then the bank analyst that highlighted the CMS memo).

[195] *Id*. (quoting Aaron Albright from CMS).

[196] Treasury and General Government Appropriations Act for Fiscal Year 2001 § 515, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153-54 (2001); 44 U.S.C. § 3516.

[197] *Id*. The Information Quality Act built on earlier requirements in the Paperwork Reduction Act that addressed information dissemination. *See* Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163, 168.

[198] *Id*.

implementing the Act,[199] followed by agencies' issuing their own guidelines.[200]

However, since 2001 it has been unclear whether "press releases" and similar agency announcements are subject to the Information Quality Act and OMB guidelines. On one hand, the Act itself does not exempt press releases. The Act states broadly that the OMB guidelines should "apply to Federal agency dissemination of public information, regardless of the form or format in which such information is disseminated."[201] On the other hand, OMB's final guidelines specifically exclude "press releases" from the definition of "dissemination" (defined broadly as "agency initiated or sponsored distribution of information to the public").[202] The exemption for "press releases" was not included in the OMB's proposed guidelines; it first appeared in the OMB's interim final guidelines, without explanation.[203]

A further complication is that the Office of Information and Regulatory Affairs (OIRA) seemed to support individual agency guidelines that narrowed the OMB's exemption for press releases to only those releases that are based on a precursor document that is itself subject to the Act.[204] For example, the EPA's guidelines exempt only press releases and other communications that announce or give public notice of information that EPA had already disseminated elsewhere.[205] Similarly, OIRA seemed to view favorably a similar approach by HHS and FDA that exempts press releases from their Information Quality Act guidelines unless the press release contains new substantive information not covered by previous information dissemination subject to the Act.[206] Several other agencies have drafted their own IQA guidelines to narrow the OMB's exemption for "press releases." Appendix G surveys 42 different agency IQA guidelines, finding that most agencies significantly narrow the OMB's exemption for press releases in this way:

Guidelines narrow the OMB's exemption for press releases:	23
Guidelines adopt the OMB's broad exemption for press releases:	11
Guidelines are unclear or do not address press releases directly:	5
Guidelines conflict on whether the broad or narrow exemption applies:	3
TOTAL	**42**

[199] 66 Fed. Reg. 34489 (Jun. 28, 2001) (proposed guidelines); 66 Fed. Reg. 49718 (Sep. 28, 2001); 67 Fed. Reg. 369 (Jan. 3, 2002); 67 Fed. Reg. 8452 (Feb. 22, 2002).

[200] OMB, Agency Information Quality Guidelines, https://www.whitehouse.gov/omb/inforeg_agency_info_quality_links/ (last visited June 15, 2015).

[201] 44 U.S.C. § 3504(d)(1).

[202] 67 Fed. Reg. at 8460.

[203] *See*, OMB, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Final Guidelines, with Request for Comments, 66 Fed. Reg. 49718, 49725 (Sep. 28, 2001).

[204] Memorandum for President's Management Council, Agency Draft Information Quality Guidelines, from John D. Graham, Administrator, Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB), dated June 10, 2002, https://www.whitehouse.gov/sites/default/files/omb/inforeg/iqg_comments.pdf (last visited June 12, 2015). Attached to this Memorandum is a document titled "OIRA Review of Information Quality Guidelines Drafted by Agencies," also dated June 10, 2002.

[205] *Id*. at 4.

[206] *Id.* at 17.

According to an OIRA memorandum to agencies issued in 2002, narrowing the exemption for press releases in this way "avoids creating an incentive to misuse press releases to circumvent information quality standards."[207] Thus, OIRA seemed to approve of agencies' narrowing the exemption for press releases. However, some agencies appear to be applying the press release exemption broadly, not narrowly.[208] Although the National Institutes of Health (NIH)'s National Toxicology Program (NTP) previously agreed to correct a press release and fact sheet posted on the NTP's web site,[209] that same year, the NIH refused to consider the substance underlying a similar request by the Salt Institute because the NIH's Information Quality Guidelines exempt press releases—the broad reading.[210]

In contrast to press releases, it would seem on first glance that agency databases clearly would be covered by the Information Quality Act and OMB guidelines. Indeed, the Act seems designed for things like agency databases. Yet, as with press releases, the Act's application to databases is unclear, and probably varies by database. Again, the broad wording of the Act states that the OMB guidelines should apply to agency "dissemination of public information, regardless of the form or format."[211] And the OMB guidelines define "information" as "any communication or representation of knowledge such as facts or data, in any medium or form,"[212] including "information that an agency disseminates from a web page."[213]

However, the OMB excludes from coverage "opinions, where the agency's presentation makes it clear that what is being offered is someone's opinion rather than fact or the agency's views."[214] The guidelines also exempt "adjudicative processes."[215]

Thus, the one law that might be used to discipline modern agency announcements has, in some situations, been construed as not applying to many agency announcements.[216]

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[207] *Id.* at 4.

[208] *See, e.g.*, OIRA, OMB, Information Quality: A Report to Congress, Fiscal Year 2003, *https*://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/fy03_info_quality_rpt.pdf (last visited June 12, 2015). In this 2003 report, requests to correct or retract press releases were denied by the NIH (pp. 50-51) and FDIC (p. 122). Requests to address press releases were agreed to by the National Toxicology Program (p. 50).

[209] *Id.* at 50.

[210] *Id.* at 50-51.

[211] 44 U.S.C. § 3504(d)(1).

[212] 67 Fed. Reg. at 8458-59.

[213] *Id.* at 8460.

[214] 67 Fed. Reg. at 377.

[215] *Id.*

[216] On a related point, it remains doubtful that the Information Quality Act creates judicially-enforceable rights, such that a party could sue an agency for violating its own information quality guidelines, or for denying a request to correct or retract information. Every court considering the question has answered it in the negative. *See, e.g.*, Harkonen v. U.S. Dep't of Justice, 2012 WL 6019571 (N.D. Cal. 2012) (not reported in F. Supp. 2d) (see analysis of *Prime Time* at *31-32); Styrene Information and Research Center, Inc. v. Sebelius, 944 F. Supp. 2d 71, 82 (D.D.C. 2013); Family Farm Alliance v. Salazar, 759 F. Supp. 2d 1083, 1095 (E.D. Cal. 2010); Prime Time Int'l Co. v. Vilsack, 599 F.3d 678 (D.C. Cir. 2010) (only court to reach merits of a claim under the IQA, but finding no cause of action); Salt. Inst. v. Leavitt, 440 F.3d 156, 158-59 (4th Cir. 2006) (discussing the IQA in depth, but finding no cause of action).

IV. CASE STUDIES

I evaluate in detail the policies and practices of three agencies—the FDA, the FTC, and the CFPB. These case studies offer a more granular picture of how agencies try to balance competing public and private interests when issuing various forms of publicity, including newer forms like social media and online databases.

A. U.S. Food and Drug Administration (FDA)

The FDA featured prominently in earlier studies on agency publicity.[217] It was one of the only agencies to propose a rule in response to Recommendation 73-1,[218] and is a frequent litigant in cases challenging agency publicity.[219] As the earlier studies observe, FDA publicity can devastate products, companies, or even entire industries. Yet, more than most agencies, FDA publicity is an essential tool for alerting the public to serious health risks, often in the face of factual and scientific uncertainty.

Benefits and uses of publicity. The FDA uses publicity to warn consumers about hazardous products or "gross economic deception."[220] The agency also uses publicity to educate consumers, solicit public comments, clarify the agency's views on matters of public interest, and report on FDA studies, investigations, and enforcement activities.[221] FDA officials describe two overarching goals of publicity—to educate the public, and to further its public health mission.[222] FDA officials also note that publicity aimed to educate the public can, for example, help consumers make smarter purchasing decisions and avoid potentially adulterated or unsafe products. In litigation, the FDA vigorously defends its discretion to warn the public of health and safety risks, even with incomplete factual and scientific information.[223] Former FDA officials emphasize that publicity is a very powerful tool for protecting public health because the agency has direct access to the media and enjoys credibility on product-specific warnings.[224] Current FDA officials carefully consider whether to make announcements, given the potential impact of FDA publicity.[225] In short, the FDA can directly affect how, and indeed whether, the public uses regulated products.[226] The agency has long been aware of this power, and such awareness may temper any inclinations to abuse it.[227]

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[217] *See, e.g.*, Gellhorn, *supra* note 7; Cortez, *supra* note 7, at 1401-15.

[218] 42 Fed. Reg. 12,436.

[219] *See* Appendix C (Table of Federal Cases: 1974-2014).

[220] *See, e.g.*, 42 Fed. Reg. at 12,436.

[221] *Id*.

[222] Interview with Heidi Rebello, *supra* note 34; Interview with Ann Wion, Senior Advisor to the Chief Counsel, FDA Office of the Chief Counsel (Aug. 5, 2015).

[223] *See, e.g.*, Fisher Bros. Sales, Inc. v. U.S., 46 F.3d 279, 287 (3d Cir. 1995).

[224] Interview with Wayne Pines, President, Regulatory Services and Health Care, APCO Worldwide (Jul. 7, 2015) (former FDA Chief of Press Relations (1975-78) and Associate Commissioner for Public Affairs (1978-82)).

[225] Interview with Heidi Rebello, *supra* note 34.

[226] Interview with Wayne Pines, *supra* note 224.

[227] *Id*.

Publicity as a regulatory tool. In the past, FDA has used publicity as a regulatory tool, treating both publicity and Warning Letters as a form of informal enforcement.[228] Although the statute gives the FDA discretion to not report "minor violations" for prosecution if the agency "believes that the public interest will be adequately served by a suitable written notice or warning,"[229] the agency does not limit Warning Letters or publicity to such "minor violations." Wayne Pines, former FDA Chief of Press Relations and Associate Commissioner for Public Affairs, explains that FDA senior leadership has long believed that Congress authorized FDA "to use publicity as an enforcement tool."[230] Current FDA officials stress that FDA no longer views publicity as an enforcement tool.

The burdens of publicity. Academics have observed that FDA sometimes wields publicity, or merely the threat of it, as a regulatory weapon.[231] Former FDA officials also recognize that "publicity from the FDA is a very, very powerful tool."[232] For example, in 2003 the FDA published a "Talk Paper" to criticize an allegedly misleading press release by a drug company about its cancer drug.[233] The agency reportedly did not notify the company of its objections beforehand, and the company's stock price fell 25% within hours.[234] There are also documented cases of FDA publicity leading directly to the closure of manufacturing plants, employee layoffs, and products being removed from retail stores nationwide.[235]As Gellhorn noted, publicity by the FDA can be particularly damaging because consumers have a very low tolerance for perceived risks to the safety of food and drugs.[236] FDA officials have long been aware that the agency's power of publicity can be "infinitely larger than any other power" the FDA possesses, and cite instances in which "FDA has come out publicly and just eliminated products from the market."[237] Thus, although FDA usually is justified in warning the public of product hazards, former officials worry that the risk of abuse of agency discretion is greater with publicity than in any other area.[238]

FDA's current position. The FDA no longer views publicity as an enforcement tool. Rather, the FDA views publicity as necessary for providing relevant health information to the public, given its statutorily-mandated mission to promote and protect the public

[228] Cortez, *supra* note 7, at 1414; 21 C.F.R. § 100(j)(1); State Enforcement Provisions of the Nutrition Labeling and Education Act of 1990, 58 Fed. Reg. 2457, 2457 (Jan. 6, 1993).

[229] 21 U.S.C. § 336 (2013).

[230] Interview with Wayne Pines, *supra* note 224.

[231] *See, e.g.*, Cortez, *supra* note 7, at 1402; Noah, *supra* note 37, at 890.

[232] Interview with Wayne Pines, *supra* note 224.

[233] FDA Talk Paper, *supra* note 58.

[234] Vodra et al., *supra* note 59, at 649; FDA Responds in Kind to SuperGen, *supra* note 59, at 6.

[235] Dickinson, *supra* note 181, at 24; O'REILLY, *supra* note 89, at § 22.42; FDA QUARTERLY REPORT, FIRST QUARTER 1987, at 20 (1987); Cortez, *supra* note 7, at 1404.

[236] Gellhorn, *supra* note 7, at 1410; Cortez, *supra* note 7, at 1403.

[237] Interview with Peter Barton Hutt, Senior Counsel, Covington & Burling LLP (Nov. 7, 2014) (Hutt was Chief Counsel at FDA from 1971-75). In 1966, for example, the FDA announced that Borden's Starlac Powdered Milk had tested positive for salmonella. The company refused to recall the product, and there were no positive cases of salmonellosis linked to Starlac. But FDA's announcement effectively removed Starlac from the market—it was never marketed again. *See, Infectious Diseases: Salmonella and Starlac*, TIME (Nov. 11, 1966), http://content.time.com/time/magazine/article/0,9171,843035,00.html (subscription required).

[238] Interview with Peter Barton Hutt, *supra* note 237.

health, and given the broad scope of consumer products the FDA regulates—*e.g.*, drugs, medical devices, foods, and tobacco. FDA views its disclosure of public health information as being governed by applicable laws and regulations, including 21 U.S.C. § 331(j) and 18 U.S.C. § 1905. The FDA is sensitive to potential economic harm that may result to regulated entities. However, the agency has procedures in place to ensure the information it provides to the public is accurate. Moreover, there is a public health need for FDA to provide information essential to the public about a particular health risk.

Statutory authority. Because FDA publicity can be so damaging, its authority to issue it has been questioned. However, more than most agencies, the FDA can claim explicit statutory authority to issue publicity.[239] Section 705 of the Federal Food, Drug, and Cosmetic Act (titled "Publicity") grants the FDA broad authority to disseminate information about regulated products that, in the agency's opinion, present an "imminent danger to health or gross deception to the consumer."[240] The same section requires the FDA to publish "reports summarizing all judgments, decrees, and court orders," including "the nature of the charge and the disposition thereof."[241] The statute makes clear that nothing prohibits the FDA from reporting the results of investigations.[242] Thus, the statute authorizes FDA to publish complaints, for example, as long as the agency explains the nature of the charge and clarifies that the charges have not been adjudicated.[243] Other parts of the statute explicitly authorize FDA to notify health professionals and consumers of product risks,[244] which would justify broad publicity in most cases.

Implicit authority. The FDA has also asserted that it has broad, implicit authority to issue publicity. The Public Health Service Act requires FDA to publish information about the products it regulates.[245] Moreover, the FDA cites the Supreme Court's opinion in *Barr v. Matteo* for the proposition that publicity is a core discretionary function of agencies.[246] The FDA has long viewed these powers expansively.[247] Former FDA Chief Counsel Peter Barton Hutt once remarked that the Federal Food, Drug, and Cosmetic Act "must be regarded as a constitution" that gives the agency broad discretion to protect public health.[248] And in legal challenges to FDA publicity, the agency argues that it enjoys almost unreviewable discretion to warn the public[249]—arguments viewed with skepticism by some courts and scholars. The D.C. District Court, for example, wrote that

[239] Cortez, *supra* note 7, at 1405; Gellhorn, *supra* note 7, at 1408.
[240] FDCA § 705(b), 21 U.S.C. § 375(b) (2013).
[241] FDCA § 705(a), 21 U.S.C. § 375(a) (2013).
[242] FDCA § 705(b), 21 U.S.C. § 375(b) (2013).
[243] Cortez, *supra* note 7, at 1405.
[244] *See, e.g.*, 21 U.S.C. §§ 360h(a), (e)(2)(B) (allowing FDA to warn individuals and health professionals of risks for specific medical devices).
[245] PHSA §§ 301, 310, 42 U.S.C. §§ 241, 242o.
[246] 42 Fed. Reg. at 12,437; Barr v. Matteo, 360 U.S. 564 (1959).
[247] Cortez, *supra* note 7, at 1406.
[248] Peter Barton Hutt, *Philosophy of Regulation under the Federal Food, Drug, and Cosmetic Act*, 28 FOOD DRUG COSM. L.J. 177, 178 (1973).
[249] Cortez, *supra* note 7, at 1441-47.

the FDA's publicity practices might allow it to "effectively regulate industry without ever exposing itself to judicial review."[250]

Litigation. Although litigation challenging agency publicity remains somewhat rare, FDA is one of the most frequently sued agencies, along with the FTC and the CPSC.[251] Like most other agencies, FDA frequently takes the position that agency publicity is not subject to judicial review under the APA,[252] and is protected by sovereign immunity and executive privilege.[253] As with other agencies, courts generally agree.[254] As noted above, FDA in the past had viewed publicity as a form of informal enforcement.[255] But again, some courts and scholars have been uncomfortable with publicity yielded this way. One district court, considering arguments that the FDA had targeted specific companies with a publicity campaign, wrote that the FDA could not have it both ways:

> This Court cannot now say that a focused effort such as this may be is immune from judicial review because the agency says its decision is tentative and open to reconsideration. If the FDA's view is, in fact, so tentative that it is not yet ripe for judicial review, it may not be appropriate to take actions which directly result in harm to those private parties who dare to disagree with them.[256]

The court observed that it would be "inherently unfair" to allow FDA to use publicity to "enforce its determination without allowing the affected party an opportunity to prove that the FDA's position is wrong."[257] Although the district court's opinion is an outlier, it expresses a common frustration with the lack of redress for agency publicity. Indeed, a former lawyer in the Office of Chief Counsel concludes that "there is relatively little a company can do in most circumstances to significantly diminish the effect of [an FDA] release."[258]

Proposed rule. Given the widely-recognized power of FDA publicity, the agency proposed a rule in 1977 that would have set standards and procedures for issuing it.[259] The proposal was an attempt to codify FDA's existing practices and implement both Recommendation 73-1 and a 1976 rule by its parent agency, then the Department of Health, Education, and Welfare (HEW).[260] The preamble cites the usual benefits of

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[250] Washington Legal Found. v. Kessler, 880 F. Supp. 26, 34 (D.D.C. 1995); Cortez, *supra* note 7, at 1441.

[251] *See* Appendix C: Table of Federal Cases (1974-2014).

[252] Cortez, *supra* note 7, at 1414; Noah, *supra* note 37, at 887.

[253] *See, e.g.*, Ajay Nutrition Foods, Inc. v. FDA, 378 F.Supp. 210 (D.N.J. 1974), *aff'd*, 513 F.2d 625 (3d Cir. 1975).

[254] *See* Appendix C: Table of Federal Cases (1974-2014).

[255] Cortez, *supra* note 7, at 1414; State Enforcement Provisions of the Nutrition Labeling and Education Act of 1990, 58 Fed. Reg. 2457, 2457 (Jan. 6, 1993).

[256] Den-Mat Corp. v. FDA, No. MJG-92-444, 1992 WL 208962, at *5 (D. Md. 1992); Cortez, *supra* note 7, at 1415.

[257] *Id.* at *5; Cortez, *supra* note 7, at 1415.

[258] Levine, *infra* note 288, at 277; Cortez, *supra* note 7, at 1415.

[259] FDA, Administrative Practices and Procedures: Publicity Policy, 42 Fed. Reg. 12,436, 12,440-41 (Mar. 4, 1977) (to be codified at 21 C.F.R. pt. 2).

[260] *Id.* The proposed rule was part of a larger initiative at FDA to promulgate rules governing its practices. FDA was one of the first agencies to propose rules implementing the Government in the

publicity—warning and informing the public—but also acknowledges that publicity can interfere with ongoing criminal and civil cases, and may "cause economic harm" to the parties identified.[261] The rule would have set distinct standards and procedures for publicizing criminal trials, civil litigation, investigations, and administrative hearings.[262] The rule also would have given advanced notice to parties identified in publicity and allowed them to request corrections or retractions for any information that was "materially erroneous or misleading."[263] In the end, FDA never finalized the rule, and withdrew it summarily years later.[264]

HHS rule. Without its own publicity policy, the FDA was left with the 1976 rule by HEW (now the Department of Health and Human Services (HHS)). The rule, "Release of Adverse Information to News Media,"[265] endorses Recommendation 73-1 and tracks it closely.[266] For example, the rule applies to "adverse information," defined as "any statement or release by the Department or any principal operating component made to the news media inviting public attention to an action or a finding by the Department or principal operating component of the Department which may adversely affect persons or organizations identified therein."[267] The rule's basic principle is that such information "shall be factual in content and accurate in description," avoiding "[d]isparaging terminology not essential to the content and purpose of the publicity."[268] The rule also requires the Department and its sub-agencies to take reasonable precautions to assure that the information is accurate and fulfills an authorized purpose, again tracking Recommendation 73-1.[269] Information released should provide context, including the nature of any studies performed, the sources of any data, and whether the information is based on allegations that have yet to be fully adjudicated.[270] In response to public comments, the Department emphasized that FDA would retain broad discretion to issue publicity "when necessary to protect public health or safety."[271]

HHS guidelines. Perhaps more important than the HHS rule are the HHS *Guidelines on the Provision of Information to the News Media*, which apply to "information in any form provided to news and information media, especially information that has the potential to generate media attention, public interest, or inquiry."[272] As FDA officials

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Sunshine Act and FOIA. Interview with Peter Barton Hutt, *supra* note 237 (Hutt was Chief Counsel at FDA from 1971-75).

[261] 42 Fed. Reg. at 12,436.

[262] *Id.* at 12,440-41.

[263] *Id.* at 12,441.

[264] Withdrawal of Certain Pre-1986 Proposed Rules, 56 Fed. Reg. 67,440, 67,446 (Dec. 30, 1991).

[265] 45 C.F.R. pt. 17.

[266] Department of Health, Education, and Welfare, Notice of Proposed Rulemaking: Release of Adverse Information to News Media, 39 Fed. Reg. 28,643 (Aug. 9, 1974); Department of Health, Education, and Welfare, Policies: Part 17 – Release of Adverse Information to News Media, 41 Fed. Reg. 2 (Jan. 2, 1976).

[267] 45 C.F.R. § 17.1.

[268] 45 C.F.R. § 17.2.

[269] 45 C.F.R. § 17.3.

[270] 45 C.F.R. § 17.5.

[271] 41 Fed. Reg. at 3.

[272] HHS, Office of the Assistant Secretary for Public Affairs (ASPA), *Guidelines on the Provision of*

explain, the *Guidelines* articulate the basic philosophy and operating principles used by HHS and its sub-agencies.[273] The FDA's *News Media* web site links to the *Guidelines*.[274] Several parts of the *Guidelines* emphasize that communications must be "accurate."[275] They also encourage employees to "[a]ct promptly to correct the record or erroneous information, when appropriate."[276] The *Guidelines* describe the responsibilities of the HHS Office of the Assistant Secretary for Public Affairs (ASPA), News Division, and how it should coordinate with other offices, divisions, and programs.[277] The *Guidelines* also prescribe, very broadly, that the ASPA News Division "will coordinate the review and clearance of departmental press materials by appropriate officials," but describe no detailed procedures for this process.[278] FDA officials explain that all press announcements are reviewed by the FDA's Office of Chief Counsel and HHS.[279]

Publicizing preliminary actions. In addition to announcing the results of enforcement actions—consent decrees, settlements, judgments, and criminal sentences—FDA also regularly publishes press releases announcing unresolved actions, including investigations, civil complaints, and criminal charges and indictments.[280] The HHS rule limits announcements of investigations or "pending agency trial-type proceedings" to cases where there is a significant risk to public health or substantial economic harm.[281] Moreover, the rule allows HHS or its sub-agencies to *withhold* releasing adverse information if "public harm can be avoided by immediate discontinuance of an offending practice."[282]

Advanced notice. The HHS rule allows agencies to provide advanced notice of publicity to identified parties "if practicable and consistent with the nature of the proceeding."[283] This provision gives parties a chance to prepare a public response in advance, but does not create a right to edit or object to the agency's announcement.[284] The FDA recognized in its 1977 proposal that identified parties are generally aware that they are on the agency's radar[285]—a notion reiterated by current officials.[286] Sometimes, FDA will contact the company to verify certain facts before publishing a press release,

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Information to the News Media (March 2012), http://www.hhs.gov/news/media_policy.html (last visited August 5, 2015). The *Guidelines*, by their terms, apply to "press releases" and "blogs and other Internet postings used to convey news or items of public interest."

[273] Interview with Heidi Rebello, *supra* note 34.

[274] FDA, *News Media Policies*, http://www.fda.gov/NewsEvents/Newsroom/NewsEmbargoPolicy/default.htm (last visited Aug. 5, 2015).

[275] HHS, *Guidelines*, *supra* note 272.

[276] *Id*.

[277] *Id*.

[278] *Id*.

[279] Interview with Heidi Rebello, *supra* note 34.

[280] Cortez, *supra* note 7, at 1408.

[281] 45 C.F.R. § 17.4.

[282] *Id*.

[283] 45 C.F.R. § 17.6.

[284] *Id*.

[285] 42 Fed. Reg. at 12,439; Cortez, *supra* note 7, at 1407-08.

[286] Interview with Jarilyn Dupont, Director of Regulatory Policy, FDA Office of Policy (Aug. 5, 2015).

but will not share the contents of the release with the company.[287] Thus, the FDA "does not negotiate with the company about the text of the FDA announcement" or "share the text of a press communication with a company in advance."[288] Long ago, FDA adopted a policy that doing so would be inconsistent with the agency's FOIA policies.[289]

Corrections and retractions. The HHS rule allows parties to request that the agency correct or retract information that is inaccurate or misleading, and provides that the response will be made "in the same manner" as the original announcement.[290] Similarly, as noted above, HHS *Guidelines* encourage employees to "[a]ct promptly to correct the record or erroneous information, when appropriate."[291] FDA's 1977 proposed rule would have allowed private parties to file a citizen petition to the Assistant Commissioner for Public Affairs requesting the agency to correct or retract publicity, including procedures for expediting requests. [292] But current FDA officials believe that informal communications are likely to be more effective than formal filings.[293]

FDA Manuals. Apart from HHS rules and guidelines, a variety of FDA employee manuals address publicity. The most significant seems to be the *Regulatory Procedures Manual*, which addresses publicity in several sections, particularly those dealing with recalls and emergencies.[294] (Note, however, that FDA indicates that some parts of the *Manual* are outdated and are thus undergoing review and revision.) Additionally, some FDA product centers mention publicity in their own manuals. The FDA's Center for Veterinary Medicine states that staff should avoid "[p]remature publicity concerning investigations and adverse reactions." [295] My previous research evaluated a detailed manual by the Center for Drug Evaluation and Research that included one section (4112.1) with detailed policies for issuing press releases, Talk Papers, and other announcements, but the section was deemed obsolete by FDA and is no longer published online.[296] Finally, FDA officials describe internal policies and procedures that are not publicly available, but these were not produced at the time of our interview.[297]

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[287] Interview with Wayne Pines, *supra* note 224.

[288] Arthur N. Levine, *FDA Enforcement: How it Works*, in A PRACTICAL GUIDE TO FOOD AND DRUG LAW AND REGULATION 277 (Kenneth R. Piña & Wayne L. Pines eds., 2d. ed. 2002).

[289] 42 Fed. Reg. at 12,439; Interview with Wayne Pines, *supra* note 224.

[290] 45 C.F.R. § 17.7.

[291] HHS, *Guidelines*, *supra* note 272.

[292] 42 Fed. Reg. at 12,441.

[293] Interview with Ann Wion, and Heidi Rebello, *supra* notes 222, 34; Interview with Mark Raza, Principal Deputy Chief Counsel, FDA Office of the Chief Counsel (Aug. 5, 2015).

[294] FDA, REGULATORY PROCEDURES MANUAL, http://www.fda.gov/iceci/compliancemanuals/regulatoryproceduresmanual/default.htm (last visited July 17, 2015).

[295] FDA Center for Veterinary Medicine, PROGRAM POLICY AND PROCEDURES MANUAL § 1240.3520.

[296] The manual, titled CDER, MANUAL OF POLICIES AND PROCEDURES (MAPP) 4112.1, CDER/FDA Press Office Interactions in the Preparation and Clearance of Written Documents for the Public (2001); Cortez, *supra* note 7, at 1406-07, 1407 n.222.

[297] Interview with Heidi Rebello, *supra* note 34.

Publicizing recalls. One of the FDA's most important public health duties is to notify the public of recalls.[298] Although the FDA has been criticized in the past for publicizing inaccurate recall information or using recalls in lieu of more appropriate sanctions,[299] the agency must retain maximum discretion to warn the public.[300] Courts generally protect this discretion.[301] And, to the agency's credit, it generally "reserves publicity for products that pose the most serious risks."[302] The *Regulatory Procedures Manual* discusses procedures for notifying the public and other government agencies of recalls,[303] although the FDA notes that some parts of the *Manual* are outdated and are currently undergoing revision. The *Manual* explains that recall notices are superintended by the Associate Commissioner for Public Affairs.[304] (Note this position no longer exists. The FDA currently has an Associate Commissioner for External Affairs and an Assistant Commissioner for Media Affairs.) The *Manual* also states that "[a]gency policy gives the recalling firm the first opportunity to prepare and issue publicity concerning its recall."[305] FDA also provides guidance to industry for notifying the public.[306] The guidance emphasizes that FDA will issue its own press release for a recall if the firm fails to do so or if the firm's press release is inadequate.[307] In the past, FDA had to rely heavily on publicity during food recalls because it lacked mandatory recall authority.[308] When Congress granted this authority, it also specified what types of information the FDA should provide to the public during a recall.[309] Although the FDA necessarily must publicize recalls with incomplete information, recalls are based on the best available scientific information, often including Health Hazard Evaluations.

Publicizing enforcement actions. The *Regulatory Procedures Manual* provides detailed procedures for issuing press releases regarding agency enforcement actions,[310] though again agency officials stress that the *Manual*'s outdated provisions are undergoing review and revision. Nevertheless, the *Manual* states that enforcement staff can

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[298] *Id.*

[299] *See, e.g.*, Gellhorn, *supra* note 7, at 1410-16; Noah, *supra* note 37, at 874-75, 888.

[300] Cortez, *supra* note 7, at 1411.

[301] *Id.* (citing Sperling & Schwartz, Inc. v. United States, 218 Ct. Cl. 625, 626-27 (1978) (finding that FDA had a rational basis for warning the public about excessive levels of lead in dishware)).

[302] Cortez, *supra* note 7, at 1411; FDA, *For Consumers, FDA 101: Product Recalls—From First Alert to Effectiveness Checks*, http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm049070.htm (last updated May 18, 2010).

[303] REGULATORY PROCEDURES MANUAL, *supra* note 294, at § 7-7.

[304] *Id.* at § 7-7-3.

[305] *Id.*

[306] FDA, *Guidance for Industry: Product Recalls, Including Removals and Corrections* (Nov. 3, 2003), http://www.fda.gov/Safety/Recalls/IndustryGuidance/ucm129259.htm (see the section "Public Notification").

[307] *Id.* at § B.1.

[308] Interview with Richard Williams, Vice President for Policy Research, Mercatus Center, George Mason University (Nov. 12, 2014) (Williams was at the FDA's Center for Food Safety and Applied Nutrition (CFSAN) for 27 years, and was formerly its Director for Social Sciences); Interview with Ann Wion, *supra* note 222 (noting that FDA now has mandatory recall authority for foods under the Food Safety Modernization Act, or FSMA).

[309] Food Safety Modernization Act (FSMA) § 206, Pub. L. No. 111-353, 124 Stat. 3885, 3941 (2011) (amending FDCA § 423), *codified at* 21 U.S.C. § 350*l*(g) ("Mandatory Recall Authority").

[310] REGULATORY PROCEDURES MANUAL, *supra* note 294, at § 6-2-17; Exhibit 6-10.

recommend that FDA issue a press release, but the decision rests with the Office of Public Affairs (which was renamed the Office of Media Affairs, a part of the Office of External Affairs).[311] The press release should describe the enforcement action, including the type of action, the basis for the action, and the firm's name, location, product(s) implicated, and the relevant geographical market.[312] FDA staff must coordinate with any Assistant U.S. Attorneys working on the case.[313] There seems to be a relatively clear set of procedures for drafting and clearing FDA press releases. The Office of External Affairs writes the first draft based on model press releases and routes it first to the appropriate product center,[314] then to the Office of Regulatory Affairs (ORA), and then to the lead case attorney from the Office of Chief Counsel (OCC).[315] Sometimes, one of the FDA's product centers writes the first draft, then seeks review. Once these three offices review the press release for accuracy, the Office of External Affairs will "route it through … standard press release clearance process, which involves top agency officials."[316] After this, the Office of External Affairs solicits final edits from the offices.[317]

FDA practices. I interviewed Heidi Rebello, the Acting Assistant Commissioner for Media Affairs in the FDA's Office of External Affairs, who described FDA practices. Although former FDA officials recalled that FDA employees followed informal customs rather than written policies,[318] current FDA officials stress the importance of written policies.[319] According to Rebello, FDA press officers are "intimately aware" of these policies.[320] Staff are required to follow standard operating procedures, and their performance evaluations consider how well they do so.[321] The internal policies are very detailed, and Rebello makes minor updates frequently.[322] New employees are trained on these procedures and given hard copies as part of their orientation packets.[323] Rebello also noted that FDA's internal policies and procedures for issuing press releases are consistent with the other federal agencies at which she has worked (the EPA and USDA).[324]

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[311] *Id*. at § 6-2-17; FDA, About FDA: Office of External Affairs Organization, *http*://www.fda.gov/AboutFDA/CentersOffices/OrganizationCharts/ucm380930.htm.

[312] *Id*. at Ex. 6-10.

[313] *Id*.

[314] The FDA has six product "centers": the Center for Food Safety and Applied Nutrition (CFSAN); the Center for Veterinary Medicine (CVM); the Center for Biologics Evaluation and Research (CBER); the Center for Tobacco Products (CTP); the Center for Drug Evaluation and Research (CDER); and the Center for Devices and Radiological Health (CDRH). *See* FDA, About FDA, FDA Organization Overview, *http*://www.fda.gov/AboutFDA/CentersOffices/OrganizationCharts/ucm380930.htm.

[315] *Id*. at Ex. 6-10.

[316] *Id*.

[317] *Id*.

[318] Interview with Richard Williams, *supra* note 308; Interview with Wayne Pines, *supra* note 224 (speaking to FDA practices when he was at the agency).

[319] Interview with Heidi Rebello, *supra* note 34.

[320] *Id*.

[321] *Id*.

[322] *Id*.

[323] *Id*.

[324] *Id*.

Forms of publicity. FDA publicity is packaged in several different forms, perhaps due to its obligation to warn the public of product risks. My earlier review found that FDA makes announcements about specific products or companies in 28 different forms,[325] most of which read as product warnings. The agency's *Newsroom* site houses its press announcements, including news releases, statements, and transcripts of press conferences. It also lists other resources, including Warning Letters, the weekly "tip sheet" for media, and the FDA's blog.[326] But beyond these five forms, the FDA uses at least 23 other forms (undoubtedly there are more) to warn the public about specific products:

Forms of FDA Product Announcements	
• Advice for Patients; • Consumer Updates; • Field Action Notification; • Field Correction; • Frequently Asked Questions; • Important Information; • Important Customer Notification; • Important Notice; • Important Safety Information; • Information Alert; • Information for Health Care Professionals;	• Market Withdrawal; • Notice of Field Correction; • Notice to Readers; • Product Withdrawal; • Public Health Advisory; • Public Health Notification; • Recall; • Safety Communication; • Urgent Instruction Correction; • Urgent Removal; and • Urgent Notification.

Some of these labels suggest different intended audiences, and some labels have legal significance. For example, product "corrections," "recalls," and "withdrawals" have different regulatory meanings.[327] Moreover, these announcements may not be mutually exclusive—each could be accompanied by a separate press release, Warning Letter, or the like. In short, the FDA often uses multiple overlapping announcements to communicate product risks. The point is not to question how the FDA labels these announcements, but simply to note their volume and variety. FDA publicity, broadly construed, comes in many forms.[328]

Warning Letters. Some of these forms, such as Warning Letters and Talk Papers, have long caused confusion. Both have been used to publicize FDA's objections to specific products or conduct. For example, FDA publishes hundreds if not thousands of Warning Letters on its web site that identify specific objections to specific products or practices.[329] Warning Letters are not formal enforcement action; they typically precede it. The letters are used to notify individuals and firms of alleged violations, often based on inspectional findings, and give firms "an opportunity to take voluntary and prompt corrective action" before FDA initiates enforcement.[330] Although FDA explains that it is not required to warn companies before taking enforcement action, "most individuals and

[325] Cortez, *supra* note 7, at 1410.

[326] FDA, Newsroom, http://www.fda.gov/NewsEvents/Newsroom/default.htm.

[327] Cortez, *supra* note 7, at 1410.

[328] *Id*. at 1409.

[329] FDA, *Inspections, Compliance, Enforcement, and Criminal Investigations: Warning Letters*, http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ (last visited July 20, 2015).

[330] FDA, REGULATORY PROCEDURES MANUAL, *supra* note 294, at 4-1-1.

firms will voluntarily comply with the law."[331] The agency emphasizes that "[a] Warning Letter is the agency's principal means of achieving prompt voluntary compliance" with the statute and regulations.[332] Less frequently, and not recently, FDA has used Talk Papers to publicize its objections to company conduct, even though Talk Papers were ostensibly designed to guide FDA staff internally.[333] Talk Papers are no longer used, according to FDA officials.[334]

FDA.gov. Perhaps equally important is the massive amount of information that FDA publishes about companies and products on its web site, www.fda.gov. Like other agencies, the FDA is required to post important information online.[335] But perhaps more than other agencies, the FDA can publish a large variety of documents with information adverse to regulated parties, including legal complaints, inspectional observations, product recalls, Warning Letters, and other agency objections that have not been fully resolved or adjudicated.[336] (Note, however, that comments submitted to the docket on FDA's Transparency Initiative indicated public interest in receiving such information.[337]) Although the FDA has long tried to distinguish active publicity versus passive disclosure,[338] the distinction has eroded during an era of sprawling agency web sites that post thousands of documents that are readily available to the media and trade press.[339]

Survey of FDA press releases. A major feature of my earlier research was a substantive review of all "press announcements" posted on the FDA's web site between 2004 and 2010.[340] A chart with my findings is reproduced in Appendix D. I found that during this

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[331] *Id.*

[332] *Id.*

[333] The public was long confused about what a "Talk Paper" signified from the agency. I described this confusion and the FDA's changing explanations for Talk Papers in my 2011 article. Cortez, *supra* note 7, at 1410 n.243. Originally, FDA explained that Talk Papers were intended for internal use as a way to ensure that agency staff responded consistently to public questions on current topics of interest. However, the FDA later explained that it distributed Talk Papers to the media. Wayne Pines explained during our interview that Talk Papers were designed to allow FDA to make external, public announcements without having to go through the HHS process for clearing press releases. Interview with Wayne Pines, *supra* note 224. Thus, a document ostensibly created for internal uses was used externally—which might be the case with much of the material published on FDA's web site.

[334] Interview with Heidi Rebello, *supra* note 34.

[335] *See, e.g.*, Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (codified at 5 U.S.C. § 552); Cortez, *supra* note 7, at 1392. Note, also, that Congressional directives require FDA to post information such as "signals of safety concerns" even if not "proven" at the time of publication.

[336] Cortez, *supra* note 7, at 1411.

[337] FDA, *FDA Transparency Initiative*, http://www.fda.gov/AboutFDA/Transparency/TransparencyInitiative/ (last updated Apr. 22, 2014).

[338] *See, e.g.*, 42 Fed. Reg. at 12,436-37 (distinguishing adverse publicity from the FDA Consumer magazine, the Drug Bulletin, and other publications reporting actions taken by FDA); Cortez, *supra* note 7, at 1411-12 n.252.

[339] Cortez, *supra* note 7, at 1412.

[340] *Id.* at 1412-13. The agency seems to use the terms "press announcement" and "press release" synonymously, and still posts them on its web site. FDA, *Press Announcements*, http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/default.htm (last visited July 21, 2015). The site contains an archive of press releases back to 2004. *See, e.g.*, FDA, *News and Events, 2004 Press Announcements*, http://www.fda.gov/newsevents/newsroom/pressannouncements/2004/default.htm (last

seven-year period, FDA issued 1,542 unique press releases—a little less than one every business day.[341] Of those, 65% (1,009) identified a specific product, company, or individual.[342] Of this group, 62% (622) were negative or adverse in some way; most of the positive announcements publicized product approvals by FDA.[343] And of the 622 press releases that both identified a specific product or party and were adverse in some way, 74% (463) involved some sort of preliminary or pending agency action that had not yet reached a final, determinative conclusion.[344] Thus, around 30% of all press releases during this time (463 out of 1,542) qualified as adverse publicity involving a pending or preliminary agency action.[345]

Of course, many of these announcements involved product recalls, which are often based on Health Hazard Evaluations and other scientific analyses. And many other announcements undoubtedly involved actions that concluded with successful judgments, orders, or settlements for the agency, or voluntary compliance by the firm.[346] Although the practice of issuing such announcements certainly is understandable given FDA's duty to alert the public to health risks, the sheer volume of early-stage adverse announcements may raise the risk of errors.[347]

Scientific uncertainty. As noted in my earlier research, "FDA is understandably protective of its duty to warn the public of dangerous products and other health risks," and "routinely emphasizes that it must warn the public of health risks, even when acting on limited information and scientific uncertainty."[348] During interviews, FDA officials emphasized that the agency uses its best judgments of the science and public health risks when deciding to communicate with the public.[349] Indeed, courts have recognized that FDA and other agencies must exercise judgment to decide when "it is more desirable to make a decision based on the currently available information than to wait for more complete data or more confirmation of the existing data."[350] After the FDA rescinded a 1971 warning that canned green beans might contain botulism, Commissioner Charles Edwards defended the agency's decision to warn the public before reaching a definitive conclusion: "In dealing with life or death problems like botulism, there are times when the public interest demands action before the scientific case is complete. The decision always must be made in favor of consumer protection."[351] This stance is consistent with other FDA disclosure and reporting practices, including its adverse event reporting

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visited July 21, 2015).

[341] Cortez, *supra* note 7, at 1413 (this number excludes duplicate press releases issued in foreign languages).

[342] Cortez, *supra* note 7, at 1413.

[343] *Id.* at 1413; Interview with Wayne Pines, *supra* note 224 (noting that a high proportion of FDA press releases announce product approvals).

[344] Cortez, *supra* note 7, at 1413.

[345] *Id.* at 1413-14.

[346] *Id.* at 1414.

[347] *Id.*

[348] *Id.* at 1403.

[349] Interview with Ann Wion, *supra* note 222.

[350] *Fisher Bros.*, 46 F.3d at 287.

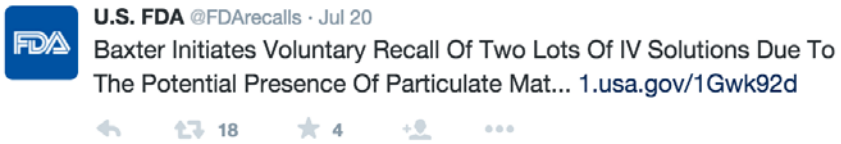
[351] HEW Release No. 71-67 (Nov. 1, 1971); Gellhorn, *supra* note 7, at 1415 n.142; Cortez, *supra* note 7, at 1403.

system, which requires reports of adverse events "associated" with a product even before causation can be established.[352] Today, FDA officials explain that the agency has made great strides improving its ability to investigate the sources of foodborne illnesses, for example, which also improves the agency's confidence in the accuracy of early announcements.[353] In short, the FDA generally engages in significant scientific analyses and review before publicizing problems with products.

Risk communication. Along these same lines, FDA is improving its understanding of how to communicate risk information effectively. The agency has a Risk Communication Advisory Committee that has published guides and strategic plans discussing how best to communicate risks associated with regulated products.[354] Thus, the FDA actively self-reflects on its communications practices.

* * *

Social media. FDA public outreach is prolific, no more so than on social media. In addition to a blog, email alerts, videos, and podcasts, the FDA maintains social media accounts on Facebook, Pinterest, Flickr, YouTube, and Twitter.[355] Currently, the FDA maintains 17 different Twitter accounts, including FDA Drug Information,[356] FDA Food,[357] and FDA Recalls.[358] FDA Recalls and FDA MedWatch identify products and firms in their announcements:



Other FDA Twitter accounts use company-specific information more sparingly. For example, FDA Tobacco includes a string of public health messages,[359] and the FDA Twitter account for medical devices includes a string of notices for new guidance documents and upcoming workshops.[360] The FDA's account on the photo sharing site Flickr includes recalls, with photos of the labels of products being recalled.[361]

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[352] 21 C.F.R. § 314.80; Cortez, *supra* note 7, at 1403.

[353] Interview with Ann Wion, *supra* note 222.

[354] FDA, Risk Communication Advisory Committee, http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/RiskCommunicationAdvisoryCommittee/default.htm (last visited Aug. 5, 2015).

[355] FDA, *Interactive Media*, http://www.fda.gov/NewsEvents/InteractiveMedia/default.htm (last updated Apr. 15, 2015).

[356] FDA, FDA Drug Information, https://twitter.com/FDA_Drug_Info (last visited July 22, 2015).

[357] FDA, FDA Food, https://twitter.com/fdafood (last visited July 22, 2015).

[358] FDA, FDA Recalls, https://twitter.com/FDArecalls (last visited July 22, 2015).

[359] FDA, FDA Tobacco, https://twitter.com/FDArecalls (last visited July 22, 2015).

[360] FDA, FDA/CDRH Industry, https://twitter.com/FDACDRHIndustry (last visited July 22, 2015).

[361] *See, e.g.*, FDA, *Recalled – 0.9% Sodium Chloride Injection, USP; 50mL and 100mL*, https://www.flickr.com/photos/fdaphotos/19837034796/ (July 17, 2015).

HHS social media policies. Social media is handled primarily by the Web and Digital Media Staff within the FDA's Office of External Affairs.[362] As with press releases and other communications, FDA follows HHS guidelines. HHS identifies well over a dozen federal policies that apply to HHS agencies' use of social media, including policies governing internal agency approvals, information security, privacy, and "Linking, Liking, Following, and Endorsement."[363] The policies emphasize that all "official uses of social media must be approved" and that the "decision to use a social media tool (or combination of tools) must be based on a strategic communications plan and must address the commitment of resources necessary to manage and maintain the public engagement."[364] HHS also requires that "[a]ll content posted to third-party sites should also be verifiable through an agency's official site," and "provide a link back to the agency's official site."[365] Finally, HHS urges employees to consider whether "following an organization [on social media] may convey endorsement of the entire entity, while retweeting or reposting content from another entity may only imply endorsement of the content that is being reposted."[366] FDA staff also noted that the GSA guidelines apply to the agency's use of social media.[367] In short, there are many different HHS and government-wide rules and guidelines that apply to FDA social media use.

* * *

FDA databases. The FDA maintains several databases that track problems with products and/or manufacturers. For example, the FDA *Enforcement Report* database displays recalls for all regulated products, including biologics, cosmetics, devices, drugs, food, and veterinary drugs.[368] The FDA Adverse Event Reporting System (FAERS) includes a database of medication errors and adverse drug events reported to the agency.[369] A similar, searchable database exists for medical devices.[370] FDA also maintains a searchable database of inspection result classifications for manufacturing facilities,[371] and a list of people debarred from submitting drug product applications.[372] There are, of

[362] Interview with Heidi Rebello, *supra* note 34; FDA, *Web and Digital Media Staff*, http://www.fda.gov/AboutFDA/CentersOffices/OC/OfficeofExternalAffairs/ucm342971.htm (last visited Aug. 5, 2015).

[363] HHS, *Policies that Apply to Social Media*, http://www.hhs.gov/web/socialmedia/policies/ (last visited Aug. 5, 2015).

[364] *Id*.

[365] *Id*.

[366] *Id*.

[367] Interview with Heidi Rebello, *supra* note 34; GSA, DigitalGov, *supra* note 11.

[368] FDA, *Enforcement Reports*, http://www.fda.gov/Safety/Recalls/EnforcementReports/default.htm (last visited July 22, 2015). Although reports are separated by week, users can search the entire database, dating back to 2004.

[369] FDA, *FDA Adverse Event Reporting System (FAERS)*, http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Surveillance/AdverseDrugEffects/default.htm (last visited July 22, 2015).

[370] FDA, *MAUDE – Manufacturer and User Facility Device Experience*, https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfmaude/search.cfm (last visited July 22, 2015).

[371] FDA, *Inspection Classification Database Search*, http://www.accessdata.fda.gov/scripts/inspsearch/ (last visited July 22, 2015).

[372] FDA, *FDA Debarment List (Drug Product Applications)*, http://www.accessdata.fda.gov/scripts/inspsearch/ (last visited July 22, 2015).

course, databases that do not necessarily focus on the negative. For example, the FDA maintains searchable databases of product approvals. Other representative FDA databases are included in Appendix E.[373] FDA officials explain that some of these databases include information that must be published by statute.[374]

Open FDA. The FDA is beginning to publish these and other databases in more user-friendly formats on its Open FDA site.[375] Currently, Open FDA has separate pages for drugs, devices, and food. All three include an *Enforcement Reports* database.[376] The drug and device sites also include adverse event databases.[377] Open FDA publishes both individual reports and trend analyses. For example, it noted that as of July 2015, the adverse drug event database contained nearly five million reports since 2004, with an interactive chart showing the number per year.[378] To former FDA officials, these "open data" initiatives are nothing new to the FDA,[379] which has maintained an adverse event database in some form since 1967,[380] and has probably published it online for nearly two decades. A former official explains that the new "Open FDA" initiative[381] takes for granted that FOIA long ago "opened the FDA."[382] Current FDA officials emphasize that the agency is trying to make public information that could be subject to FOIA requests, or otherwise are required to be published by statute.[383]

Disclaimers. Some of the FDA's online databases include noteworthy disclaimers about the accuracy and reliability of the data. For example, FDA publishes a large database of reports from hospitals, manufacturers, and others who suspect that a medical device may have caused or contributed to death or serious injury. Below the search fields are several disclaimers, including the following two:

> Although [Medical Device Reports] are a valuable source of information, this passive surveillance system has limitations, including the potential submission of incomplete, inaccurate, untimely, unverified, or biased data. In addition, the incidence or prevalence of an event cannot be determined from this reporting system alone due to potential under-reporting of events and lack of information about frequency of device use.
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> * * *
>
> Confirming whether a device actually caused a specific event can be difficult based solely on information provided in a given report. Establishing a cause-and-effect

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[373] This site also includes searchable product databases. FDA, *For Industry: Search Databases*, http://www.fda.gov/ForIndustry/FDABasicsforIndustry/ucm234631.htm (last updated Apr. 13, 2015).

[374] Interview with Jarilyn Dupont, *supra* note 286.

[375] FDA, *Open FDA*, https://open.fda.gov/ (last visited July 23, 2015).

[376] *Id*.

[377] *Id*.

[378] FDA, *Adverse Drug Event Reports Since 2004*, OPEN FDA, https://open.fda.gov/drug/event/ (last visited July 22, 2015).

[379] Interview with Peter Barton Hutt, *supra* note 237.

[380] Dr. David Gortler, *Adverse Event Database (AERS Database)*, http://faculty.georgetown.edu/dg298/adverse-event-database.html (last visited July 22, 2015).

[381] FDA, *Open FDA*, https://open.fda.gov/ (last visited July 22, 2015).

[382] Interview with Peter Barton Hutt, *supra* note 237.

[383] Interview with Mark Raza, *supra* note 293.

> relationship is especially difficult if circumstances surrounding the event have not been verified or if the device in question has not been directly evaluated.[384]

Similarly, the FDA's adverse drug event database notes that the "data does have limitations":

> First, there is no certainty that the reported event (adverse event or medication error) was actually due to the product. FDA does not require that a causal relationship between a product and event be proven, and reports do not always contain enough detail to properly evaluate an event. Further, FDA does not receive reports for every adverse event or medication error that occurs with a product. Many factors can influence whether or not an event will be reported, such as the time a product has been marketed and publicity about an event. Therefore, FAERS data cannot be used to calculate the incidence of an adverse event or medication error in the U.S. population.[385]

Thus, the FDA seems to appreciate the value of providing context for negative data. It is less clear whether public audiences read or appreciate the FDA's disclaimers. However, FDA officials do reiterate these caveats to reporters who use these databases to write stories, and work with reporters to help them understand the nature of the data.[386] FDA officials cited significant interest by the media and other groups in adverse events associated with childhood vaccines.[387] FDA staff spent extensive time and resources in the 1990s explaining the nature of the information posted in its adverse event databases, including basic concepts like numerators and denominators and what kinds of conclusions could fairly be drawn from the data.[388]

Objections to FDA databases are rare. FDA officials could not recall instances in which manufacturers objected to information published in one of its databases.[389] Perhaps this is because the FDA regularly posts physician labeling for each product online shortly after the agency approves the product.[390] The approved physician labeling includes a significant amount of negative information uncovered from extensive clinical testing, including specific warnings, precautions, and adverse reactions (which often include data related to deaths and other serious complications).[391] Thus, adverse events posted in the FDA's online databases may replicate dangers and deaths that are forecasted in the approved labeling already published online.

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[384] FDA, *MAUDE – Manufacturer and User Facility Device Experience*, https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfmaude/search.cfm#disclaimer (last visited July 23, 2015).

[385] FDA, *FAERS*, *supra* note 369.

[386] Interview with Heidi Rebello, *supra* note 34.

[387] Interview with Mark Raza, *supra* note 293.

[388] *Id*.

[389] Interview with Ann Wion, Mark Raza, and Heidi Rebello, *supra* notes 222, 293, 34.

[390] Interview with Ann Wion and Heidi Rebello, *supra* notes 222, 34.

[391] *See* 21 C.F.R. §§ 201.56, 201.57.

Best practices. FDA officials are in favor of the Conference's identifying best practices.[392] They stress that the FDA prides itself on maintaining good procedures and ensuring that employees know and understand these procedures.[393] The agency takes a very "intentional approach" to its internal procedures.[394] Ann Wion, Senior Advisor to the Chief Counsel, noted that without such procedures, agencies may be more likely to make mistakes in issuing publicity; having procedures in place does not completely eliminate mistakes, but makes them less likely.[395] Former FDA officials seem to agree. The former Associate Commissioner for Public Affairs supports the Conference's recommending that agencies adopt written policies governing their publicity practices.[396] He explained that, after leaving the agency, he thought it would be worthwhile for FDA to develop a rule or guidance on its publicity practices.[397] However, he cautioned that such a document must be formulated properly, noting that it can be difficult to commit agency practices to writing.[398] Like other agency officials, he also cautioned that any written policy would have to define practices and procedures broadly.[399] Highly-specific requirements might be difficult to follow, might unnecessarily constrain the agency, and would require numerous exceptions.[400] Unforeseen circumstances will always arise.[401] He suggested that recommendations express broad statements of principles rather than technical details.[402] More importantly, if the agency does adopt written policies, it should take care to train officials on the policy and ensure that they understand the power of publicity to affect companies and products.[403] These lessons are not necessarily passed down from generation to generation at the agency, and each new generation should not have to re-learn these lessons anew.[404] My interview with Heidi Rebello suggests that the FDA currently meets many of these recommendations.[405]

Information Quality Act. The FDA adopted its own information quality guidelines,[406] and is also subject to those of HHS and OMB.[407] Like many other agencies, both FDA and

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[392] Interview with Ann Wion, *supra* note 222.
[393] *Id.*
[394] *Id.*
[395] *Id.*
[396] Interview with Wayne Pines, *supra* note 224.
[397] *Id.*
[398] *Id.*
[399] *Id.*
[400] *Id.*
[401] *Id.*
[402] *Id.*
[403] *Id.*
[404] *Id.*
[405] Interview with Heidi Rebello, *supra* note 34.
[406] HHS, Office of the Assistant Secretary for Planning and Evaluation (ASPE), HHS Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated to the Public (Oct. 1, 2002), http://aspe.hhs.gov/report/hhs-guidelines-ensuring-and-maximizing-quality-objectivity-utility-and-integrity-information-disseminated-public/f-food-and-drug-administration.
[407] HHS, HHS Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated to the Public, http://aspe.hhs.gov/report/hhs-guidelines-ensuring-and-maximizing-quality-objectivity-utility-and-integrity-information-disseminated-public. FDA also maintains its own standards for peer review of scientific information. See FDA, Peer Review of Scientific Information and Assessments,

HHS guidelines narrow the OMB's exemption for press releases. FDA exempts press releases "unless they contain new substantive information not covered by previous information dissemination," and HHS guidelines "do not apply to … press releases that support the announcement or give public notice of information that the agency disseminates elsewhere."[408] Although the HHS guidelines do not explicitly state that press releases are exempt only if they include new information not covered by the IQA, that seems to be the intent of the exemption. Also, like some other agencies, HHS exempts "opinions, when the agency's presentation makes clear that what is disseminated is someone's opinion rather than fact or agency views."[409] This language might reasonably be construed as exempting the FDA's adverse event databases, which include reports from patients, physicians, facilities, and other users. HHS guidelines emphasize that disseminating timely and accurate information to the public "is a critical component of the missions of many HHS programs," and thus HHS and its agencies play "a major role in information dissemination."[410] HHS guidelines, more than most, emphasize these core functions and explicitly retain discretion to protect public health, particularly during emergencies.[411] FDA guidelines also emphasize that the agency "may need to disseminate information without fully applying the principles for assuring the quality, objectivity, utility, and integrity of the information" disseminated, particularly in public health emergencies.[412]

IQA litigation. Recently, the FDA and HHS were sued to correct a 2001 statement to the Drug Enforcement Administration (DEA) that marijuana had no accepted medical uses—a highly contested assertion that is periodically reconsidered by the agencies. The plaintiffs, Americans for Safe Access, petitioned HHS in 2004 to correct its public statements to this effect. In 2007, a district court granted the agencies' motion to dismiss on the grounds that the IQA does not provide judicial review.[413] In 2010, the 9th Circuit affirmed the decision, finding that both courts lacked jurisdiction because the failure of HHS to respond immediately to the petition did not constitute final agency action (the issue had been pending in a rulemaking petition).[414]

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http://www.fda.gov/ScienceResearch/SpecialTopics/PeerReviewofScientificInformationandAssessments/default.htm (page last updated July 17, 2015).

[408] HHS Guidelines, *supra* notes 407, at § 3; FDA Guidelines, *supra* note 406, at Part II.

[409] HHS Guidelines, *supra* note 407, at § 3.

[410] *Id.* at § 4.b.

[411] *Id.* at § 4.h. ("Several HHS agencies are responsible for dissemination of authoritative health, medical and safety information on a real time basis in order to protect the health of the public against urgent and emerging threats. Accordingly, nothing in these guidelines relating to reproducibility or peer review shall be construed to limit or delay the timely flow of vital information from agencies to medical providers, patients, health agencies, and the public. HHS reserves the right to waive information quality standards temporarily for agencies addressing urgent situations (*e.g.*, imminent threats to public health or homeland security) in accordance with the latitude described in both the OMB and agency specific guidelines.").

[412] FDA Guidelines, *supra* note 406, at Part VIII.

[413] Americans for Safe Access v. HHS, 2007 WL 2141289, at *3 (N.D. Cal. 2007). The court granted plaintiffs leave to amend their complaint because HHS and FDA did not respond to their IQA petition in a timely manner. *See also* Americans for Safe Access v. HHS, 2007 WL 4168511 (N.D. Cal. 2007).

[414] Americans for Safe Access v. HHS, 399 Fed. Appx. 314 (9th Cir. 2010).

Ombudsman. Like other agencies, the FDA has an Office of the Ombudsman, housed within the Office of Scientific Integrity.[415] But perhaps unlike other agencies, FDA also has ombudsmen in five of its six product centers.[416] If the center ombudsmen cannot resolve a problem, it will be escalated to the main Office of the Ombudsman.[417] The FDA Office of the Ombudsman helps coordinate complaints under the IQA,[418] and the various FDA ombudsman offices do handle complaints about FDA publicity. Most offices report that they receive one or two such complaints per year.

Corrections. FDA officials explain that parties should have an opportunity to request corrections from FDA or otherwise express their objections to FDA publicity.[419] However, they believe informal discussion would be more effective than formal requests, such as filing a Citizens Petition.[420] Jarilyn Dupont, Director of Regulatory Policy, explained that an FDA press release usually occurs at the end of a long process and after "hours of meetings" with the company; it is not the initial contact.[421] Thus, FDA press releases rarely will be a surprise to companies, and companies will have several points of contact if they do have complaints. The Office of Media Affairs does field objections regarding press announcements, but these are rare.[422]

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[415] FDA, *The FDA Ombudsman*, http://www.fda.gov/AboutFDA/CentersOffices/OC/OfficeofScientificandMedicalPrograms/ucm197508.htm (last updated Apr. 16, 2015).

[416] FDA, *Product Center Ombudsmen*, http://www.fda.gov/AboutFDA/CentersOffices/OC/OfficeofScientificandMedicalPrograms/ucm2005612.htm (last updated Mar. 18, 2015). Only the FDA's Center for Food Safety and Applied Nutrition (CFSAN) lacks its own product center ombudsman.

[417] *Id.*

[418] FDA, *FDA's Office of the Ombudsman: Dispute Resolution and Problem Solving*, at 2, http://www.fda.gov/downloads/aboutfda/centersoffices/oc/officeofscientificandmedicalprograms/ucm164330.pdf (last visited July 22, 2015).

[419] Interview with Ann Wion, *supra* note 222.

[420] *Id.*

[421] Interview with Jarilyn Dupont, *supra* note 286.

[422] Interview with Heidi Rebello, *supra* note 34.

B. U.S. Federal Trade Commission (FTC)

The FTC is worth examining for a few reasons. First, it was a focus of Professor Gellhorn's report that formed the basis for Recommendation 73-1. Gellhorn praised the FTC for having "the most sophisticated publicity policies and practices of the regulatory and executive agencies examined."[423] By 1973, not only had the D.C. Circuit upheld the FTC's practices,[424] but the Commission had already articulated its policies "in continually evolving agency rules, manuals, and guidebooks."[425] Thus, it is worth reexamining whether the FTC remains a useful model for other agencies. Second, as a classic enforcement agency, the FTC's approach to publicizing investigations, complaints, and settlements is worth revisiting, as is its use of social media. Finally, the Commission's database practices are worth examining. The FTC maintains the Consumer Sentinel Network ("Sentinel"), a massive, nonpublic database of consumer complaints made available to law enforcement organizations.[426] The Commission resists open-ended requests to publicly disclose complaints in Sentinel,[427] but makes discrete disclosures in response to particularized FOIA requests. In this part I examine the FTC's publicity practices, database practices, social media practices, and potential reforms.

Statutory authority. Like other agencies, the FTC can make a strong case that it has broad, implicit statutory authority—and perhaps even explicit authority—to issue publicity.[428] Section 46(f) of the FTC Act authorizes the Commission "[t]o make public from time to time such portions of the information obtained by it … as are in the public interest" and "to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use."[429] Long ago the D.C. Circuit interpreted this language as authorizing the FTC "to alert the public of suspected violations of the law by factual press release," noting that "Congress obviously has been long aware of and acquiesced in the Commission's press release procedures."[430] More recently, district courts have interpreted this language as "explicitly authoriz[ing] the FTC to make news releases."[431]

Benefits of publicity. The FTC's public information policies are based on the premise that the public has a "right to know what the Commission is doing, tempered by the

[423] Gellhorn, *supra* note 7, at 1388.

[424] FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308, 1309 (D.C. Cir. 1968) (refusing to grant review of an FTC news release announcing that the Commission had "reason to believe" that several companies were engaged in unfair and deceptive trade practices).

[425] Gellhorn, *supra* note 7, at 1388; Cortez, *supra* note 7, at 1416.

[426] FTC, Consumer Sentinel Network, https://www.ftc.gov/enforcement/consumer-sentinel-network (last visited July 6, 2015).

[427] Complaint, Ayuda, Inc. v. Fed. Trade Comm'n, No. 1:13 Civ. 1266 (D.D.C. filed Aug. 20, 2013).

[428] Cortez, *supra* note 7, at 1416.

[429] 15 U.S.C. § 46(f)

[430] *Cinderella*, 404 F.2d at 1314. *See also*, Bristol-Myers Co. v. FTC, 424 F.2d 935, 940 (D.C. Cir. 1970), in which the D.C. Circuit found that the FTC "is specifically authorized by statute to publicize information acquired by it"; Indus. Safety Equip. Ass'n v. EPA, 837 F.2d 1115, 1119 (D.C. Cir. 1988).

[431] FTC v. Freecom Communications, 966 F. Supp. 1066, 1067 (D. Utah 1997); Trudeau v. FTC, 384 F. Supp. 2d 281, 290-91 (D.D.C. 2005) (citing *Cinderella* and *Bristol-Myers*).

parameters established by the FTC Act and the Commission's Rules."[432] FTC officials also emphasize that the Commission is not only a law enforcement agency, but also conducts consumer education and outreach.[433] Thus, warning consumers of unfair or deceptive business practices is a core function of the Commission—one long intended by Congress and recognized by courts. In *FTC v. Cinderella Career & Finishing Schools, Inc.*, the D.C. Circuit explained:

> If the unsophisticated consumer is to be protected in any measure from deceptive or unfair practices, it is essential that he be informed in some manner as to the identity of those most likely to prey upon him… Certainly advice through news media as to actions being taken by a government agency in his behalf constitutes a prophylactic step….[434]

The FTC's Office of Public Affairs (OPA) drafts press releases to be understandable to ordinary consumers and works with journalists to explain complex Commission actions.[435] The director of OPA emphasized that his office wants the public to clearly understand the Commission's work.[436]

Operating Manual. Gellhorn applauded the FTC's *Public Information Policy Guidebook*, published in 1972,[437] as being "both sensible and sensitive," revealing "a thoughtful attempt to balance administrative efficiency, the public's need for warning, and private interests."[438] Now, the Commission articulates some of its policies in an *Operating Manual*, published online.[439] The *Manual* addresses "news releases" in various chapters, but focuses on them in Chapter 17 (Public Information and Education). The section on news releases is brief:

> News releases are issued to inform the public of actions taken by the Commission, such as the issuance of complaints, decisions and orders, acceptance of consent agreements, promulgation of trade regulation rules, and other significant actions. When a memorandum recommending such action is forwarded to the Commission, a copy will also be circulated to OPA. That Office will, after consultation with staff and review by the appropriate Bureau Director, Office Head, or designee, prepare a news release appropriate to the Commission action, not necessarily the staff recommendation.[440]

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[432] FTC Operating Manual (Release 14-01), at Ch. 17.2.1.

[433] Interview with officials from the FTC Office of General Counsel, *supra* note 16.

[434] *See, e.g.*, *Cinderella Career & Finishing Schools*, *supra* note 30, at 1314.

[435] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.

[436] *Id.*

[437] ACUS maintains on file a version of the FTC's *Public Information Policy Guidebook* updated in 1975. However, only two pages of the policy are included (pages 14-15), and the document seems to be incomplete.

[438] Gellhorn, *supra* note 7, at 1388; Cortez, *supra* note 7, at 1416.

[439] *See* FTC, FTC Administrative Staff Manuals, https://www.ftc.gov/about-ftc/foia/foia-resources/ftc-administrative-staff-manuals.

[440] FTC OPERATING MANUAL, *supra* note 432, at Ch. 17.2.2.

Limited use of Operating Manual. Although my interview with FTC officials suggests that the Commission roughly follows the procedures above, officials emphasize that other sections of the *Operating Manual* are outdated in parts and may not be closely followed at all times.[441] They describe the *Manual* as a "framework" for staff rather than a "step-by-step guide" on how to do something.[442] In fact, many FTC staff may not have looked at the *Manual* recently, as they are aware that more updated procedures may be available elsewhere.[443] It was written in the late 1970s, and some parts have not been updated since then.[444] However, Chapter 17, which focuses on news releases, was updated in 2014; at that time and periodically since then, the Commission has reminded its staff about the FTC press policy.[445] In addition, OPA has a small staff and all of them are familiar with the *Manual* and the press policy.[446] OPA placed an emphasis on having the press releases be "accurate" and "fair."[447]

Press release practices. The OPA director described Commission practices for issuing press releases. When drafting a press release related to an enforcement action, for example, OPA will receive supporting documents from the Commission's litigating team, and will draft a one- to two-page press release based on these documents.[448] If the press release announces the initiation of a law enforcement proceeding, OPA explains the nature of the Commission's action and makes clear that the complaint involves allegations and not proven violations. OPA will try to use plain language to explain the Commission action being announced.[449] OPA sends a first draft to the litigation staff, who will review for accuracy.[450] This back-and-forth editing process continues until relevant Commission staff are satisfied with the language of the release.[451] FTC officials could not recall disagreements between staff; the drafting and vetting process eventually produces a consensus.[452] If there were a disagreement, OPA and the Chairwoman both have "final say."[453] The process can be quite simple or quite prolonged depending on the case.[454] All press releases deal with public actions taken by the Commission through a vote, the announcement of a public event held by the agency, or other Commission activities.[455] Then OPA will send the press release to the Chairwoman for approval, and once approved, will post it publicly.[456] The OPA director emphasized that "the system has checks and balances" to ensure the content of announcements is accurate.[457] Officials

[441] Interview with officials from the FTC Office of General Counsel, *supra* note 16.
[442] *Id.*
[443] *Id.*
[444] *Id.*
[445] *Id.*
[446] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.
[447] *Id.*
[448] *Id.*
[449] *Id.*
[450] *Id.*
[451] *Id.*
[452] Interview with officials from the FTC Office of General Counsel, *supra* note 16.
[453] *Id.*
[454] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.
[455] *Id.*
[456] *Id.*
[457] *Id.*

in the Office of General Counsel explained that the published press release is based closely on the public documents such as a complaint or settlement document, and that the web version of the announcement will link to the original documents, supplemental documents, and any Commissioners' statements as well.[458] Officials in the Office of General Counsel added that the press release would contain "no new information" outside the public documents.[459] Sometimes, FTC bureau directors or the Chairwoman are quoted in press releases.[460] Litigation staff rarely are quoted.[461]

Investigations. FTC investigations are nonpublic unless otherwise directed by the Commission.[462] Thus, according to the *Manual*, the existence of the investigation, the identity of the parties, the facts, and any other nonpublic information "can be disclosed only in accordance with the Commission's directive and procedures."[463] Those procedures, described in the *Manual*, state that "the Commission may issue a news release announcing a nonpublic industrywide investigation or an investigation of practices involving a risk to public health or safety or a significant risk of economic harm."[464] The Commission may also announce "public investigations."[465] However, FTC officials explained that references to "public investigations"[466] are dated, and refer to a time decades ago when the Commission initiated large rulemaking proceedings and announced fact-gathering investigations.[467] The officials explained that the Commission no longer conducts "public" investigations.[468] Nevertheless, the *Manual* cites the risk of "premature adverse publicity"[469] and seems sensitive to longstanding concerns with publicizing investigations. Later, the *Manual* dictates that "Staff should not initiate media contacts about investigations or other non-public law enforcement matters under any circumstances" and "should not respond to any press inquiry" about non-public enforcement matters without first notifying OPA to get clearance.[470] FTC officials were not aware of the FTC's ever publicizing investigations, explaining that the Commission's blanket policy is "very careful" not to disclose them.[471] It is probably important, however, that the *Manual* includes language to allow the Commission to announce investigations when there is a significant risk to public health or economic harm.[472]

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[458] Interview with officials from the FTC Office of General Counsel, *supra* note 16.
[459] *Id*.
[460] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.
[461] *Id*.
[462] FTC OPERATING MANUAL, *supra* note 432, at Ch. 3.1.2.3.
[463] *Id.* at Ch. 3.1.2.3.
[464] *Id.* at Ch. 3.3.3.1.
[465] *Id.* at Ch. 3.3.3.2.
[466] *Id*.
[467] Interview with officials from the FTC Office of General Counsel, *supra* note 16.
[468] *Id*.
[469] FTC OPERATING MANUAL, *supra* note 432, at Ch. 3.3.3.1.
[470] *Id.* at Ch. 17.2.5.
[471] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.
[472] FTC OPERATING MANUAL, *supra* note 432, at Ch. 3.3.3.1. The *Manual* also permits the Commission to issue a news release announcing closure of an investigation when directed by the Commission, particularly when a news release announced the investigation. *Id.* at Ch. 3.3.7.4.6.

No publicity absent enforcement action. FTC officials explained that the Commission does not identify companies or individuals in press releases absent an enforcement action.[473] The FTC may broadly warn consumers about a specific practice (for example, alerting consumers to donation scams shortly after a natural disaster), but will publish these as "consumer alerts" or "scam alerts" rather than press releases.[474] When it publishes these alerts, the Commission will not name specific firms or individuals.[475]

Timing press releases. Depending on the specific circumstances of the case, the Commission occasionally will time press releases to minimize capital market reactions.[476] Most press releases are issued during business hours.[477] FTC officials explained that with global capital markets and after-hours trading, it would be difficult to avoid at least some capital market reactions.[478] The Commission times press releases to coincide with Commission votes and court filings, and takes care to issue the press release only after the filing or the votes are public.[479] Sometimes the subject of an enforcement action will ask to see the Commission's press release in advance, but the FTC declines such requests.[480]

Corrections or retractions. FTC officials explain that the subjects of press releases do not necessarily want or need to request corrections or retractions.[481] Commission staff, including bureau directors, will often meet with the subject prior to filing a complaint, and the subject will be aware of any ongoing investigation.[482] Thus, by the time the Commission publishes a press release, the subject will have several points of contact within the agency if they do object.[483]

Litigation against the FTC. Despite the FTC's sensitivity to concerns with adverse publicity, it is one of the most frequently sued agencies.[484] The Commission has been sued four times since 1974.[485] However, courts uniformly reject challenges that the Commission is violating its statutory authority or acting *ultra vires*.[486] Moreover, in the few instances in which parties have charged the FTC with violating its own publicity policies, courts have rejected these challenges without much discussion.[487] Aside from the occasional lawsuit, FTC officials could not recall any instances in which the subject

[473] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.
[474] *Id*.
[475] *Id*.
[476] *Id*.
[477] *Id*.
[478] *Id*.
[479] Interview with officials from the FTC Office of General Counsel, *supra* note 16.
[480] *Id*.
[481] *Id*.
[482] *Id*. (noting an exception for fraud cases, in which the FTC must act quickly).
[483] *Id*.
[484] *See* Appendix C, *infra*; Cortez, *supra* note 7, at 1417.
[485] Appendix C, *infra*.
[486] Cortez, *supra* note 7, at 1417.
[487] *Id*. (citing FTC v. Magui Publishers, Inc., No. CV 89-3818-RSWL, 1990 WL 132719 at *1-2 (C.D. Cal. 1990) (rejecting a claim that the FTC violated its Operating Manual, § 17.2.5).

of an FTC press release objected to it.[488] The last objection was by Kevin Trudeau a decade ago.[489]

Trudeau v. FTC. The D.C. Circuit has addressed FTC publicity practices from time to time over the last five decades.[490] The latest opportunity was in *Trudeau v. FTC*, a case involving the Commission's longstanding dispute with an infomercial marketer.[491] The Commission had filed several complaints against Trudeau for marketing sham treatments for a variety of health conditions, including obesity and cancer.[492] Five days after a court entered a final order prohibiting Trudeau from participating in infomercials, the FTC described the order in a press release on its web site.[493]

Trudeau sued the Commission after it refused to remove the press release from its site, arguing that the announcement mischaracterized the settlement and retaliated against him for criticizing the FTC, in violation of both the APA and section 46(f) of the FTC Act.[494] The press release was titled "Kevin Trudeau Banned from Infomercials" and quoted an FTC official who said that Trudeau had "misled American consumers for years" and was a "habitual false advertiser."[495] Trudeau's objections were numerous—he objected to what he deemed to be inaccurate media reports based on the press release, objected that the FTC's announcement was the second result on Google searches for his name, and claimed that the announcement damaged his ability to contract with vendors, citing a contract rescinded by Ed McMahon.[496]

Both the D.C. district and circuit courts engaged in lengthy analyses of the merits, focusing on whether the FTC's press release was reviewable as "final agency action" under the APA and whether the APA provided a cause of action. The District Court granted the FTC's motion to dismiss on both grounds,[497] which the D.C. Circuit largely upheld.[498] Although the D.C. Circuit acknowledged that agency publicity may constitute "final agency action" in certain circumstances—notably, when the announcement is false or misleading, or when it is intended as a sanction—it found that this was not such a case, and noted that the D.C. Circuit had never encountered such a case.[499] Trudeau presented no evidence that the FTC's press release was false or misleading.[500] The court evaluated

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[488] Interview with officials from the FTC Office of Public Affairs and FTC Office of General Counsel, *supra* notes 34, 16.

[489] Interview with officials from the FTC Office of General Counsel, *supra* note 16.

[490] *See, e.g.*, FTC v. Cinderella Career and Finishing Schools, Inc., 404 F.2d 1308 (1968).

[491] Trudeau v. FTC, 384 F. Supp. 2d 281 (D.D.C. 2005), *aff'd*, 456 F.3d 178 (D.C. Cir. 2006).

[492] *Trudeau*, 456 F.3d at 180.

[493] *Trudeau*, 384 F. Supp. 2d at 284-85.

[494] *Id*. at 282-83.

[495] *Id*. at 285; *Trudeau*, 456 F.3d at 195.

[496] *Trudeau*, 384 F. Supp. 2d at 285-86; *Trudeau*, 456 F.3d at 196.

[497] *Trudeau*, 384 F. Supp. 2d at 288-90.

[498] *Trudeau*, 456 F.3d at 183-87. Note that the D.C. Circuit disagreed with the District Court's conclusion that it lacked jurisdiction because the press release was not "final agency action" under APA § 704, explaining that a lack of "final agency action" would not cost federal courts their jurisdiction but would prevent the plaintiff from asserting a cause of action under APA § 704. *Id.* at 183-87.

[499] *Id.* at 188-97.

[500] *Id.* at 191-97.

each of Trudeau's objections, parsing the language that the FTC used versus the language Trudeau wanted the FTC to use. The court found that "no reasonable person could misinterpret the press release in the ways that Trudeau suggests."[501] The D.C. Circuit concluded: "In the end, … it comes down to whether Trudeau has the right to take a red pencil to the language of the FTC's press release. He does not."

Thus, although the FTC has had to defend its publicity practices more than most agencies, such challenges remain relatively infrequent and uniformly unsuccessful.

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Consumer Sentinel Network. The FTC also maintains the Consumer Sentinel Network, a secure, nonpublic database of over 10 million consumer complaints,[502] accessible by roughly 1,000 different federal, state, local, and international law enforcement bodies.[503] Sentinel receives complaints from roughly 40 different law enforcement agencies and by certain nongovernmental organizations like the Better Business Bureau.[504] Federal agencies like the CFPB and the FBI's Internet Crime Complaint Center also feed it complaints.[505] The FTC has long been a repository for consumer complaints, and in 1997 the Commission created Sentinel to track complaints of fraud and identity theft.[506] Now, the FTC sorts complaints into 30 different categories, including identity theft, debt collection, telephone and mobile services, and many others.[507] The Sentinel network includes three different databases—one for identity theft complaints, one for complaints about the Do Not Call Registry, and a large database for fraud and other consumer complaints.[508]

Uses. Sentinel is an enforcement tool for the FTC and other agencies. For example, FTC enforcement staff will query Sentinel to uncover complaint trends in different product or service categories, or to research complaints against an existing enforcement target.[509] The Commission publishes aggregate data from Sentinel, organized by product code or service code, but does not publish information concerning specific firms or

[501] *Id.* at 196-97.

[502] The FTC has a five-year data retention policy, and so purges older complaints. Thus, aggregate complaint data does not include complaints received from 2001 to 2009. *See* FTC, DATA BOOK, *infra* note 503, at 5 n.1. The total number of complaints in Sentinel, including older complaints, is estimated to be over 20 million. *See* Interview with officials from the FTC Office of General Counsel, *supra* note 16.

[503] FTC, Consumer Sentinel Network, https://www.ftc.gov/enforcement/consumer-sentinel-network; FTC, CONSUMER SENTINEL NETWORK DATA BOOK FOR JANUARY – DECEMBER 2014 (Feb. 2015), https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2014/sentinel-cy2014-1.pdf (last visited July 9, 2015); Interview with officials from the FTC Office of General Counsel, *supra* note 16.

[504] FTC, DATA BOOK, *supra* note 503, at 2; Interview with officials from the FTC Office of General Counsel, *supra* note 16.

[505] FTC, DATA BOOK, *supra* note 503, at 2.

[506] Interview with officials from the FTC Office of General Counsel, *supra* note 16; FTC, DATA BOOK, *supra* note 503, at 2.

[507] FTC, DATA BOOK, *supra* note 503, at 6 (listing 30 complaint categories by volume).

[508] Ayuda, Inc. v. FTC, 2014 WL 4829574 at *1 (D.D.C. 2014).

[509] Interview with officials from the FTC Office of General Counsel, *supra* note 16.

individuals.[510] The annual *Consumer Sentinel Network Data Book* does not seem to name companies.[511] As such, FTC officials report that companies do not object to being included in Sentinel, and the Commission does not share information with companies who are the subject of complaints, except to the extent they might request the information via FOIA.[512]

Unverified complaints. The FTC explains that Sentinel "is based on unverified complaints reported by consumers" and "is not based on a consumer survey."[513] The Commission does not verify complaints.[514] If the Commission does initiate an enforcement action, it might use data from Sentinel to gather facts or seek affidavits.[515] But entries in Sentinel are simply data points and do not form the major basis for FTC complaints.[516] FTC officials do recommend that any agencies considering establishing their own complaint databases use quality controls to ensure the accuracy of the complaint intake process by outside contractors.[517] FTC officials also recommend that agencies effectively manage consumer expectations and make clear that the agency will not necessarily act on individual complaints.[518]

Nonpublic database. As a nonpublic, inward-facing database, Sentinel should be distinguished from public-facing counterparts like the CFPB's Consumer Complaint Database.[519] As such, the FTC generally opposes open-ended requests to publish information in Sentinel.[520] Any disclosure by the Commission is passive, again contrary to public databases that actively disclose information about identified firms or individuals. The FTC only affirmatively discloses information in Sentinel in very broad, aggregated formats. Individual complaints are only disclosed in response to particularized FOIA requests.[521] After the Commission created Sentinel in the late 1990s, it considered at length what information might have to be disclosed under FOIA.[522] Although FOIA exempts "investigatory records compiled for law enforcement purposes,"[523] the Commission determined that there was no basis for withholding Sentinel complaints except when the Commission could show that a particular disclosure was going to impede an investigation in some non-conjectural fashion, or when another FOIA

[510] *Id.*; FTC, DATA BOOK, *supra* note 503.
[511] *See, e.g.*, FTC, DATA BOOK, *supra* note 503.
[512] Interview with officials from the FTC Office of General Counsel, *supra* note 16.
[513] FTC, DATA BOOK, *supra* note 503, at 2.
[514] Interview with officials from the FTC Office of General Counsel, *supra* note 16.
[515] *Id.*
[516] *Id.*
[517] *Id.*
[518] *Id.*
[519] *See*, CFPB, Part IV.C. *infra*.
[520] FTC officials have noted that open-ended disclosures would require substantial expenditures of limited agency resources.
[521] Interview with officials from the FTC Office of General Counsel, *supra* note 16.
[522] *Id.*
[523] FTC, FOIA Exemptions, https://www.ftc.gov/about-ftc/foia/exemptions (Exemption 7). The Commission indicates in its annual FOIA reports that it also denies FOIA requests for complaints under Exemption 6 (personal privacy). *See* FTC, Freedom of Information Act Annual Report, Fiscal Year 2014 (Oct. 1, 2013 – Sep. 30, 2014), at 3, https://www.ftc.gov/system/files/documents/reports/foia-report-fy14/2014r-fo.pdf.

exemption applied.[524] FTC officials estimate that the Commission receives roughly 1,400 FOIA requests every year, and that requests for information in Sentinel are "some measurable percentage."[525] Officials report that when the Commission does disclose information from Sentinel, it is much easier to release auto-filled fields in complaints than free-form fields that require individual review.[526] The Commission's main concern is releasing consumers' personal information.[527]

Ayuda v. FTC. By and large, the FTC has not been asked to make Sentinel broadly available to the public.[528] One exception was a request by several non-profit groups, including Ayuda and Catholic Charities, which submitted several FOIA requests for data about all the complaints in Sentinel, including company names, contact information, and consumers' comments.[529] The FTC's FOIA Unit initially denied the request due to the burden of individually reviewing millions of complaints and redacting personal information.[530] After an administrative appeal, the Commission granted access to the data fields that could be released without individual review because they do not elicit free-form responses (except ZIP code fields), but denied their request for all free-form fields—including company name and contact information—because they must be reviewed to identify and redact personal information that is exempt from disclosure under FOIA.[531] The FTC's FOIA Unit also denied access to company names and contact information.[532]

Ayuda's lawsuit argued that the subjects of the complaints in Sentinel do not have any privacy interest in the accusations against them. But the D.C. District Court held for the Commission on summary judgment on this issue, noting that "individuals accused of wrongdoing also have a substantial privacy interest in their names and addresses not being disclosed" because the "database contains allegations of illegal conduct, and there is no filter for weeding out the legitimate complaints from those completely lacking in a factual or legal basis."[533] The court also emphasized the reputational and privacy implications of being included in a government enforcement database:

> [B]y having one's personal information included in a complaint, that person is both accused of an illegal activity and associated with a federal agency's crime enforcement effort. *Cf. Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 485 F. Supp. 1, 6 (D.D.C. 1978) ("An individual does not lose his right to privacy simply because he has been investigated and subsequently not charged with any offense. Indeed, such an individual may require even greater protection, especially where … the mere connection of an individual's name with

[524] Interview with officials from the FTC Office of General Counsel, *supra* note 16.
[525] *Id.* at 9. Note that the FTC's annual FOIA report does not indicate what percentage of FOIA requests seek Sentinel information. FTC, FOIA Annual Report, *supra* note 523.
[526] Interview with officials from the FTC Office of General Counsel, *supra* note 16.
[527] *Id.*
[528] *Id.*
[529] Ayuda, Inc. v. FTC, 2014 WL 4829574 at *2 (D.D.C. 2014).
[530] *Id.* at *3-4.
[531] *Id.* at *2.
[532] *Id.* at *3-4.
[533] *Id.* at *10.

a well-known investigation may be both embarrassing and damaging.").[534]

The plaintiffs were unsuccessful in convincing the court that the public interest outweighed the privacy rights of individuals whose information might be released. In particular, the court rejected the argument that a broad release of Sentinel complaints would help the public evaluate the FTC's performance, noting that the plaintiffs' proposed purpose for the data, which included the creation of "a consumer review tool akin to Yelp.com,"[535] "serve purely private interests disassociated from monitoring the agency's functioning."[536] The court also agreed with the FTC that Sentinel complaints qualify as law enforcement records under FOIA Exemption 7(c).[537]

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Social media. Like other agencies, the FTC uses social media to communicate with the public. The Commission currently uses Twitter, Facebook, YouTube, and LinkedIn.[538] It has nine separate Twitter accounts, five of which are personalized for the four Commissioners and Chairwoman.[539] FTC announcements on Twitter seem to be geared primarily towards alerting consumers to unfair or deceptive practices, without identifying specific violators. Although the FTC does use Twitter to highlight enforcement actions, it tends not to name the company:

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FTC officials explained that social media can be important for reaching younger audiences.[541] Over half of all visitors to the FTC's web site visit on smart phones or from social media sites.[542]

Challenges of social media. FTC officials recognized that social media can present problems due to their truncated formats.[543] They also note that once a post is made public,

[534] *Id.* at *11 (quoting the Supreme Court in *Reporters Comm.*, 489 U.S. at 773).
[535] *Id.* at *11.
[536] *Id.* at *12.
[537] *Id.* at *15.
[538] FTC, Social Media, https://www.ftc.gov/news-events/social-media (last visited July 8, 2015).
[539] *Id.*
[540] FTC, Twitter, https://twitter.com/FTC (screenshot captured on July 8, 2015).
[541] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.
[542] *Id.*
[543] *Id.*

"it is very hard to take back."[544] Thus, the FTC was one of the last agencies to join social media, and did so only after the Commission had created policies to ensure its proper use and compliance with federal obligations like the Federal Records Act.[545] These written policies are not public[546] and were not provided at the time of our interview. Finally, although FTC officials are aware of fake FTC social media accounts, or accounts that use the FTC's name, the Commission assumes that audiences can distinguish them from authentic accounts and thus does not pay much attention to them.[547] One reason for this assumption is the use by many social media platforms of procedures to verify the identity of account holders, marking verified accounts with check marks or other notations.

Social media practices. FTC officials emphasized that the Commission tries to be very careful using social media, explaining that posts can reach large audiences immediately.[548] The Commission uses "security protocols" to limit unauthorized access to Commission accounts, and strictly limits the Commission staff who are authorized to post from these accounts.[549] The staff who are authorized are subject to strict protocols.[550] FTC officials emphasized that its policies are "careful" and "robust."[551] The Office of Public Affairs has a dedicated staff member responsible for social media.[552]

Social Media Task Force. The Commission maintains a Social Media Task Force with representatives from various FTC offices and bureaus, including the Office of General Counsel, the Office of Public Affairs, and staff who handle enforcement and consumer education.[553] The Task Force evaluates whether social media platforms are appropriate for Commission use, assessing potential audiences, legal requirements, security protocols, and the like.[554]

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Information/Data Quality Act. Like other agencies, the FTC posts its Information Quality Act guidelines online,[555] as required by the OMB. More importantly, like some other agencies,[556] the FTC exempts press releases, but not if they "contain new substantive

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[544] *Id.*

[545] *Id.*

[546] Interview with officials from the FTC Office of General Counsel, *supra* note 16.

[547] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.

[548] Interview with officials from the FTC Office of Public Affairs and Office of General Counsel, *supra* notes 34, 16.

[549] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.

[550] *Id.*

[551] *Id.*

[552] *Id.*

[553] Interview with officials from the FTC Office of Public Affairs and Office of General Counsel, *supra* notes 34, 16.

[554] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.

[555] FTC, Data Quality Act, https://www.ftc.gov/site-information/website-policy/data-quality-act (last visited July 9, 2015); FTC, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Federal Trade Commission, https://www.ftc.gov/data-quality-act/guidelines-for-ensuring (last visited July 9, 2015).

[556] *See* Appendix G, *infra*.

information not covered by a previous information dissemination covered by the guidelines."[557] Again, this narrows the broad exemption for press releases in the OMB guidelines.[558] However, Commission guidelines also exempt information that derives from adjudicatory processes, including factual allegations, evidence, analyses, findings, determinations, rulings, and opinions.[559] Thus, a press release announcing a complaint filed by the FTC would be exempt. Similarly, there seem to be several grounds under FTC guidelines for exempting information in Sentinel. For example, complaints in Sentinel would be exempt if "the agency's presentation makes clear that what is being offered is someone's opinion rather than fact or the agency's views."[560] Moreover, because Sentinel is a non-public database intended for law enforcement bodies, it might also be exempt because distribution is "limited to government employees or agency contractors or grantees" and the information is "intended merely for intra- or inter-agency use or sharing."[561] In contrast to press releases, Sentinel complaints are non-public and thus present a very weak case for coverage under the IQA.

Best practices. FTC officials support the Conference's recommending best practices for agencies.[562] FTC officials welcomed recommendations that would improve the practices, procedures, and transparency of government agencies, and help the Commission provide more useful information to consumers.[563] FTC officials believe that because the Commission is a relatively small agency, it is somewhat easier for staff to be trained on new policies.[564] For example, FTC staff receive guidance on the Commission's rules governing the treatment of nonpublic information, and are mostly aware that Section 10 of the FTC Act imposes criminal sanctions for unauthorized disclosures.[565] The Commission also reminds its staff periodically about the FTC's press policy.

Judicial review. FTC officials would oppose any Conference recommendation that Congress amend the APA or any other statutes to make press releases judicially reviewable.[566] They note, in any event, that judicial review might be available under current doctrines, under some circumstances.[567] Still, FTC officials think that more readily-available judicial review could interfere with agencies' missions to provide the public with useful information.[568] FTC officials also are concerned that defending lawsuits would divert limited agency resources.[569]

Inspector General or OMB review. FTC officials would support Inspector General review of the Commission's publicity practices if there is any doubt about the propriety of

[557] FTC, Data Quality Act Guidelines, *supra* note 555, at § V.B.5.
[558] 67 Fed. Reg. at 377.
[559] FTC, Data Quality Act Guidelines, *supra* note 555, at § V.B.9.
[560] *Id.* at § V.A.
[561] *Id.* at §§ V.B.1, V.B.2.
[562] Interview with officials from the FTC Office of General Counsel, *supra* note 16.
[563] *Id.*
[564] *Id.*
[565] *See, e.g.*, 15 U.S.C. § 50; 16 C.F.R. §§ 4.09-4.11.
[566] Interview with officials from the FTC Office of General Counsel, *supra* note 16.
[567] *Id.*
[568] *Id.*
[569] *Id.*

agency actions.[570] The Inspector General can provide independent analysis, as it has done for other FTC practices.[571] However, FTC officials did not necessarily favor review by the OMB, expressing concern about adding layers of pre-publication review and diverting scarce agency resources.[572]

Ombudsman. The FTC does not have an ombudsman. FTC officials explained that the Commission is a small agency with a structure that makes it easy to identify who within the Commission can be contacted. Officials had no position on whether an ombudsman would be useful for resolving complaints.[573]

[570] *Id.*
[571] *Id.*
[572] *Id.*
[573] *Id.*

C. Consumer Financial Protection Bureau (CFPB)

The CFPB deserves special attention because it is a new agency operating under a new statute and is on the forefront of the "open data" trend. As Katherine Porter notes, "the CFPB is a unique agency, born of a crisis and being designed in a world of new technology."[574] Created by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,[575] the Bureau is responsible for regulating consumer financial products and services.[576] Though the Bureau is an independent executive agency, it resides within the Federal Reserve for budget purposes.[577] Over 12% of the Bureau's budget is dedicated to the Office of Consumer Response,[578] which operates the formal consumer complaint process. The most notable feature of this process is that complaints are published in a massive, searchable, sortable Consumer Complaint Database online.[579]

Complaint Database. The Bureau's database currently allows consumers to submit complaints for 11 categories of financial products, including mortgages, student loans, auto loans, bank accounts, credit cards, debt collection services, and others.[580] Bureau procedures for publishing complaints are described exhaustively in Policy Statements published in the Federal Register.[581] Consumers can submit complaints in several ways, including through the Bureau's web site.[582] The intake process prompts consumers to fill in a series of data fields, including their contact information, the name of the company involved, the type of product or service involved (including any relevant account numbers), and the type of issue or problem.[583] The Bureau authenticates this information

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[574] Katherine Porter, *The Complaint Conundrum: Thoughts on the CFPB's Complaint Mechanism*, 7 BROOK. J. CORP. FIN. & COM. L. 57, 86 (2012).

[575] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 12 U.S.C.). The germinal idea for a consumer financial protection agency comes from a 2007 essay by Elizabeth Warren, then a Harvard Law Professor and now a U.S. Senator. *See* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY (Summer 2007).

[576] 12 U.S.C. § 5491(a).

[577] Ian Ayres, Jeff Lingwall, & Sonia Steinway, *Skeletons in the Database: An Early Analysis of the CFPB's Consumer Complaints*, 19 FORDHAM J. CORP. & FIN. L. 343, 347 n.6 (2014) (citing Arthur Delaney & Shahien Nasiripour, *Dodd Unveils Financial Regulatory Reform Bill with 'Consumer Financial Protection Bureau,'* HUFFINGTON POST (June 17, 2010), http://www.huffingtonpost.com/2010/03/15/dodd-unveils-financial-re_n_499569 (last visited July 2, 2015).

[578] CFPB, Strategic Plan, Budget, and Performance Plan and Report (Mar. 2014) 14 http://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report-FY2013-15.pdf (roughly $73 million of the Bureau's $583 million budget for FY 2015) (last visited July 2, 2015).

[579] CFPB, Consumer Complaint Database, *http*://www.consumerfinance.gov/complaintdatabase/ (last visited July 2, 2015).

[580] *See* CFPB, Consumer Complaint Database, http://www.consumerfinance.gov/complaint/ (last visited May 5, 2015). The database began by posting credit card complaints only, *see* CFPB, Disclosure of Certain Credit Card Complaint Data, 76 Fed. Reg. 76,628 (Dec. 8, 2011), before broadening the database to all products and services regulated by the Bureau. CFPB, Disclosure of Consumer Complaint Data, 77 Fed. Reg. 37,616 (Jun. 22, 2012).

[581] *See, e.g.*, CFPB, Notice of Final Policy Statement: Disclosure of Certain Credit Card Complaint Data, 77 Fed. Reg. 37,558 (Jun. 22, 2012).

[582] CFPB, Disclosure of Consumer Complaint Data, 77 Fed. Reg. 37,616 (Jun. 22, 2012).

[583] *Id.* at 37,616-17. The database includes the following fields:

(i) Bureau-assigned unique ID number;

(ii) Channel of submission to Bureau;

and then forwards the complaint to the company for response.[584] In essence, the database is a public window into the Bureau's case management system.[585] The database is searchable and sortable—listing for each complaint the type of product, the primary and secondary complaints, the name of the company, the company's response, and whether the company's response was timely and further disputed by the customer.[586]

Company responses. Companies respond to complaints through a secure online Company Portal,[587] guided by a *Company Portal Manual*.[588] Companies can choose one of ten response categories:

Closed with monetary relief;	Alerted CFPB;
Closed with non-monetary relief;	Incorrect company;
Closed with explanation;	Duplicate CFPB case reported;
Closed;	Redirected to related company;
In progress;	Sent to regulator.[589]

Responses categorized by companies as "In progress" indicate that the company could not close the complaint within 15 days, giving the company a total of 60 days to respond.[590] Late responses not categorized by companies as "In progress" are tagged by the Bureau as "Past due."[591] Those without a response after 30 days are tagged as "No response."[592] These responses are published.

Publication criteria. The Bureau will withhold publication unless a complaint meets each of the publication criteria. For example, the Bureau's policy is to exclude complaints that (i) are missing critical information, such as the name of the company or product category,

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(iii) Date of submission to Bureau;
(iv) Consumer's 5-digit zip code;
(v) Product or service;
(vi) Sub-product;
(vii) Issue;
(viii) Date of submission to company;
(ix) Company name;
(x) Company response category;
(xi) Whether the company response was timely; and
(xii) Whether the consumer disputed the response.

78 Fed. Reg. at 21,225.

[584] 77 Fed. Reg. at 37,616.

[585] Interview with Darian Dorsey, Chief of Staff, Office of Consumer Response, CFPB (May 28, 2015).

[586] A screenshot of credit card complaints listed in the database is attached in Appendix F.

[587] CFPB, Sign Up to Address Complaints, http://www.consumerfinance.gov/company-signup/ (last visited July 2, 2015).

[588] CFPB, Company Portal Manual (Version 2.14) (May 2015), http://www.cfjblaw.com/files/Uploads/Documents/Resources/cfpb-company-portal-manual-may-2015.pdf (last visited July 2, 2015).

[589] *Id.* at 19.

[590] *Id.* at 24.

[591] *Id.*

[592] *Id.*

(ii) have been referred to other agencies, (iii) are duplicative, (iv) would reveal trade secrets, (v) are fraudulently submitted, or (vi) identify the incorrect company.[593]

Publishing complaint narratives. Initially, the Bureau decided not to publish consumers' narrative comments in their complaints,[594] expressing concern that personally identifiable information could not be redacted sufficiently to ensure privacy.[595] But the Bureau reversed course, proposing in July 2014 to publish narratives,[596] finalizing the proposal in March 2015.[597] For a narrative to be published, the consumer must give consent and the narrative must be scrubbed of personal information.[598] Industry members "nearly uniformly opposed" the proposal,[599] questioning the Bureau's statutory authority and raising other concerns about unnecessary harm to company reputations, echoing longstanding concerns with adverse publicity.[600] Industry commenters also objected that the Bureau did not verify complaints. However, the Bureau's screening and authentication process gives companies ample opportunity to object before a complaint is published.[601] Acknowledging industry concerns over publishing consumer narratives, the Bureau proposed to allow companies to publish their own narrative responses.[602] But financial industry commenters preferred to respond with pre-set, "structured" responses rather than free-form, "unstructured" ones.[603] The nine *optional* responses are:[604]

[593] *Id.* at 26; 78 Fed. Reg. at 21,225.

[594] 77 Fed. Reg. at 37,568.

[595] *Id.* at 37,566.

[596] Disclosure of Consumer Complaint Narrative Data, Notice of Proposed Policy Statement with Request for Public Comment, 79 Fed. Reg. 42,765 (Jul. 23, 2014). The privacy concerns are addressed with relatively robust "scrubbing standards." *See* CFPB, Office of Consumer Response, Narrative Scrubbing Standard (March 2015) (copy on file with author).

[597] CFPB, Final Policy Statement: Disclosure of Consumer Complaint Narrative Data, 80 Fed. Reg. 15,572 (Mar. 24, 2015).

[598] 80 Fed. Reg. at 15,583.

[599] 78 Fed. Reg. at 21,224.

[600] *See, e.g.*, Public Interest Comment, Mercatus Center, George Mason University (Sep. 10, 2014), http://mercatus.org/sites/default/files/Peirce-Soliman-CFPB-Consumer-Complaint-PIC-091014.pdf; *see also* 80 Fed. Reg. at 15,581.

[601] 80 Fed. Reg. at 15,576-77.

[602] 79 Fed. Reg. at 42,768. Consumer groups pushed to allow companies to respond with narrative comments. 78 Fed. Reg. at 21,224.

[603] Companies seemed opposed to posting their own narrative responses for several reasons, including legal, business, and practical. 80 Fed. Reg. at 15,577. Companies also cited reputational concerns as a disincentive to respond. 80 Fed. Reg. at 15,578, 15,581.

[604] Company Portal Manual, *supra* note 588, at 29. Companies, again, are not obligated to choose a narrative response. 80 Fed. Reg. at 15,583.

Category	Description displayed in Consumer Complaint Database
Company acted appropriately	Company believes it acted appropriately as authorized by contract or law.
Factual dispute	Company disputes the facts presented in the complaint.
Unable to verify facts	Company can't verify or dispute the facts in the complaint.
Misunderstanding	Company believes the complaint is the result of a misunderstanding.
Discontinued policy or procedure	Company believes complaint relates to a discontinued policy or procedure.
Opportunity for improvement	Company believes complaint represents an opportunity for improvement to better serve consumers
Isolated error	Company believes complaint is the result of an isolated error
Third party	Company believes complaint caused principally by actions of third party outside the control or direction of the company
No public response	Company chooses not to provide a public response

Benefits of publishing narratives. Public comments from consumer groups, open government groups, privacy groups, and individuals favored publishing complaint narratives.[605] Indeed, major news organizations and press associations favored publishing narratives even without consumer consent.[606] Sean Moulton and Scott Klinger from the Center for Effective Government noted that narratives are more compelling than sanitized data and can help concretize otherwise anonymous problems.[607] Bureau staff also stressed the value of giving context to complaints, citing as one example a woman in Columbus, Ohio, who had been waiting months for a mortgage servicer to send her $66,000 after her house burned down.[608] After months of unsuccessful haggling, she submitted a complaint to the Bureau, which prompted the company to send her check overnight.[609] Without this narrative, the database would indicate merely that a complaint had a been submitted about a mortgage servicing company in Columbus, Ohio, and that monetary relief had been the response—with no sense that the complaint process had resolved months of being displaced from home.[610]

Benefits of the database more generally. Disclosing complaints even without narratives confers several public benefits. The intended beneficiaries are consumers, the Bureau, other regulators, researchers, and even the companies identified in complaints.[611] But the main intended beneficiaries are consumers.[612] The Bureau and consumers groups note that publishing complaint data is a "public service" and helps "fulfill the Bureau's affirmative disclosure requirements under FOIA."[613] Consumer advocates argue that the

[605] 80 Fed. Reg. at 15,576.

[606] 80 Fed. Reg. at 15,576 (citing comments by the Reporters Committee for Freedom of the Press).

[607] Interview with Sean Moulton & Scott Klinger, *supra* note 16.

[608] Interview with Darian Dorsey, *supra* note 585.

[609] *Id.* The woman gave the Bureau permission to use her story after she sent a written Thank You note to the agency.

[610] Interview with Darian Dorsey, *supra* note 585.

[611] *Id.*; 76 Fed. Reg. at 76,630-631.

[612] 78 Fed. Reg. at 21,225. The Dodd-Frank Act tasked the Bureau with providing consumers "timely and understandable information to make responsible decisions about financial transactions" and help the market "operate transparently and efficiently." 12 U.S.C. § 5511(b)(1), (5).

[613] CFPB, Final Policy Statement: Disclosure of Consumer Complaint Data, 78 Fed. Reg. 21,218,

database can "empower" consumers to better understand financial services and avoid "bad actors."[614] They also argue that "disclosure is one of the best tools government agencies can use" and that complaint data can help "detect trends of unfair, deceptive, or abusive acts and practices."[615] Although the Bureau itself analyzes complaint data to make mandated reports to Congress,[616] the database is meant for external consumption. Director Richard Cordray encouraged "the public, including consumers, the companies that serve them, analysts, data scientists, civic hackers, developers, policymakers, journalists, and academics, to analyze, augment, and build on the public database."[617] Academics have begun to publish empirical studies based on complaint data.[618] Public interest researchers like U.S. PIRG are using the database to produce reports on specific financial products, such as credit cards and debt collection.[619] Bureau staff hope that third parties develop mobile apps and other information products based on complaint data.[620] *U.S. News and World Report* published in August 2015 a ranking of credit cards based in part on data from the Bureau's database.[621] Firms like Deloitte are publishing reports based on complaint data, encouraging companies to "turn what they hear from the CFPB's consumer complaint database into a business advantage."[622] Indeed, Bureau staff report that companies are addressing potential problems, such as long customer phone trees, in response to consumer complaints.[623] One of the original aspirations for the database was to encourage upward competition on customer service and complaint handling.[624] Indeed, Bureau staff tell anecdotes that companies are comparing themselves to competitors based on database metrics—with some companies tying executive bonuses to how well the company responds to complaints.[625] The Bureau occasionally analogizes its database to federal airline data, which is used by third parties to create ratings systems,

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21,220 (Apr. 10, 2013).

[614] *Id.* at 21,220.

[615] *Id.*

[616] 12 U.S.C. § 5496(c)(4).

[617] Richard Cordray, Director, CFPB, Remarks at the Consumer Response Field Hearing (Mar. 28, 2013), http://www.consumerfinance.gov/speeches/prepared-remarks-of-director-richard-cordray-at-the-consumer-response-field-hearing/ (last visited July 2, 2015).

[618] *See, e.g.*, Ian Ayres, Jeff Lingwall, & Sonia Steinway, *Skeletons in the Database: An Early Analysis of the CFPB's Consumer Complaints*, 19 FORDHAM J. CORP. & FIN. L. 343 (2014).

[619] Interview with Darian Dorsey, *supra* note 585. *See, e.g.*, U.S. PIRG, Reports: The CFPB Gets Results for Consumers, http://www.uspirg.org/page/usf/reports-cfpb-gets-results-consumers (last visited June 30, 2015) (linking to several reports). (U.S. PIRG is the federation of state public interest research groups (PIRGs)).

[620] Interview with Darian Dorsey, *supra* note 585 (citing as an example the mobile app Hipmunk, https://itunes.apple.com/us/app/hipmunk-flight-hotel-search/id419950680, which uses government data on flight delays to help customers book flights).

[621] U.S. News & World Report, *How* U.S. News *Ranks the Best Credit Cards*, http://money.usnews.com/money/personal-finance/articles/2015/08/13/how-us-news-ranks-the-best-credit-cards?page=3 (Aug. 13, 2015).

[622] Deloitte, Analysis: CFPB's Consumer Complaint Database: Deloitte's Analysis Reveals Valuable Insights, http://www2.deloitte.com/us/en/pages/financial-services/articles/consumer-financial-protection-bureau-cfpb-consumer-complaint-database.html (last visited June 30, 2015).

[623] Interview with Darian Dorsey, at 2.

[624] CFPB, Disclosure of Certain Credit Card Complaint Data, 76 Fed. Reg. 76,628, 76,630 n.9 (Dec. 8, 2011).

[625] Interview with Darian Dorsey, *supra* note 585.

and by airlines to distinguish themselves from competitors.[626] The Bureau concludes that after complaint data is made public, "The marketplace of ideas then does the rest."[627]

Industry concerns. The complaint database has been controversial, of course, to the companies identified in it. Industry members have filed a cascade of public comments opposing Bureau proposals.[628] These are the most salient industry objections and how the Bureau addresses them:

1. *Lack of complaint verification*. Industry comments object that because the Bureau does not verify complaints, the database publishes complaints that lack factual support or legal merit and thus represent mere opinion.[629] Industry members also argued that it is unfair to publish complaints resolved without any showing of company fault, perhaps in violation of their due process rights.[630] Industry also objected that publication by a government agency would give complaints the "appearance" of being validated by the Bureau.[631]

Although the Bureau agrees that it does not fully verify claims made in complaints, it emphasizes that the Bureau "authenticates" complaints to confirm a commercial relationship between the consumer and the company.[632] The current system for authentication seems to be robust. Companies can respond to complaints via the secure online Company Portal, which allows companies to deny a commercial relationship or otherwise respond to valid customers.[633] As such, Bureau staff report that the number of complaints posted without either company confirmation or a response within 15 days is "very, very low."[634] Of the roughly 600,000 complaints the Bureau has processed, only around 380,000 have been published in the database.[635] In 2014, 62% of the complaints submitted (roughly 156,600 of 250,700) were sent to companies for review.[636] The 38% not sent to companies were referred to other agencies (25%), were incomplete (10%), or were still pending (3%).[637] Companies responded to roughly 94% of the complaints sent to them.[638] In short, there are several opportunities for companies to interject before a

[626] 76 Fed. Reg. at 76,631.

[627] *Id.*

[628] *See, e.g.* CFPB, Notice of Final Policy Statement: Disclosure of Certain Credit Card Complaint Data, 77 Fed. Reg. 37,558, 37,559 (Jun. 22, 2012); Public Comments to Docket No. CFPB-2011-0040, http://www.regulations.gov/#!searchResults;rpp=25;po=0;s=cfpb-2011-0040 (last visited July 2, 2015).

[629] 77 Fed. Reg. at 37,561.

[630] *Id*.

[631] 80 Fed. Reg. 15,572, 15,581.

[632] 77 Fed. Reg. at 37,561; 78 Fed. Reg. at 21,221.

[633] Company Portal Manual, *supra* note 588, at 7.

[634] Interview with Darian Dorsey, *supra* note 585.

[635] *Id*. Note that the Consumer Response Annual Report for 2014 states that the CFPB has "handled approximately 558,800 consumer complaints" as of February 28, 2015. *See* CFPB, Consumer Response Annual Report: January 1 – December 31, 2014 (Mar. 2015), at 6, http://files.consumerfinance.gov/f/201503_cfpb_consumer-response-annual-report-2014.pdf (last visited June 30, 2015).

[636] Consumer Response Annual Report: January 1 – December 31, 2014, *supra* note 635, at 40; 78 Fed. Reg. at 21,221.

[637] Consumer Response Annual Report: January 1 – December 31, 2014, *supra* note 635, at 40 n.18.

[638] *Id.* at 40 n.19 (roughly 147,100 out of 156,600).

false or fraudulent complaint is published. Bureau staff believe that the only way such a complaint would be posted is if the company failed to respond to the complaint.[639]

Bureau staff emphasize that information published in the database is provided directly by consumers and companies rather than the Bureau.[640] The Bureau sees the database as a record of consumers and companies speaking to each other—shining a light on how companies treat their customers.[641]

Nevertheless, the Bureau responded to industry concerns by noting that it "plans to specifically disclaim the accuracy of complaints when the data are made available."[642] Currently, the Bureau web site includes the disclaimer: "We don't verify all the facts alleged in these complaints but we take steps to confirm a commercial relationship between the consumer and company."[643] Consumer groups commented that "the lack of verification presented only minimal risks to companies because of the controls in place to ensure that complaints must come from actual customers … [and] that companies are given adequate time to challenge the customer/company relationship."[644] The benefits of disclosure, they argued, outweigh the "speculative harm of unverified complaints."[645] My review confirms that there are sufficient safeguards to ensure that false or fraudulent complaints can be identified well before publication.[646]

2. *Non-representative complaints*. Industry commenters also objected to the Bureau publishing self-selected complaints, arguing that a non-random database would provide consumers, academics, and researchers with unreliable information.[647] In response, the Bureau replied that it would "inform consumers and any other public database users that the data reflect only the … complaints that consumers submit to the Bureau."[648] The Bureau explained that it would work with commenters to identify ways to normalize the data,[649] but Bureau staff explained the difficulty of gathering sufficient information to do so effectively.[650]

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[639] Interview with Darian Dorsey, *supra* note 585; 78 Fed. Reg. at 21,223 ("No company will be associated with a complaint if it demonstrates a reasonable basis to challenge a commercial relationship with the consumer.").

[640] Interview with Darian Dorsey, at 3. Bureau staff emphasized any Bureau information added to the case management system is used only internally and not presented to the public. *Id.*

[641] Interview with Darian Dorsey, *supra* note 585.

[642] 77 Fed. Reg. at 37,561; 78 Fed. Reg. at 21,221.

[643] CFPB, Consumer Complaint Database, http://www.consumerfinance.gov/complaintdatabase/ (last visited Nov. 4, 2014).

[644] 78 Fed. Reg. at 21,221.

[645] *Id.*

[646] Interview with Darian Dorsey, *supra* note 585. The Bureau refers multiple times to allegations by a company commenter that at least one outside party had used the company's name unlawfully to defraud customers and generate complaints against that company. *See, e.g.*, 80 Fed. Reg. at 15,576.

[647] 77 Fed. Reg. at 37,561.

[648] *Id.*

[649] 78 Fed. Reg. at 21,222.

[650] Interview with Darian Dorsey, *supra* note 585.

3. *Lack of context*. A related objection is that the complaint data lacks context and thus might lead consumers and the media to overlook its limitations.[651] Commenters also argued that audiences might believe that the information was being endorsed by the Bureau, even with disclaimers to the contrary.[652] The Bureau did not find these arguments convincing, but solicited suggestions on how best to provide context. Bureau staff commented on the difficulty of normalizing the data to better reflect, for example, what proportion of consumer accounts were the subject of complaints between banks of different sizes.[653]

4. *Manipulation*. Industry commenters also objected that the database would be susceptible to manipulation, for example by third parties submitting false complaints. The Bureau responded that the burden of filing complaints was not negligible and that several procedural barriers, such as the requirement of providing a real customer account number, and the procedures for seeking company responses before publication, would deter or detect false complaints.[654] The Bureau itself can also intervene if it observes anomalies in mass complaint submissions, for example.[655]

5. *Reputational harms*. Industry commenters objected that identifying company names in the database would harm their reputations, which might be compounded by "viral media" or serve as "fodder for plaintiffs' lawyers."[656] Commenters also argued that company names should be exempt from disclosure under FOIA because disclosure would cause the companies substantial competitive harm.[657] The Bureau responded that any "unwarranted public criticism, reputational harm, and perhaps even a loss of existing or prospective customers" would be a burden shared by all companies, and that disclaimers could "warn consumers that the public database contains data reflecting unverified complaints."[658] Consumer groups commented that disclosing company names was a significant feature of the Bureau's proposal, noting that "other complaint databases that disclose the identity of specific companies—like NHTSA—have created pressure on companies to improve whatever metrics are measured by the public database."[659] Finally, responding to arguments that publishing complaint narratives would harm companies' reputations, the Bureau noted that more information is usually better in the marketplace of ideas.[660]

6. *Overinclusiveness*. The complaint database is intended to increase the transparency of markets for various financial products and services, and thus includes complaints that

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[651] 77 Fed. Reg. at 37,562.

[652] *Id.*

[653] Interview with Darian Dorsey, *supra* note 585; 78 Fed. Reg. at 21,222.

[654] 77 Fed. Reg. at 37,562; 78 Fed. Reg. at 21,222.

[655] 78 Fed. Reg. at 21,222.

[656] 77 Fed. Reg. at 37,564; 78 Fed. Reg. at 21,222.

[657] 77 Fed. Reg. at 37,562-63. Note that Exemption 4 of FOIA allows agencies to withhold trade secrets or confidential commercial information if it would result in competitive harm to the business, among other things. The Bureau cites several cases interpreting the scope of Exemption 4 in favor of disclosure.

[658] 77 Fed. Reg. at 37,563.

[659] *Id*. at 37,564 (quoting the Bureau's characterization of the consumer groups' comments).

[660] 80 Fed. Reg. 15,572, 15,581.

are not necessarily violations of the law.[661] The Bureau defines "complaints" as "submissions that express dissatisfaction with, or communicate suspicion of wrongful conduct by, an identifiable entity related to a consumer's personal experience with a financial product or service."[662] Thus, the database includes not only potential legal violations, "but also vague expressions of being wronged."[663] As one observer notes astutely, "Dissatisfied consumers can be widespread in lawful industries; indeed, financial services may be a poster child for such an industry."[664] To combat a one-side presentation of this dissatisfaction, companies are permitted to review and respond to complaints before publication. Although consumer dissatisfaction can help inform future legislation and rulemaking efforts,[665] it is also used as a pressure point or enforcement lever, much like traditional agency publicity.

7. *Statutory authority*. The Bureau cites several provisions in the Dodd-Frank Act as authorizing public disclosure of consumer complaint data.[666] Dodd-Frank clearly authorizes the Bureau to maintain a centralized database of consumer complaints.[667] But industry members have questioned the Bureau's statutory authority to make this database public.[668] Several sections of the Dodd-Frank Act clearly contemplate publication of individual complaint data so long as confidential information is not published.[669] Indeed, Congress emphasized that the "primary functions of the Bureau" include "collecting, investigating, and responding to consumer complaints" and "publishing information" on consumer financial markets.[670] If the Bureau may use complaint data to guide its own activities, the Bureau reasoned, then "there is good reason to allow consumers and outside researchers to weigh the importance of complaint data in their own research, analysis, and decision-making."[671] The Bureau justifies its *public* database by pointing to three statutory provisions: the requirement that the Bureau make reports to Congress;[672] the authority to provide consumers with information to make financial decisions and help the market operate transparently;[673] and the broad authority to make public non-confidential information "as is in the public interest" and via "appropriate formats."[674] Bureau staff also report that information in the database was the subject of frequent FOIA

[661] Porter, *supra* note 574, at 78.

[662] CFPB, SEMI-ANNUAL REPORT OF THE CONSUMER FINANCIAL PROTECTION BUREAU 17 n.13, http://files.consumerfinance.gov/f/2012/01/Congressional_Report_Jan2012.pdf.

[663] Porter, *supra* note 574, at 78.

[664] *Id*.

[665] *Id*. at 79-80.

[666] *See, e.g.*, 76 Fed. Reg. at 76,629.

[667] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1013(b)(3)(A), 12 Stat. 1376, 1969 (2010), *codified at* 12 U.S.C. § 5493(b)(3)(A) (requiring the Bureau to "establish a unit whose functions shall include establishing a single, toll-free telephone number, a website, and a database or utilizing an existing database to facilitate the centralized collection of, monitoring of, and response to consumer complaints regarding consumer financial products or services…").

[668] *See, e.g.*, 77 Fed. Reg. at 37,560-561.

[669] Dodd-Frank Act §§ 1013, 1022, 1034; 77 Fed. Reg. at 37,561; 80 Fed. Reg. at 15,575.

[670] 12 U.S.C. § 5511(c)(2), (3).

[671] 78 Fed. Reg. at 21,223.

[672] Dodd-Frank Act § 1013(b)(3)(C).

[673] 12 U.S.C. § 5511(b)(1), (5).

[674] 12 U.S.C. §§ 5492(a); 5512(c)(3)(B), (c)(8).

requests from the outset and would be sought repeatedly were it not made public.[675] Posting the information systematically is much more efficient than responding to repeated FOIA requests, according to Bureau staff.[676]

Responsive to industry concerns. My review of these objections shows that although the Bureau and companies certainly disagree on important points, the Bureau has been painstakingly transparent and relatively responsive to industry concerns. The long process of proposing, building, and refining the complaint database, detailed in numerous Federal Register discussions, shows that the Bureau has been sensitive to industry input, granting companies more time to respond, varying standards between industries that operate differently, and repeatedly soliciting industry input.[677]

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Traditional publicity. Like other agencies, the CFPB publicizes complaints filed against alleged regulatory violators. For example, the Bureau published a press release in May 2015 explaining that it filed suit against the firm Nationwide Biweekly Administration for misleading consumers about savings from biweekly loan payoff programs.[678] The news release clarifies that "The Bureau's complaint is not a finding or ruling that the defendants have actually violated the law" and includes a link to the full complaint. A quick review shows that the Bureau frequently publicizes complaints like this[679]—I found seven web pages' worth of "enforcement" press releases.[680]

The press release process. The Bureau's Office of Communications drafts press releases, working with the Office of Enforcement to publicize enforcement actions and the Office of Consumer Response to alert consumers that might be affected.[681] I interviewed Jennifer Howard, Assistant Director for the Bureau's Office of Communications, who described agency practices. Howard explained that her office is careful to ensure the accuracy of press releases (often through multiple rounds of edits with the input of Bureau counsel and enforcement staff), strike the appropriate tone, and include necessary caveats for publicizing pending and unresolved legal actions.[682] Bureau staff report that they have a written process to clear press announcements.[683] My interview with Bureau staff suggested that written policies and procedures are not closely followed, but that press announcements are carefully written by the Office of Communications with clear

[675] Interview with Darian Dorsey, *supra* note 585.

[676] *Id.* at 9.

[677] *Id.* at 10.

[678] CFPB, CFPB Files Suit Against Nationwide Biweekly for Luring Consumers with False Promises of Mortgage Savings (May 11, 2015), http://www.consumerfinance.gov/newsroom/cfpb-files-suit-against-nationwide-biweekly-for-luring-consumers-with-false-promises-of-mortgage-savings/.

[679] *See, e.g.*, CFPB, "CFPB and State of Maryland Take Action Against "Pay to Play" Mortgage Kickback Scheme" (Apr. 29, 2015), http://www.consumerfinance.gov/newsroom/cfpb-and-state-of-maryland-take-action-against-pay-to-play-mortgage-kickback-scheme/.

[680] CFPB, Newsroom, http://www.consumerfinance.gov/newsroom/?topic=enforcement (narrowed by selecting "Enforcement" under "Topic").

[681] Interview with Jennifer Howard, Assistant Director, *supra* note 34.

[682] *Id.*

[683] *Id.*

lines of review and approval.[684] Bureau staff also expressed concern that an additional written policy might challenging to execute in practice if not drafted with sufficient flexibility.[685] However, staff were interested in identifying best practices culled from other agencies.[686]

Naming companies in press releases. It is not Bureau practice to name companies in press announcements in the absence of an enforcement action, unless the announcement is positive (and even then it is rare).[687] Bureau staff indicated that the agency does not want to "pick winners and losers."[688] When the Office of Communications does issue a press release on a "widespread" problem, it will focus on the industry or the specific market and not "call out a particular company."[689] The Bureau does publicize its database, including on social media,[690] but generally does not spotlight specific companies. Specific Bureau offices, such as the Office of Students and the Office of Servicemember Affairs, will issue periodic reports based on trends identified in the database, and these reports will name specific companies.[691] For example, a mid-year report on student loan complaints identified the five companies with the highest volume of complaints.[692] The report notes that "Due to the lack of publicly-available data on private student loans, these tables are not indexed for market share."[693] Notwithstanding these congressionally-mandated reports, Bureau staff emphasize that the agency is "very leery of naming companies."[694]

Benefits of publicity. Bureau staff emphasized the importance of using press announcements to reach the general public, noting that press releases can "reach Americans where they are, at the airport or at home," and that few people follow the Bureau on Twitter, for example.[695] Bureau staff also emphasized that both press and social media announcements are written to be understandable to regular consumers. Identifying the appropriate audience can be a struggle, given the Bureau's many constituents (industry, consumers, Congress).[696] For example, Howard observed that highly technical legal language in press releases "doesn't mean anything" to

[684] *Id*.

[685] Interview with Jennifer Howard and Darian Dorsey, *supra* notes 34, 585.

[686] *Id*.

[687] Interview with Jennifer Howard, *supra* note 34 (using as an example a Bureau announcement that credited Discover with disclosing free consumer credit scores on their credit card bills).

[688] Interview with Jennifer Howard, *supra* note 34.

[689] *Id*.

[690] CFPB, Twitter, https://twitter.com/CFPB/status/614153117630861314 (last visited July 1, 2015).

[691] Interview with Jennifer Howard, *supra* note 34.

[692] *See, e.g.*, CFPB, Mid-Year Update on Student Loan Complaints (June 2015) at 7, Tbl. 2, http://files.consumerfinance.gov/f/201506_cfpb_mid-year-update-on-student-loan-complaints.pdf (last visited July 1, 2015) (identifying five companies with the highest volume of student loan complaints).

[693] *Id*. at 5-6.

[694] Interview with Jennifer Howard, *supra* note 34. Note that Howard acknowledged that the Office of Students does "list student loan servicers" in its periodic reports on database complaints. *Id*. at 9.

[695] Interview with Darian Dorsey, *supra* note 585.

[696] Interview with Jennifer Howard, *supra* note 34.

consumers.[697] In her words, "consumer education is the priority" so "plain language is unbelievably critical."[698]

Publicizing enforcement actions. In publicizing enforcement actions, the Office of Communications works with Bureau counsel and enforcement staff to ensure the accuracy of the announcement.[699] Often, announcements will go through "multiple rounds of edits."[700] Companies are not notified in advance of a press release, although Bureau staff suggest that companies are aware that announcements usually follow publication of a complaint.[701] A press release is issued concurrently with the Bureau filing an enforcement action, and is meant to communicate the action in plain language for lay audiences.[702] Bureau staff could not recall any objections by companies to such announcements.[703] The Bureau does not publicize investigations.[704]

Timing press releases. The Bureau does not embargo or otherwise time press announcements to avoid influencing stock markets.[705] Bureau staff explained that a press embargo on a potentially market-moving announcement might encourage early leaks, given the large size of the Bureau's press list.[706]

* * *

Social media. The Bureau maintains social media accounts on Facebook, Flickr, Twitter, and YouTube.[707] The Bureau's Office of Consumer Education and Engagement handles social media rather than the Office of Communications.[708] Bureau staff explain that the agency uses social media more as "an opportunity to engage directly with consumers" rather than a "publicity platform."[709] A very cursory review of the Bureau's Twitter feed confirms this use.[710] The Bureau did not identify policies or procedures governing its use of social media.[711]

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[697] *Id.*
[698] *Id.*
[699] *Id.*
[700] *Id.*
[701] *Id.* Bureau regulations on "Disclosure of Records and Information" at 12 C.F.R. part 1070 do not seem to address publication of complaints and enforcement actions.
[702] Interview with Jennifer Howard and Darian Dorsey, *supra* notes 34, 585.
[703] *Id.*
[704] Bureau regulations at 12 C.F.R. part 1080 state that Bureau investigations are non-public. 12 C.F.R. § 1080.14(b).
[705] Interview with Jennifer Howard, *supra* note 34.
[706] *Id.*
[707] CFPB, http://www.consumerfinance.gov/ (last visited July 1, 2015).
[708] Interview with Jennifer Howard, *supra* note 34.
[709] *Id.*
[710] CFPB, at https://twitter.com/CFPB (last visited July 1, 2015).
[711] Interview with Jennifer Howard, *supra* note 34.

The CFPB should be credited for being exceedingly transparent in its operations and solicitous of industry concerns in constructing its complaint database. Like other agencies, the Bureau's publicity practices seem to be sensitive to longstanding concerns but lack the discipline that might come with written policies and procedures. The Bureau is still a young agency, but staff report that the Bureau has never been sued over entries in its complaint database.[712] Thus, I briefly consider other potential checks on Bureau practices:

Information Quality Act. It is not clear whether the IQA applies to the Consumer Complaint Database, and the Bureau has not taken a position on this question.[713] The Bureau has adopted its own *Information Quality Guidelines* pursuant to the Act and OMB guidelines,[714] which state that the guidelines apply to "information that the Bureau posts on the internet" and to "Bureau-sponsored distribution of information" (meaning "any information distributed by a third party at the direction of the Bureau or information the Bureau has the authority to review and approve prior to release").[715] This broad language would seem to apply to the Consumer Complaint Database. But the Bureau's *Guidelines* do not make clear whether they exempt the database, as they exclude "archival records, public filings, subpoenas, or adjudicative processes."[716] Similarly, the OMB's guidelines exclude information posted by agencies that "makes [] clear that what is being offered is someone's opinion rather than fact or the agency's views."[717] These provisions could be read to exclude the Consumer Complaint Database from the IQA. Industry members, like the American Bankers Association, have argued that the IQA should apply to the database.[718] The Bureau's *Information Quality* site includes documents relating to one request[719] that the Bureau retract a white paper on payday loans.[720] Though the request did not relate to the complaint database, it demonstrates how Bureau reports and analyses of complaint data might inspire requests for correction or retraction under the IQA. In light of my review above, requests to correct or retract

[712] Interview with Scott Everett, Examiner, Midwest Region, CFPB Division of Supervision, Enforcement & Fair Lending (May 28, 2015).

[713] *Id.*

[714] Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554; OMB, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002).

[715] CFPB, Information Quality Guidelines, http://www.consumerfinance.gov/informationquality/.

[716] *Id*. Note that the Bureau does not make any kind of determination as to the merits of the consumer's complaint, and thus entries in the Complaint Database may not represent "adjudicative processes."

[717] OMB, 67 Fed. Reg. at 8460.

[718] *See, e.g.*, Letter from Wayne A. Abernathy of the American Bankers Association to Hon. Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System (Jan. 12, 2015), http://www.cfpbmonitor.com/files/2015/01/LTC-ConsCompDatabase2015Jan.pdf (last visited July 2, 2015).

[719] Petition of Community Financial Services Association of America, Ltd. for Retraction of "Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings" (Jun. 20, 2013), http://files.consumerfinance.gov/f/201308_cfpb_cfsa-information-quality-act-petition-to-CFPB.pdf (last visited July 2, 2015).

[720] CFPB, Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings (Apr. 24, 2013), http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf (last visited July 2, 2015).

database entries under the IQA would seem to be redundant given the opportunities companies have to respond via the Company Portal.

Ombudsman. The Bureau has an Ombudsman,[721] which has received complaints about the database, among other things.[722] Some companies that disagree with Bureau decisions will contact the Ombudsman in addition to utilizing notice-and-comment periods, writing letters to Director Cordray, and using the press.[723] In fact, some companies will file complaints with the Ombudsman that track closely the public comments they file.[724] Staff report that the Bureau's Office of Consumer Response meets monthly with the Ombudsman.[725] In some other agencies, the ombudsman receives most consumer complaints; in the Bureau, the Office of Consumer Response serves that role.[726] The Ombudsman might be an effective restraint if the Bureau were to ever turn more aggressive with its publicity or database practices.

Inspector General. The Federal Reserve's Office of Inspector General has oversight responsibility for the CFPB.[727] For example, it is auditing the Bureau's complaint database "to assess the effectiveness of the CFPB's controls over the accuracy and completeness of the public complaint database."[728] Inspectors General provide another avenue for industry members to voice their preferences and pursue complaints.[729]

[721] CFPB, Ombudsman's Office, http://www.consumerfinance.gov/ombudsman/ (last visited July 1, 2015).

[722] CFPB, Ombudsman's Office, Annual Report to the Director (Nov. 17, 2014), http://files.consumerfinance.gov/f/201411_cfpb_report_ombudsman-office.pdf (last visited July 1, 2015).

[723] Interview with Darian Dorsey, at 11, *supra* note 585.

[724] *Id.*

[725] *Id.*

[726] *Id.*

[727] Office of Inspector General, Board of Governors of the Federal Reserve System, *CFPB Activity*, http://oig.federalreserve.gov/cfpb-activity.htm (last visited July 3, 2015).

[728] *See* Federal Reserve, OIG, Work Plan (Current as of June 5, 2015), http://oig.federalreserve.gov/reports/work-plan-full.htm#CFPBOngoing ("Audit of the CFPB's Public Consumer Complaint Database").

[729] For example, the American Bankers Association encouraged the Federal Reserve OIG's audit of the CFPB's database, arguing that the Bureau has become "an official purveyor of unsubstantiated, and potentially false, information." Letter from Wayne A. Abernathy of the American Bankers Association to Hon. Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System (Jan. 12, 2015), http://www.cfpbmonitor.com/files/2015/01/LTC-ConsCompDatabase2015Jan.pdf (last visited July 2, 2015).

V. RECOMMENDATIONS FOR UPDATED REFORMS

Agency publicity remains a conundrum four decades after Conference Recommendation 73-1. Agencies must retain wide discretion to inform the public, but sometimes exercise this discretion in damaging ways. Part II detailed how agency publicity can be problematic when it is premature, excessive, inaccurate, or used as a sanction. This latter use, a technique sometimes called "naming and shaming," can be particularly problematic. As Eric Posner notes, "shaming is the very antithesis of the law."[730]

In this spirit, I consider recommendations directed to all three branches—executive, legislative, and judicial. Most important are the recommendations to agencies. I urge agencies to make their publicity practices more transparent and to conform not only to existing law, but also to principles of good governance. The recommendations to Congress are mostly to clarify existing law. Finally, after much careful thought, and a change of opinion,[731] I do not recommend judicial review of agency publicity absent the exceptional circumstances already recognized by courts.

A. Improving Agency Practices

In 1973, the Conference recommended that agencies "balance the need for adequately serving the public interest and the need for adequately protecting persons affected by adverse agency publicity." [732] Thus, Recommendation 73-1 was directed solely at agencies. Today, several groups, both in and out of agencies, said they would support Conference recommendations for best practices.[733] In light of these discussions, and in light of the research above, I recommend the following ten best practices:

1.	*Written policies*. Agencies should adopt written policies that address the content of agency announcements and the procedures for issuing them.
2.	*Publication of policies*. Agencies should publish their written policies online.
3.	*Advanced notice*. Agencies should consider giving advanced notice to subjects identified in publicity, but only when the subject is not already aware of an ongoing agency action, unless such notice would be impracticable or inconsistent with the nature of the proceeding
4.	*Corrections and retractions*. Agencies should adopt procedures for correcting and retracting materially inaccurate statements, subject to exceptions in the public interest.
5.	*Publicizing investigations, complaints, and other preliminary actions*. Agencies should not publicize investigations except in rare circumstances as required by the public interest, and should publicize complaints and other preliminary actions only with a clear explanation that the action is tentative and non-final.

[730] Eric Posner, *A Terrible Shame: Enforcing Moral Norms Without the Law Is No Way to Create a Virtuous Society*, SLATE.COM (Apr. 9, 2015) (noting that, on the whole, the law on using shame as a sanction is ambivalent and incoherent).

[731] Cortez, *supra* note 7, at 1441-53 (arguing for judicial review of agency publicity).

[732] 1 C.F.R. § 305.73-1; 38 Fed. Reg. 16,839 (Jun. 27, 1973).

[733] *See, e.g.*, Interview with Sean Moulton & Scott Klinger, *supra* note 16; Interview with officials from the FTC Office of General Counsel, *supra* note 16;

6.	*Capital market reactions*. Agencies should consider the potential capital market reactions to their announcements and should, when practicable and subject to exceptions in the public interest, try to minimize potential capital market shocks.
7.	*Social media*. Agencies should incorporate into their social media policies best practices and procedures that apply to traditional types of agency publicity, such as clear lines of responsibility for publishing information via agency accounts and safeguards to ensure the accuracy of statements.
8.	*Database disclosures*. Agencies should adopt written policies governing online databases that contain adverse information about identified parties. Those policies should ensure that (i) the data are accurate, (ii) that users are informed of the source(s), context, and any limitations of the data, and (iii) that subjects are given the chance to post responses or request corrections or retractions, subject to reasonable exceptions in the public interest.
9.	*Clarifying the Information Quality Act*. The OMB should clarify that the Information Quality Act applies to new substantive information in press releases that is not covered by previous information dissemination subject to the Act. The OMB should also consider updating its guidelines to account for the different types of databases published by agencies.
10.	*Fielding objections*. Agencies that are not subject to the Information Quality Act, and do not otherwise have post-publication procedures for requesting corrections to information should direct objections to the agency's announcement to the Ombudsman or Inspector General, as appropriate.

1. Written Policies

Recommendation. Agencies should adopt written policies that address the content of agency announcements and the procedures for issuing them.

This recommendation is not new. Gellhorn's 1973 article found that very few agencies had established written policies.[734] ACUS thus recommended that "Each agency should state in its published rules the procedures and policies to be followed in publicizing agency action or policy, and internal operating practices should assure compliance."[735] However, few agencies implemented this recommendation. The ACUS files contain a 1974 letter from John Cushman, who observed: "I suspect you will find a number of agencies who say in effect that they agree with [the] Recommendation in principle but who are not willing to state their policies in regulations or even a policy statement."[736] His letter viewed the need for a written policy as probably "vital" to Recommendation 73-1, "since it may be the only way to test whether [an] agency will do anything."[737] My non-exhaustive review identified only the following written policies, some of which may be outdated or not followed:

[734] Gellhorn, *supra* note 7, at 1384.

[735] 1 C.F.R. § 305.73-1; 38 Fed. Reg. 16,839 (Jun. 27, 1973).

[736] Letter from John F. Cushman to Ed Leahy of Jan. 4, 1974) (internal quotations omitted) (on file with ACUS).

[737] *Id.*

Agency	Written Publicity Policy	Public?
Bureau of Alcohol, Tobacco, and Firearms (ATF)[738]	ATF Directive O 1200.7	No[739]
Consumer Product Safety Commission (CPSC)	Information Disclosure Under Section 6(b) of the Consumer Product Safety Act, 16 C.F.R. part 1101	Yes[740]
Federal Power Commission (FPC)[741]	18 C.F.R. §§ 1.6 and 1.36	Yes[742]
Federal Trade Commission (FTC)	Operating Manual, Chapter 17 § 2.5	Yes[743]
Department of Health and Human Services (HHS)	Release of Adverse Information to News Media, 45 C.F.R. part 17	Yes[744]
Securities and Exchange Commission (SEC)	SEC Administrative Regulations on "Press Relations Policies and Procedures"	Yes[745]

The need for written policies. Even agencies staffed with professionals of immense goodwill can benefit from adopting written policies. Although agency practices may be constrained by internal protocols—or by what Gellhorn called "custom, habit, and natural bureaucratic caution"[746]—the four-decade interim shows that agencies sometimes breach these self-restraints. Moreover, agencies with written policies are probably less likely to abuse publicity than agencies without them.[747] Further, written publicity policies can be an important way to preserve best practices. As one former FDA official explained, the lessons of the 1960s and 1970s have not necessarily been passed down to later generations at agencies, and without written policies, agency staff might have to re-learn those lessons through trial and error.[748] Of the three agencies examined in detail, the FTC seems to have the clearest publicly-available written policies, although FTC officials are quick to note that the agency's policies are not always embedded in the *Operating Manual*.[749] Yet, the FTC's publicity policy was updated in 2014 and is included in the *Operating Manual*, perhaps indicating that the earlier FTC policies praised by Gellhorn have survived in some form.

[738] Today, the agency is named the Bureau of Alcohol, Tobacco, Firearms, and Explosives.

[739] This policy was at issue in *Banfi Products Corp. v. United States*, 40 Fed. Cl. 107 (1997). I could not find the policy on the current ATF web site. *See* ATF, https://www.atf.gov/ (last visited July 24, 2015).

[740] 16 C.F.R. part 1101.

[741] The FPC is now the Federal Energy Regulatory Commission (FERC).

[742] Currently, publicity practices are not addressed in FERC regulations. Sections 1b.9 and 1b.20 address the confidentiality of FERC investigations. *See* 18 C.F.R. §§ 1b.9, 1b.20.

[743] FTC, Administrative Staff Manuals, Operating Manual, https://www.ftc.gov/about-ftc/foia/foia-resources/ftc-administrative-staff-manuals.

[744] 45 C.F.R. part 17.

[745] SECR 18-2, Section B(15)(c).

[746] Gellhorn, *supra* note 7, at 1419.

[747] Cortez, *supra* note 7, at 1429; Gellhorn, *supra* note 7, at 1423 n.174 (comparing the FTC's record with written policies to the EEOC's record without them).

[748] Interview with Wayne Pines, *supra* note 224.

[749] *See* Part IV.B, *supra*.

The need to observe written policies. Just as important as establishing written policies, it is important that agencies make staff aware of these policies and provide training. Both current and former public affairs officials noted that their agencies issued publicity without following any written guidelines. [750] Again, staff may be completely unaware of such policies, leaving them to rely on custom, habit, and self-restraint. Several current and former officials emphasized that written policies would be most useful if drafted with sufficient generality; but they worried that adopting highly specified policies and procedures might unnecessarily constrain agency discretion, frustrate attempts to notify the public, and possibly lead to non-compliance. The most useful written policies, many noted, would express broad principles and procedures, preserving agency discretion, particularly in emergencies and when otherwise required in the public interest.

Content guidelines. Written policies should address the content of agency announcements. In 1973, the Conference recommended that "All adverse agency publicity should be factual in content and accurate in description," and that "Disparaging terminology should be avoided."[751] The Conference also urged agencies to take "reasonable precautions to assure that the information stated is accurate and that the publicity fulfills an authorized purpose." [752] These recommendations remain relevant today. The three agencies examined in Part IV seem to recognize the power of their publicity and take care to ensure that announcements are accurate. But again, occasional disputes over the language used by some agencies shows that content guidelines remain useful.[753] Still, courts are correct in declining to demand perfection of agencies in formulating announcements, and agencies "cannot be blamed because certain media reports inaccurately reported an accurate press release." [754] FDA once defended its discretion "even if there is the possibility that the information may be ignored, misinterpreted, oversimplified, overstated, or misunderstood by the media or by the public."[755]

Still, agencies should strive for press releases that will not, in fact, be misinterpreted.[756] A best practice followed by many enforcement agencies is to provide prominent links to underlying documents in a case, such as complaints, settlements, and orders. Applying the Information/Data Quality Act to new information published in press releases, as many agencies do,[757] may also help ensure that the content of announcements is accurate and not unnecessarily pejorative. Finally, agency guidelines should require agencies to clarify the preliminary nature of investigations, complaints, and other actions that have not been resolved.[758]

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[750] *See, e.g.*, Interview with Wayne Pines, *supra* note 224; Interview with Jennifer Howard, *supra* note 34.

[751] 1 C.F.R. § 305.73-1; 38 Fed. Reg. 16,839 (Jun. 27, 1973).

[752] 1 C.F.R. § 305.73-1; 38 Fed. Reg. 16,839 (Jun. 27, 1973).

[753] Cortez, *supra* note 7, at 1430 (citing instances in which parties objected to pejorative language used by the FDA and FTC, though courts largely rejected these challenges).

[754] *Trudeau*, 384 F. Supp. 2d at 293.

[755] 42 Fed. Reg. at 12,437.

[756] Cortez, *supra* note 7, at 1432.

[757] *See* Part III.E, *supra*.

[758] *See* Part V.A.5, *infra*.

Procedural guidelines. With all the different ways agencies can reach the public today—including press releases, social media posts, and countless types of announcements on agency web sites—it is more important than ever that agencies articulate clear procedures.[759] Rather than specifying such procedures here, it is probably more useful to identify broad principles and best practices for agencies to follow. Of course, agencies adopting procedures would have to tailor them to their own needs.

Policies for who may issue publicity. Gellhorn recommended that agencies adopt policies that clarify who within the agency may issue publicity and answer media inquiries.[760] By and large, the agencies I studied seem to observe protocols on these matters, though the protocols may not be in writing.

Procedures to ensure accuracy. Second, agencies should establish procedures to ensure the accuracy of publicity. For example, the FTC uses a painstaking, multi-tiered process to review and clear press releases that discuss enforcement actions.[761] The CFPB also subjects press releases to multiple rounds of edits with clear stages of review and approval.[762] The HHS rule requires its agencies like FDA to take reasonable precautions to assure the information in announcements is accurate, per Recommendation 73-1.[763] Agencies should also consider not only the technical accuracy of their statements, but also the impression left by the announcement as a whole.[764] Thus, for example, an agency should not suggest in the title of an announcement something that is not fully supported in the body of the text.[765]

Likelihood of harm and alternatives. Both Gellhorn and ACUS recommended that agencies use publicity only as necessary and consider alternatives that might be equally effective.[766] Gellhorn also urged agencies to consider the likelihood of causing severe harm to the subject.[767] It might be difficult to prescribe this consideration in writing, other than to include a general statement in agency policies emphasizing that adverse publicity can cause harms that can be indeterminate and difficult to calibrate.

Exceptions in the public interest. Agencies should consider adopting reasonable exemptions in their publicity policies for emergencies and the like, tailored to the agency's individual needs and statutory authorities. For example, the FDA should maintain significant discretion to warn the public of product risks that might cause death or severe injuries, or gross economic losses. Several agency officials emphasized the need for flexibility and warned that strict policies might chill important agency announcements.

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[759] Cortez, *supra* note

[760] Gellhorn, *supra* note 7, at 1430.

[761] *See* Part IV.B, *supra*.

[762] *See* Part IV.C, *supra*.

[763] *See* Part IV.A, *supra*.

[764] Cortez, *supra* note 7, at 1432.

[765] *See, e.g.*, *Trudeau*, 384 F. Supp. 2d, at 292. Note, however, that the court rejected Trudeau's claim that the title of the press release was false or misleading.

[766] Gellhorn, *supra* note 7, at 1426; 38 Fed. Reg. at 16,839.

[767] Gellhorn, *supra* note 7, at 1427-28.

2. Publication of Policies

Recommendation. Agencies should publish their written policies online.

If few agencies have adopted written publicity policies, even fewer have published them. However, in an era of sprawling agency web sites, when many agencies publish detailed employee manuals, handbooks, and other internal policies online, reasons for *not* publishing a written publicity policy seem scarce. Indeed, the FDA publishes its extensive *Regulatory Procedures Manual* online, as does the FTC its long *Operating Manual*.[768] As Peter Barton Hutt explained regarding the FDA's 1977 proposed rule, agencies have a duty to tell the public what is and is not permitted.[769] Publication of written policies not only establishes expectations for regulated parties, but may serve an internal prophylactic purpose by encouraging agency personnel to exercise their discretion wisely.[770] Moreover, if agencies do offer procedures for subjects to seek corrections or retractions, agencies will have to publish these procedures. One model is the Information/Data Quality Act. The OMB guidelines implementing the Act require agencies to post their guidelines on their web sites.[771] It does not appear that agencies are inundated with requests under the Act, despite publication of their policies.

3. Advanced Notice to Subjects

Recommendation. Agencies should give advanced notice to subjects identified in publicity, but only when the subject is not already aware of an ongoing agency action, unless such notice would be impracticable or inconsistent with the nature of the proceeding.

History. In 1973, the Conference similarly recommended that the subjects of publicity be "given advanced notice" and "a reasonable opportunity" to respond in advance "if practicable and consistent with the nature of the proceeding."[772] The Conference did not recognize an exception for parties who are already aware of an ongoing agency action. Some agencies objected to these recommendations.[773]

Problems with lack of notice. The lack of advanced notice can be particularly damaging—and seem particularly unfair—to the subjects of agency publicity. When agencies take enforcement actions, both due process and the APA typically require that agencies give the targets prior notice and an opportunity to respond.[774] But when agencies issue publicity, they sometimes do not provide these basic procedural protections. For example, in 2003, the FDA publicized objections to a drug company's

[768] *See* Parts IV.A and IV.B, *supra*.
[769] Interview with Peter Barton Hutt, *supra* note 237.
[770] Noah, *supra* note 37, at 940; Cortez, *supra* note 7, at 1429-30.
[771] OMB, *Guidelines*, *supra* note 714 OR 203 ?; OMB, *Agency Information Quality Guidelines*, https://www.whitehouse.gov/omb/inforeg_agency_info_quality_links/ (last visited July 24, 2015).
[772] 1 C.F.R. § 305.73-1; 38 Fed. Reg. 16,839 (Jun. 27, 1973).
[773] Letters on file with ACUS.
[774] APA §§ 5-8, 5 U.S.C. §§ 554-57; Cortez, *supra* note 7, at 1383.

press release, but did not notify the company of the agency's objections beforehand.[775] The company's stock price dropped nearly 25% within hours of the announcement.[776] Courts, however, have not always been sympathetic to parties challenging a lack of prior notice. The D.C. District Court held long ago that the FDA did not have to provide a prior hearing before issuing adverse publicity condemning a cancer clinic for making illegal marketing claims.[777] Thus, as Gellhorn emphasized, "usually no protection other than the common sense and good will of the administrator prevents unreasonable use of coercive publicity."[778] A former FDA lawyer also observed that "there is relatively little a company can do" to stop adverse publicity.[779] Thus, principles of good governance probably dictate that agencies provide some basic due process to subjects.

Agency practices. Agency practices on giving advanced notice vary. HHS rules allow FDA and other sub-agencies to provide advanced notice "if practicable and consistent with the nature of the proceeding."[780] The rule notes that this provision gives subjects an opportunity to prepare their own public response, but does not give them a right to edit or object to the agency's announcement.[781] FDA's practice is to notify subjects that a press release is coming but to not negotiate over the text of the announcement (or even to provide the text prior to publication).[782] As noted above, the SEC failed to make sufficient efforts to give advanced notice to Goldman Sachs before filing its complaint, contrary to SEC Administrative Regulation SECR 18-2.[783] Multiple agencies explained that most subjects of adverse publicity are already aware that they are on the agency's radar.[784] The FTC, for example, generally meets with the subjects of investigations before filing a complaint, meaning the subject will be aware of the investigation.[785]

Analogs. Congress has shown sensitivity to agency disclosures without prior notice. The Toxic Substances Control Act makes it a crime to publicly disclose confidential information that manufacturers have submitted to the EPA unless the agency gives thirty days advanced notice.[786] Exceptions allow EPA to disclose such information if necessary to protect public health or the environment. But even then, the EPA must provide either 15 days or 24 hours advanced notice, depending on the significance of the threat.[787] Other laws make it a crime for agency personnel to publicly disclose confidential company information.[788] Similarly, good database practices support some form of advanced notice.

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[775] Vodra et al., *supra* note 59, at 649.
[776] *FDA Responds in Kind to SuperGen*, *supra* note 59, at 6; Vodra et al., *supra* note 59, at 649.
[777] Hoxsey Cancer Clinic v. Folsom, 155 F. Supp. 376, 377-78 (D.D.C. 1957).
[778] Gellhorn, *supra* note 7, at 1420.
[779] Levine, *supra* note 288, at 277.
[780] 45 C.F.R. § 17.6.
[781] *Id*.
[782] Levine, *supra* note 288, at 277.
[783] SEC OIG, *supra* note 33, at 57-65. Note that the OIG found that SEC staff took differing views on whether the Commission should give advanced notice to defendants in advance of filing a complaint, and recommended that the SEC consider revising SECR 18-2.
[784] *See, e.g.*, 42 Fed. Reg. at 12,439; Interview with Jennifer Howard (CFPB), *supra* note 34.
[785] Interview with officials from the FTC Office of General Counsel, *supra* note 16.
[786] 15 U.S.C. § 2613(c).
[787] 15 U.S.C. § 2613(c)(2)(B)(i).
[788] *See, e.g.*, 15 U.S.C. § 50; 16 C.F.R. §§ 4.09-4.11.

The CFPB's consumer complaint database, for example, gives companies ample opportunity to learn about and verify complaints before they are published online.[789]

Exceptions. If agencies do adopt a policy to provide advanced notice, they should have sufficient leeway to also adopt exceptions relevant to the agency's mission and statutory responsibilities. For example, the EPA and FDA should be able to forego advanced notice during emergencies or if otherwise contrary to the public interest. Consumer protection agencies like the FTC and CFPB should be able to recognize exceptions if there is a risk of significant economic harm. Finally, all enforcement agencies should be able to adopt exceptions if prior notice would compromise ongoing surveillance, investigations, or other enforcement activities.

4. Corrections and Retractions

Recommendation. Agencies should adopt procedures for correcting and retracting materially inaccurate statements, subject to emergencies and other exceptions in the public interest.

History. In 1973, the Conference recommended that when agency publicity is erroneous or misleading, parties may request corrections or retractions, to be published in as close to the same manner as feasible to the original publicity.[790] Although agency retractions "are infamous for going unnoticed,"[791] providing post-publication procedures should ameliorate most disputes over agency publicity.[792] Doing so also achieves a measure of symmetry—for example, agencies frequently publicize when they bring successful enforcement actions, but rarely publicize investigations that found no wrongdoing or complaints that failed.[793] Moreover, many suspect that when agencies do make such announcements, they do not publicize them with the same vigor, nor do media give them the same level of attention.[794] Thus, procedures for requesting corrections and retractions can help soften criticisms that agencies use publicity unfairly.

Agency practices. Agency practices for corrections and retractions vary. The HHS rule discussed above[795] allows parties to request that HHS or its sub-agencies correct or retract information that is inaccurate or misleading, and provides that the response will be

[789] Part IV.C, *supra*.

[790] 1 C.F.R. § 305.73-1; 38 Fed. Reg. 16,839 (Jun. 27, 1973).

[791] Cortez, *supra* note 7, at 1437 (citing O'Reilly, *The 411 on 515*, *supra* note 37, at 849). For example, the National Highway Traffic Safety Administration (NHTSA) believes that corrective announcements can undo the damage from earlier errors. NHTSA, Petitions for Rulemaking, Defect and Noncompliance Orders, 60 Fed. Reg. 17,254, 17,257 (1995) (noting that suppliers whose components or parts are erroneously identified as defective in recall notices can simply counter "[a]ny adverse publicity that does affect a supplier … by publicizing the correct information when it becomes available").

[792] Cortez, *supra* note 7, at 1437-38.

[793] *Id.* at 1437. Note that the FTC will publish a "closing letter" if an investigation finds no violations. FTC, *Commission Closing Letters*, https://www.ftc.gov/enforcement/cases-proceedings/closing-letters-and-other-public-statements/commission-closing-letters (last visited July 27, 2015).

[794] Gellhorn, *supra* note 7, at 1391-92; Cortez, *supra* note 7, at 1437.

[795] Part IV.A, *supra*.

made "in the same manner" as the original announcement.[796] The FTC does not make clear any procedures for making such requests, and FTC officials explain that the subjects of press releases do not necessarily want or need to request corrections or retractions.[797] Nonetheless, FTC officials note that aggrieved parties will have several points of contact with the Commission should they object to an announcement.[798] Another example that also applies to agency databases is the EPA, which designates agency personnel to consider objections that data entered on the EPA web site are incorrect.[799] EPA will then identify the data with yellow flag icons, indicating that the data are disputed.[800]

Recommended procedures. Agencies should provide clear instructions for parties to request that agencies correct or retract information in an agency announcement. Subjects seem to prefer that the information be removed completely, but also welcome corrections and retractions.[801] Because many agencies apply the Information/Data Quality Act to press releases that contain new information that is not already subject to the Act, these procedures might suffice.[802] Other agencies should consider extending the Act to press releases in this manner, contrary to the OMB's guidelines. Second, it should not be difficult for agencies that maintain media distribution lists to reach the same audience twice.[803] Third, agencies should use the same method of distribution as the original announcement. Fourth, agencies should also establish clear deadlines for responding to the request, and make available procedures for seeking expedited reviews.[804] For example, the FDA's proposed 1977 policy required subjects to send expedited requests to the Assistant Commissioner for Public Affairs.[805] Fifth, it is important that agencies tailor these procedures to meet their own unique circumstances and needs. Finally, disputed requests might be appealed to an agency Ombudsman, Chief Information Officer, or Inspector General.[806] Providing an appeal mechanism could help agencies generate more credibility and perhaps deter litigation.[807]

5. Publicizing Investigations, Complaints, and Other Preliminary Actions

Recommendation. Agencies should not publicize investigations except in rare circumstances as required in the public interest, and should publicize complaints and other preliminary actions only with a clear explanation that the action is tentative and non-final.

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[796] 45 C.F.R. § 17.7.

[797] Interview with officials from the FTC Office of General Counsel, *supra* note 16.

[798] *Id.*

[799] O'Reilly, *Libels on Government Websites*, *supra* note 93, at 514, 533-36.

[800] *Id.* at 534.

[801] *Id.* at 534-36.

[802] The Act required the OMB to "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency" that does not meet the required standards for quality, objectivity, and the like. 44 U.S.C. § 3516(b)(2)(B).

[803] O'Reilly, *Libels on Government Websites*, *supra* note 37, at 536.

[804] Cortez, *supra* note 7, at 1438; O'Reilly, *Libels on Government Websites*, *supra* note 93, at 537.

[805] 42 Fed. Reg. at 12,440-41.

[806] *See, e.g.*, O'Reilly, *Libels on Government Websites*, supra note 93, at 538-39.

[807] O'Reilly, *The 411 on 515*, *supra* note 37, at 848; Cortez, *supra* note 7, at 1438.

History. In 1973, the Conference recommended that agencies publicize investigations or "pending agency trial-type proceedings only in limited circumstances" and subject to certain criteria.[808] For example, agencies should issue such publicity when "there is a significant risk the public health or safety may be impaired or substantial economic harm may occur unless the public is immediately notified."[809] However, when feasible, the Conference recommended that agencies give parties a chance to cease immediately the offending practice and avoid public harm in lieu of using adverse publicity.[810] Such publicity might also be necessary, according to Recommendation 73-1, when required to notify interested parties of pending agency adjudications, or when information about the adverse agency action is already public and likely to be covered by the media (but only to ensure accurate media coverage and "public understanding").[811] However, a critique of Recommendation 73-1 in the media sums up the counterargument well:

> The heart of the problem is in the peculiar role of the regulatory agency itself. Litigated cases, like those which worry the Administrative Conference, are part of the regulatory agency's broader effort to devise and enforce solutions to complex public problems. So these cases are more than private squabbles between prosecutor and accused.[812]

Risks of premature publicity. As noted above,[813] agency publicity can be problematic when it is premature, such as when an agency publicizes that it has initiated an investigation into certain practices without also clarifying that the allegations have not been proven yet. Since 1973, numerous parties have sued agencies for publicizing investigations or complaints, showing that such announcements remain controversial.[814] There are also well-known instances of early-stage publicity causing significant harm to industry. Perhaps the most recent case was the FDA and CDC incorrectly identifying tomatoes as the source of a salmonella outbreak in 2008, costing the tomato industry roughly $200 million.[815] Of course, publicity of preliminary agency actions may be necessary in many cases, particularly when required to alert the public to health or safety risks. Again, agencies should retain maximum discretion to make such announcements.

Statutory authority. As explained above, Congress and the White House have not taken a consistent stance on whether agencies should publicize investigations and complaints. For example, the PTO may publicize complaints against invention submission promoters,[816] but the FEC is prohibited from publicizing investigations into suspected violations of campaign finance laws.[817] And another statute prohibits the Equal

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[808] 1 C.F.R. § 305.73-1; 38 Fed. Reg. 16,839 (Jun. 27, 1973).

[809] 1 C.F.R. § 305.73-1; 38 Fed. Reg. 16,839 (Jun. 27, 1973).

[810] 1 C.F.R. § 305.73-1; 38 Fed. Reg. 16,839 (Jun. 27, 1973).

[811] 1 C.F.R. § 305.73-1; 38 Fed. Reg. 16,839 (Jun. 27, 1973).

[812] Stanley E. Cohen, *Curbs on Regulatory Press Releases – Would They Hurt or Help Businesses?*, ADVERTISING AGE (June 18, 1973) (on file with ACUS).

[813] Part II.C.1, *supra*.

[814] Appendix C (Table of Federal Cases, 1974-2014).

[815] Maki, *supra* note 61.

[816] 35 U.S.C. § 297(d).

[817] Federal Election Campaign Act, 2 U.S.C. § 437g(a)(4)(B), (a)(12)(A); Common Cause v. FEC, 83 F.R.D. 410, 412 (D.D.C. 1979); Cortez, *supra* note 7, at 1435.

Employment Opportunity Commission (EEOC) from "making public" information that it obtains while investigating or negotiating with employers suspected of violating federal antidiscrimination laws.[818] There are likely several other similar statutes governing agencies.[819] Thus, statutory authority for this practice varies. It is likely that most agencies do not receive explicit direction one way or the other.

Agency practices. Most agencies "regularly publicize every significant formal action," even when not necessary to warn the public.[820] My review of FDA, FTC, and CFPB practices show that most agencies are sensitive to the dangers of publicizing investigations, but regularly publicize agency complaints. Agencies do, however, use disclaimers and links to full court documents to provide context for such announcements.

FDA. Although HHS rules limit announcements of investigations or pending proceedings to when there is a significant risk to public health or substantial economic harm,[821] the FDA regularly publicizes preliminary actions, including investigations, civil complaints, and criminal charges and indictments.[822] My empirical review of FDA press announcements between 2004 and 2010 showed that a high percentage of negative press releases that identified specific products or parties involved some preliminary or tentative agency determination (74%), rather than a final, determinative action (26%).[823] Of course, many of these press releases announce product recalls, perhaps one of the FDA's most important functions. The Federal Food, Drug, and Cosmetic Act allows FDA to disseminate information about regulated products, and clarifies that nothing prohibits FDA from publishing the *results* of investigations.[824] The FDA's *Regulatory Procedures Manual* includes detailed procedures for issuing press releases regarding enforcement actions.[825] Note also that the FDA publishes on its web site Warning Letters and records of inspectional observations, including company responses.

FTC. The FTC treats investigations as non-public, but regularly publicizes formal complaints initiating law enforcement actions.[826] As early as 1918, the FTC adopted a policy of issuing press releases when it filed complaints,[827] and the D.C. Circuit upheld this practice in 1968.[828] The FTC's policy is a thoughtful one—the Commission takes care when announcing formal complaints to clarify that the case has not yet been adjudicated.[829] Even though these disclaimers are not always effective,[830] they should be

[818] Civil Rights Act §§ 706(b), 709(e), 42 U.S.C. §§ 2000e-5(b), 2000e-8(e); Sears, Roebuck & Co. v. EEOC, 581 F.2d 941 (D.C. Cir. 1978); Cortez, *supra* note 7, at 1435.

[819] *See, e.g.*, 15 U.S.C. § 50 (making it a crime for FTC employees to make public confidential information).

[820] Gellhorn, *supra* note 7, at 1392; *see also* FTC, *Enforcement*, https://www.ftc.gov/enforcement (last visited Aug. 21, 2015) (linking to several pages of enforcement announcements and documents).

[821] 45 C.F.R. § 17.4.

[822] Cortez, *supra* note 7, at 1408.

[823] *See* Part IV.A, *supra*; Appendix D (FDA Press Announcements, 2004-2010), *infra*.

[824] FDCA § 705(b); 21 U.S.C. § 375(b).

[825] Part IV.A, *supra*.

[826] Part IV.B, *supra*.

[827] Gellhorn, *supra* note 7, at 1388-89.

[828] FTC v. Cinderella Career & Finishing Sch., Inc., 404 F.2d 1308, 1313-14 (D.C. Cir. 1968).

[829] Gellhorn, *supra* note 7; Interview with Officials from FTC Office of Public Affairs, *supra* note 34.

required at minimum. The FTC's *Operating Manual* provides detailed requirements on making public both investigations and complaints. FTC officials explain that investigations are no longer made public. Both the FTC *Manual* and agency officials describe careful procedures for drafting and approving press releases for FTC complaints. These procedures are designed to ensure that the announcement is factual and accurate.

CFPB. One of the CFPB's most controversial practices is to publish consumer complaints in an online database.[831] But the CFPB's publication criteria, and the procedures allowing companies to review and verify complaints before publication, seem to provide adequate quality assurance. Moreover, the Bureau disclaims the accuracy of the entries, emphasizing that the information is provided by consumers and companies, rather than the Bureau.[832] Traditional press releases sometimes announce complaints against regulated firms. The CFPB web site includes roughly seven pages of "enforcement" press releases.[833] Like the FDA and FTC, the CFPB uses a multi-tiered approval process to ensure the accuracy of such announcements. However, Bureau regulations provide that investigations are non-public.[834]

Incomplete information. The Conference recognized that agencies must sometimes disclose information that "has a limited basis," such as when allegations are made but not fully adjudicated, but urged agencies to "prominently" disclose the limited basis and tentative nature of the information.[835] Agencies like the EPA and FDA might also have to alert the public to potentially dangerous products amid substantial scientific uncertainty. Again, as the Conference recommended four decades ago, agencies should clarify when the factual or scientific basis for the announcement is tentative and subject to change.

Compliance or publication. Recommendation 73-1 endorsed the practice of agencies' using the threat of publicity to encourage quick compliance.[836] The Conference stated that "where public harm can be avoided by immediate discontinuance of an offending practice, a respondent should be allowed an opportunity, where feasible, to cease the practice (pending a legal test) in lieu of adverse agency publicity."[837] This recommendation was criticized as "blackmail,"[838] A magazine article argued that agencies could use this leverage to say "Either quietly stop now and avoid publicity … or face the kind of publicity you don't want."[839] It is also interesting to note that public criticisms of Recommendation 73-1 frequently invoked the then-recent Watergate scandal and the dangers of executive secrecy. However, courts have approved of this use of publicity. One court in 1977 noted that the FTC publicizes complaints in part "to

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[830] Cortez, *supra* note 7, at 1431.
[831] Part IV.C, *supra*.
[832] I discuss recommendations for agency databases more fully in Part V.A.8, *infra*.
[833] CFPB, Newsroom, *supra* note 680.
[834] 12 C.F.R. § 1080.14(b).
[835] 1 C.F.R. § 305.73-1; 38 Fed. Reg. 16,839 (Jun. 27, 1973).
[836] 38 Fed. Reg. 16,839 (Jun. 27, 1973).
[837] *Id.*
[838] Stanley E. Cohen, *Curbs on Regulatory Press Releases – Would They Hurt or Help Businesses?*, ADVERTISING AGE (June 18, 1973) (on file with ACUS).
[839] *Id.*

induce respondents to agree promptly to remedial orders without the necessity of extended legal proceedings."[840] Similarly, HHS rules allow sub-agencies like the FDA to withhold releasing adverse information to the public if "public harm can be avoided by immediate discontinuance of an offending practice."[841] Undoubtedly, the threat of publicity can be a strikingly effective—if coercive—regulatory tool.[842]

Clarifying the nature of the action. Agency policies should require that announcements clarify the nature of any agency enforcement action as best as possible. Agencies should take particular care when announcing pending or preliminary agency actions via social media or other truncated formats.[843] Companies often express concern that agency announcements misstate the nature of the agency's action or mislead the public to believe that the allegations are more definitive than they are.[844] Agencies press releases are not "obliged to repeat every word or phrase in a settlement,"[845] but they should avoid using language in titles and headings that are likely to be misinterpreted.[846] Agencies should remain sensitive to these concerns.

Exceptions. There are obvious exceptions in the public interest that must be recognized. Agencies do not always have the luxury of waiting for cases to conclude to alert the public. For example, agencies like the CPSC, EPA, and FDA must announce product recalls or other public health hazards.[847] These agencies are often in a Catch-22, as they are often criticized for not making these announcements *soon* enough.[848] For example, the NHTSA has long been criticized for publicizing vehicle defects months or years after they are first suspected.[849] Observers worry that regulated companies might use procedures for correcting or retracting publicity to delay important agency announcements.[850] Thus, agencies should have flexibility to make public announcements before notifying or responding to identified parties.[851] Again, agencies should have discretion to balance the public and private interests at stake.

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[840] Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 820 (N.D. Cal. 1977). FTC officials note that the court appears to have misread the FTC Act and rules on this point, explaining that 15 U.S.C. § 45 and 16 C.F.R. §§ 2.31-32 do not govern the Commission's procedures for issuing proposed complaints.

[841] 45 C.F.R. § 17.4.

[842] Cortez, *supra* note 7, at 1427; Noah, *supra* note 37, at 875; Gellhorn, *supra* note 7, at 1421.

[843] See Part V.7, *infra*, for a fuller discussion.

[844] *See, e.g.*, Kaiser Aluminum & Chem. Corp. v. CPSC, 414 F. Supp. 1047, 1061-62 (D. Del. 1976) (alleging that the CPSC's public announcements led the public to believe that the CPSC had made a final determination based on more convincing evidence than it really possessed).

[845] *Trudeau*, 384 F. Supp. 2d at 292.

[846] Cortez, *supra* note 7, at 1431.

[847] *Id*. at 1436.

[848] *Id*.

[849] Contrast Gellhorn, *supra* note 7, at 1418, with the recent criticism of Toyota and other manufacturers. *See, e.g.*, 156 CONG. REC. S2759-60 (daily ed. Apr. 28, 2010) (statement of Sen. Barbara Boxer).

[850] O'Reilly, *Libels on Government Websites*, *supra* note 93, at 546-47; Cortez, *supra* note 7, at 1437; Sidney A. Shapiro, The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Rider, 28 WM. & MARY ENVT'L L. & POL'Y REV. 339, 358-61 (2004).

[851] Cortez, *supra* note 7, at 1437.

6. Timing Announcements to Avoid Capital Market Shocks

Recommendation. Agencies should consider the potential capital market reactions to their announcements and should, when practicable and subject to exceptions in the public interest, try to minimize potential capital market shocks.

Hyper-sensitive market reactions. As I explain above, the potential impact of agency publicity is magnified by modern capital markets, made hyper-responsive by Internet technologies.[852] Company stock prices can be extremely sensitive to agency announcements, regardless whether the announcement is inaccurate or misinterpreted. Recent incidents involving CMS, FDA, and SEC announcements demonstrate how markets can react quickly and hastily to adverse publicity.

Agency rules. Agency publicity policies are largely silent on whether agencies should consider or try to avoid capital market reactions to their announcements. One exception is a memorandum by the Centers for Medicare and Medicaid Services (CMS), which discourages employees from releasing "market sensitive" information that "may have stock or bond market implications" during trading hours.[853] Otherwise, the HHS rule[854] and the FTC *Operating Manual*[855] are both silent on this issue. The CFPB also does not seem to have a written policy on this issue.

Agency practices. Agency practices vary, of course, but also tend to disregard potential capital market reactions in favor of other considerations. The FTC publishes press releases during business hours (which are roughly coterminous with trading hours) and does not try to minimize market reactions.[856] Similarly, the CFPB does not embargo press releases to avoid influencing capital markets.[857] The SEC has refused to give NYSE advanced notice of major enforcement actions or to make such announcements during non-trading hours.[858] Even CMS, which has a policy on point, made a recent public announcement that influenced billions of dollars in trading, seemingly oblivious to the potential market response.[859] Thus, many agencies seem to make announcements without overriding concern for their potential market impact. Agencies cite several reasons for not limiting announcements to non-trading hours or otherwise trying to minimize market reactions. The CFPB and SEC both cite the potential for early leaks.[860] CMS, FDA, and FTC officials argue that the agencies cannot predict or control market reactions.[861] FTC officials explain that global capital markets and after-hours trading make it difficult to

[852] Part III.D, *supra*.
[853] Memorandum on Employee Nondisclosure Policy from James Webber, *supra* note 189.
[854] 45 C.F.R. part 17.
[855] FTC Operating Manual, *supra* note 432.
[856] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.
[857] Interview with Jennifer Howard, *supra* note 34.
[858] Cortez, *supra* note 7, at 1397 n.151 (citing SEC OIG, *supra* note 33, at 65-71).
[859] Part III.D, *supra*.
[860] Interview with Jennifer Howard, *supra* note 34; Cortez, *supra* note 7, at 1397 n.151 (citing SEC OIG, *supra* note 33, at 65-71).
[861] Schulte, *supra* note 191, (quoting Aaron Albright from CMS); Interview with officials from the FTC Office of Public Affairs, *supra* note 34.

avoid market reactions completely.[862] FTC officials also explain that press releases regarding enforcement actions are timed to issue when the complaint is filed or when Commission votes are made public, not when markets are closed.[863] Thus, although many agencies are aware of potential market reactions to their announcements, such reactions do not seem to be an overriding concern for them. A more deliberate policy might be warranted.

Exceptions in the public interest. Again, agencies should be able to adopt exceptions, in the public interest, tailored to their statutory responsibilities. For example, agencies like the CPSC, EPA, and FDA should be able to alert the public to health and safety risks during trading hours. The risk of substantial harm or death should trump, obviously, the risk of causing capital market shocks. The FDA, for example, stresses that public announcements can be critical in avoiding deaths or serious injury, citing several recent examples, including the 2013 warnings of non-sterile drugs distributed by pharmacy compounders, the 2012 peanut products recall, the 2008 recall of heparin, and the 2007 recall of pet food tainted by melamine. Similarly, consumer protection agencies like the CFPB and FTC should be able to alert consumers to fraud and other substantial risks of economic harm. Thus, this is a soft recommendation—agencies should consider the potential capital market reactions to their announcements, balancing public and private interests when timing announcements. Agencies should not, for example, restrict announcements to non-trading hours when necessary to alert the public, or when the announcement truly is routine (notwithstanding the CMS example above).

7. Social Media Announcements

Recommendation. Agencies should incorporate into their social media policies best practices and procedures that apply to other types of agency publicity, such as clear lines of responsibility for publishing information via agency accounts and safeguards to ensure the accuracy of statements.

Agency uses. As explained above, modern agencies use social media platforms such as Facebook, Twitter, and YouTube to communicate with the public.[864] These and other social media platforms are designed to disseminate information widely and immediately—making them an important new tool for agencies. Social media can also be important for reaching younger audiences.[865]

Agency challenges. However, social media exacerbate some of the longstanding problems with agency publicity. Wide, immediate publication amplifies the reach of agency publicity, and short, truncated formats probably increase the risk that audiences will misread, misunderstand, or mischaracterize complex regulatory actions. Moreover, the volume and variety of social media platforms—including frequent changes to these platforms—create challenges for agencies. Agencies seem to recognize these dangers.

[862] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.
[863] *Id.*
[864] Part III.A.2, *supra*.
[865] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.

The FTC, for example, has been exceedingly cautious with its use of social media, and did not establish such accounts until the Commission had created policies to ensure proper use.[866]

Agency practices. Social media practices among agencies are evolving. The federal web site USA.gov lists 21 different social media services used by the federal government.[867] As noted above, agencies make prolific use of social media to reach the public. The FDA maintains 17 different Twitter accounts, in addition to accounts on Facebook, Pinterest, Flickr, and YouTube.[868] The FTC maintains nine separate Twitter accounts (including five for each of the commissioners and Chairwoman), in addition to accounts on Facebook, YouTube, and LinkedIn.[869] And the CFPB maintains accounts on Facebook, Flickr, Twitter, and YouTube.[870] My earlier research found that agencies like the EPA also maintain over a dozen Twitter feeds.[871]

Types of announcements. The case studies show that the CFPB, FDA, and FTC all use social media to announce enforcement actions. The FDA, for example, operates multiple social media accounts solely to announce recalls and other product alerts.[872] However, many agency announcements do not name specific companies or products. A large portion of the FTC's announcements on Twitter, for example, draw attention to unfair or deceptive trade practices, but without identifying specific violators.[873] Even when the FTC announces enforcement actions on Twitter, it tends not to name companies in the post itself.[874] The CFPB uses social media more to engage and educate consumers rather than to publicize enforcement actions.[875] For the most part, agencies seem to use social media for a variety of purposes and to reach a variety of audiences. Thus, agency practices can be difficult to generalize.

Dedicated personnel. Some agencies designate personnel responsible for social media accounts. The organizational chart for the FDA's Office of External Affairs shows "Web and Digital Media" as staffed by Charles Mulieri.[876] The FTC's Office of Public Affairs has a staff member responsible for social media.[877] And the CFPB handles social media through its Office of Consumer Education and Engagement, rather than through its Office

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[866] *Id.*

[867] USA.gov, Federal Government Social Media Registry, *supra* note 108.

[868] Part IV.A, *supra*.

[869] Part IV.B, *supra*.

[870] CFPB, http://www.consumerfinance.gov (last visited July 28, 2015) (displaying links to the Bureau's social media accounts).

[871] Cortez, *supra* note 7, at 1394 (tallying 18 separate Twitter accounts maintained by the EPA).

[872] *See* FDA Recalls, http://twitter.com/FDArecalls (last visited July 22, 2015); FDA MedWatch, http://twitter.com/fdamedwatch (last visited July 28, 2015).

[873] Part IV.B, *supra*.

[874] *Id.*

[875] Interview with Jennifer Howard, *supra* note 34.

[876] FDA, *Office of External Affairs Organization*, http://www.fda.gov/AboutFDA/CentersOffices/OrganizationCharts/ucm380930.htm (last visited July 28, 2015).

[877] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.

of Communications.[878] Agencies should establish clear internal lines of responsibility for using social media on the agency's behalf.

Written policies. The FTC reportedly uses written policies to govern staff use of social media on the Commission's behalf, but did not produce these policies at the time of our interview.[879] The FTC also established a "Social Media Task Force" to evaluate whether different platforms are appropriate for Commission use.[880] CFPB officials could not identify policies or procedures that govern social media use by the Bureau.[881] The FDA is subject to extensive social media rules by its parent agency, HHS.[882] All agencies are subject to extensive guidelines published by OMB and the GSA, but these guidelines largely focus on privacy, security, and other technical recommendations, ignoring the unique problems of adverse agency publicity.

Security. As with agency web sites, agencies should take care to limit access to the agency's social media accounts. The FTC makes use of such protocols, and strictly limits the staff who are authorized to post from Commission accounts.[883] FTC officials said they were aware of fake FTC social media accounts, but assume that audiences can distinguish them from authentic agency accounts, given account verification symbols offered by social media services.[884] The U.S. Chief Information Officer (CIO) publishes *Guidelines for Secure Use of Social Media by Federal Departments and Agencies*, which includes a mix of technical and common sense recommendations for agencies, focusing on cybersecurity.[885] The OMB has also published memoranda on the use of social media and third-party platforms and web sites by agencies.[886] Given the use of agency names in social media accounts maintained by non-agency users, agencies should make use of account verification features when available on the social media platform.

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[878] Interview with Jennifer Howard, *supra* note 34.

[879] Interview with officials from the FTC Office of General Counsel, *supra* note 16.

[880] Interview with officials from the FTC Office of Public Affairs and Office of General Counsel, *supra* notes 34, 16.

[881] Interview with Jennifer Howard, *supra* note 34.

[882] HHS, *Policies that Apply to Social Media*, http://www.hhs.gov/web/socialmedia/policies/ (last visited Aug. 5, 2015).

[883] Interview with officials from the FTC Office of Public Affairs, *supra* note 34.

[884] *Id.*

[885] U.S. CIO Council, *Guidelines for Secure Use of Social Media by Federal Departments and Agencies* (Sep. 2009), https://cio.gov/wp-content/uploads/downloads/2012/09/Guidelines_for_Secure_Use_Social_Media_v01-0.pdf (last visited Aug. 5, 2015).

[886] Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies from Cass R. Sunstein, OMB Administrator, "Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act" (Apr. 7, 2010), https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf; Memorandum for the Heads of Executive Departments and Agencies from Peter R. Orszag, OMB Director, "Guidance for Agency Use of Third-Party Websites and Applications" (Jun. 25, 2010) (OMB Memorandum 10-23), https://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-23.pdf.

8. Procedures Governing Database Disclosures

Recommendation. Agencies should adopt written policies governing online databases that contain adverse information about identified parties. Those policies should ensure that (i) the data are accurate, (ii) that users understand the source(s), context, and any limitations of the data, and (iii) that subjects are given the chance to post responses or request corrections or retractions, subject to reasonable exceptions in the public interest.

A popular tool for agencies. As noted above, federal agencies now maintain perhaps hundreds or even thousands of searchable online databases, many of which contain negative information about identified products or parties.[887] Data.gov lists 174 different federal, state, and local public entities that maintain online datasets, several of which publish hundreds of datasets each.[888] Appendix E provides a sample of roughly two dozen federal databases that contain negative information about identified parties. These include CMS databases that use Medicare data to disclose patient satisfaction surveys, rates of complications and deaths, and other quality metrics.[889] The CFTC publishes a searchable online database of sanctions against regulated firms and individuals.[890] The CPSC publishes a database of product recalls and other safety problems.[891] The Department of Transportation publishes large datasets of airline and airport statistics, including on-time departure rates and lost luggage rates.[892] The EPA posts several databases online, including its Enforcement and Compliance History Online (ECHO) and the well-known Toxic Release Inventory Program (TRI).[893] Other databases publish large amounts of data on government contractors or banned exporters, for example.[894] And, of course, the databases maintained by the FDA, FTC, and CFPB were described in detail above.[895]

Diversity of databases. The volume and variety of agency databases makes generalizations difficult. They vary widely in purpose, scope, design, data sources, and other key characteristics. As such, agencies should tailor these recommendations to fit the functions of their own databases. Yet, my review also suggests that best practices are emerging. For example, when the CFPB began designing its consumer complaint database, staff consulted with other agencies to try to identify best practices and potential complications.[896] It is in this spirit that I make the following observations and recommendations.

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[887] Part III.A.3, *supra*.

[888] *Id*.

[889] CMS, Hospital Compare, Physician Compare, and Nursing Home Compare, Appendix E, infra.

[890] CFTC, *Discipline History*, Appendix E, *infra*.

[891] CPSC, *SaferProducts.gov*, Appendix E, *infra*.

[892] DOT, Airlines and Airports Data and Statistics, Appendix E, infra.

[893] EPA, Enforcement and Compliance History Online, and Toxic Release Inventory Program, Appendix E, infra.

[894] Consolidated Screening List, and System for Award Management (SAM), Appendix E, infra.

[895] *See* Parts IV.A, IV.B, IV.C, *supra*.

[896] Interview with Darian Dorsey, *supra* note 585.

The need for accuracy. It is paramount that agency databases include accurate information. Government agencies are perhaps the most trusted source of information,[897] and agency databases tend to carry the imprimatur of the government. Thus, a court recently sustained a challenge against a "materially inaccurate" report on the CPSC's database, *SaferProducts.gov*, noting that the report "bears the Government's stamp of approval through its publication on an official website that, by its terms, is a repository of reports regarding 'unsafe products.'"[898] Agencies also play an important information-forcing role in various markets.[899] In fact, some believe that agencies can use information disclosure to replace traditional command-and-control regulation, citing the EPA's Toxic Release Inventory database as a classic example.[900] The Obama Administration endorses these ideas,[901] as does the occasional statute.[902]

Problems with database disclosures. Objections to agency databases echo many of the longstanding objections to agency publicity. Subjects argue, for example, that complaints posted in online databases are unverified, and thus might lack factual support or a legal basis. They argue that data are presented without context because they are not randomized or normalized. Subjects also note that data can be manipulated during the intake process, with parties posting false or fraudulent reports or complaints. Subjects describe reputational harms akin to those suffered by the subjects of adverse publicity, including competitive harms, the risk of viral publicity, and providing fodder for plaintiffs' lawyers.[903] Subjects also object that databases give the appearance of being endorsed by the government. Even courts recognize that inclusion in an agency database may signal the government's official condemnation.[904] As databases become a more popular tool for agencies, it is important that subjects believe they are being treated fairly.

Ensuring accuracy. No database is error-free.[905] As such, agencies should try to ensure the accuracy of any information that is presented as factual. If the information is not presented as accurate and objective—such as databases of third party complaints—agencies should clearly explain the nature and any limitations of the information (see *Providing disclaimers, limitations, and context* below). Indeed, databases containing data only from regulated parties, without review or challenge by an agency or by regulatory beneficiaries, might also require explanation of the potentially one-sided nature of the information being presented.

Pre-publication procedures. An emerging best practice is to provide the subjects of negative database entries with pre-publication procedures to comment on, challenge, or

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[897] Interview with Sean Moulton & Scott Klinger, *supra* note 16.

[898] Company Doe v. Tenenbaum, *supra* note 133, at 597 (finding that publishing the report online was both "final agency action" and "arbitrary and capricious").

[899] Interview with Sean Moulton & Scott Klinger, *supra* note 16.

[900] *Id*.

[901] Memorandum on Transparency and Open Government, *supra* note 8

[902] *See, e.g.*, Consumer Product Safety Improvement Act of 2008, *supra* note 141 (requiring the CPSC to create on its web site a searchable product safety database).

[903] CFPB, Part IV.C, *supra*.

[904] Ayuda v. FTC, *supra* note 427, at *11; *Company Doe*, *supra* note 133, at 597.

[905] Interview with Sean Moulton, *supra* note 16.

correct the information before it is posted. The CPSC, for example, is required by statute to allow companies to comment on reports to *SaferProducts.gov*, and to request that their comments be included in the published report.[906] The statute also requires the CPSC to consider objections that any information is "materially inaccurate," though it allows the Commission to determine what meets that standard.[907] The CPSC posts clear procedures in the *Code of Federal Regulations*.[908] Similarly, the CFPB authenticates consumer complaints and provides clear procedures for companies to verify a commercial relationship with the consumer and post the company's response.[909] The CFPB also has adopted clear publication criteria that each complaint must meet before it is published.[910]

Post-publication procedures. If pre-publication procedures do not ensure the accuracy of database entries, then agencies should provide post-publication procedures to subjects. Similar to the Information/Data Quality Act, subjects should be able to challenge materially inaccurate entries and request corrections and/or retractions. Ideally, agencies would provide procedures for expediting requests, as the FDA contemplated long ago. Agencies should consider the feasibility of flagging for readers what data is being challenged. The EPA, for example, marks disputed data on its web site with yellow flag icons.[911]

Providing disclaimers, limitations, and context. For databases that do not purport to contain only objective, verified facts, agencies should take care to provide necessary disclaimers and context for the data, including any limitations of the dataset. Doctors, for example, have long lamented "surgical report cards" used by state and federal regulators, which publish death and complication rates for surgeons, but fail to normalize for riskier patient populations. This can create perverse incentives for surgeons to avoid high-risk populations who might need surgery the most.[912]

Several agency databases do disclaim their accuracy. The FDA's adverse event database for medical devices includes a disclaimer that its "surveillance system has limitations, including the potential submission of incomplete, inaccurate, untimely, unverified, or biased data."[913] Similarly, the FDA's adverse event database for drugs explains in detail the limitations of the data, emphasizing that "there is no certainty that the reported event … was actually due to the product."[914] The CFPB complaint database site includes the disclaimer: "We don't verify all the facts alleged in these complaints but we take steps to confirm a commercial relationship between the consumer and company."[915] Even the

[906] 15 U.S.C. § 2055(c)(2).
[907] 15 U.S.C. § 2055(c)(4).
[908] 16 C.F.R. § 1102.26.
[909] Part IV.C, *supra*; CFPB, *Company Portal Manual*, *supra* note 588.
[910] Part IV.C, *supra*.
[911] O'Reilly, *Libels on Government Websites*, *supra* note 93, at 534; Cortez, *supra* note 7, at 1419.
[912] *See, e.g.*, Sandeep Jauhar, *Giving Doctors Grades*, N.Y. TIMES (Jul. 22, 2015), http://www.nytimes.com/2015/07/22/opinion/giving-doctors-grades.html.
[913] FDA, *MAUDE*, *supra* note 370.
[914] FDA, *FAERS*, *supra* note 369.
[915] CFPB, Consumer Complaint Database, http://www.consumerfinance.gov/complaintdatabase/ (last visited Nov. 4, 2014).

aggregated and anonymized data that the FTC publishes about the consumer complaints contained in its nonpublic *Consumer Sentinel* database includes disclaimers that the aggregated data is based on "unverified complaints."[916] Sometimes, Congress requires the disclaimer. The statute requiring the CPSC to create *SaferProducts.gov* requires the Commission to "provide clear and conspicuous notice to users of the database that the Commission does not guarantee the accuracy, completeness, or adequacy of the contents of the database."[917] Thus, *SaferProducts.gov* includes a disclaimer that tracks the statute almost verbatim.[918] Note, however, that a court called this language "boilerplate" that "would not interest an ordinary consumer."[919] Thus, the old concern that corrective publicity cannot undo erroneous agency publicity probably applies to agency databases as well.

Clarifying the source(s) of data. Agency databases are populated with data from different sources, which may require different quality controls to ensure accuracy. The CFPB's database, for example, presents information provided directly by consumers and companies rather than by the Bureau.[920] However, because government agencies are a trusted source of information, it is essential that agencies clearly distinguish for readers databases that publish objective, government-endorsed data from databases that publish consumer complaints, industry accounts, or other subjective or unverified information.[921] Moreover, there may be a reduced risk of publishing inaccurate data if the data comes directly from the subject, as in the case of the EPA's Toxic Release Inventory database. Databases populated with information from third parties, such as customers, might require additional steps to verify the information. For example, the CFPB gives companies identified in complaints a chance to verify a commercial relationship with the customer and post a response.[922] Other databases are populated by data generated by the agency itself, such as the numerous enforcement databases listed in Appendix E. These databases will include information that is disputed, which makes pre-publication verification and post-publication appeals particularly important. Finally, some databases, like Medicare's provider quality ratings, cull data from a number of objective and subjective sources, and require more careful explanation.

High-volume databases. Large datasets may be attractive to agencies, but they also create challenges. When the CFPB created its consumer complaint handling system, it surveyed other agencies to identify best practices, but found that other systems were smaller in scale and based on different regulatory models.[923] For example, the Bureau initially

[916] FTC, DATA BOOK, *supra* note 503.

[917] 15 U.S.C. § 2055(b)(5).

[918] SaferProducts.gov, http://www.saferproducts.gov (last visited July 29, 2015) ("CPSC does not guarantee the accuracy, completeness, or adequacy of the contents of the Publicly Available Consumer Product Safety Information Database on SaferProducts.gov, particularly with respect to information submitted by people outside of CPSC.").

[919] Company Doe v. Tenenbaum, *supra* note 133, at 598.

[920] Interview with Darian Dorsey, *supra* note 585. Bureau staff emphasized any Bureau information added to the case management system is used only internally and not presented to the public. *Id.*

[921] Interview with Sean Moulton & Scott Klinger, *supra* note 16.

[922] Part IV.C, *supra*.

[923] Interview with Darian Dorsey, *supra* note 585.

looked to the Office of the Comptroller of the Currency's (OCC's) consumer complaint handling system to understand its approach to handling high volumes (around 90,000 complaints at that time).[924] But the Bureau now processes over 25,000 complaints per *month*.[925] Agencies with high-volume systems like the CFPB and FTC emphasize that other agencies considering their own databases should use quality controls to ensure the accuracy of the intake process, particularly by outside contractors.[926]

Design. Creating databases from scratch, rather than from existing complaint or case management systems, seems to be an advantage for agencies. The CFPB was probably able to be more thoughtful and open about the data it collects because it designed the database from scratch and considered these issues prior to gathering data.[927] The CFPB's Consumer Complaint Database, for example, essentially is a small "public window" into the Bureau's case management system.[928] But Bureau staff were able to consider carefully how and what information they would collect as they designed the database and company response system.[929]

Timing. Databases that populate automatically probably require more pre-publication quality assurance than databases populated manually. For example, fields in the CFPB's database populate in real time and get published nightly,[930] but the Bureau has a relatively robust process for verifying commercial relationships and allowing companies to respond before a complaint is published.[931] Having clear publication criteria probably reduces the number of complaints by subjects.

Privacy. A major consideration for agencies that publish consumer reports is maintaining consumer privacy. The Privacy Act governs how agencies collect, maintain, use, and disseminate personal information.[932] CFPB officials report that the Bureau struggled with privacy questions as it developed the Consumer Complaint Database. The CFPB now uses a three-step process to scrub personal information from consumer complaint narratives: (i) a computer program identifies and scrubs personal information; (ii) a trained human reviewer reads narratives to scrub additional personal information that may have been missed; and (iii) a quality assurance specialist performs a second human review, sending narratives back for reprocessing if they still contain personal information.[933] Importantly, the CFPB's scrubbing process removes not just obvious personal information, but also related information that might be used to identify the consumer, such as medical conditions, employment information, and proper place

[924] *Id.* The public arm of the OCC's consumer complaint case management system is http://www.helpwithmybank.gov/ (last visited June 30, 2015).

[925] *Id.*

[926] *See, e.g.*, Interview with officials from the FTC Office of General Counsel, *supra* note 16.

[927] Interview with Darian Dorsey, *supra* note 585.

[928] *Id.*

[929] *Id.*

[930] CFPB, Consumer Response Annual Report: January 1 – December 31, 2013 (March 2014) at 8; Interview with Darian Dorsey, *supra* note 585.

[931] Part IV.C, *supra*.

[932] Privacy Act of 1974, Pub. L. No. 93-579, *codified at* 5 U.S.C. § 552a.

[933] CFPB, Office of Consumer Response, Narrative Scrubbing Standard, *supra* note 596, at 3.

names.[934] The CFPB said that it "relied heavily on guidance by the Department of Health and Human Services regarding de-identification of health data" used for the HIPAA Privacy Rule.[935] The CFPB, like other agencies, maintains a Chief Privacy Officer.[936]

The FTC has no plans to make its Sentinel database public (as its purpose is to serve as an enforcement tool for the FTC and other agencies), but FTC officials explained that doing so would require relatively sophisticated software and substantial human resources to scrub each complaint of individually identifiable information.[937] Both would require a major investment of manpower and budget.[938] In response to FOIA requests for particularized information in Sentinel, the FTC's main concern is to redact individuals' personal information.[939]

Cybersecurity. A related suggestion is that agencies also consider cybersecurity measures. The CFPB considered security measures as it developed its database.[940] The Federal Information Security Management Act of 2002 (FISMA) requires agencies to develop agency-wide information security programs.[941] The Federal Reserve OIG audits the CFPB's information security practices annually.[942]

Information/Data Quality Act. Agencies should consider whether the Information/Data Quality Act should be applied to each database they maintain. As noted above, the Act seems better designed for agency databases than press releases.[943] Although the Act states that it should apply to agency "dissemination of public information" regardless of the form or format,[944] the OMB excludes "opinions" when the agency's presentation makes clear that the information is someone's opinion rather than fact or the agency's own views.[945] Thus, the CFPB's consumer complaint database and portions of the reports on the CPSC's *SaferProducts.gov* database might not fall under the IQA guidelines—so long as the agencies clearly present the information as opinions by third parties. The OMB also exempts "adjudicative processes,"[946] which might exclude many of the enforcement databases in Appendix E.

Notwithstanding the legal scope of the Act (or OMB guidelines), it might be appropriate in many instances to apply the Act to online databases. The Act helps ensure that the

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[934] *Id*.
[935] 80 Fed. Reg. at 15,583.
[936] *See* 12 C.F.R. §§ 1070.50, 1070.51.
[937] Interview with officials from the FTC Office of General Counsel, *supra* note 16.
[938] *Id.*
[939] *Id*.
[940] Interview with Darian Dorsey, *supra* note 585.
[941] Pub. L. No. 107-347, 116 Stat. 2899, 2946. (the short title is the E-Government Act of 2002).
[942] *See, e.g.*, Board of Governors of the Federal Reserve System, Office of Inspector General, 2014 Audit of the CFPB's Information Security Program (Nov. 14, 2014), http://oig.federalreserve.gov/reports/cfpb-information-security-program-nov2014.pdf (last visited July 2, 2015).
[943] Part III.E, *supra*.
[944] 44 U.S.C. § 3504(d)(1).
[945] 67 Fed. Reg. at 377.
[946] 67 Fed. Reg. at 8460.

information is subject to minimum standards for accuracy and objectivity, and would require procedures for parties to request corrections. Consumer groups were concerned that the Act would be used to suppress, delay, or dilute information published by agencies and thus should not apply to databases.[947] These groups strongly suspected that industry would misuse the IQA to protect company interests.[948] Agencies should consider the benefits and burdens of applying the Act to each database they maintain. Again, given the volume and variety of agency databases, it is difficult to produce a blanket recommendation on this issue.

9. OMB Clarifications to the Scope of the Information Quality Act

Recommendation. The OMB should clarify that the Information/Data Quality Act applies to new substantive information in press releases that is not covered by previous information dissemination subject to the Act. The OMB should also consider updating its guidelines to account for the different types of databases published by agencies.

Benefits of applying the IQA. As discussed above, the IQA is well-suited to address some of the longstanding problems with agency publicity. The IQA requires agencies to ensure the quality, objectivity, utility, and integrity of certain information they disseminate.[949] These requirements, if applied to agency publicity, would go a long way toward addressing many of the longstanding problems with it. The IQA also requires agencies to allow affected persons to request that agencies correct information that fails to meet the substantive standards.[950] This requirement, if applied to agency publicity that contains new substantive information, would also mitigate due process and other procedural concerns with agency publicity practices. Applying the IQA to agency publicity would seem to be palatable to agencies, as the IQA does not create judicially-enforceable rights for private parties.[951]

Unclear scope of the IQA. However, as explained in detail above, it is not clear whether the IQA applies to press releases or to agency disclosures that constitute opinions.[952] Again, the IQA by its terms applies very broadly to "agency dissemination of public information, regardless of the form or format in which such information is disseminated."[953] Although the IQA does not exempt press releases, the OMB's final guidelines inserted such an exemption without elaboration. [954] Compounding the confusion, several agencies have drafted their own IQA guidelines to narrow the OMB's exemption for "press releases" to only those that are based on a precursor document that is itself subject to the IQA. Appendix G surveys 42 different agency IQA guidelines,[955]

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[947] Interview with Sean Moulton & Scott Klinger, *supra* note 16.
[948] *Id*.
[949] 44 U.S.C. § 3516(b)(2)(A).
[950] 44 U.S.C. § 3516(b)(2)(B).
[951] *See* Part III.E, n.216, *supra* (citing cases).
[952] Part III.E, *supra*.
[953] 44 U.S.C. § 3504(d)(1).
[954] 67 Fed. Reg. at 8460.
[955] Both the OMB and the Center for Regulatory Effectiveness maintain extensive lists of agency data quality guidelines. *See* OMB, *Agency Information Quality Guidelines*, *supra* note 200; Center for

finding that most agencies narrow the OMB's exemption for press releases in this way:

Guidelines that narrow the OMB's exemption for press releases:	23
Guidelines that adopt the OMB's broad exemption for press releases:	11
Guidelines that are unclear or do not address press releases directly:	5
Guidelines that conflict on whether broad or narrow exemption applies:	3
TOTAL	**42**

OIRA seems to have supported narrowing the press release exemption, noting in a memorandum that doing so "avoids creating an incentive to misuse press releases to circumvent information quality standards."[956] Yet, OIRA has not stopped other agencies from applying the press release exemption broadly, rather than narrowly.[957] As such, the OMB should update its government-wide guidelines to make clear that the IQA applies to new substantive information in press releases and other agency publicity that does not derive from a precursor document subject to the IQA.

Applying the IQA to agency databases. As explained in the previous section,[958] the great variety of agency databases deters any blanket recommendations. However, I encourage agencies to evaluate whether their data quality guidelines should apply to online databases that include negative information about identified products or parties. Again, OMB exemptions for "opinions" and "adjudicative processes" might exclude several important databases from the scope of data quality protections. Nevertheless, agencies should consider using pre- and post-publication procedures to ensure the accuracy of data posted online, and should consider using appropriate disclaimers to ensure that users understand the context and any limitations of the data.

10. Review by an Ombudsman, Inspector General, or the GAO

Recommendation. Agencies that are not subject to the Information Quality Act, and do not otherwise have post-publication procedures for requesting corrections to information should direct objections to the agency's announcement to the Ombudsman or Inspector General, as appropriate.

Ombudsman review. In many agencies, the Office of Ombudsman would be well-suited to hear complaints regarding inaccurate or unfair agency publicity. The CFPB's Ombudsman, for example, has heard complaints about the Consumer Complaint Database.[959] The FDA maintains several product-specific ombudsmen, as well as a centralized Office of the Ombudsman,[960] which has handled complaints under the

Regulatory Effectiveness, *Data Quality Guidelines by Agency*, http://www.thecre.com/quality/agency-database.html (last visited July 30, 2015).

[956] Part III.E, *supra*; Memorandum for President's Management Council from John D. Graham, *supra* note 204.

[957] Part III.E, *supra* (citing the NIH guidelines and the *Salt Institute* case).

[958] Part V.A.8, *supra*.

[959] CFPB, Ombudsman's Office, *Annual Report to the Director*, *supra* note 722.

[960] FDA, Product Center Ombudsmen, *supra* note 416.

Information/Data Quality Act,[961] and supports review by an Ombudsman. However, some agencies, like the FTC, do not have an ombudsman.[962] Such agencies would need to identify an Inspector General or equivalent to handle such reviews.

Inspector General review. An alternative to using an ombudsman is to use an Inspector General to field objections to agency publicity practices. Inspectors General provide another avenue for industry members to voice their preferences.[963] For example, the SEC's Office of Inspector General published a thorough review of Commission practices when asked to investigate whether the SEC had violated its own policies in publicizing a complaint against Goldman Sachs.[964] The report provides the most detailed review of an agency's internal deliberations over publicity since Gellhorn's 1973 report.[965] FTC officials said they would support Inspector General review of the Commission's publicity practices if there is any doubt about the propriety of agency practices, citing the Inspector General's capacity for independent analysis and its past evaluation of other FTC practices as an analog.[966] Another indication that Inspector General review might be suitable for agency publicity is the ongoing review of the CFPB's consumer complaint database by the Federal Reserve's Office of Inspector General.[967] The office is auditing the CFPB database "to assess the effectiveness of the CFPB's controls over the accuracy and completeness of the public complaint database."[968]

Review by the Government Accountability Office (GAO). GAO review of agency publicity practices or incidents may be another way to counterbalance agency discretion. An attorney in private practice explained that although GAO review does not always change agency behavior, agencies generally take such reviews seriously.[969] GAO reviews, in her view, can range from being a "nuisance" to "serious," and can bring unwanted scrutiny to an agency.[970] Another benefit of GAO review is that private parties harmed by agency publicity might be more willing to complain to the GAO than to the agency itself.[971] Firms with repeated, ongoing business with agencies may be reluctant to challenge agency practices.[972] Nevertheless, as an arm of Congress, the GAO may not be an appropriate entity to review complaints from parties affected by executive branch

[961] FDA, FDA's Office of the Ombudsman: Dispute Resolution and Problem Solving, *supra* note 418, at 2.

[962] Interview with officials from the FTC Office of General Counsel, *supra* note 16.

[963] For example, the American Bankers Association encouraged the Federal Reserve OIG's audit of the CFPB's database, arguing that the Bureau has become "an official purveyor of unsubstantiated, and potentially false, information." Letter from Wayne A. Abernathy of the American Bankers Association to Hon. Mark Bialek, Inspector General, Board of Governors of the Federal Reserve System (Jan. 12, 2015), http://www.cfpbmonitor.com/files/2015/01/LTC-ConsCompDatabase2015Jan.pdf (last visited July 2, 2015).

[964] SEC Office of Inspector Gen., *supra* note 33.

[965] Cortez, *supra* note 7, at 1424 (noting that the SEC OIG reviewed over 3.4 million emails from 64 separate SEC employees and took sworn testimony from 32 witnesses to produce its report).

[966] Interview with officials from the FTC Office of General Counsel, *supra* note 16.

[967] Federal Reserve, OIG, Work Plan, *supra* note 728.

[968] *Id.*

[969] Interview with Megan Brown, Partner, Wiley Rein LLP (Apr. 7, 2015).

[970] *Id.*

[971] *Id.*

[972] *Id.*

agency action. Congress can request or order the GAO to examine agency policies, practices, and procedures, but may not be an appropriate arbiter of complaints by regulated parties with executive branch agencies.

B. Statutory Reforms

Recommendation. Congress should consider amending the Administrative Procedure Act or the Information Quality Act to require agencies to publish written procedures governing their use of publicity, including procedures tailored to social media, online databases, and other new forms of agency disclosure.

Authorizing publicity? Parties aggrieved by agency publicity sometimes argue that the agency acted *ultra vires* or otherwise lacked statutory authority to make the announcement. Courts almost uniformly reject such arguments, given broadly-worded statutes and the basic need for agencies to communicate with the public.[973] In 1973, Gellhorn recommended that Congress specify which agencies could issue adverse publicity, under which circumstances, and via which procedures.[974] Although Recommendation 73-1 asked agencies to ensure that adverse publicity "fulfills an authorized purpose,"[975] it stopped short of adopting Gellhorn's full recommendation. My prior research concluded that the full recommendation might be too ambitious today, as it would require Congress to legislate agency-by-agency, with a fair bit of specificity.[976]

Administrative Procedure Act. A relatively straightforward alternative would be to amend the APA to make clear that agencies do have discretion to issue publicity or otherwise to communicate with the public (perhaps a superfluous point), but require agencies to adopt written policies. Given how few agencies formally implemented Recommendation 73-1,[977] an amendment to the APA would ensure more optimal compliance. The amendment could be very short, and would need to reserve discretion for agencies to tailor procedures to fit their regulatory responsibilities. However, because agency authority to issue publicity does not seem to be a seriously contested issue—and perhaps one not appropriately addressed by the APA—the major contribution would be to codify the call for agencies to publish written procedures. FTC officials note that a detailed recommendation about agency procedures, as this might be, would not be appropriate to address via the APA, which contains broader mandates. It is also worth noting that in 1970, the American Bar Association (ABA) adopted a resolution that "prejudicial agency publicity" may be grounds for setting aside an agency action, and recommended amending the APA to provide a cause of action for any person aggrieved by prejudicial agency publicity in relation to an agency investigation or proceeding.[978] ACUS published a statement in 1973 explaining that it "does not favor at this time amending the

[973] *See* Appendix C: Table of Federal Cases (1974-2014).
[974] Gellhorn, *supra* note 4, at 1435-39.
[975] 38 Fed. Reg. at 16,839.
[976] Cortez, *supra* note 7, at 1440-41.
[977] Part II.E, *supra*.
[978] *The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, 24 ADMIN L. REV. 389, 410-411 (1970) (reprinting the ABA resolution and recommendation, calling for a new section 560 of Title 5 of the U.S. Code).

Administrative Procedure Act to treat agency issuance of prejudicial publicity," as it believed there was an "adequate legal remedy for agency publicity which affects the integrity of an on-the-record agency proceeding."[979]

Federal Tort Claims Act. Gellhorn also recommended that Congress amend the Federal Tort Claims Act (FTCA)[980] to compensate parties injured by agency publicity.[981] Injured parties should be compensated, he thought, when the publicity was (i) directed at the party, (ii) "materially erroneous, substantially misleading, or clearly excessive," and (iii) "not remedied by the final administrative action."[982] The academic literature—both before 1973 and since—concludes that neither federal statutes nor judicial review provides remedies for parties injured by agency publicity.[983] As with the APA, courts routinely dismiss claims under the FTCA, which specifically excludes libel, slander, and other government statements that would qualify as intentional torts, and broadly excludes "discretionary functions."[984] Appendix C documents these cases. As explained in the next section, I do not endorse this recommendation, as judicial review of agency publicity poses several problems—legal and practical.

Information Quality Act. A final target for congressional reform might be the IQA.[985] Amending the Act would allow Congress to resolve several ambiguities with the Act, particularly whether it should apply to agency publicity, including newer forms like social media and online databases. It would also require consideration of the appropriate procedures for requesting corrections, retractions, or disclaimers. Finally, amendments to the IQA would also allow stakeholders—Congress, agencies, the subjects of publicity, and regulatory beneficiaries[986]—to carefully consider how to balance public and private interests. The IQA was passed with little attention, as a rider to an appropriations bill,[987] and might benefit from being more fully ventilated. An alternative, short of amendment, would be for the OMB to address these issues via guidance, after soliciting public comment.

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[979] ACUS, Statement # 2, Statement of the Administrative Conference on the ABA Proposal to Amend the Administrative Procedure Act at 5 (adopted June 7-8, 1973) (on file with author).

[980] 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401–02, 2411–12, 2671–80.

[981] Gellhorn, *supra* note 7, at 1437-39.

[982] *Id.*; Cortez, *supra* note 7, at 1391.

[983] *See, e.g.*, Noah, *supra* note 37, at 889-91; James T. O'Reilly, *The 411 on 515: How OIRA's Expanded Information Roles in 2002 Will Impact Rulemaking and Agency Publicity Actions*, 54 ADMIN. L. REV. 835, 838 (2002); O'Reilly, *Libels on Government Web Sites*, *supra* note 93, at 511-12.

[984] Appendix C: Table of Federal Cases (1974-2014); Cortez, *supra* note 7, at 1448.

[985] 44 U.S.C. §§ 3504(d)(1), 3516.

[986] "Regulatory beneficiaries" are those who benefit from the regulation of others. *See* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 401-02 (2007).

[987] Treasury and General Government Appropriations Act for Fiscal Year 2001 § 515, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153-154 (2001). Although private parties have been able to comment on many of the dozens of IQA guidelines published by agencies, *see* Center for Regulatory Effectiveness, *supra* note 955, more centralized debate might be useful, given the IQA's relevance to many modern agency communications.

C. Judicial Review Reforms

Recommendation. I do not recommend judicial review of agency publicity outside the "compelling" circumstances envisioned (but yet to be encountered) by courts.

Survey of cases since 1973. The academic literature uniformly concludes that judicial review is not available for parties injured by agency publicity.[988] My 2011 article reviewed 26 federal court opinions since 1973 involving agency publicity. Appendix C updates this research, showing a total of 33 federal court opinions since 1973, representing 30 unique judicial challenges to agency publicity. Twenty of these challenged agency press releases. Eight challenged agency press conferences or other statements (or leaks) to the media. The other suits involved agency publications, such as public warning letter, a guide, and even agency dissemination of a scientific journal article written by agency scientists. Two cases involved either the threat or possibility of publicity.[989] Finally, the chart includes one "reverse FOIA" case, in which plaintiffs challenged a federal statute that prohibits the FEC from making public its investigations into suspected campaign finance violations.[990] (Note that some of these cases involve multiple types of announcements.)

Only three of the 33 opinions are favorable to the challenger. Two of these cases deny very early agency motions to dismiss, and thus may be of limited importance. In *Den-Mat Corp. v. United States*, a district court refused to grant the FDA's motion to dismiss, allowing Den-Mat a chance to establish its claims that a Warning Letter and accompanying publicity could qualify as final agency action.[991] In *Kaiser Aluminum & Chemical Corp. v. CPSC*, another district court denied the CPSC's motion to dismiss, finding that CPSC press releases and fact sheets were final agency action.[992] The third case, *Reliance Electric Co. v. CPSC*, was a "reverse FOIA" case in which a company challenged the CPSC's releasing roughly 500 pages of investigative documents in response to a FOIA request.[993] The D.C. Circuit remanded to require the CPSC to respond to the company's objections that some of the documents were inaccurate. There is no record that any of these challengers obtained equitable or monetary relief in these cases.

Thus, notwithstanding a few minor victories, the case law since 1973 confirms the

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[988] *See, e.g.*, Cortez, *supra* note 7, at 1441-53; Noah, *supra* note 37, at 889-91; O'Reilly, *The 411 on 515*, *supra* note 37, at 838; O'Reilly, *Libels on Government Web Sites*, *supra* note 93, at 511-12.

[989] First Jersey Securities, Inc. v. SEC, 553 F. Supp. 205 (D.N.J. 1982); Premo Pharmaceutical Laboratories, Inc. v. U.S., 1980 WL 588226 (S.D.N.Y. 1980).

[990] Common Cause v. FEC, 83 F.R.D. 410 (D.D.C. 1979).

[991] Den-Mat Corp. v. U.S., 1992 WL 208962 (D. Md. 1992). See Appendix C for a full description of the facts and holding. The holding in this case is an outlier not only with regard to the reviewability of agency publicity, but also as to the reviewability of FDA Warning Letters. *See, e.g.*, Holistic Candlers and Consumer's Ass'n v. FDA, 664 F.3d 940 (D.C. Cir. 2012) (finding an FDA Warning Letter to not constitute final agency action under the APA).

[992] Kaiser Aluminum and Chemical Corp. v. U.S. Consumer Prod. Safety Comm., 414 F. Supp. 1047 (D. Del. 1976). See Appendix C for a full description of the facts and holding.

[993] Reliance Electric Company v. Consumer Prod. Safety Comm., 924 F.2d 274 (D.C. Cir. 1991). See Appendix C for a full description of the facts and holding.

original observation by ACUS that agency publicity "is almost never subject to effective judicial review."[994] There are several reasons why this is so. Challengers (and courts) struggle to locate appropriate causes of action. Moreover, agency publicity raises complicated questions about exhaustion of administrative remedies, ripeness doctrine, sovereign immunity, the record to be reviewed, and the lack of suitable remedies.

What cause of action? Aggrieved parties have struggled to find an appropriate cause of action for challenging agency publicity. Most parties sue under the APA.[995] APA § 704 offers a generic cause of action to parties aggrieved by agency action.[996] And APA § 706 directs courts to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[997] However, most challenges under the APA fail for one of the following two reasons.

Publicity is not "agency action." Although there is a "strong presumption that Congress intends judicial review of administrative action,"[998] courts routinely decline to review agency publicity on the grounds that it is not "agency action," or is not "final," or both, under the APA.[999] The D.C. Circuit has hinted that agency publicity might be reviewable if the agency intended it as a sanction, or if it was false, but the court has yet to encounter such a case.[1000] The APA defines "agency action" to include "the whole or part of an agency rule, order, license, *sanction*, relief, or the equivalent or denial thereof."[1001] As Appendix C shows, courts sometimes evaluate whether agency publicity qualifies as a "sanction." The APA defines "sanction" as "an agency … prohibition, requirement, limitation, or other condition affecting the freedom of a person[, or] … taking other compulsory or restrictive action."[1002] The legislative history to the APA shows that publicity used as a sanction was a "troublesome subject" to Congress, particularly when the agency lacked statutory authority for this purpose.[1003] Moreover, the D.C. Circuit has steadily retreated from its assertion almost 70 years ago that agency publicity is *never* reviewable under the APA.[1004] But only one court—a Delaware District Court—has found agency publicity to constitute "final agency action."[1005] Again, the D.C. Circuit and other courts have yet to encounter a suitable case for review. The D.C. Circuit has noted that "adverse impact alone would not necessarily make agency publicity reviewable as a sanction," explaining that the aggrieved party would have to show evidence that the agency intended to penalize the company or that the publicity was

[994] Recommendation 73-1, *supra* note 2.

[995] Appendix C, *infra*.

[996] Md. Dep't of Human Res. v. Dep't of Health and Human Servs., 763 F.2d 1441, 1445 n.1 (D.C. Circ. 1985).

[997] APA § 706(2)(C), 5 U.S.C. § 706(2)(C).

[998] Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986).

[999] 5 U.S.C. §§ 551(13), 704.

[1000] Cortez, *supra* note 20, at 1442.

[1001] 5 U.S.C. § 551(13) (emphasis added).

[1002] 5 U.S.C. § 551(10)(a), (g).

[1003] Indus. Safety Equip. Ass'n v. EPA, 837 F.2d 1115, 1119 (D.C. Cir. 1988) (quoting H.R. REP. NO. 79-1980, at 40 (1946) (House of Representatives Report on APA)); Cortez, *supra* note 7, at 1442.

[1004] Hearst Radio v. FCC, 167 F.2d 225 (D.C. Cir. 1948).

[1005] *Kaiser Aluminum*, 414 F. Supp. 1047.

false.[1006] This might require a showing that the publicity "caused destruction of property or revocation of a license."[1007] The most notable recent decision on this issue is *Trudeau v. FTC*, discussed above,[1008] in which an infomercial producer challenged a press release by the FTC describing their settlement.[1009] The D.C. Circuit held that Trudeau did not have a valid cause of action under the APA, observing that the circuit had "never found a press release of the kind at issue here to constitute 'final agency action' under the APA."[1010] The D.C. Circuit did not categorically bar such an action, but found that the FTC's press release was neither false nor misleading, concluding that "no reasonable person could misinterpret the press release in the ways that Trudeau suggests."[1011]

Publicity is not "final." If a separate statute does not specifically grant judicial review, the APA allows courts to review only "final" agency actions rather than tentative, intermediate, or interlocutory decisions.[1012] Courts have interpreted "finality" to mean that the agency's decision is the consummation of its decision-making process and determines a party's legal rights or obligations, or otherwise has some legal consequence for the party.[1013] However, agency publicity is rarely intended to represent a final or binding determination by the agency.[1014] Again, although the D.C. Circuit has hinted that adverse publicity that is intended to sanction, or is demonstrably false, could be "final," it has never encountered such a case.[1015] The district court in *Trudeau* noted that courts must review agency announcements "with care," and that they reside "at the outermost boundaries of the definitions of both 'final' and 'agency action.'"[1016]

Other potential causes of action. Aside from the APA, parties have challenged agency publicity under the Privacy Act, the Information/Data Quality Act, the Federal Tort Claims Act (FTCA), and the due process clause of the Constitution. Each of these vehicles lacks in some way. For example, the FTCA specifically excludes libel, slander, and other statements by the government that would qualify as intentional torts.[1017] Courts have interpreted these exclusions as covering press releases.[1018] The FTCA also includes a sprawling exception for discretionary functions, which courts have interpreted as

[1006] *Indus. Safety Equip.*, 837 F.2d at 1119.
[1007] *Id.* (internal quotations and citation omitted).
[1008] Part III.B, *supra*.
[1009] Trudeau v. FTC, 456 F.3d 178 (D.C. Cir. 2006).
[1010] *Id.* at 189.
[1011] *Id.* at 192, 197.
[1012] APA § 704; 5 U.S.C. § 704.
[1013] Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 478 (2001); Bennett v. Spear, 520 U.S. 154, 177-78 (1997); Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967); Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 435-36 (D.C. Cir. 1986).
[1014] O'Reilly, *Libels on Government Websites*, *supra* note 93, at 512.
[1015] *Id.* at 1444 (citing cases, including one possible exception, a 1976 case in Delaware District Court, *Kaiser Aluminum & Chem. Corp. v. CPSC*, 414 F. Supp. 1047, 1053-54 (D. Del. 1976)).
[1016] *Trudeau*, 384 F. Supp. 2d at 290.
[1017] 28 U.S.C. §§ 2671-2680.
[1018] *See, e.g.*, Fisher Bros. Sales v. United States, 46 F.3d 279, 288 (3d Cir. 1995); *Banfi*, 41 Fed Cl. at 583-84; Lance Indus., Inc. v. United States, 3 Cl. Ct. 762, 777-78 (1983).

covering not only the initial decision to issue a press release, but also the underlying data upon which the press release relies.[1019]

Only four of the 30 distinct cases in Appendix C involve due process arguments, and courts give these claims only superficial treatment.[1020] Plaintiffs have also asserted violations of the First Amendment and the Bill of Attainder Clause, but these claims are no more successful.[1021]

As a last resort, several parties have sought relief via private bills in Congress. Private bills entail a house of Congress's adopting a bill asking the Court of Federal Claims to determine whether the U.S. government should compensate a party for injuries caused by an agency.[1022] If the Court of Federal Claims agrees, Congress must adopt a private law approving the compensation, and it must be signed by the President.[1023] However, as Appendix C shows, the Court of Federal Claims routinely denies compensation for agency publicity, largely because agency publicity is not compensable under the FTCA.[1024] As long as the agency has a rational basis for issuing the publicity and did not make an error, courts are reluctant to grant compensation.[1025]

Other barriers to review. Other legal and practical barriers weigh against judicial review of agency publicity, at least outside of the "compelling" cases envisioned by some courts.

Exhaustion. Many claims against agencies are frustrated because the challenger failed to exhaust administrative remedies. Of course, most agencies provide no such remedies for adverse publicity.[1026] Even regimes like the IQA that do provide administrative procedures are found not to entail judicial review.[1027] Sometimes, a party can seek judicial review before exhausting administrative remedies if the agency's procedures cannot provide effective relief. For example, one court allowed a challenge to proceed because the company alleged that the agency's public statements would continue to cause severe damage to the company.[1028] Thus, courts might be sympathetic if the harm is immediate and agency procedures provide no real remedy.[1029] Otherwise, agencies frequently invoke the exhaustion doctrine, even without providing adequate administrative remedies.

[1019] 28 U.S.C. § 2680(a); *Banfi Prods. Corp.*, 40 Fed. Cl. at 125-26; *Fisher Bros. Sales*, 46 F.3d at 282.

[1020] Indus. Safety Equip. Ass'n v. EPA, 837 F.2d at 1121-22 (D.C. Cir. 1988); *Impro Prods.*, 722 F.2d 845; EEOC v. Sears, Roebuck & Co., 504 F. Supp. 241 (N.D. Ill. 1980); Ajay Nutrition Foods, Inc. v. FDA, 378 F. Supp. 210 (D.N.J. 1974), *aff'd mem.*, 513 F.2d 625 (3d Cir. 1975).

[1021] *Trudeau*, 456 F.3d at 191 & n.23; EEOC v. Sears, Roebuck & Co, 504 F. Supp. at 270.

[1022] 28 U.S.C. § 2509.

[1023] *Id*.

[1024] Cortez, *supra* note 7, at 1451-52.

[1025] See, e.g., Sperling & Schwartz, Inc. v. United States, 218 Cl. Ct. 625 (1978).

[1026] Cortez, *supra* note 7, at 1445.

[1027] *See* Part III.E, *supra*.

[1028] *Kaiser Aluminum*, 414 F. Supp. At 1055.

[1029] Cortez, *supra* note 7, at 1446.

Ripeness. Even if agency publicity constitutes final agency action, it must also be ripe for review.[1030] Most courts decline to review agency publicity even if it has a significant practical effect on the company.[1031] However, the district court in *Den-Mat* rejected the FDA's motion to dismiss for lack of ripeness, finding that FDA threats in a Warning Letter essentially demanded "compliance" with the agency's position and was more definitive, final, and harmful than in most cases because the FDA said it would recommend that other federal agencies not award contracts to the company unless the allegations were resolved.[1032] The court noted that FDA had already "utilized the public press to enforce its determination."[1033] Under ripeness doctrine, the court found that the company was in a Catch-22—either comply with the FDA's demands or risk an enforcement action.[1034] Still, the opinion in *Den-Mat* is an outlier with regard to both publicity and Warning Letters. Such holdings remain the exception, not the rule, and lack of ripeness remains a barrier for most litigants.

Sovereign immunity. Compounding matters for litigants, agencies and agency officials that make public statements may be immune from suit. When agency officials are sued in their individual capacities to avoid sovereign immunity, the officials can invoke executive privilege to make statements to the public.[1035] Moreover, agencies might have a First Amendment right to issue publicity. One court emphasized that courts "should be hesitant to restrain the Government in speaking out about matters of public concern absent some very strong overriding showing of inappropriate harm."[1036]

Record for review. Another major barrier for effective judicial review is identifying an appropriate record for review. A claim that an agency abused its discretion would need to be proven by reference to internal agency documents, such as e-mails, memoranda, and the like. Moreover, claims that an agency intended to sanction a company via publicity would need to be supported by evidence of such intent. As the Inspector General investigation into the SEC's announcement of its complaint against Goldman Sachs demonstrates, such inquiries can be exceedingly difficult.[1037] The Inspector General reviewed over 3.4 million emails from 64 separate SEC employees and took sworn testimony from 32 witnesses to produce its report.[1038] More readily-available judicial review of agency publicity could be a significant burden to agencies and detract significantly from their regulatory responsibilities.

[1030] U.S. CONST. art. III, § 2, cl. 1; *Abbott Labs.*, 387 U.S. 136 (1967).

[1031] *See, e.g.*, Relco, Inc. v. CPSC, 391 F. Supp. at 846-47.

[1032] 1992 WL 208962 at *4-5.

[1033] *Id.* at *5.

[1034] *Id.*

[1035] *See* Barr v. Matteo, 360 U.S. 564 (1959) (finding executive privilege against a defamation claim for a press release issued by the Acting Director of the Office of Rent Stabilization announcing his intent to suspend employees); *Ajay Nutrition Foods*, 378 F. Supp. at 216-17 (holding that the FDA Commissioner and Secretary of HEW were protected by executive privilege when making public statements and issuing press releases critical of regulated industries).

[1036] FTC v. Freecom Communications, 966 F. Supp. 1066, 1070-71 (D. Utah 1997) (acknowledging the lack of such an argument from the government).

[1037] Cortez, *supra* note 7, at 1424 n.330 (citing SEC OIG, *supra* note 33, at 1-2).

[1038] SEC OIG, *supra* note 33, at 1-2.

Remedies. A final barrier to effective judicial review is the difficulty in crafting an appropriate remedy for parties aggrieved by agency publicity. Both courts and scholars struggle to identify workable, satisfactory remedies. Indeed, part of the reluctance to recognize judicial review in statutes like the IQA probably stems from the difficulty in identifying an appropriate, judicially enforceable remedy.

For these reasons, I do not recommend judicial review of agency publicity, absent the "compelling" circumstances envisioned by courts.

APPENDICES

Appendix A: Conference Recommendation 73-1 (adopted June 8, 1973); 38 Fed. Reg. 16,389 (Jun. 27, 1973); 1 C.F.R. § 305.73-1.

Appendix B: List of Interviews (2014-2015)

Appendix C: Table of Federal Cases (1974-2014)

Appendix D: FDA Press Releases (2004-2010)

Appendix E: Sample of Agency Databases

Appendix F: Sample of CFPB Consumer Complaint Data

Appendix G: Agency IQA Guidelines