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Adverse Publicity by Administrative Agencies in the Internet Era

Nathan Cortez[*]

Nearly forty years ago, Ernest Gellhorn documented the potentially devastating impact that can occur when federal agencies issue adverse publicity about private parties. Based on his article, the Administrative Conference of the United States recommended that courts, Congress, and agencies hold agencies to clear standards for issuing such publicity. In the decades since, some agencies have adopted standards, but most have not, and neither the courts nor Congress has intervened to impose standards. Today, agencies continue to use countless forms of publicity to pressure alleged regulatory violators and to amplify their overall enforcement powers—all without affording due process or other procedural safeguards that attach to more formal actions.

This Article renews the call for standards given four developments since 1973. First, agencies now have even more incentives to issue adverse publicity and eschew more formal statutory enforcement actions. Second, new media give agencies more ways to issue adverse publicity, for example, by making announcements via their websites, Facebook, or Twitter. Third, new media make it easier for audiences to misread or mischaracterize an agency's message. Finally, hyper-responsive capital markets now process adverse publicity more swiftly and hastily, multiplying the potential for damage.

In light of these developments, and after reviewing agency practices and litigation since 1973, this Article revisits the earlier recommendations. It calls for agencies to constrain themselves with published standards, for Congress to recognize that publicity used as a sanction is "final agency action," and for courts to review adverse publicity for an "abuse of discretion." Agencies should retain wide discretion to communicate with the public, but should be held accountable if they abuse that discretion. To counterbalance this restraint on agencies, Congress should enhance their statutory

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enforcement powers and resources, so that agencies do not need to rely on extrastatutory tactics like adverse publicity.

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I. INTRODUCTION

In 2003, the Food and Drug Administration (FDA) publicly condemned a drug company for exaggerating the safety and efficacy of its cancer drug.[1] The FDA communicated its objections via a Talk

1. FDA, Talk Paper T03-18: FDA Warns Public About Misrepresentations in Marketing Claims About Drug to Treat Cancer (Mar. 14, 2003).

Paper posted on its website, calling the company's statements "misleading," "demonstrably false," and "particularly egregious."[2] Within hours, the company's stock price fell nearly 25%.[3] The FDA reportedly did not notify the company of its objections beforehand.[4]

Many years earlier, in 1973, Ernest Gellhorn documented how adverse publicity by federal agencies can devastate products, companies, or even entire industries.[5] His article accompanied a report for the Administrative Conference of the United States (ACUS), which together recommended that agencies adopt standards for issuing adverse publicity, and that courts and Congress hold agencies accountable.[6] Yet, in the decades since, very few agencies have adopted standards. Courts have been exceedingly reluctant to restrain agencies' discretion to issue adverse publicity in any meaningful way. Congress has not intervened. And scholarly attention remains scant.[7]

Today, federal agencies continue to use press releases and countless other forms of publicity to identify and pressure alleged regulatory violators—and to amplify their overall statutory enforcement powers. This can be problematic on a number of levels.

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2. *Id.*

3. 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.

4. Vodra et al., *supra* note 3, at 649.

5. Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380 (1973).

6. Administrative Conference of the United States, Conference Recommendation No. 73-1 (adopted June 8, 1973); Rules and Regulations, 38 Fed. Reg. 16,839 (June 27, 1973) (to be codified at 1 C.F.R. pt. 305). Both Professor Gellhorn and ACUS define "adverse agency publicity" as an affirmative statement made by an agency that calls attention to an agency action or policy and adversely affects an identified party. Gellhorn, *supra* note 5, at 1381.

7. Since Professor Gellhorn's study, only a few articles have revisited the problem, usually as part of an analysis ancillary to another issue. *See, e.g.*, Eugene I. Lambert, *Recalls, Regulatory Letters, and Publicity—Quasi-Statutory Remedies*, 31 FOOD DRUG COSM. L.J. 360 (1976); Richard S. Morey, *Publicity as a Regulatory Tool*, 30 FOOD DRUG COSM. L.J. 469 (1975); Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 874; 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 (2002) [hereinafter O'Reilly, *The 411 on 515*]; James T. O'Reilly, *Libels on Government Websites: Exploring Remedies for Federal Internet Defamation*, 55 ADMIN. L. REV. 507 (2003) [hereinafter O'Reilly, *Libels on Government Websites*]; Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841 (2011).

Agency publicity can be premature, excessive, misleading, or just plain wrong. Agencies can make announcements without providing due process or other procedural safeguards required for more formal enforcement actions. Most agencies do not have clear statutory authority to issue adverse publicity, particularly when used to punish or sanction. And courts generally find that agency publicity is either not reviewable or reviewable but not redressable. Agencies thus enjoy almost boundless discretion to brandish adverse publicity.

These problems have been compounded by four developments since 1973. First, because modern agencies are so bogged down by procedural requirements and formal oversight, they have even more incentives to issue adverse publicity and eschew more formal, statutorily authorized enforcement actions. Moreover, agencies often lack sufficient statutory authority or adequate resources (or some combination of both) to police violators. Adverse publicity can be strikingly convenient and effective compared to other enforcement tools, making its allure clear to overburdened agencies.

Second, agencies have many more ways to disseminate adverse publicity today, thanks to the Internet and new media. Every federal agency has a website through which it can post press releases, news updates, enforcement actions, and other material that regulated companies would find to be negative or adverse to them in some way. My review of FDA practices, for example, found that the agency makes public announcements identifying specific products or companies in over two dozen different formats. And agencies now utilize podcasts, Internet news feeds, and even Facebook and Twitter accounts, which allow them to make announcements more quickly—and more casually—than ever.

Third, partly due to these first two developments, audiences now have more opportunities to misread, misinterpret, or mischaracterize agency announcements. The announcements themselves are more truncated. And recipients can forward, link to, repost, and retweet agency announcements with strikingly little effort. Mistakes are easily multiplied.

Finally, capital markets and other audiences now process adverse publicity more quickly and perhaps more hastily. Adverse publicity can have a snowball effect, not only in an amorphous reputational sense, but more tangibly by depressing stock prices, as in the example above. The efficient market hypothesis (EMH), explained in Part III.D below, lends some theoretical explanatory power here,

and might also offer empirical ways to measure the effects of adverse publicity through "event studies."

Together, these four developments suggest that we revisit the use of adverse publicity by federal agencies. I begin by looking back at what agencies did in response to the ACUS recommendation—virtually nothing—and consider how agencies have both exercised their discretion and defended themselves in litigation, examining twenty-six federal court opinions since 1973 that challenged an agency's use of adverse publicity. I find that courts routinely hold that agency publicity is not reviewable and not redressable under the APA.

I conduct an in-depth case study of the FDA because it featured prominently in Gellhorn's article, it was the one agency that actually proposed rules in response to ACUS (though it never finalized them), and the FDA has litigated a number of cases since 1973 defending its use of adverse publicity. The FDA also has a very compelling case that it needs to warn the public despite imperfect information and scientific uncertainty, making it a good case study for testing reforms.

My review makes a few noteworthy observations. For example, the FDA relies on a medley of nonbinding guidance documents and employee manuals that address public announcements and media relations. However, none of these documents confront the long-standing concerns with adverse publicity.

The FDA also issues adverse or negative publicity in over two dozen different formats, including press releases, warning letters, and a mélange of advisories, alerts, notifications, and updates—not to mention multiple Twitter feeds and the voluminous information it releases on its website.

Moreover, after reviewing just one form of FDA publicity ("press announcements") over the last seven years, I find that (i) the FDA issued over 1500 press announcements during that period, or almost one per business day; (ii) 65% of these announcements identify a specific product, company, or individual; (iii) 62% of this subgroup are adverse or negative in some way; and (iv) 74% of *that* subgroup publicize pending or preliminary agency actions, rather than final or determinative actions.[8] Thus, looking at just one of many forms of publicity that the FDA uses, a large proportion (30%) are

8. *See infra* notes 256–59 and accompanying text.

individualized, negative, *and* preliminary. Yet, the FDA does not hold itself to written policies, does not offer procedural safeguards to the parties singled out, and consistently takes the litigating position that its announcements are not reviewable by courts.

After considering the FDA in depth, the Article also considers cases involving the Federal Trade Commission (FTC), the Environmental Protection Agency (EPA), the Consumer Products Safety Commission (CPSC), the Securities and Exchange Commission (SEC), and other agencies. Although these examples offer variations on the FDA's story—for example, the FTC restrains itself through internal policies, and the CPSC adheres to clear congressional directives—they otherwise confirm some of the long-standing concerns, suggesting that the problems might stretch across the federal bureaucracy.

So what is the answer? As a baseline, agencies obviously must be able to communicate with the public. They must have wide discretion to issue warnings and alerts in the face of scientific uncertainty and imperfect information. And they should be able to use modern means to do so. But agency discretion should not be boundless, particularly when used to sanction.

I address my recommendations to three parties: agencies, Congress, and courts. I tailor these recommendations based on agency practices since 1973, judicial opinions published since 1973, and the four developments above. Agencies should articulate written standards for issuing different forms of adverse publicity, particularly via new media. These standards should address the content of announcements and establish both internal procedures for issuing publicity and procedures for private parties to request corrections or retractions through timely administrative appeals—all subject to reasonable exceptions for emergencies and other justifications in the public interest. Agency self-restraint is perhaps the most effective and most realistic response.

Congress should create a baseline set of expectations, perhaps by amending the Administrative Procedure Act (APA).[9] The statute should explicitly authorize agencies to issue adverse publicity, and should delegate the responsibility to each agency to codify its own procedures for self-restraint. Moreover, Congress should declare that adverse publicity is "final agency action" under the APA and is

9. 5 U.S.C. §§ 500–96 (2006).

reviewable for an abuse of discretion, as this seems like a classic case for that standard. If these changes unduly hamper the ability of agencies to encourage compliance and enforce their regulatory schemes, then Congress should authorize more efficient statutory enforcement mechanisms and should grant agencies the resources to use them.

Finally, until Congress intervenes, courts should recognize that publicity intended at least in part as a sanction should be reviewable as final agency action under the APA. Parties aggrieved by agency publicity need not exhaust administrative remedies because typically there are none. And courts should recognize a cause of action under the APA or via procedural due process, if applicable.

This Article makes these arguments in four parts, focusing on how federal agencies wield adverse publicity.[10] Part II describes the basic problem and how Gellhorn and ACUS recommended responding to it, counterposing agency motivations and public benefits with the risks to private parties. In Parts III and IV, I describe the aftermath. Part III examines the four developments since 1973. Part IV then surveys what agencies have done since 1973, using the FDA as a case study and examining over two dozen judicial opinions in which a party challenged a federal agency's use of publicity. Given these findings, Part V updates the call for standards, urging agencies, Congress, and courts to check agency discretion.

Admittedly, it can be difficult to generalize about how agencies use publicity because it is so varied, informal, and discretionary.[11] But

10. Note that agencies often use press releases and other forms of publicity for other reasons that I will not cover in this Article. For example, in *Croplife America v. EPA*, 329 F.3d 876, 878–879 (D.C. Cir. 2003), the D.C. Circuit invalidated the EPA's attempt to announce in a press release a binding new policy that it should have promulgated through notice and comment rulemaking. And, of course, state agencies may also use publicity inappropriately. *See, e.g.*, Cox v. N. Va. Transp. Comm'n, 551 F.2d 555, 557–58 (4th Cir. 1976) (holding that state agency employee was deprived of due process after agency commissioners granted interviews attributing employee's termination to financial scandal at agency and employee was denied request for hearing); Dixon v. Pa. Crime Comm'n, 67 F.R.D. 425, 429 n.4, 430 (M.D. Pa. 1975) (finding no due process violation despite state crime commission publicizing investigation and releasing audit reports); Gen. Elec. Co. v. N.Y. State Assembly Comm. on Gov't Operations, 425 F. Supp. 909, 915–16 (N.D.N.Y. 1975) (finding legislative investigation and attendant adverse publicity surrounding it were caused as much by lawsuit challenging it as the investigation itself). However, this Article limits its focus to federal agencies.

11. O'Reilly, *The 411 on 515*, *supra* note 7, at 837–38; *see also* Alfred C. Aman, Jr., *Bargaining for Justice: An Examination of the Use and Limits of Conditions by the Federal Reserve Board*, 74 IOWA L. REV. 837, 839 n.9 (1989) (noting in his examination of how the

it continues to be one of the more coercive actions an agency can take.[12] This Article thus takes a fresh look at how modern agencies use modern media against modern regulated parties, and what standards should apply.

II. BOUNDLESS DISCRETION AND THE NEED FOR STANDARDS

Gellhorn analyzed a series of high-profile incidents in which agency publicity devastated a company, a product, or even an industry. His was not the first to address the topic,[13] but it accompanied an ACUS recommendation published in the Code of Federal Regulations. Gellhorn's primary concern was that agencies issued publicity "without articulated standards or safeguards."[14] Yet, despite the call for action, few standards or safeguards exist.

A. Agency Motivations and Public Benefits

Agencies have many motivations for issuing adverse publicity, and these motivations have not changed considerably since 1973. Agencies continue to issue publicity primarily to inform, to warn, or to sanction.[15] The first two do not provoke much debate—many agencies are required by statute to inform and warn the public,[16] and publicity is an efficient way to do so.[17] Indeed, some agencies

Federal Reserve Board bargains that the "malleability of informal decision-making makes it difficult to study, but extremely important to the everyday functioning of an agency"); Noah, *supra* note 7, at 897 (proposing a typology for scrutinizing agency "arm-twisting" and acknowledging that any such typology would be oversimplified).

12. O'Reilly, *The 411 on 515*, *supra* note 7, at 836–37.

13. *See, e.g.*, Michael R. Lemov, *Administrative Agency News Releases: Public Information Versus Private Injury*, 37 GEO. WASH. L. REV. 63 (1968); Note, *Disparaging Publicity by Federal Agencies*, 67 COLUM. L. REV. 1512 (1967); Note, *The Distinction Between Informing and Prosecutorial Investigations: A Functional Justification for "Star Chamber" Proceedings*, 72 YALE L.J. 1227 (1963).

14. Gellhorn, *supra* note 5, at 1381.

15. As Professor Gellhorn emphasized, agencies often issue adverse publicity for more than one reason. *Id.* at 1382.

16. Consumer Product Safety Commission Act § 2, 15 U.S.C. § 2051(b) (2006) (requiring the CPSC to "protect the public against unreasonable risks of injury" and "assist consumers in evaluating the comparative safety of consumer products"); Federal Food, Drug, and Cosmetic Act § 705(b), 21 U.S.C. §§ 301, 375(b) (2006) (requiring the FDA to issue publicity when the agency believes there is "imminent danger to health, or gross deception of the consumer").

17. Gellhorn, *supra* note 5, at 1383.

essentially exist to inform and warn the public.[18] Very few would argue, for example, that the SEC should not warn about major investment frauds, or that the FDA should not warn about hazardous products. We need agencies to alert the public.

But publicity can also serve as a form of sanction (whether intended or not), when it punishes, deters, or coerces.[19] The severity depends on how sensitive the firm is to public disapproval,[20] and perhaps whether the firm is publicly traded and thus sensitive to investor reactions. Some agencies like the SEC gained notoriety for sanctioning companies this way.[21]

Agencies can also use publicity as an extrastatutory way to amplify their statutory enforcement powers.[22] Some use the threat of adverse publicity to make up for their limited statutory enforcement authority and the difficulty of proving violations.[23] Agencies also use adverse publicity as a more efficient pressure point to achieve goals authorized by statute.[24] Adverse publicity—or simply the threat of it—often precedes or accompanies formal enforcement actions.

Agencies also defend their use of publicity as a way to authoritatively state the agency's positions and ensure that media coverage is accurate.[25] This use obviously can benefit the public, as

18. *Id.* at 1394 (stating that issuing publicity "is the essence of [the SEC's] statutory purpose").

19. *Id.* at 1383.

20. *Id.* It is debatable whether corporations can be punished or deterred the same way as individuals. *See, e.g.*, BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS (1983); John C. Coffee, Jr., *"No Soul to Damn, No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); Andrew Cowan, Note, *Scarlet Letters for Corporations? Punishment by Publicity Under the New Sentencing Guidelines*, 65 S. CAL. L. REV. 2387 (1992).

21. Gellhorn, *supra* note 5, at 1406, n.107 (noting that the Cost of Living Council and SEC gained attention for aggressively issuing adverse publicity as a sanction).

22. *Id.* at 1398–1401.

23. *Id.* at 1398–99 (citing "civil rights commissions and agencies encouraging fair employment practices," including the Equal Employment Opportunity Commission, which has a "broad mandate and limited enforcement powers").

24. Noah, *supra* note 7, at 876.

25. *See, e.g.*, 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 (Sept. 30, 2010), *available at* http://www.sec.gov/foia/docs/oig-534.pdf [hereinafter SEC OIG]; 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) ("On a number of occasions, FDA has issued publicity to prevent rumors and confusion."); Gellhorn, *supra* note 5, at 1390.

agencies often apply byzantine regulatory schemes to highly technical industries, which may be difficult for the lay public to understand.

Agencies may target publicity to their constituents. Publicizing enforcement actions is a way to remind Congress and the White House that agencies are fulfilling their mandates,[26] and that they deserve every cent of their budgets. Moreover, publicity can also appease interest groups that push for greater oversight.[27]

Finally, agencies use publicity because it is convenient. As Gellhorn noted, "[p]ublicity is quicker and cheaper; it is not presently subject to judicial review or other effective legal control; and it involves the exercise of pure administrative discretion."[28] For overburdened agencies, the allure of publicity is clear, particularly compared to more formal actions.

Although some refer to the practice as a guerilla tactic or a lesser form of blackmail,[29] in most cases, agencies are acting upon several motivations—most of them perfectly legitimate.

B. The Risks to Private Parties

Several incidents inspired Gellhorn and ACUS. For example, in 1959 the Secretary of Health, Education, and Welfare (HEW) held a press conference warning the public not to buy cranberries from Washington and Oregon because they might be contaminated with carcinogens.[30] He neglected to clarify that cranberries from *other* states were safe, and punctuated his warning by stating that he personally would not be eating cranberries for Thanksgiving.[31] That holiday season, "virtually the entire crop remained unsold, even though 99% of it was subsequently cleared and marketed as government approved."[32] The industry lost $21.5 million worth of surplus, which ultimately led Congress to indemnify growers $8.5

26. Gellhorn, *supra* note 5, at 1393 (noting that adverse publicity by the FTC "occasionally appears to be influenced as much by the desire to enhance its political position as by legitimate policy considerations").

27. *Id.* at 1399 (noting that EEOC employees admitted to using more pejorative language in press statements to cater to constituent groups).

28. *Id.* at 1424.

29. O'Reilly, *The 411 on 515*, *supra* note 7, at 836.

30. Gellhorn, *supra* note 5, at 1408.

31. *Id.*

32. *Id.* (internal quotation marks omitted).

million.[33] The incident became known in the industry as Black Monday.[34]

The cranberry announcement demonstrated the risks of publicity to private parties: it exaggerated the danger to consumers; it used excessive language; it failed to limit the scope of the warning; it failed to consider the costs to the industry; and it bypassed statutory remedies that would have been less damaging and just as swift, such as seizing the cranberries or enjoining producers from distributing them.[35] The episode captured both the variety and severity of the risks.

Contemporary examples show similar patterns. In 2006, after receiving reports from the CDC about an outbreak of *E. coli* related to bagged spinach, the FDA issued a series of press releases warning consumers.[36] Although FDA's initial announcement identified "bagged fresh spinach" as the likely culprit,[37] its second press release a day later broadened it to "fresh spinach or spinach-containing products."[38] The FDA did not narrow its warnings until five days later, when it excluded only frozen and canned spinach from the warnings.[39]

And the FDA was slow to clarify the geographic scope of the danger. It took the agency two days after identifying three counties in California that may have produced the spinach to clarify that consumers could safely eat spinach grown elsewhere.[40] Ultimately,

33. *Id.* at 1409–10, n.118.

34. *Id.* at 1408.

35. *Id.* at 1409.

36. *Press Announcements, September 2006–October 2006*, FDA PRESS ANNOUNCEMENTS, http://tinyurl.com/3q3qkav (last visited Nov. 6, 2011) (showing eighteen separate press releases by the FDA on the E. coli O157:H7 outbreak in September and October 2006).

37. Press Announcement, U.S. Food and Drug Admin., FDA Warning on Serious Foodborne E.coli O157:H7 Outbreak (Sept. 14, 2006), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/ucm108731.htm.

38. Press Announcement, U.S. Food and Drug Admin., FDA Statement on Foodborne E.coli O157:H7 Outbreak in Spinach (Sept. 19, 2006), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/ucm108732.htm.

39. Press Announcement, U.S. Food and Drug Admin., FDA Statement on Foodborne E.coli O157:H7 Outbreak in Spinach (Sept. 20, 2006), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/ucm108740.htm.

40. Press Announcement, U.S. Food and Drug Admin., FDA Statement on Foodborne E.coli O157:H7 Outbreak in Spinach (Sept. 22, 2006), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/ucm109578.htm; Sara M. Benson, *Guidance for Improving the Federal Response to Foodborne Illness Outbreaks Associated with Fresh Produce*, 65 FOOD & DRUG L.J. 503, 509 (2010).

the FDA traced the *E. coli* contamination to spinach produced during a single shift, on a single day, at a single farm.[41] Although such precision could not be expected in the agency's initial warnings, its delay in narrowing the scope of the warning evoked the cranberry episode nearly fifty years earlier. Critics also argue that the FDA could have traced the source of contamination much sooner, narrowed its warnings to certain packaging dates, and reassured consumers more quickly that spinach was safe to eat.[42]

The episode turned out to be one of the most damaging in the nation's history, both to consumers and to the industry.[43] Over 200 consumers got sick, half of whom required hospitalization, with three deaths.[44] It cost the industry roughly $350 million, and spinach sales have yet to recover.[45]

Another contemporary example is the salmonella outbreak in 2008, which the FDA and CDC incorrectly blamed on tomatoes.[46] The FDA's press announcements included a steadily-expanding list of states from which the agency deemed it was safe to consume tomatoes. Eventually, the FDA whittled down its warnings to tomatoes produced in Florida and Mexico, and then even further to specific areas of Florida and Mexico.[47] Nearly six weeks later, the FDA identified peppers as the culprit rather than tomatoes, although the CDC disagreed.[48] The erroneous publicity cost the tomato industry roughly $200 million.[49]

For these reasons, Gellhorn's original concerns remain valid nearly four decades later: agency publicity is problematic "when it is erroneous, misleading or excessive or it serves no authorized agency purpose."[50] My review finds that the problems are even broader than

41. Benson, *supra* note 40, at 509.

42. *Id.* at 515–16.

43. *Id.* at 509.

44. *Id.*

45. *Id.* at 509, 516 (citing *Developing A Comprehensive Response to Food Safety Before the S. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. 57–62 (2007) (statement of Caroline Smith DeWaal, Food Safety Director, Center for Science in the Public Interest)).

46. *Id.* at 510.

47. *Id.*

48. *Id.*

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

50. Adverse Agency Publicity (Recommendation No. 73-1), 38 Fed. Reg. 16,839, 16,839 (June 27, 1973).

that. I organize the problems into four categories: (1) the substance of announcements can be wrong or misleading; (2) the procedures for issuing publicity can be inadequate; (3) the authority to issue publicity can be unclear or lacking; and (4) there is often no way to redress mistakes or abuses.

The first problem is with the substance of the publicity itself. Agency publicity can mislead or mischaracterize by failing to explain the limited scope of the agency's objections or by failing to clarify that the allegations have not fully been adjudicated.[51] Publicity can be premature, such as when an agency publicizes that it has begun investigating a company or filed a complaint, or that a grand jury has indicted a company, without simply clarifying that no violations have been proven. Publicity can be excessive, such as when an agency uses pejorative language, implies broader violations or a history of violations not proven, or goes beyond factual reporting.[52] And publicity can be just plain wrong, such as when an agency relies on erroneous information or reports information that turns out to be inaccurate.

The second problem is procedural. When agencies issue publicity, they may not give prior notice or any sort of chance to plead the company's case, which is often required by due process or by statute when taking more formal actions.[53] When agencies make rules or adjudicate, they generally have to provide some sort of notice and an opportunity to be heard.[54] But as Gellhorn emphasized, "usually no protection other than the common sense and good will of the administrator prevents unreasonable use of

51. Another problem is that agencies often commission third-party reports and publicize their findings without adequately explaining the nature of the study or its limitations. For example, the Public Health Service (PHS) aggressively promoted its Cigarette Report to the media and failed to correct reasonable misperceptions that the Report was a culmination of clinical studies on the safety of cigarettes based on new data, rather than a post-hoc review of earlier studies. Gellhorn, *supra* note 5, at 1384–88.

52. Agencies also frequently adorn publicity with quotes from agency prosecutors or investigators. *See, e.g.*, News Release, Federal Trade Commission, Kevin Trudeau Banned from Infomercials (Sep. 7, 2004), http://www.ftc.gov/opa/2004/09/trudeaucoral.shtm.

53. In an early example, a federal court held that the FDA did not have to provide a prior hearing before issuing adverse publicity condemning a cancer clinic's therapeutic claims and marketing practices. Hoxsey Cancer Clinic v. Folsom, 155 F. Supp. 376, 377–78 (D.D.C. 1957). *See* Gellhorn, *supra* note 5, at 1419–20.

54. Gellhorn, *supra* note 5, at 1420; Administrative Procedure Act §§ 5–8, 5 U.S.C. §§ 554–57 (2006).

coercive publicity."[55] In disputes with agencies, private parties have been unable to convince them to stop disseminating information that the party believes is false or misleading.[56] As a former FDA lawyer cautioned, "there is relatively little a company can do" to stop or minimize the damage.[57]

The third problem relates to the lack of agency authority. The vast majority of agencies do not have explicit statutory authority to issue adverse publicity, and thus do so either as a form of extrastatutory enforcement, or as a power they derive from the interstices of broadly worded enabling statutes.[58] Arguably, only the FDA, CPSC, and the Patent and Trademark Office (PTO) have explicit statutory authority to issue adverse publicity.[59] Thus, many agencies that do so are accused of exceeding their statutory powers.[60] Nevertheless, the vast majority of agencies can probably justify their use of publicity through broadly worded enabling statutes,[61] sometimes treating the statutes as "constitutions" and interpreting their broad provisions as a form of "necessary and proper" clause

55. Gellhorn, *supra* note 5, at 1420.

56. Impro Prods., Inc. v. Block, 722 F.2d 845, 846 (D.C. Cir. 1983) (manufacturer of veterinary product disputing scientific conclusions about effectiveness of product in article published by agency scientists that the USDA widely disseminated).

57. 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).

58. Gellhorn, *supra* note 5, at 1384.

59. Federal Food, Drug, and Cosmetic Act § 705(b), 21 U.S.C. § 375(b); Consumer Product Safety Act § 6(b), 15 U.S.C. § 2055(b); Inventors' Rights Act of 1999, 35 U.S.C. § 297(d) (authorizing the Patent and Trademark Office to publicize complaints against invention promoters).

60. For example, the Attorney General's Commission on Administrative Procedures alleged that the Federal Alcohol Administration abused its power and exceeded its statutory authority by threatening to use adverse publicity. *See* FINAL REPORT OF THE ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURES, S. DOC. NO. 77-8, at 135 (1941). Professor Gellhorn also noted that the Cost of Living Council's use of adverse publicity was not authorized by statute. Gellhorn, *supra* note 5, at 1404–05; Noah, *supra* note 7, at 890–91. Moreover, in virtually every case discussed in Part IV, *infra*, the aggrieved party alleges that the agency exceeded its statutory authority.

61. Gellhorn, *supra* note 5, at 1410–11 (noting, for example, that the FDA, like other agencies, "can point to the usual vague grants of authority in its enabling act"); Noah, *supra* note 7, at 890–91. For just one of many examples, the Clean Air Act directs the EPA to "collect and disseminate" information on air quality and pollution. 42 U.S.C. § 7403(b)(6) (2006). As James Conrad Jr. observes, "These broad authorizations generally are decades old, and thus were not enacted at a time when these agencies were consciously using information as a means of achieving regulatory goals." James W. Conrad, Jr., *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?*, 12 KAN. J.L. & PUB. POL'Y 521, 529 (2002–03).

that enables agencies to carry out their statutory responsibilities.[62] One court even declared that agencies' enforcement powers "would be crippled were these agencies not permitted to use the quick and cheap instrument of publicity."[63]

Agencies obviously need to communicate with the public, and it would be unwise to weaken their ability to communicate legitimate messages that are not intended to punish regulated firms. Moreover, agencies have their own First Amendment right to speak, though the contours and extent of this right are not yet clear.[64]

Unfortunately, it is difficult to categorize publicity as either authorized by statute or *ultra vires.* On one side, most agencies can justify their publicity based on expansive delegations of authority to disseminate information and notify the public. And on the other side, even agencies that have clear statutory authority to issue publicity can easily stretch or exceed it.[65]

The APA states that agencies may not impose sanctions "except within jurisdiction delegated to the agency and as authorized by law."[66] But it can be exceedingly difficult to determine when an agency is using publicity as a sanction, particularly if the agency has multiple motivations.[67] As the SEC's investigation of one recent incident reveals, agency personnel consider many priorities when issuing adverse publicity, including the desire to deter other violations.[68]

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62. Peter Barton Hutt, *Philosophy of Regulation Under the Federal Food, Drug and Cosmetic Act*, 28 FOOD DRUG COSM. L.J. 177, 178 (1973). For a rejoinder, see Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1476–78 (2000).

63. *See* Indus. Safety Equip. Ass'n v. EPA, 837 F.2d 1115, 1118 (D.C. Cir. 1988).

64. *Cf.* Pleasant Grove City v. Summum, 129 S.Ct. 1125 (2009).

65. For a nuanced, thoughtful effort to categorize agencies' use of adverse publicity and other forms of administrative arm-twisting, see Noah, *supra* note 7, at 896–99. In one case, a court found that the CPSC exceeded its statutory authority to publicize product hazards but denied a motion to order the agency to retract its earlier press release. United States v. 52,823 Children's Dolls, More or Less, No. 89 Civ. 4643 (JFK), 1989 WL 140250, at *7–8 (S.D.N.Y. Nov. 13, 1989).

66. Administrative Procedure Act § 558(b), 5 U.S.C. § 558(b) (2006).

67. In *Trudeau v. FTC*, the district court cautioned that private parties should not be permitted to "root through the files of a federal agency to determine the motivation of any press release . . . ." 384 F. Supp. 2d 281, 294 (D.D.C. 2005). In *Invention Submission Corp. v. Rogan*, the PTO seemed to have a long-standing bone to pick with a particular company, but was authorized by statute to publicize complaints about the industry and did not identify the particular company in the press release. 357 F.3d 452, 460 (4th Cir. 2004).

68. *See generally* SEC OIG, *supra* note 25.

This problem is aggravated because Congress generally either ignores or acquiesces to agency practices. For example, the D.C. Circuit said that Congress had long been aware of the FTC's practices of "issuing news releases and the adverse effects resulting therefrom" and had essentially acquiesced to them.[69] Congress has specifically bounded agency discretion to issue adverse publicity, but in only three circumstances.[70] And Congress even specifically authorized one agency to publicize consumer *complaints* that had not yet been adjudicated,[71] seemingly insensitive to the dangers.[72]

But courts have noted that the proper venue for challenging agency publicity is through the political rather than the judicial branch.[73] And courts have echoed Gellhorn's observation that potential injuries are "best controlled by internal agency restraint."[74] Aggrieved parties sometimes seek private bills from Congress asking for compensation, but Congress has largely abstained from passing such bills. And even when Congress does recommend compensation, the Court of Federal Claims rarely grants it.[75]

The fourth problem with agency publicity is the lack of redress. Courts tend to find that agency publicity is either not reviewable, or

69. FTC v. Cinderella Career & Finishing Sch., Inc., 404 F.2d 1308, 1309 (D.C. Cir. 1968). Of course, the idea that congressional silence equals "acquiescence" is not without controversy. Two canonical examples are *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

70. Toxic Substances Control Act, 15 U.S.C. § 2613; Consumer Product Safety Act, 15 U.S.C. § 2055(b); Federal Election Campaign Act, 2 U.S.C. § 437g(a). The FEC Act prohibits the Federal Election Commission from publicizing investigations for fear of adverse publicity being premature, unfair, and interfering with campaigns. *See* Common Cause v. FEC, 83 F.R.D. 410, 411 (D.D.C. 1979) (citing the legislative history of 2 U.S.C. § 437). For discussions of the others, see Part IV.B, *infra*.

71. In 1999, Congress enacted the Inventors' Rights Act of 1999, which required the Patent and Trademark Office to publicize complaints filed with the PTO against invention promoters. 35 U.S.C. § 297; 37 C.F.R. § 4.1 (2011). Another possible example is that in 2007, Congress required the FDA to maintain a website to disclose adverse events being investigated by the agency for possible labeling revisions. FDA Amendments Act of 2007, Pub. L. No. 110-85, § 915, 121 Stat. 823, 958 (2007) (codified at 21 U.S.C § 355(r)(2)(D) (Supp. I 2007).

72. 145 Cong. Rec. S14,521, 29,418–19 (daily ed. Nov. 10, 1999) (statement of Sen. Joseph Lieberman); *but see* 2 U.S.C. § 437g(a) (2006).

73. Invention Submission Corp. v. Rogan, 357 F.3d 452, 459–60 (4th Cir. 2004); Flue-Cured Tobacco v. EPA, 313 F.3d 852, 861 (4th Cir. 2002); Indus. Safety Equip. Ass'n v. EPA, 837 F.2d 1115, 1119 (D.C. Cir. 1988); Trudeau v. FTC, 384 F. Supp. 2d 281, 290 (D.D.C. 2005).

74. *E.g.*, *Indus. Safety Equip.*, 837 F.2d at 1118.

75. *See* Part V.B.1, *infra*.

if it is, not redressable.[76] In 1973, ACUS warned that adverse agency publicity "is almost never subject to effective judicial review."[77] Not much has changed since then. In turn, agencies will be less deterred and less likely to check their own discretion.[78]

Even when judicial review is available, rarely can it remedy or undo the damage.[79] Courts cannot unring the bell. The few courts that actually found that an agency exceeded its statutory authority have searched for ways, such as corrective publicity, to repair the damage, but have struggled to find an adequate remedy.[80] Some agencies, like the National Highway Traffic Safety Administration (NHTSA), believe that corrective publicity can correct prior errors,[81] despite the long-standing critique of that assumption.[82]

Finally, courts are justifiably reluctant to hold agencies accountable when an agency has mixed motives for publicizing alleged wrongdoing.[83] One court went as far as saying that "[t]he courts may no more enjoin Government departments from issuing statements to the public than they may enjoin a public official from making a speech."[84] This problem is particularly important, given the recent case law fortifying the government's free speech rights,[85] as well as intuitive concerns that agencies should not be chilled by congressional oversight or judicial second-guessing when warning the public.

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76. *See* Part V.C.2, *infra*.

77. Adverse Agency Publicity (Recommendation No. 73-1), 38 Fed. Reg. 16,839, 16,839 (June 23, 1973).

78. Noah, *supra* note 7, at 936–37.

79. Gellhorn, *supra* note 5, at 1420.

80. United States v. 52,823 Children's Dolls, More or Less, No. 89 Civ. 4643 (JFK), 1989 WL 140250, at *7–8 (S.D.N.Y. Nov. 13, 1989) (denying a motion to order the CPSC to publicly retract its previous press release because it would only further taint the product at issue and would confuse consumers).

81. For example, the National Highway Traffic Safety Administration stated that suppliers whose components are erroneously identified as defective in recall notices can simply counter "[a]ny adverse publicity that does erroneously affect a supplier . . . by publicizing the correct information when it becomes available." Petitions for Rulemaking, Defect and Noncompliance Orders, 60 Fed. Reg. 17,254, 17,257 (1995).

82. O'Reilly, *The 411 on 515*, *supra* note 7, at 849.

83. *See, e.g.*, FTC v. Freecom Commc'ns, Inc., 966 F. Supp. 1066, 1067 (D. Utah 1997) (rejecting allegations that the FTC exceeded its statutory authority to make information public when in the "public interest").

84. Bristol-Myers Co. v. FTC, 284 F. Supp. 745, 748 (D.D.C. 1968).

85. *See, e.g.*, Pleasant Grove City v. Summum, 555 U.S. 460 (2009).

Thus, adverse publicity presents various risks to private parties, many of which have persisted for decades.

C. Recommendations by Gellhorn and ACUS

Given the risks, Gellhorn and ACUS recommended that agencies publish procedures and articulate standards for issuing adverse publicity.[86] Congress originally established ACUS to advise the President, Congress, and agencies themselves on how to improve the fairness and efficiency of federal agencies.[87] ACUS published its nonbinding recommendations in the *Federal Register* and codified them in the Code of Federal Regulations.[88] Gellhorn turned his report for ACUS into an article for the *Harvard Law Review*, which became the canonical statement on agency publicity.

When Gellhorn surveyed federal agencies in the early 1970s, he found that although many agencies issued adverse publicity, virtually none imposed standards on the practice.[89] So he encouraged agencies to adopt written standards and publish them, which would both force agencies to evaluate their practices and inform regulated parties.[90]

To this end, Gellhorn and ACUS recommended that agencies create policies to help them decide *whether* to issue publicity in the first place.[91] Agencies, they argued, should consider whether they are specifically authorized to issue publicity, not including general grants of authority to make information public.[92] They should consider whether publicity is necessary, for example, to protect public health or prevent substantial economic harm.[93] Agencies should consider

86. Adverse Agency Publicity (Recommendation No. 73-1), 38 Fed. Reg. 16,839, 16,839 (June 27, 1973).

87. 5 U.S.C. § 574(1) (2006). Congress declined to renew funding and authorization for ACUS in 1995, allowing it to dissolve over bipartisan objections. However, ACUS was resurrected with new funding in 2010.

88. Adverse Agency Publicity, 38 Fed. Reg. at 16,839; 1 C.F.R. § 305.73–1 (1974).

89. Gellhorn, *supra* note 5, at 1384–85, 1401 (finding that the EEOC had never examined or announced guidelines governing its use of publicity).

90. *Id.* at 1423–24; Adverse Agency Publicity, 38 Fed. Reg. at 16,839.

91. Gellhorn, *supra* note 5, at 1424.

92. *Id.*

93. *Id.* at 1425–26; Adverse Agency Publicity, 38 Fed. Reg. at 16,839. For example, Gellhorn recommended that the FTC "limit the use of publicity to cases in which it was necessary to warn the public about imminent danger," among other circumstances. Gellhorn, *supra* note 5, at 1427.

alternatives that are equally effective but less damaging.[94] Gellhorn emphasized that publicity "should usually be a sanction of last, not first resort."[95] Agencies should be aware of the likelihood and severity of the harm that the publicity might cause.[96] Agencies should consider how accurate and reliable the information supporting the publicity is, including the likelihood that it would influence the public.[97] Finally, agencies should be more circumspect when publicizing pending adjudications.[98] Publicity about investigations or "pending agency trial-type proceedings should issue only in limited circumstances. . . ."[99] Driving these recommendations is the idea that the damage from adverse publicity is hard to undo—agencies cannot unring the bell—so they should carefully consider the initial decision to issue publicity.

If an agency answers this *whether* question affirmatively, the recommendations urged that agency policies also address the *content* of publicity, factoring how complex the issue is, how sophisticated the audience is, and whether to reprint pleadings or other documents.[100] Agency guidelines should instruct personnel to use language that is factual and nonpejorative,[101] and clarify that investigations and complaints are tentative and limited in scope.[102]

The recommendations also called for agency policies to specify the internal procedures agencies will use, including procedures available to the subjects of the publicity. First, policies should make clear who within the agency may issue publicity.[103] The policies should direct media inquiries to a single source and away from employees that handle the investigations or litigation.[104] Second, Gellhorn urged agencies to consider allowing private parties to seek

94. Gellhorn, *supra* note 5, at 1426. ACUS urged agencies to use adverse publicity "only to the extent necessary to foster agency efficiency, public understanding, or the accuracy of news coverage." Adverse Agency Publicity, 38 Fed. Reg. at 16,839.

95. Gellhorn, *supra* note 5, at 1426.

96. *Id.* at 1427.

97. *Id.* at 1426; Adverse Agency Publicity, 38 Fed. Reg. at 16,839.

98. Gellhorn, *supra* note 5, at 1428.

99. Adverse Agency Publicity, 38 Fed. Reg. at 16,839.

100. Gellhorn, *supra* note 5, at 1430; *id.*

101. Adverse Agency Publicity, 38 Fed. Reg. at 16,839.

102. *Id.* ("Where information in adverse agency publicity has a limited basis—for example, allegations subject to subsequent agency adjudication—that fact should be prominently disclosed."); Gellhorn, *supra* note 5, at 1430.

103. Gellhorn, *supra* note 5, at 1430.

104. *Id.*

redress within the agency.[105] And perhaps most importantly, agencies should consider notifying private parties in advance and giving them an opportunity to respond before publicity is issued.[106] This latter provision seems to be the lynchpin: it would have a prophylactic effect on restraining agency discretion, and it would satisfy procedural concerns.

The recommendations also addressed courts. Courts should not be reluctant to review agency publicity, particularly the threshold question of whether an agency has statutory authority.[107] If a court determines that no such authority to issue publicity exists, it should grant injunctions if the private party can show that the injuries are not compensable at law.[108] Courts should consider whether agencies bypassed less burdensome alternatives.[109] They should not be hesitant to review agency practices and procedures, even though these arguably are not "final agency action[s]" under the APA.[110] Finally, courts can use devices to protect the anonymity of the private party—such as allowing anonymous complaints, sealing the pleadings, and holding *in camera* hearings—which would prevent "the very injury the plaintiff seeks to avoid or have compensated."[111]

Finally, three statutory reforms were addressed to Congress. First, Congress should specifically authorize agencies to issue adverse publicity, using the Consumer Product Safety Act's provisions as a model.[112] The Act requires the CPSC to (i) notify manufacturers before publishing damaging information, (ii) give companies a reasonable opportunity to respond, and (iii) publish a symmetrical retraction of any inaccurate or misleading disclosures.[113] If Congress cannot do this on an agency-by-agency basis, it should amend the APA.[114] Second, Congress should authorize direct judicial review to determine whether the agency satisfied its own policies and

105. *Id.* at 1431.

106. *Id.*; Adverse Agency Publicity, 38 Fed. Reg. at 16,839.

107. Gellhorn, *supra* note 5, at 1432.

108. *Id.*

109. *Id.* at 1433.

110. *Id.* at 1434.

111. *Id.*

112. *Id.* at 1435.

113. *Id.* (citing Consumer Product Safety Act § 5(b)(1), 15 U.S.C.A. § 2055(b)(1) (Supp. 1973)).

114. *Id.*

procedures.[115] Congress should allow courts to issue orders compelling agencies to retract or explain publicity, or change the agency's policies and procedures.[116] Finally, Congress should amend the Federal Tort Claims Act[117] to compensate parties injured by adverse agency publicity that was (i) directed at the party, (ii) "materially erroneous, substantially misleading, or clearly excessive," and (iii) "not remedied by the final administrative action."[118]

The thrust of these recommendations was to reign in the seemingly boundless discretion agencies enjoy. But virtually none of these recommendations came to fruition.

III. WHY THE PROBLEMS ARE AMPLIFIED TODAY

Despite the call for standards and its subsequent echoes,[119] agency discretion remains virtually unbound. Today, the problems are amplified given four interrelated developments—all of which can render adverse publicity not only more damaging but also harder to remedy.

A. More Incentives to Use Adverse Publicity

Since the 1973 ACUS recommendations, agencies have been given more incentives to rely on adverse publicity. Much of this pertains to the evolutionary arc of modern regulatory agencies, which is well-known. Through the twentieth century, Congress granted and courts upheld increasingly broad delegations of authority to empower agencies to respond to problems of greater scope and complexity. The legislative, executive, and judicial branches tried to counterbalance this shift of power by imposing various checks and balances on agencies, which progressively "ossified" agency practices.[120] Agencies with finite resources and expanding responsibilities responded by developing an arsenal of informal tools not specifically authorized by statute and not subject to judicial review.[121] Thus, the traditional focus of administrative law

115. *Id.* at 1436.

116. *Id.*

117. 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401-02, 2411-12, 2671-80 (2006).

118. Gellhorn, *supra* note 5, at 1437-39.

119. *See, e.g.*, Lambert, *supra* note 7; Morey, *supra* note 7; Noah, *supra* note 7.

120. Noah, *supra* note 7, at 875.

121. *Id.*

scholarship on rulemaking and adjudication "represent[s] only a small fraction of agency activity" today.[122] Adverse publicity is a perfect example of what Lars Noah calls extrastatutory "arm-twisting."[123]

From federal agencies' perspective, this is perfectly understandable. Agencies often struggle to carry out their statutory mandates, often due to some combination of insufficient funding, watered-down statutory authority, formal and informal oversight by the political branches, and industry pressures. Agencies cannot enforce all regulations at all times. Moreover, the refrain that agencies are hostile to regulated industries tends to be overblown. Agencies frequently try to cooperate with and accommodate industry interests, which triggers criticisms that agencies are too industry-friendly. Agencies rightly feel they are in a Catch-22. Either way, modern regulatory agencies often find that adverse publicity is much more convenient than using more traditional regulatory tools.

B. More Ways to Issue Adverse Publicity

The second major evolution resides less with agencies and more with the platforms now available to them. Today, every federal agency has a website, and through these websites agencies can publish a staggering amount of freestanding information about companies that is not disclosed as part of rulemaking.[124] A number of catalysts encouraged this. The 1996 Electronic Freedom of Information Act (FOIA) Amendments required federal agencies to establish electronic reading rooms that make important documents available to the public, including those documents likely to be requested via FOIA.[125] The 2002 E-Government Act requires agencies to make rulemaking accessible electronically by soliciting and accepting comments online.[126] More recently, the Obama

122. *Id.* at 874.

123. *Id.* Professor 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." This definition encompasses, and Professor Noah thus addresses, adverse publicity. *Id.*

124. Conrad, *supra* note 61, at 526.

125. Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (codified at 5 U.S.C. § 552 (2006)).

126. E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915–16 (2002).

administration has emphasized transparency in the federal government.[127]

But even without these initiatives, most agencies have realized that websites are an efficient way to communicate. In fact, press releases and other forms of publicity may represent a small fraction of the information that an agency makes public about a private party.[128] Most agencies publish enforcement actions, including preliminary investigations and warnings.[129] Agencies also post comments submitted during rulemaking, company reports, license applications, and copious amounts of other information about firms.

Agencies also use modern media, sometimes as a response to how regulated firms use it. For example, the FDA used adverse publicity to respond to a company that had issued its own publicity, in part to reach the same audience.[130] The PTO used its own advertising campaign to counter deceptive advertising by an invention submission marketer.[131] Our intuition might be to let agencies fight fire with fire. After all, companies subject to adverse agency publicity often issue their own publicity simultaneously as a counter.[132] Today, these publicity wars use more sophisticated weaponry than in 1973.

Federal agencies have also embraced new media, such as podcasts, RSS feeds, and even Twitter feeds.[133] For example, of the

127. Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009).

128. For an account of how private parties can address inaccurate or misleading information about them on agency websites, see O'Reilly, *Libels on Government Websites*, *supra* note 7, at 507.

129. *See, e.g.*, EPA, *Enforcement and Compliance History Online*, EPA.GOV, http://www.epa.gov/echo (last updated Sept. 7, 2011); FDA, *Criminal Investigations*, FDA.GOV, http://www.fda.gov/ICECI/CriminalInvestigations/default.htm (last updated Sept. 12, 2011); OSHA, *Establishment Search*, OSHA.GOV, http://www.osha.gov/pls/imis/establishment.html (last visited Sept. 12, 2011); SEC, *Litigation*, SEC.GOV http://www.sec.gov/litigation.shtml (last modified Dec. 20, 2011).

130. *See supra* text accompanying notes 1–4.

131. Invention Submission Corp. v. Rogan, 357 F.3d 452, 455 (4th Cir. 2004) (quoting the PTO's press release that the agency was "unveil[ing] a television and radio campaign in five media markets to counter the flood of deceptive advertising aimed at America's independent inventors" (citation omitted)).

132. Banfi Products issued its own press release on the same day that the ATF issued a press release announcing that wine imported by the company was likely contaminated. Banfi Products Corp. v. United States, 40 Fed. Cl. 107, 119 (Fed. Cl. 1997).

133. For example, the FDA publishes four separate podcasts and eighteen separate RSS feeds. *See* FDA, *Subscribe to Podcasts and News Feeds*, FDA.GOV, http://www.fda.gov/AboutFDA/ContactFDA/StayInformed/RSSFeeds/default.htm (last updated Feb. 11, 2011).

five agencies I address (the CPSC, EPA, FDA, FTC, and SEC), all but the FTC maintain a Twitter feed, often with thousands of subscribers or "followers," several of which are news media organizations. Agencies do not use Twitter to announce what they had for lunch. The CPSC routinely announces product recalls on Twitter.[134] The EPA maintains 18 separate Twitter feeds, including "EPA News" and a feed for EPA Administrator Lisa Jackson.[135] The FDA has several Twitter feeds dedicated to drugs, devices, tobacco, and recalls generally.[136] The SEC announces enforcement actions under its "SEC News" Twitter feed.[137] In July 2010, it "tweeted" that Goldman Sachs had agreed to pay $550 million to settle SEC charges, with a link to the agency's press release.[138]

New media allow agencies to communicate with audiences more quickly and more casually than ever. These media utilize truncated, blurb-inducing formats to encourage wide dissemination—Twitter, for example, is famous for limiting posts to 140 characters. Thus, agency announcements via new media are even more distilled and have less room to explain the nuance of complex regulatory actions than traditional press releases. This is a considerable departure from 1973, and one that agencies should consider when creating internal guidelines.

134. *See OnSafety*, TWITTER, http://twitter.com/OnSafety (last visited Sept. 12, 2011). As of September 12, 2011, more than 11,000 people were following this Twitter feed.

135. *See EPAnews*, TWITTER, http://twitter.com/EPAnews (last visited Sept. 12, 2011); *lisapjackson*, TWITTER, http://twitter.com/lisapjackson (last visited Sept. 12, 2011). As of September 12, 2011, the EPA News feed had over 14,000 followers and the Lisa Jackson feed at over 23,000 followers.

136. *See FDADeviceInfo*, TWITTER, http://twitter.com/FDADeviceInfo (last visited Sept. 12, 2011); *FDA_Drug_Info*, TWITTER, http://twitter.com/FDA_Drug_Info (last visited Sept. 12, 2011); *FDArecalls*, TWITTER, https://twitter.com/#!/FDArecalls (last visited Sept. 12, 2011); and *FDATobacco*, TWITTER, http://twitter.com/FDATobacco (last visited Sept. 12, 2011). Together, these FDA Twitter feeds had roughly 252,000 subscribers or followers as of September 12, 2011, with *FDArecalls* alone boasting nearly 200,000 followers.

137. *See SEC_News*, TWITTER, http://twitter.com/SEC_News?source=onebox (last visited Sept. 12, 2011). The SEC also has Twitter feeds for investor education (http://twitter.com/SEC_Investor_Ed), which includes announcements of enforcement actions.

138. Press Release, SEC, Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO (July 15, 2010), http://www.sec.gov/news/press/2010/2010-123.htm.

C. More Opportunities to Misinterpret Publicity

New media also make it more likely that audiences will misread, misunderstand, or mischaracterize the announcement. Readers can forward, repost, link to, and retweet agency announcements with very little effort. Readers can even create their own pages or news feeds that essentially make agency announcements *for* them. For example, Facebook users created a page for the Food and Drug Administration, which allows other users to link to FDA announcements and post other information that casual readers could easily attribute to the agency itself.[139] Sometimes it can be difficult to determine if the agency is authoring the content or not.[140] For example, some Twitter feeds include agency names in the title (*e.g.*, "FDAWarning"), but appear to be published by nonagency sources, increasing the risk that readers will be confused.[141]

Even if one focuses solely on traditional publicity rather than on new media or social media, this publicity now comes in multiple formats. For example, in one case the CPSC had issued statements about a product in an official agency news publication, a "Technical Fact Sheet," and in a traditional press release.[142] The FDA alone uses dozens of forms of publicity, as I catalog below.[143] Some formats have legal or regulatory significance—for example, FDA "recall" announcements are different from "market withdrawal" announcements—but many do not. And most audiences generally do not appreciate these distinctions anyway.

The media can also turn an agency press release that is relatively innocuous into something more damaging. For example, after the PTO issued a press release announcing its new media campaign to warn the public about invention submission promoters—quoting one inventor who lost money dealing with an unnamed company—a journalist contacted the inventor quoted and published stories that

139. *See Food and Drug Administration*, FACEBOOK, http://tinyurl.com/3vdunmt (last visited Sept. 12, 2011).

140. *See, e.g.*, *U.S. Securities and Exchange Commission*, FACEBOOK, http://tinyurl.com/3qhbde3 (last visited Sept. 12, 2011).

141. *FDAWarning*, TWITTER, http://twitter.com/FDAWarning (last visited Sept. 12, 2011). Note, however, that Twitter does indicate that certain Twitter feeds are "Verified Accounts."

142. Kaiser Aluminum & Chem. Corp. v. CPSC, 414 F. Supp. 1047, 1050–51 (D. Del. 1976).

143. *See infra* Part IV.A.

identified the company.[144] Despite the PTO's long-standing skepticism of this company, it had not identified the company in its press release.[145] But once the information became public, the agency lost the ability to control it. Today, investigative bloggers and other online news sources can easily dig up this information.

D. Hyper-Responsive Capital Markets

The fourth major change since 1973 is that capital markets and other audiences now process agency publicity swiftly and sometimes hastily, raising the stakes for companies and decreasing the margin for error. Stock prices quickly reflect new information—whether the information is inaccurate, misleading, or simply misinterpreted.

The most noteworthy recent example of capital markets over-responding to bad information happened in 2008, when United Airlines stock lost 76% of its value—roughly $1 billion—in just over thirty minutes of trading. Bloomberg financial news mistakenly republished a six-year-old story announcing that United would file for bankruptcy.[146] Bloomberg relied on third-party content providers to find the latest news on companies, and one mistakenly reposted the 2002 article after searching for 2008 articles on United using Google's search engine.[147] Although Bloomberg posted a correction just fifteen minutes later, and though United's stock mostly recovered,[148] the incident showed that "the market apparently reacts to a headline as much as anything else."[149] Capital markets today are swift, decisive, and jittery. Moreover, it is doubtful that companies or their investors could recover legal damages for an incident like this.[150] Aware of this problem, the regulatory branch of the New

144. Invention Submission Corp. v. Rogan, 357 F.3d 452, 455, 459 (4th Cir. 2004).

145. *Id.* at 456. *But see* Tozzi v. HHS, 271 F.3d 301, 307–10 (D.C. Cir. 2001) (finding that manufacturer had standing to challenge an HHS report classifying a chemical as a carcinogen because manufacturer could demonstrate actual and immediate injury-in-fact that was fairly traceable to the agency's report).

146. Frank Ahrens, *2002's News, Yesterday's Sell-Off*, WASH. POST, Sept. 9, 2008, at A1.

147. *Id.*

148. NASDAQ halted trading on United's stock after the 76% drop. After trading reopened that day, United stock largely rebounded, though it ended the day 11.2% below the previous day's close and continued to trade lower several days after the incident. *See* 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), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1408169.

149. Ahrens, *supra* note 146, at A1.

150. The Communications Decency Act of 1996 states that "[N]o provider or user of an

York Stock Exchange (NYSE) asked the SEC to give it advanced notice of major enforcement announcements, or make such announcements during non-trading hours, but the SEC denied this request.[151]

Of course, we have long known that adverse agency publicity can decimate stock prices. The United incident merely demonstrates that mistakes can be amplified with today's hyper-responsive capital markets. Under the "efficient market hypothesis" (EMH), securities prices rapidly reflect available information without bias.[152] Early studies testing this hypothesis "demonstrate[d] that the capital market responds efficiently to an extraordinary variety of information."[153] This response is quick enough that investors possessing new information usually cannot really profit from it.[154] Although EMH has long been the subject of an increasingly sophisticated theoretical and empirical debate among legal and

interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Pub. L. No. 104–104, tit. I, § 509, 110 Stat. 137 (codified at 47 U.S.C. § 230(c)(1) (2006)). Moreover, mere negligence would not sustain a libel claim; the plaintiff must prove malicious intent. For another contemporary example of hypersensitive investors, focusing on different legal issues, see *Matrixx Initiatives Inc. v. Siracuso*, 131 S. Ct. 1309, 1315–16 (2011), in which a drug company's shares fell over 11% after a news report that the FDA was investigating adverse reactions from a common cold medicine, then almost completely recovered after the company posted its press release that (fraudulently) assured that its drug did not cause the adverse reactions. Moreover, *Matrixx* was sued in consumer class action suits just days after the FDA published its original warning letter to *Matrixx* on its website. *See* Sarah Taylor Roller, Raqiyyah R. Pippins, & Jennifer W. Ngai, *FDA's Expanding Postmarket Authority to Monitor and Publicize Food and Consumer Health Product Risks: The Need for Procedural Safeguards to Reduce "Transparency" Policy Harms in the Post-9/11 Regulatory Environment*, 64 FOOD & DRUG L.J. 577, 592 n.63 (2009).

151. SEC OIG, *supra* note 25, at 65–71. The SEC declined NYSE's request because it was concerned about leaks and believed that announcements that have a big trading impact would be sufficiently rare.

152. There are "strong," "semi-strong," and "weak" forms of this hypothesis. *See* Ian Ayers & Stephen Choi, *Internalizing Outsider Trading*, 101 MICH. L. REV. 313, 318 n.18 (2002). In the strong form, the securities price reflects *all* information, including both public and nonpublic. *Id.* Under the semi-strong form, the price reflects only public information. *Id.* And under the weak form, it reflects only prior *price* information. *Id.* Empirical reviews tend to support the weak or semi-strong variants. Daniel R. Fischel, *Efficient Capital Markets, the Crash, and the Fraud on the Market Theory*, 74 CORNELL L. REV. 907, 911–12 n.11 (1989). Eugene Fama first developed these variants. Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383 (1970).

153. Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 551 (1984).

154. *Id.* at 555 ("'[A]vailable information' does not support profitable trading strategies or arbitrage opportunities.").

financial scholars,[155] most generally accept that stock prices fluctuate in response to specific events. Indeed, "event studies" can use econometrics to measure how stock prices respond after certain events, "usually announcements of various corporate, legal, or regulatory action or proposed action."[156] Event studies of regulation tend to focus on the banking and financial industries, and on the announcement of new *regulations* rather than announcements of *enforcement* actions.[157] But economists have been conducting event studies for years,[158] and event studies tied to particular regulatory enforcement announcements could be used to appraise the immediate effects of adverse publicity.

Beyond the immediate market reaction, the Internet acts as a multiplier to adverse publicity,[159] and the effects can linger. Word can spread via online news aggregators, blogs, message boards, chat rooms, and social media. These media and the twenty-four hour news cycle propagate news bites that lack the nuance to convey the nature of regulatory actions. Thus, agency statements can be multiplied "without a corresponding right or remedy for those who disagree with the agency."[160] Companies are rightly terrified that their legal and regulatory violations—real or alleged—will be broadcast.[161] Although this may be the cost of doing business in a regulated industry, agencies should not completely disregard these concerns.

E. Counterforces?

Two counterforces might limit the risks that agencies will issue adverse publicity that is erroneous, excessive, or misinterpreted. First,

155. See Donald C. Langevoort, *Taming the Animal Spirits of the Stock Markets: A Behavioral Approach to Securities Regulation*, 97 NW. U. L. REV. 135 (2002), for an overview of the debate.

156. Sanjai Bhagat & Roberta Romano, *Event Studies and the Law: Part I: Technique and Corporate Litigation*, 4 AM. L. & ECON. REV. 141, 144 (2002).

157. *See* Sanjai Bhagat & Robert Romano, *Event Studies and the Law: Part II: Empirical Studies of Corporate Law*, 4 AM. L. & ECON. REV. 380, 410–14 (2002).

158. John J. Binder, *Measuring the Effects of Regulation with Stock Price Data*, 16 RAND J. ECON. 167, 167–68 (1985); G. William Schwert, *Using Financial Data to Measure Effects of Regulation*, 24 J.L. & ECON. 121, 122–24, 149–50 (1981).

159. O'Reilly, *The 411 on 515*, *supra* note 7, at 838.

160. *Id.*

161. Andrea A. Curcio, *Painful Publicity: An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 343 (1996).

agencies seem to be aware that they can saturate the public with warnings and announcements. Back in 1973, Gellhorn noted that consumers were relatively indifferent to warnings by the National Highway Traffic Safety Administration (NHTSA) due to "notice saturation," given the frequent warnings relating to "almost every make and model of automobile."[162] Today, agencies like the EPA, FDA, FTC, and CPSC issue so many warnings that the public may have developed some immunity to them, ironically rendering each announcement *less* newsworthy. Frequent warnings by the NHTSA "may have dissipated rather than heightened public interest."[163] The FTC's frequent notices similarly fell on numbed ears.[164]

Other agencies recognize the danger of notice saturation in theory,[165] though they continue to inundate the public. As noted in my review of FDA publicity between 2004 and 2010, *infra*, the FDA issued, on average, one new press release almost every business day over a seven-year period.[166] Agency announcements even compete with each other for attention, and agencies sometimes schedule big announcements on different days to maximize their reach.[167] Agencies like the FDA will publish multiple press releases about important recalls—often with daily updates and titles that declare their urgency—in order to distinguish them from run-of-the-mill announcements.[168] Thus, although agencies seem to be aware of notice saturation, it is not clear that it serves as a meaningful restraint. Moreover, although the general public can be easily saturated by notices, industry followers and the investing community seem to pay attention to the large volume of agency announcements.

162. Gellhorn, *supra* note 5, at 1418.

163. *Id.* (noting, however, that FDA warnings tended to be less frequent and involved scientific matter that the public was less likely to challenge).

164. *Id.* at 1427.

165. FDA Administrative Practices and Procedures, 42 Fed. Reg. 12,436 (Mar. 4, 1977) (to be codified at 21 C.F.R. pt. 2) ("[A]n excess of negative information could make the public indifferent or insensitive to important warnings . . . ."); Wayne L. Pines, *Regulatory Letters, Publicity & Recalls*, 31 FOOD DRUG COSM. L.J. 352, 354 (1976) ("We know what happened to the boy who cried 'adulterated' too often. He got himself and his message 'adulterated.'").

166. *See infra* Part IV.A.

167. *See, e.g.*, SEC OIG, *supra* note 25, at 53.

168. For example, the FDA published eighteen separate press releases to publicize the 2006 E. coli outbreak. *Press Announcements*, FDA, http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/default.htm?Page=2 (last visited Nov. 6, 2011).

The second potential counterforce is that agencies now give more careful scrutiny to the accuracy of information they publish and the fairness of publishing it. As agencies began to release more information to the public—both passively, as when responding to FOIA requests and posting information on websites, and more actively, by affirmatively issuing press releases[169]—concerns grew that agencies were releasing information that was inaccurate or based on less-than-perfect data.

So in 2001, Congress required agencies to ensure the "quality, objectivity, utility, and integrity of information" that they disseminate.[170] The law required the Office of Management and Budget (OMB) to publish guidelines to ensure that information released met minimum standards for accuracy and objectivity and to create procedures that allowed parties to correct information if the agency did not.[171] However, after the OMB's Office of Information and Regulatory Affairs (OIRA) proposed such guidelines, it explicitly excluded agency press releases, as well as charges made by agencies during adjudications.[172] Although OIRA's guidelines create a very large exception, Professor James T. O'Reilly suggests that they might make agency personnel more circumspect when issuing adverse publicity, or maybe even require agencies to retract inaccurate or misleading statements.[173]

Despite these developments, adverse publicity generally has become even more coercive. As O'Reilly observes, "the forceful assertion of agency condemnation may achieve more in a day than an adjudicative proceeding could produce in many months of effort."[174]

169. Professor O'Reilly distinguishes active versus passive publicity, noting the distinction between an agency affirmatively publishing a press release and hosting a press conference and "passively" posting information on its website. O'Reilly, *Libels on Government Websites*, *supra* note 7, at 516–17.

170. Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 515(a), 114 Stat. 2763 (codified at 44 U.S.C. §§ 3504(d)(1), 3516 (2006)). Around the same time, the American Bar Association's House of Delegates adopted a recommendation that agencies establish and publicize a process for correcting factual errors in information disseminated by agencies. HOUSE OF DELEGATES 2001 ANNUAL MEETING, DAILY J. AM. BAR ASS'N, Report No. 107c, at 7–11 (Aug. 6–7, 2001) (on file with author).

171. Consolidated Appropriations Act of 2001 § 515.

172. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 369, 371 (Jan. 3, 2002).

173. O'Reilly, *The 411 on 515*, *supra* note 7, at 845, 849.

174. *Id.* at 837.

We have long recognized that companies fear adverse publicity as much as, if not more than, formal sanctions.[175] And in the modern era, when the Internet serves as a content multiplier, and when capital markets seize information without verifying the details, the velocity and severity of the fallout can be even greater.[176] For these reasons, the 1973 recommendations cannot be completely superimposed today, and must be adapted to account for technological developments.

IV. THE AFTERMATH: AGENCIES AND DISPUTES SINCE 1973

This Part evaluates what agencies did in response to the ACUS recommendations—virtually nothing—and considers how agencies have exercised their discretion and defended themselves in litigation, examining twenty-six federal court opinions since 1973 that challenged adverse agency publicity. I begin with an in-depth case study of the FDA, and then briefly examine other agencies, including the FTC, EPA, SEC, and CPSC. These agencies offer variations on the FDA's story, but confirm our generalized concerns. In short, Congress should improve agencies' statutory enforcement authority so that the agency does not have to rely on publicity.

A. Case Study: The Food and Drug Administration

The FDA responded more than other agencies to the ACUS recommendations. In 1977, the FDA proposed a rule on its use of adverse publicity, attempting to codify and update its existing policies.[177] In the preamble to the proposal, the FDA acknowledged that adverse publicity can interfere with criminal and civil actions and "cause economic harm to both individuals and firms."[178] Of course, the FDA had every reason to acknowledge these dangers after causing the 1959 cranberry scare and other incidents.

The FDA's proposed rule would have set publicity standards and procedures that varied according to the nature of the FDA's action, delineating between criminal trials, civil litigation, investigations, and

175. Curcio, *supra* note 161, at 370; FISSE & BRAITHWAITE, *supra* note 20, at 249.

176. Curcio, *supra* note 161, at 370.

177. 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).

178. *Id.* at 12,436.

administrative hearings.[179] The rule would have provided advance notice to the parties identified and would have allowed parties to request that the FDA correct or retract its statements.[180] Although the thrust of the FDA's proposal was to restrain itself, it emphasized that it would reserve broad discretion to go beyond these self-imposed limits when necessary.[181] Indeed, the preamble reads like one long justification for issuing adverse publicity.[182] The FDA even stated that it would knowingly jeopardize a criminal action with pretrial publicity if "needed to protect the public."[183]

Ultimately, the FDA never finalized the proposed rule and withdrew the rule fourteen years later without much explanation.[184] In 1976, the FDA's parent agency adopted publicity regulations,[185] and the FDA generally follows this policy today.[186]

But despite being the only federal agency to formally respond to the ACUS recommendations, the FDA continues to use adverse publicity in ways that contravene those recommendations. The FDA continues to rely on adverse publicity (or simply the threat thereof) as a regulatory weapon.[187] The FDA asserts the same justifications for issuing adverse publicity that it articulated in its 1977 proposed rule, as evidenced by its arguments in litigation.[188] Like other agencies, the FDA uses publicity for a number of purposes: to warn the public, to notify the public of agency activities, and to clarify the agency's views and policies.[189]

179. *Id.* at 12,440–41.

180. *Id.* at 12,441.

181. *Id.* at 12,436–41.

182. The FDA's proposal even defined "publicity" very narrowly as press releases, press conferences, and media interviews intended to invite public attention. *Id.* at 12,440. Of course, today FDA uses several additional vehicles for publicity.

183. FDA Administrative Practices and Procedures, 42 Fed. Reg. at 12,438.

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

185. Release of Adverse Information to News Media, 41 Fed. Reg. 2 (Jan. 2, 1976) (to be codified at 45 C.F.R. pt. 17).

186. *See, e.g.*, JAMES T. O'REILLY, FOOD AND DRUG ADMINISTRATION § 22:41 (3d ed. 2010).

187. Noah, *supra* note 7, at 890.

188. *See, e.g.*, Banfi Products Corp. v. United States, 40 Fed. Cl. 107, 124–26 (Fed. Cl. 1997); Fisher Bros. Sales, Inc. v. United States, 46 F.3d 279, 286–87 (3d Cir. 1995).

189. FDA Administrative Practices and Procedures, 42 Fed. Reg. 12,436, 12,436 (Mar. 4, 1977) (to be codified at 21 C.F.R. pt. 2). Although the FDA stated these purposes in a proposed rule that was later withdrawn, these purposes generally reflect the agency's approach. FDA, RESEARCHING FDA WITH PUBLISHED PRIMARY SOURCES, http://tinyurl.com/4yr97c3

The FDA is understandably protective of its duty to warn the public of dangerous products and other health risks. In cases challenging FDA publicity, the agency routinely emphasizes that it must warn the public of health risks, even when acting on limited information and scientific uncertainty.[190] The FDA has long had to warn the public in the face of such uncertainty. In 1971, the FDA Commissioner Charles C. Edwards defended the agency's decision to warn the public before reaching a definitive conclusion that a product in fact caused death or serious injury: "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."[191]

Other FDA reporting and disclosure programs take a similar stance—requiring disclosure of events before establishing causation with scientific certainty, for example.[192] Indeed, modern regulatory agencies of all kinds must routinely operate amid scientific uncertainty.[193]

As with adverse publicity by other agencies, FDA press releases are generally reported by the trade press, the investment media,[194] and often the national media. FDA publicity can be particularly damaging partly because consumers traditionally have a very low tolerance for perceived risks to the safety of food and drugs.[195]

It is difficult to locate every instance in which adverse publicity by the FDA tangibly harmed the parties identified. Apart from legal challenges that generate judicial opinions, few publications report the aftermath. There are even fewer reported incidents affecting

(last updated May 5, 2009) ("The agency's press releases and talk papers present FDA's viewpoints and policies on a wide variety of issues . . . .").

190. *See, e.g.*, *Banfi*, 40 Fed. Cl. at 124–26; *Fisher Bros.*, 46 F.3d at 286–87.

191. Gellhorn, *supra* note 5, at 1415 n.142 (quoting HEW Release No. 71-67 (Nov. 1, 1971)).

192. For example, companies must report to the FDA adverse events "associated" with their products even before the company may know for sure that its product caused the adverse event. 21 C.F.R. § 314.80 (2011).

193. In a well-known contemporary example, the EPA claimed that it could not propose regulations governing greenhouse gas emitting substances like carbon dioxide because it could not conclude definitively that carbon dioxide qualifies as an air pollutant. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,930–31 (Sep. 8, 2003). The Supreme Court rejected this argument in *Massachusetts v. EPA*, 549 U.S. 497, 533–34 (2007).

194. Levine, *supra* note 57, at 278.

195. Gellhorn, *supra* note 5, at 1410.

individual firms, but some stand out. For example, one day after the FDA publicized manufacturing violations at a medical device plant, the company's stock lost 35% of its value, and the company subsequently suspended manufacturing and laid off 350 employees.[196] In another incident, the FDA's alert about a medical device caused a national retail pharmacy chain to immediately remove it from its stores.[197]

More recently, in March 2003, the FDA issued a public "Talk Paper" to publicize its objections to a press release issued by the drug company SuperGen that discussed its cancer drug Mitozytrex.[198] The FDA criticized SuperGen for exaggerating the drug's safety and effectiveness, and for minimizing its risks.[199] The FDA called SuperGen's statements "misleading," "demonstrably false," and "particularly egregious."[200] The company's stock price fell nearly 25% within hours.[201]

The FDA reportedly did not notify SuperGen of its objections beforehand.[202] Agency officials subsequently referred to the SuperGen Talk Paper as a novel approach to "stop misleading promotion."[203] But the FDA seemed to struggle internally with the decision to publish it. The SuperGen Talk Paper was the first time in 17 years that the FDA voiced its objection through its own publicity rather than through a more traditional Warning Letter.[204] And the FDA did not publish the Talk Paper until four months after SuperGen issued its press release.[205] As my coauthors and I noted in

196. James G. Dickinson, *Publicity as Punishment*, MED. DEVICE & DIAGNOSTIC INDUSTRY 24 (Jan. 1992); O'REILLY, *supra* note 186 at § 22.42.

197. FDA QUARTERLY REPORT, FIRST QUARTER 1987, at 20 (1987); O'REILLY, *supra* note 186, at § 22.42.

198. FDA, *supra* note 1.

199. *Id.*

200. *Id.*

201. *FDA Responds in Kind to SuperGen*, *supra* note 3, at 6; Vodra et al., *supra* note 3, at 649.

202. Vodra et al., *supra* note 3, at 649.

203. *DDMAC Looking for More "Creative" Enforcement Actions*, FDAWEBVIEW (June 18, 2003), http://www.fdaweb.com (quoting DDMAC Director Tom Abrams) (last accessed Sept. 12, 2011).

204. Vodra et al., *supra* note 3, at 649. Traditionally, Talk Papers were ostensibly aimed at FDA personnel, while Warning Letters were notifications to specific private parties notifying them that the agency believes the party is violating the FDCA. FDA, REGULATORY PROCEDURES MANUAL at Exhibit 4-1 (Mar. 2010), *available at* http://www.fda.gov/downloads/ICECI/ComplianceManuals/RegulatoryProceduresManual/UCM176965.pdf.

205. Vodra et al., *supra* note 3, at 649. Moreover, the FDA later republished the Talk

a prior article,[206] the FDA used the Talk Paper to reach the same audience as SuperGen's press release and to avoid giving SuperGen procedural rights associated with formal enforcement actions. It is not clear why the FDA did not notify SuperGen of its objections beforehand, particularly because four months had passed and there did not appear to be a health emergency or a risk of significant economic loss that might justify it. The Talk Paper would have violated the FDA's proposed 1977 rule in several ways, although in the agency's defense "Talk Papers" would not be covered under the rule's definition of "publicity."[207] Nevertheless, the SuperGen Talk Paper illustrates how easily agencies can name and shame companies.

Of course, the FDA has more explicit statutory authority to issue publicity than most other agencies.[208] Section 705 of the Federal Food, Drug, and Cosmetic Act (FDCA) allows the FDA to publish "judgments, decrees, and court orders" enforcing the Act, including the nature and disposition of the action.[209] But § 705 also bestows broader authority on the FDA to disseminate information about regulated products that involve an "imminent danger to health or gross deception of the consumer."[210] This latter provision clarifies that nothing prohibits the FDA from publishing the results of investigations.[211] Notably, this language seems to bless the FDA practice of announcing fully adjudicated actions, rather than preliminary actions, unless there is imminent danger.

The FDA has long interpreted § 705 as granting it explicit authority to issue adverse publicity[212]—a reasonable assertion given the statute's plain language.[213] But the FDA has also asserted that it has implicit authority to issue publicity because the Public Health

Paper, removing a disclaimer on the original Talk Paper that noted that the agency uses Talk Papers to guide agency personnel but uses press releases to inform the general public. *Id.* at 649 n.138. Apparently, the FDA was aware that it was using the Talk Paper more like a press release.

206. *Id.* at 648–50.

207. FDA Administrative Practices and Procedures, 42 Fed. Reg. 12,436 (March 4, 1977) (to be codified at 21 C.F.R. pt. 2).

208. Gellhorn, *supra* note 5, at 1408.

209. FDCA § 705(a), 21 U.S.C. § 375(a) (2006).

210. FDCA § 705(b), 21 U.S.C. § 375(b).

211. *Id.*

212. FDA Administrative Practices and Procedures, 42 Fed. Reg. at 12,437.

213. Some also argue that the 1990 Safe Medical Devices Act enhanced FDA's statutory authority to issue publicity by granting the FDA additional authority to warn about device hazards. O'REILLY, *supra* note 186, at § 22.41 (citing 21 U.S.C. § 360h(e)(2)(B)).

Service Act requires the agency to make public information about the products that it regulates.[214] Finally, the FDA has justified its discretionary authority to issue publicity under the Supreme Court's opinion in *Barr v. Matteo*, which "recognized that Federal agencies have implicit authority to issue public statements respecting agency policy on matters of wide public interest."[215]

Thus, Congress clearly has granted the FDA discretion to issue adverse publicity. The question is whether FDA abuses its discretion. The FDA has long viewed its statutory powers expansively. When Peter Barton Hutt was Chief Counsel for the agency, he declared that the FDCA "must be regarded as a constitution" that gives the FDA broad discretion to protect the public health as necessary.[216] And in subsequent legal challenges to FDA publicity, the agency argued that it had almost unreviewable discretion to warn the public.[217] Of course, scholars and courts have long been suspicious of such claims.[218] The FDA enjoys several other statutory enforcement powers, such as the power to seize products and obtain injunctions,[219] but these powers "depend on court approval and are costly to administer, time-consuming, and . . . often ineffective."[220] Thus, the FDA sometimes relies on the threat of adverse publicity to encourage parties to comply with its demands.

Today, the FDA uses nonbinding guidance documents and employee manuals to address its use of publicity. Its *Regulatory Procedures Manual* states that the FDA Office of Public Affairs is responsible for preparing and approving press releases and Talk Papers.[221] The FDA's Center for Drug Evaluation and Research (CDER) publishes a *Manual of Policies and Procedures* that articulates policies for issuing press releases, Talk Papers, and other

214. FDA Administrative Practices and Procedures, 42 Fed. Reg. at 12,437 (citing Public Health Service Act §§ 301, 310, 42 U.S.C. §§ 241, 242o).

215. FDA Administrative Practices and Procedures, 42 Fed. Reg. at 12,437 (citing Barr v. Matteo, 360 U.S. 564 (1959)).

216. Hutt, *supra* note 62, at 178.

217. *See infra* Part V.C.2.a.

218. *See, e.g.*, Noah, *supra* note 7, at 911–12; Lars Noah, *The Little Agency That Could (Act with Indifference to Constitutional and Statutory Strictures)*, 93 CORNELL L. REV. 901 (2008).

219. FDCA §§ 302, 304, 21 U.S.C. §§ 332, 334.

220. Gellhorn, *supra* note 5, at 1407.

221. REGULATORY PROCEDURES MANUAL, *supra* note 204, at § 8-8 (2010).

forms of publicity,[222] describing in detail procedures for drafting and clearing these documents. It even specifies procedures for resolving disputes *within* the agency that might arise when approving publicity, but does not mention any procedures available to parties *outside* the agency.[223] In fact, the *Manual* addresses virtually none of the recommendations urged by Gellhorn and ACUS, and does not even seem to incorporate FDA's proposed rule from 1977.[224]

In the preamble to its 1977 proposed rule, the FDA stated that press releases "ordinarily are personally approved by the Assistant Commissioner for Public Affairs and the Commissioner."[225] But the proposed rule included no definite procedures for approving and releasing publicity.[226] Today, press releases require a relatively low level of clearance within the FDA compared to other forms of publicity, and are disseminated by public relations personnel and on FDA's website.[227]

The FDA's 1977 proposal also stated that private parties could file a citizen petition asking the Assistant Commissioner for Public Affairs to retract or correct publicity, and included procedures for expediting requests.[228] Today, parties can still file citizen petitions with the agency under separate regulations,[229] but the FDA specifies no separate procedures for parties to object to publicity. Citizen petitions may not receive timely responses, and the FDA does not describe any expedited procedures.

The FDA sometimes does not notify the private party or give it an opportunity to respond to adverse publicity, although the agency

222. 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), *available at* http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDER/ManualofPoliciesProcedures/ucm073021.pdf.

223. CDER MAPP 4112.1, *supra* note 222, at 3–6.

224. FDA Administrative Practices and Procedures, 42 Fed. Reg. 12,436, 12,436 (Mar. 4, 1977) (to be codified at 21 C.F.R. pt. 2).

225. *Id.* at 12,437.

226. *See id.*

227. Although press releases are issued by departments within FDA's five centers, Talk Papers are issued at the agency level, and Frequently Asked Questions (FAQs) are issued by the FDA's centers. CDER MAPP 4112.1, *supra* note 222, at 1–2.

228. FDA Administrative Policies and Procedures, 42 Fed. Reg. at 12,441 (to be codified 21 C.F.R. pt. 2.746).

229. *See, e.g.*, 21 C.F.R. 10.30 (2011).

believes that targeted parties are often aware that they are on the agency's radar.[230]

The FDA is often willing to notify parties beforehand, but only in general terms stating that the agency will be issuing publicity; the agency "does not negotiate with the company about the text of the FDA announcement," "[n]or will FDA share the text of a press communication with a company in advance,"[231] on the grounds that doing so "would be inconsistent with the principle of equal access to public information" under FOIA.[232] Sometimes, advance notice gives the party an opportunity to issue its own publicity in response; other times, the FDA believes advance notice would be inappropriate, such as when it initiates an enforcement action.[233]

Although the FDA does not routinely publicize the enforcement actions it initiates—such as issuing a Warning Letter or even signing a consent decree[234]—it does announce a significant number of these actions in press releases, and posts virtually all of them on its website. The FDA also recognizes that a press release can be more effective than formal enforcement in some cases, and is more likely to publicize "an enforcement action against a large multinational corporation" or one involving "a well-recognized product or brand."[235]

The FDA has defended its discretion to publicly disclose enforcement actions already taken,[236] and frequently issues press releases announcing consent decrees, settlements, judgments, and criminal sentences. But the FDA also regularly issues press releases announcing preliminary matters like investigations, civil complaints, and criminal charges, and indictments. Sometimes, the FDA will update previously issued announcements stating that a court has entered a consent decree of permanent injunction. But I did not find any updates announcing decisions favorable to defendants.[237]

230. FDA Administrative Policies and Procedures, 42 Fed. Reg. at 12,439.

231. Levine, *supra* note 57, at 277.

232. FDA Administrative Policies and Procedures, 42 Fed. Reg. at 12,439.

233. *Id.*

234. Levine, *supra* note 57, at 277.

235. *Id.*

236. *See, e.g.*, Protection of Human Subjects; Standards for Institutional Review Boards for Clinical Investigations, 46 Fed. Reg. 8958, 8974 (Jan. 27, 1981) (rejecting a public comment stating that publicly disclosing FDA disqualifications of Institutional Review Boards would make it difficult for the IRB to recruit).

237. Note that in a bizarre press release, the FDA stated that it had posted a Warning

In general, FDA press releases sound less threatening than Warning Letters, in which the FDA typically alleges that a company has violated the statute, regulations, or both, and asks the company to take immediate remedial action or face a formal enforcement action.[238] Moreover, in the past, the FDA's Warning Letters stated that it would recommend to other federal agencies not to award contracts for affected products.[239] Although press releases did not contain similar threats, both types of documents can constitute a form of punishment against companies that the FDA suspects are violating its regulations.

I surveyed the FDA's website to determine how frequently the agency issues publicity and in what forms. My review found that the FDA uses a large number of forms and formats for publicity. In addition to traditional press releases, the FDA also uses television and radio appearances, speeches at conferences, and even congressional testimony.[240] But FDA publicity, broadly construed, comes in many more forms, perhaps reflecting the agency's basic philosophy that "the public's business must be and will be conducted in public."[241] Again, the Obama administration has emphasized transparency by agencies, but not all transparency is benign. Some authors call it "adverse transparency."[242]

Letter regarding several Procter & Gamble over-the-counter drugs by mistake, attributing the mistake to "an internal systems error." FDA clarified that "no warning letter has been sent to Procter & Gamble." Note to Correspondents, FDA, Procter & Gamble Warning Letter Posted in Error (Oct. 15, 2009), *available at* http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2009/ucm186832.htm.

238. *See, e.g.*, Den-Mat Corp. v. FDA, No. MJG-92-444, 1992 WL 208962, at *1 (D. Md. Aug. 17, 1992).

239. *Id.*

240. Levine, *supra* note 57, at 278.

241. FDA Administrative Practices and Procedures, 42 Fed. Reg. 12,436 (Mar. 4, 1977) (to be codified at 21 C.F.R. pt. 2) (internal quotation marks omitted).

242. Roller et al., *supra* note 150, at 597.

I found FDA news announcements identifying particular companies or products under the following titles:

- Media Transcript (of press briefings);
- Press Announcement;
- Press Release;
- Talk Paper[243]; and
- Warning Letter.[244]

Moreover, the FDA labels its warnings about specific products and companies in many different ways, some of which have legal significance and some of which do not:[245]

- Advice for Patients;
- Consumer Updates;
- Field Action Notification;
- Field Correction;
- Frequently Asked Questions;
- Important Information;
- Important Customer Notification;
- Important Notice;
- Market Withdrawal;
- Notice of Field Correction;
- Notice to Readers;
- Product Withdrawal;
- Public Health Advisory;
- Public Health Notification;
- Recall;
- Recovery Notice;
- Safety Communication;

243. The public has long been confused about what the FDA Talk Papers signify. FDA Administrative Practices and Procedures, 42 Fed. Reg. at 12,436. The FDA tried to clarify that Talk Papers are aimed internally at FDA personnel to ensure that their responses to public questions are uniform, attaching the disclaimer that Talk Papers are "For Internal Distribution Only." *Id.* (internal quotation marks omitted) ("'Talk Papers' are not considered publicity subject to this proposal."). Later Talk Papers included the disclaimer that "FDA Talk Papers are prepared by the Press Office to guide FDA personnel in responding with consistency and accuracy to questions from the public on subjects of current interest." FDA, Talk Paper T01-62: FDA Strengthens Warning for Droperidol (Dec. 5, 2001), *available at* http://tinyurl.com/3blyrbd. The FDA subsequently changed its position, noting that although Talk Papers were intended to provide more detailed information to guide agency staff, Talk Papers were "actively disseminated to the media" and the intended audience was the "[g]eneral [p]ublic." CDER MAPP 4112.1, *supra* note 222, at 1. As noted above, the FDA has published Talk Papers on its website that publicly criticize regulated companies. The FDA discontinued its use of Talk Papers in October 2005. *See, e.g.*, *Food, Nutrition and Cosmetics Announcements*, FDA.GOV, http://tinyurl.com/4yk83mt (last updated Apr. 25, 2011).

244. *Newsroom*, FDA.GOV, http://www.fda.gov/NewsEvents/Newsroom/default.htm (last updated Sept. 1, 2011).

245. For example, a product "withdrawal" and "correction" have different regulatory significance than a "recall." *Guidance for Industry: Product Recalls, Including Removals and Corrections*, FDA.GOV (Nov. 3, 2003), http://www.fda.gov/Safety/Recalls/IndustryGuidance/ucm129259.htm.

- Important Safety Information;
- Information Alert;
- Information for Health Care Professionals;
- Urgent Instruction Correction;
- Urgent Removal; and
- Urgent Notification.

Of course, the FDA often finds it necessary to announce product recalls, and this practice demonstrates the Catch-22 for agencies dealing with imperfect information and scientific uncertainty. On one hand, Gellhorn originally found that not only did the FDA arguably not have clear statutory authority to require recalls, but that the agency publicized recalls in excessive and damaging ways.[246] Other authors have been similarly critical of the FDA's use of recalls in lieu of sanctions more explicitly authorized by statute.[247]

On the other hand, courts generally protect the FDA's discretion to warn the public about potential health hazards, which includes notifying the public of recalls and other product removals.[248] To its credit, the FDA does not publicize all recalls, but reserves publicity for products that pose the most serious risks.[249] Current FDA regulations call for manufacturers to cooperate with the FDA in publicizing the recall, noting that the FDA "in consultation with the recalling firm will ordinarily issue such publicity" itself, or at least provide written comments on the firm's own publicity.[250]

Aside from affirmatively issuing publicity, the FDA more passively makes negative information about companies public on its website, without drawing much attention to it. For example, it posts formal legal complaints, Warning Letters (which it sometimes publicizes), inspectional observations, and other documents stating objections that have yet to be resolved or adjudicated.[251] In its 1977

246. Gellhorn, *supra* note 5, at 1410–16.

247. Noah, *supra* note 7, at 874–75, 888.

248. *See, e.g.*, Sperling & Schwartz, Inc. v. United States, 218 Ct. Cl. 625, 626–27 (Ct. Cl. 1978) (holding the FDA had a rational basis for warning public through press releases about excessive lead in dishware).

249. *For Consumers, FDA 101: Product Recalls—From First Alert to Effectiveness Checks*, FDA.GOV, http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm049070.htm (last updated Sept. 9, 2011).

250. 21 C.F.R. § 7.42(b)(2) (2010). Note that for Class I recalls, the most serious type of recall, it is the FDA's policy to give "the recalling firm the first opportunity to prepare and issue publicity concerning its recall." REGULATORY PROCEDURES MANUAL, *supra* note 204, at § 7-7-3.

251. *Newsroom*, FDA.GOV, http://www.fda.gov/NewsEvents/Newsroom/default.htm (last updated Sept. 9, 2011); *Inspections, Compliance, Enforcement, and Criminal*

proposal, the FDA tried to distinguish publicity that it intended to distribute to the mass media for further consumption from other notifications meant to educate or simply notify the public.[252] But this distinction means very little when the FDA posts thousands of documents on its website that are reported by the media and trade press—without any specific efforts by the FDA to publicize them. Even more recent policies try to distinguish between information intended for the general public and for the media,[253] although it is not clear what really distinguishes the two today.[254]

As part of my review of FDA publicity, I tried measuring how frequently the FDA publicizes negative or adverse information about private parties, and the proportion that announced preliminary or pending actions rather than final, adjudicated ones. I reviewed all "Press Announcements" archived on the FDA's Newsroom page, from 2004 to 2010.[255]

Investigations, FDA.GOV, http://www.fda.gov/ICECI/default.htm (last updated Jan. 25, 2011). *See* Levine, *supra* note 57, at 278.

252. FDA Administrative Practices and Procedures, 42 Fed. Reg. 12,436, 12,437 (Mar. 4, 1977) (to be codified at 21 C.F.R. pt. 2) (delineating publicity from the FDA Consumer magazine, the FDA Drug Bulletin, and other publications that report actions taken by FDA).

253. CDER MAPP 4112.1, *supra* note 222, at 1–2.

254. The chart on CDER MAPP 4112.1, *supra* note 222, at 1–2, generally shows that information intended for the media is disseminated by the FDA's press office and information intended for the general public is posted on FDA's website, although the two overlap when FDA issues press releases, talk papers, and notes to correspondents.

255. *Newsroom*, FDA.GOV, http://www.fda.gov/NewsEvents/Newsroom/default.htm (last updated Sept. 13, 2011).

Year	Total releases[256]	(1) Identify private party or product?[257]	(2) Negative or adverse?[258]	(3) Preliminary or pending action?[259]	Percent of total that were (1), (2) *and* (3)
2004	160	73/160 (46%)	54/73 (74%)	40/54 (74%)	40/160 (25%)
2005	144	80/144 (56%)	50/80 (63%)	45/50 (90%)	45/144 (31%)
2006	254	161/254 (63%)	82/161 (51%)	71/82 (87%)	71/254 (28%)
2007	229	157/229 (69%)	89/157 (57%)	70/89 (79%)	70/229 (31%)
2008	174	121/174 (70%)	65/121 (54%)	52/65 (80%)	52/174 (30%)
2009	282	198/282 (70%)	130/198 (66%)	80/130 (62%)	80/282 (28%)
2010	299	219/299 (73%)	152/219 (69%)	105/152 (69%)	105/299 (35%)
Total	1542	1009/1542 (65%)	622/1009 (62%)	463/622 (74%)	463/1542 (30%)

As illustrated on the chart, the FDA issued 1542 press announcements between 2004 and 2010, equating to almost one every business day. Although O'Reilly observed that "[t]he FDA does not overly rely upon publicity" and uses it only sparingly,[260] my review suggests otherwise.

256. These numbers exclude duplicate press releases published in foreign languages.

257. Column (1) counts the number of press releases that identify a specific product, company, and/or individual in the title or body. Note that some press releases refer to types or categories of products without identifying specific products or manufacturers by name. I did not include these press releases in Column (1).

258. Column (2) refers to press releases that include negative or adverse information about a specific company, product, or individual. For example, FDA announcements that the agency has recalled a product or issued a Warning Letter are negative actions. The vast majority of positive announcements involve the FDA approving or clearing new products to market.

259. Column (3) refers to press releases that announce some sort of preliminary determination or pending agency action that has not reached a final, determinative conclusion. I counted recalls, seizures, Warning Letters, and import alerts as preliminary or pending actions because they are often based on preliminary information and have not been subject to agency adjudication or other final determination, even if a company initiated the recall voluntarily. Companies often initiate voluntary recalls in cooperation with, or with pressure from, the FDA.

260. O'REILLY, *supra* note 186, at §§ 22.42, 22.43 n.1 (citing Pines, *supra* note 165, at 354) (noting that the FDA issued fewer than 50 press releases each year as of 1976, but

My review also finds that 65% of FDA press announcements during this period identify a specific product, company, or person (Column (1)). Of these, 62% are negative or adverse in some way (Column (2)). And of these, 74% announce a preliminary or pending action by the FDA that has not been fully resolved or adjudicated (Column (3)). For an agency that seems to appreciate that adverse publicity announcing preliminary actions can unfairly damage companies, the FDA certainly does not seem to shy away from the practice.

Of course, the FDA can justify many of these adverse, preliminary announcements as protecting the public health, such as during a recall. And many other matters ultimately result in successful adjudications or settlements for the agency. Thus, the chart above is not meant to imply that the FDA is not justified in making most of these announcements. But the sheer volume of such announcements (463 out of 1542) raises the risk of errors or abuse. And no legal constraints deter errors or abuse, apart from internal self-discipline, such as the agency's willingness to maintain legitimacy with repeat players, its desire to keep its enforcement powder dry, and its respect for due process, among other considerations.

Compounding matters, the FDA consistently argues that its publicity is not subject to judicial review.[261] Like Warning Letters, which the FDA defines by regulation as informal enforcement actions,[262] the FDA considers adverse publicity to be a statutorily authorized form of informal enforcement.[263] One court noted that the FDA cannot have it both ways, after the agency targeted particular companies through a publicity campaign:

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acknowledging that "the number may have increased in recent years").

261. Noah, *supra* note 7, at 887 (noting that only once has a court allowed a challenge to an FDA warning letter to proceed). *See, e.g.*, Den-Mat Corp. v. FDA, Civ. A. No. MJG-92-444, 1992 WL 208962, at *1, 5 (D. Md. Aug. 17 1992) (denying FDA's motion to dismiss an action claiming that an FDA warning letter and related publicity against a company were not final agency actions, requiring instead a further hearing on the company's standing to sue).

262. 21 C.F.R. § 100.2(j)(1) (1993). The FDCA states that the Secretary of Health and Human Services need not report "minor violations" for prosecution "whenever he believes that the public interest will be adequately served by a suitable written notice or warning." 21 U.S.C. § 336 (2006). FDA "Warning Letters" typically identify alleged regulatory violations and ask the identified company to respond and take corrective action within a certain period of time, or else face formal enforcement. REGULATORY PROCEDURES MANUAL, *supra* note 204, at § 4-1.

263. State Enforcement Provisions of the Nutrition Labeling and Education Act of 1990, 58 Fed. Reg. 2457, 2457 (Jan. 6, 1993).

> 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.[264]

The court also objected that it would be "inherently unfair" to allow the FDA to use coercive methods such as threatening Warning Letters and adverse publicity to "'enforce' its determination without allowing the affected party an opportunity to prove that the FDA's position is wrong."[265] But that is exactly the agency's approach. And like other agencies, the FDA frequently invokes sovereign immunity and executive privilege to defend its use of adverse publicity.[266] As a former lawyer in the FDA Chief Counsel's Office cautions, "there is relatively little a company can do in most circumstances to significantly diminish the effect of [an FDA] release."[267]

These problems can be addressed in several ways. The agency has long struggled with insufficient resources and personnel to enforce its regulations.[268] And its previously limited statutory authority to require mandatory as opposed to voluntary recalls for things like food products is well known.[269] It remains to be seen whether increased funding and enhanced statutory authority will reduce the incentive to wield adverse publicity. Either way, the FDA is a fascinating case study, given its responsibilities to alert the public about certain health risks.

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264. *Den-Mat*, 1992 WL 208962, at *5. The court noted the plaintiff's allegations that the FDA's public stance against the manufacturer "caused a significant decrease in sales, with an accompanying erosion of customer goodwill." *Id.* at *4.

265. *Id.* at *5.

266. *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).

267. Levine, *supra* note 57, at 277.

268. *See, e.g.*, INSTITUTE OF MEDICINE, THE FUTURE OF DRUG SAFETY: PROMOTING AND PROTECTING THE HEALTH OF THE PUBLIC 151–76 (Alina Baciu et al. eds., 2006); SUBCOMMITTEE ON SCIENCE AND TECHNOLOGY, FDA SCIENCE AND MISSION AT RISK 4 (2007).

269. *Subcomm. on Regulations and Healthcare: Hearing on Impact of Food Recalls on Small Businesses Before the H. Comm. on Small Bus.*, 111th Cong. 52 (2009) (statement of Steven M. Solomon, Assistant Comm'r for Compliance Policy, Office of Regulatory Affairs, Food and Drug Admin., Dep't of Health and Human Servs.). Note, however, that in 2011, President Obama signed the Food Safety Modernization Act, which for the first time authorized the FDA to use mandatory recalls for all food products. Pub. L. No. 111-353, 124 Stat. 3885 (2011) (codified at 21 U.S.C. §§ 2201 *et seq.* (Supp. 2011)).

B. Other Agencies

Other agencies offer variations on the FDA's story. For example, the FTC restrains itself through written policies, and the CPSC adheres to clear congressional directives. The following looks at how other agencies fare compared to the FDA.

1. Federal Trade Commission

In 1973, Gellhorn lauded the FTC for having "the most sophisticated publicity policies and practices of the regulatory and executive agencies examined in [his] study."[270] Not only had the D.C. Circuit upheld the FTC's approach,[271] but the FTC was one of the only agencies to articulate its policies "in continually evolving agency rules, manuals, and guidebooks."[272] The FTC enunciated written policies in its *Public Information Policy Guidebook*, which made its policies clear to both agency personnel and the public.[273] Gellhorn praised the FTC's policies as "both sensible and sensitive," representing "a thoughtful attempt to balance administrative efficiency, the public's need for warning, and private interests."[274] The agency has also received judicial blessing to issue publicity,[275] and although it does not seem to have explicit statutory authority to do so, it probably has implicit authority.[276]

270. Gellhorn, *supra* note 5, at 1388.

271. In *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1309 (D.C. Cir. 1968), the FTC issued news releases announcing that it had "reason to believe" that several companies were engaged in unfair and deceptive trade practices.

272. Gellhorn, *supra* note 5, at 1388.

273. *Id.* (citing FTC, PUBLIC INFORMATION POLICY GUIDEBOOK (1972)).

274. *Id.*

275. *See, e.g.*, Indus. Safety Equip. Ass'n v. EPA, 837 F.2d 1115, 1118 (D.C. Cir. 1988) (stating that agency publications promote congressional intent); *Cinderella Schools*, 404 F.2d at 1314 (holding that 15 U.S.C. § 46(f) authorized the agency to issue factual press releases concerning pending adjudications).

276. Gellhorn, *supra* note 5, at 1388–93; Noah, *supra* note 7, at 890–91. The FTC has a strong case for implicit authority to issue publicity under 15 U.S.C. § 46(f) (2006), which states that the FTC has the authority "[t]o make public from time to time such portions of information obtained by it hereunder 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." The D.C. Circuit stated in *Cinderella Schools* that "Congress obviously has long been aware of and acquiesced in the Commission's press release procedures." 404 F.2d at 1314. Moreover, the court in *FTC v. Freecom Communications* stated that § 46(f) "specifically authorize[s] the FTC to make news releases." 966 F. Supp. 1066, 1067 (D. Utah 1997). Finally, the FTC Act allows the FTC to propose a complaint and notify the subject that it intends to file it unless the subject agrees to discontinue allegedly

Notwithstanding the agency's efforts, since 1973 the FTC has been one of the most frequently sued agencies. Even so, courts almost uniformly interpret the FTC Act as granting the FTC broad discretion to issue publicity.[277] Rarely do parties charge that the FTC violated its own policies and procedures, and when they do, courts generally reject these challenges out of hand, without much analysis.[278]

The most recent federal case addressing agency publicity allowed the D.C. Circuit to articulate its latest thinking. In *Trudeau v. FTC*,[279] the court resolved a long legal battle between the FTC and Kevin Trudeau, an infomercial entrepreneur who marketed various products as treatments for a wide range of medical conditions, like cancer and obesity.[280] The FTC had filed several complaints alleging that Trudeau had engaged in false and deceptive trade practices.[281] A final order prohibited Trudeau from participating in infomercials, with some narrow exceptions for books or other publications not marketing his services.[282] Five days *after* the court entered the final order, the FTC described it in a press release on its website.[283]

Trudeau sued the FTC after it refused to remove the press release from its website, arguing that the press release exceeded the agency's statutory authority, mischaracterized the settlement, and retaliated against Trudeau for criticizing the FTC.[284] He claimed that several aspects of the press release mischaracterized the nature of the settlement and obscured the fact that Trudeau never admitted to—and no adjudicator had ever found—any wrongdoing.[285] For example, the press release was titled "Kevin Trudeau Banned from Infomercials" and quoted an FTC employee saying that Trudeau had

violative practices—a much less public type of pressure. 15 U.S.C. § 45(b); 16 C.F.R. §§ 2.31, 2.32 (2001).

277. *See, e.g.*, *Freecom*, 966 F. Supp. at 1067.

278. *See, e.g.*, FTC v. Magui Publishers, Inc., No. CV 89-3818-RSWL, 1990 WL 132719 at *1–2 (C.D. Cal. 1990) (rejecting out of hand an allegation that FTC violated Operating Manual Ch. 17 § 2.5 because the FTC's publicity largely tracked the preliminary injunction the agency had obtained).

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

280. 456 F.3d at 180.

281. 384 F. Supp. 2d at 283–85.

282. *Id.* at 284.

283. *Id.* at 284–85.

284. *Id.* at 282–83.

285. *Id.* at 285–87; 456 F.3d at 194–97.

"mislead American consumers for years" and was a "habitual false advertiser."[286] Trudeau noted that several media reports characterized the settlement as a "ban" and his $2 million payment as a "fine."[287] He also argued that a Google search for "Kevin Trudeau" returned the FTC's press release as the second result, which became the first result returned by the time the district court wrote its opinion.[288] Trudeau also claimed that the publicity hurt his ability to contract with vendors and market his publications, citing an incident in which Ed McMahon backed out of promoting a Trudeau book.[289] Trudeau asked the district court to require the FTC to clarify in the press release that the allegations were only allegations, and that the FTC had imposed no fines or penalties.[290]

The court granted the FTC's motion to dismiss on two grounds: the court lacked subject matter jurisdiction because the press release was not "final agency action" under APA § 704, and Trudeau could not state a valid cause of action.[291]

Although the court recognized that agency publicity could constitute a sanction and thus qualify as final agency action under the APA in certain circumstances, no court had ever encountered such a case, and the FTC's press release about Trudeau did not qualify.[292] Trudeau did not produce evidence showing that the agency exceeded its authority, nor could he identify any "discernible harm."[293]

The D.C. Circuit upheld the district court's ruling, though it disagreed that the court lacked jurisdiction.[294] The D.C. Circuit assumed that Trudeau could assert several causes of action, but found that his allegations could not sustain them as a matter of law because the press release simply was not false or misleading.[295] The

286. 384 F. Supp. 2d at 285; 456 F.3d at 195.

287. 384 F. Supp. 2d at 285–86; 456 F.3d at 196.

288. 384 F. Supp. 2d at 285 n.3. Indeed, this has become a major area of concern for companies and individuals alike. *See, e.g.*, DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 9–13 (2007) (discussing Google's search results and their interminable memory).

289. 384 F. Supp. 2d at 286.

290. *Id.* at 287.

291. *Id.* at 288–90.

292. *Id.* at 289–90.

293. *Id.* at 293, 296–97.

294. Trudeau v. FTC, 456 F.3d 178, 183–87 (D.C. Cir. 2006).

295. *Id.* at 191–97.

court found that "no reasonable person could misinterpret the press release" given the clarifying language in the subtitle and body, the accurate descriptions of the action, the disclaimer reemphasizing the nature of the settlement, and the links to the full documents, including settlement order.[296] "In the end," the D.C. Circuit found that the case "[came] down to whether Trudeau has the right to take a red pencil to the language of the FTC's press release," concluding that "[h]e does not."[297]

The *Trudeau* case illustrates a few points. First, even agencies with written policies like the FTC will sometimes issue publicity that private parties claim is unfair and punitive. Second, it can be difficult to prove that agency publicity was intended to punish or sanction. And third, even though the public (and markets) react to a headline, courts will go beyond the headline in asking whether "a reasonable person could misinterpret" the announcement. But one cannot help but wonder how many announcements would struggle to meet that standard with the truncated announcements typical of new media.

2. Environmental Protection Agency

Like the FDA, the EPA often justifies its announcements as necessary to protect public health. Also like the FDA, the EPA does not voluntarily restrain its discretion in ways that would address the long-standing concerns with publicity. The EPA does designate agency personnel to field objections that data entered on its website are incorrect.[298] EPA staff marks such data with yellow flag icons.[299] But this policy does not extend to EPA announcements or other forms of publicity.

The EPA has routinely publicized cases that it refers to the Justice Department for criminal prosecution, despite the Justice Department's policy of being much more circumspect in making public statements before trial.[300] Like FDA officials, EPA officials

296. *Id.* at 196–97.

297. *Id.* at 180.

298. O'Reilly, *Libels on Government Websites*, *supra* note 7, at 514, 533–36.

299. *Id.* at 534.

300. Gellhorn, *supra* note 5, at 1402. Like many agencies, the EPA must rely on the Justice Department to prosecute criminal violations. *Id.* at 1401–03 (noting that EPA's publicity during pretrial criminal cases made at least one U.S. Attorney "furious"). However, the Justice Department itself is not always so careful. For example, in *U.S. v. Abbott Laboratories*, 505 F.2d 565 (4th Cir. 1974), Justice Department prosecutors prepared a press release and gave media interviews that interfered with a fair trial for individual defendants

recognize that strategic use of information "can be a supplement, sometimes even an alternative, to regulation" and can change how regulated parties behave.[301]

Congress has shown some sensitivity to disclosures about private parties by the EPA, but in only one narrow context. In 1976, when Congress passed the Toxic Substances Control Act, it made it a crime for EPA employees to disclose information that private manufacturers had submitted to the agency and designated as confidential, unless the agency gave them prior notice.[302] The Act requires the EPA to notify the private party thirty days before disseminating the information,[303] unless the agency finds that disclosing the information is "necessary to protect health or the environment against an unreasonable risk of injury," in which case the EPA must provide fifteen days notice.[304] If the EPA believes there is an "imminent, unreasonable risk of injury to health or the environment," the prior notice requirement is cut to twenty-four hours.[305] Again, this policy applies to information designated as confidential, but the procedures might form the basis for broader EPA policies addressing publicity.

Another similarity with the FDA is that the EPA often finds it useful to publish its opinions about products, manufacturers, and overall regulatory conditions. For example, in one case the EPA and the National Institute for Occupational Safety and Health (NIOSH) published a "guide" recommending the use of two specific respirators to prevent inhaling asbestos, and recommending against using eleven other respirators, even though the eleven others had been federally certified.[306] The D.C. Circuit held that the guide, despite being adverse to the eleven respirator manufacturers, was not a sanction or another form of reviewable "agency action" under the APA.[307]

accused of distributing tainted pharmaceuticals.

301. Envtl. Law Inst., *West Tower Philosopher*, ENVTL. F., July–Aug. 1998, at 36 (quoting former EPA General Counsel Jonathan Cannon).

302. Toxic Substances Control Act, Pub. L. No. 94-469, Tit. I § 14, 90 Stat. 2034 (1976) (codified as amended at 15 U.S.C. § 2613 (2006)).

303. 15 U.S.C. § 2613(c) (2006).

304. *Id.* at § 2613(c)(2)(B)(i).

305. *Id.*

306. Indus. Safety Equip. Ass'n v. EPA, 837 F.2d 1115, 1117 (D.C. Cir. 1988).

307. *Id.* at 1117–21.

Ultimately, agencies like the EPA and FDA share much in common, and could benefit from adopting similar policies and procedures that preserve their discretion to make announcements in the interest of public health and safety. Congress should also consider whether public health agencies like the EPA and FDA have sufficiently clear statutory authority to make necessary public statements, as both agencies present compelling cases to retain wide discretion to do so.

3. Consumer Product Safety Commission

The CPSC is one of the only federal agencies to be guided by clear congressional directives governing its announcements. In 1982, Congress amended the Consumer Product Safety Act to require that the agency publish only information that is accurate and balanced.[308] The law followed several embarrassing incidents in which the CPSC identified allegedly unsafe products but released inaccurate information, costing the manufacturers significant amounts of money.[309] Congress was concerned that the CPSC would unfairly publicize inaccurate information that might harm a company.[310]

The amendments required the CPSC to: (1) assure that its public statements are accurate and fair; (2) give manufacturers advance notice and an opportunity to respond, subject to some exemptions, including emergencies; (3) respond to the manufacturer's objections or face an injunction; and (4) retract errors in roughly the same manner that the agency made the original disclosure.[311]

The law has made the CPSC more "cautious about naming individual products without careful internal review of the technical support documentation."[312] Still, the CPSC has been sued over public statements that do not mention a particular manufacturer.[313]

308. 15 U.S.C. § 2055(b); O'Reilly, *The 411 on 515*, *supra* note 7, at 847.

309. O'Reilly, *Libels on Government Websites*, *supra* note 7, at 542; Noah, *supra* note 7, at 890. The CPSC is authorized to declare products to be "substantial product hazards" after adjudicatory hearings. 15 U.S.C. § 2064.

310. H.R. REP. NO. 1153, at 32 (1972); 118 CONG. REC. H31,389 (daily ed. Sept. 20, 1972) (statement of Rep. Crane).

311. 15 U.S.C. § 2055(b). The CPSC promulgated regulations at 16 C.F.R. part 1101 fleshing out these details.

312. O'Reilly, *The 411 on 515*, *supra* note 7, at 848.

313. Kaiser Aluminum & Chem. Corp. v. CPSC, 414 F. Supp. 1047, 1057–58 (D. Del. 1976).

In fact, like the FDA and the FTC, the CPSC is one of the most frequently sued agencies for making public announcements.

In one case, a court found that the CPSC had exceeded its statutory authority to notify the public of product risks because its press release announcing that toy dolls were "banned hazardous substances" was not a final determination and thus was not authorized to be disclosed under the statute.[314] However, the court refused to order the CPSC to retract its statement because it was technically accurate, and because a retraction would only further confuse the public, as the allegations still had not been addressed by the court.[315] This case shows why courts are often reluctant to intervene.

In another case, an aluminum manufacturer sued the CPSC for violating the Act's procedural protections for manufacturers, even though the CPSC's public statements made only general statements about problems with aluminum wiring and did not mention the manufacturer or its products by name.[316] The court held that Kaiser should be able to ask for a retraction, per the Act, but that Congress did not intend for manufacturers whose identities could not readily be ascertained to receive prior notice and an opportunity to comment.[317] Like the FTC in *Trudeau*, the CPSC was sued despite taking precautions.

These cases illustrate that parties regulated by the CPSC, as with parties regulated by the FDA and the EPA, are particularly sensitive to negative announcements. Although the agency continues to be sued for its practices, the Consumer Product Safety Act remains a model that Congress could apply to other agencies.

4. Securities and Exchange Commission

The SEC seems to appreciate more than other agencies the effects of adverse publicity,[318] perhaps because its regulatory scheme tries to ensure that investors have access to both positive and negative information about public companies.

314. United States v. 52,823 Children's Dolls, More or Less, No. 89 Civ. 4643 (JFK), 1989 WL 140250, at *7 (S.D.N.Y. Nov. 13, 1989).

315. *Id.* at *7–8.

316. *Kaiser Aluminum*, 414 F. Supp. at 1057–58.

317. *Id.*

318. Gellhorn, *supra* note 5, at 1394 n.48.

SEC complaints receive a lot of publicity, often generated by the agency itself, and courts have held that such publicity is part of the "expense and annoyance of litigation."[319] Injunctions rarely succeed unless the plaintiffs can show that the SEC is engaged in an aggressive and ongoing publicity campaign against the party.[320] SEC regulations allow the subjects of preliminary investigations to, "on their own initiative, submit a written statement to the Commission" making their case.[321] But this regulation does not confer procedural rights to litigants, and the SEC can file a formal complaint without violating the subject's due process or statutory rights.[322]

The SEC also has a policy that directs agency personnel to give advance notice to defendants of enforcement actions so they do not learn of complaints through the news.[323] But an internal investigation found that SEC personnel do not always follow the policy, and that some are not even aware of it.[324]

In 2010, some Congressmen criticized the SEC for publicizing charges against Goldman Sachs and allegedly trying to embarrass the company.[325] The SEC filed its complaint without first notifying Goldman Sachs, in violation of agency policy.[326] The agency also publicized the complaint via Twitter, just one week after establishing its SEC_News Twitter feed.[327]

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319. First Jersey Sec., Inc. v. SEC, 553 F. Supp. 205, 212 (D.N.J. 1982) (internal quotation marks omitted) (quoting FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 244 (1980)).

320. Jerry T. O'Brien, Inc. v. SEC, No. C-81-546, 1982 WL 1566, at *4 (E.D. Wash. Jan. 20, 1982) (distinguishing its case from *Silver King Mines v. Cohen*, 261 F. Supp. 666 (D. Utah 1966), in which the SEC was engaged in "an aggressively adverse publicity campaign against Silver King," which was "so arbitrary and capricious as to amount to a due process violation").

321. 17 C.F.R. § 202.5(c) (2008).

322. Wellman v. Dickinson, 79 F.R.D. 341, 352–53 (S.D.N.Y. 1978). This case did not involve adverse publicity by the SEC, but instead involved general allegations that the SEC was abusive during its investigation, including a specific allegation that the agency disclosed privileged documents to private litigants.

323. SEC OIG, *supra* note 25, at 57–59 (citing Administrative Regulation SECR 18-2 § B(15)(c)).

324. *Id.*

325. SEC, LITIGATION RELEASE NO. 21489, THE SEC CHARGES GOLDMAN SACHS WITH FRAUD IN CONNECTION WITH THE STRUCTURING AND MARKETING OF A SYNTHETIC CDO (Apr. 16, 2010), *available at* http://www.sec.gov/litigation/litreleases/2010/lr21489.htm.

326. SEC OIG, *supra* note 25 (citing Administrative Regulation SECR 18-2, § B(15)(c)).

327. *SEC_News*, TWITTER (Apr. 16, 2010), https://twitter.com/#!/SEC_News/status/

The SEC's Office of Inspector General (OIG) subsequently investigated how the agency publicized the complaint, including allegations that SEC employees had leaked details to the New York Times prior to filing charges.[328] Although the review found no evidence of such a leak, it did note that at least one news reporter knew that the SEC had scheduled a decision on the Commission's nonpublic calendar a day before the complaint was filed.[329]

The OIG's report provides a remarkable inside view of the Commission's internal deliberations when choosing to publicize a complaint.[330] The document reveals that although the SEC was acutely aware of how to maximize publicity for its complaint against Goldman Sachs, it was relatively oblivious to the massive market reaction that it might trigger. For example, SEC personnel were well aware that announcing two cases on the same day would dilute the publicity for both, and that announcing on a Friday typically reduces media coverage.[331] But employees were "shocked" and "quite surprised" about the resulting media coverage and market reaction.[332] Goldman Sachs's stock price fell 13%, "the biggest one-day decline in its stock in over a year."[333]

The report also confirmed that agency publicity can be driven by many motives: the SEC wanted to show taxpayers that it was enforcing the law; it wanted to deter other violations; it wanted to control the message by beating a media-savvy company like Goldman Sachs to the punch; and it wanted to ensure accuracy.[334] No e-mails, internal documents, or sworn testimony showed that the SEC intended to punish Goldman Sachs. But there was significant internal discussion about using announcements strategically during investigations and how advanced notice of such announcements

12303044878. The earliest tweets for this feed were published on April 9, 2010.

328. SEC OIG, *supra* note 25, at 12.

329. *Id.* at 31–32.

330. *Id.* at 1–2. To wit, the Inspector General reviewed over 3.4 million e-mails from sixty-four SEC employees during the time. It also took sworn testimony from thirty-two witnesses and reviewed documents from the agency, the New York Times, and Bloomberg Media.

331. *Id.* at 49, 51, 55.

332. *Id.* at 65–66.

333. *Id.* at 65.

334. *Id.* at 49, 55, 61–62.

might encourage gamesmanship by regulated firms and discourage efforts to settle cases.[335]

In the end, the OIG found that SEC personnel did not follow and were not aware of the Commission's publicity policies.[336] The report recommended that the SEC consider revising the policy and give better guidance to staff on how to apply it.[337]

5. Other agencies

The experiences of other agencies are hard to generalize, given the diversity of agencies and agency practices. But even a superficial glimpse confirms some of the observations above.

Although a few agencies have adopted rules or standards, none approach the recommendations by Gellhorn and ACUS. For example, the predecessor to the U.S. Department of Health and Human Services (HHS) issued regulations governing its use of publicity in 1976, though it narrowly defined the scope of publicity that it covered.[338] The Department of Justice has published rules on issuing publicity, which are largely tailored to ensure that officials do not make public statements that might influence the outcome of pending or future trials.[339] In 1975, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) adopted policies for announcing regulatory actions.[340] This policy, which is not available on its web site but is referenced in cases,[341] states that the ATF will issue press releases describing significant regulatory actions.[342] Overall, some agency policies do address adverse publicity, though not in anything approaching the comprehensive manner recommended by ACUS.

Congress has also authorized some agencies to issue publicity, even if it is clearly adverse. The U.S. Department of Agriculture

335. *Id.* at 57–64.

336. *Id.* at 65.

337. *Id.* at 77.

338. Release of Adverse Information to News Media, 41 Fed. Reg. 2–3 (Jan. 2, 1976) (to be codified at 45 C.F.R. pt. 17).

339. 28 C.F.R. § 50.2 (2010).

340. ATF, INDUSTRY CIRCULAR 1975-21: PUBLICATION OF ADMINISTRATIVE ACTIONS TAKEN BY ATF (Dec. 11, 1975), *available at* http://ttb.gov/industry_circulars/archives/1975/75-21.html.

341. Banfi Prods. Corp. v. United States, 40 Fed. Cl. 107, 118 (Fed. Cl. 1997), *modified*, 41 Fed Cl. 581 (Fed. Cl. 1998).

342. *See id.* at 118 (citing ATF, *supra* note 340).

(USDA) is authorized by statute to disseminate information[343] and has been sued for doing so.[344] The National Highway Traffic Safety Administration (NHTSA) is authorized to notify the public of safety defects with automobiles.[345] The NHTSA must alert registered vehicle owners of defects, even if the manufacturer objects.[346] But Gellhorn found that, like most agencies, the NHTSA had "not subjected its publicity program to rigorous examination" and had no rules or policies governing its practices.[347] Years later, the NHTSA still clings to the notion that corrective publicity can undo any errors,[348] despite Gellhorn's caution that the public does not digest corrective press releases quite the same way.

The Nuclear Regulatory Commission (NRC) recognizes that adverse publicity can encourage companies to comply with its regulations.[349] Yet, it has taken conflicting approaches on whether to mitigate civil penalties based on adverse publicity from the enforcement action itself.[350] Similarly, the Federal Energy Regulatory Commission (FERC) acknowledges that publicizing investigations that have not resulted in a formal complaint can be unfair,[351] but continues to do so anyway.[352]

343. 7 U.S.C. § 430 (2006).

344. Impro Prods., Inc. v. Block, 722 F.2d 845, 849 (D.C. Cir. 1983).

345. 49 U.S.C. §§ 30118–19; Gellhorn, *supra* note 5, at 1416 (citing 15 U.S.C. § 1402 (repealed 1994)).

346. Determination of Manufacturer's Obligation, 49 C.F.R. § 557.8 (2010).

347. Gellhorn, *supra* note 5, at 1419.

348. For example, the NHSTA stated that suppliers whose components are erroneously identified as defective in recall notices can simply counter "[a]ny adverse publicity that does erroneously affect a supplier . . . by publicizing the correct information when it becomes available." Petitions for Rulemaking, Defect and Noncompliance Orders, 60 Fed. Reg. 17,254, 17,257 (Apr. 5, 1995).

349. *See, e.g.*, Nuclear Regulatory Commission Revisions to Procedures to Issue Orders, 56 Fed. Reg. 40,664, 40,683 (Aug. 15, 1991).

350. *See* Nuclear Regulatory Commission Order Imposing Civil Monetary Penalty on Reich Geo-Physical, Inc., 49 Fed. Reg. 44,253, 44,255 (Nov. 5, 1984) ("NRC's Enforcement Policy states that enforcement actions are publicly available and that press releases are generally issued for civil penalties and Orders. Mitigation of civil penalties because of adverse publicity suffered by a licensee is not considered in the Enforcement Policy to be a basis for mitigating civil penalties."). *But see* Nuclear Regulatory Commission Order Imposing Civil Monetary Penalties on Inspection and Testing, Inc., 49 Fed. Reg. 28,781, 28,783 (July 16, 1984) (mitigating civil monetary penalties based in part on the loss caused by adverse publicity from the enforcement action and the NRC's attendant press release).

351. Federal Energy Regulatory Commission Rules Relating to Investigations, 50 Fed. Reg. 47,556, 47,557 (Nov. 19, 1985).

352. *See, e.g.*, News Release, FERC, FERC Launches Investigation into Pipeline Rates

These and other agencies deserve more scrutiny, not only because they offer variations on the FDA's story, but because they also appear to be using adverse publicity in ways that invoke long-standing concerns.

V. RENEWING THE CALL FOR STANDARDS

Given these findings, I propose several ways that courts, Congress, and agencies themselves can impose standards on adverse agency publicity. I revisit the recommendations by Gellhorn and ACUS based on the trends since 1973 described in Part III, agencies' responses, and the case law canvassed in Part IV.

A. Should Publicity Be Used To Punish?

A threshold question is whether agencies should be able to use adverse publicity to punish, deter, or otherwise sanction regulated parties. Doing so can result in burdens that are more severe than those authorized by statute, and regulated parties often cannot challenge these actions in court.[353] Indeed, as Lars Noah argues, such arm-twisting "may be even more insidious than the frequently discussed tendency of agencies to develop informal but essentially binding policies without adhering to notice and comment rulemaking procedures."[354] Moreover, because the problem often evades judicial review, some scholars have called for agencies to exercise greater self-restraint.[355]

Others recognize the power of publicity in another way, by calling for Congress and courts to employ it as a form of punitive damages on corporate wrongdoers.[356] The *U.S. Sentencing Guidelines* authorize publicity in some circumstances.[357] Gellhorn acknowledged that an agency deciding to issue adverse publicity is

(Nov. 18, 2010), http://www.ferc.gov/media/news-releases/2010/2010-4/11-18-10-G-3.asp (announcing investigations into the rates charged by two gas companies, Kinder Morgan Interstate Gas Transmission and Ozark Gas Transmission).

353. *See* Noah, *supra* note 7, at 875.

354. *Id.*

355. *Id.* at 876; Gellhorn, *supra* note 5, at 1421.

356. *See generally* FISSE & BRAITHWAITE, *supra* note 20; Curcio, *supra* note 161; Cowan, *supra* note 20. These recommendations often reference Nathaniel Hawthorne's *The Scarlet Letter* (1850) and colonial forms of punishment.

357. U.S. SENTENCING GUIDELINES MANUAL §§ 8B1.4 (applying § 5F1.4), 8D1.4(a) (2010); Cowan, *supra* note 20, at 2387.

somewhat analogous to a prosecutor exercising prosecutorial discretion.[358] In fact, because regulatory violations can sometimes trigger criminal prosecutions, agencies and the Justice Department have been sued for issuing pretrial publicity.[359] Still others point out that adverse publicity does not always deter wrongdoing.[360]

Nevertheless, adverse publicity can be a blunt instrument that injures companies in ways that courts or agencies cannot calibrate. Agencies should not be able to punish alleged regulatory violators with indeterminate sanctions without providing some sort of procedural relief.[361] The Eighth Amendment prohibits "excessive fines,"[362] and adverse publicity can generate "fines" or punishments that are "determined later by the capricious jury of public opinion."[363] Thus, neither agencies nor legislatures can define the upper or lower limits of such punishment.[364] Agencies should be limited to issuing factual publicity that fulfills a legitimate statutory purpose, such as warning the public of health hazards or considerable financial risks. If this unduly restricts agencies' capacity to regulate effectively, then Congress should enhance their *statutory* enforcement authority and provide enough resources to use these statutory powers.

358. Gellhorn, *supra* note 5, at 1381 n.4.

359. In *United States v. Abbott Laboratories*, Justice Department prosecutors and FDA officials issued press releases and made statements to the media after a grand jury indictment charged Abbott and five employees with distributing pharmaceuticals that were potentially deadly. 505 F.2d 565, 568–69 (4th Cir. 1974). Although both the district court and the Fourth Circuit strongly condemned FDA and Justice Department lawyers for jeopardizing the right to a fair trial, the Fourth Circuit reversed a decision by the district court dismissing the charges because there were other ways to protect the defendants' right to a fair trial short of dismissal. *Id.* at 571–72. The court explained,

> [W]e join in the district court's condemnation of this conduct and express our strongest disapproval that highly placed legal officers would make a statement of this import with regard to a pending criminal prosecution, and even more so that FDA, which had referred the matter to the Department of Justice, would issue a press release containing such prejudicial material.

Id. at 571.

360. For example, Lochner and Cain express doubts that adverse publicity deters offenders of campaign finance laws. Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891, 1919–20 (1999).

361. Even Professor Curcio, who proposes using adverse publicity as a formal sanction, acknowledges that it is indeterminate. Curcio, *supra* note 161, at 377–78.

362. U.S. CONST. amend. VIII.

363. FISSE & BRAITHWAITE, *supra* note 20, at 310.

364. *Id.*

B. Agencies Should Articulate Standards

When Gellhorn published his article in 1973, very few agencies provided written guidance on issuing press releases.[365] Today, not much has changed. Most agencies have an Office of Public Affairs or an equivalent, though few provide written guidelines on making media announcements.[366] Very few of the cases I surveyed alleged that the agency violated its own internal procedures,[367] in part because very few agencies have such procedures (or at least publish them). Moreover, very few agencies are governed by statutes that specifically require confidentiality and constrain their public statements—and even when they are, courts have struggled to find suitable remedies.[368] Thus, the overarching purpose of the following recommendations is not to completely remove agency discretion to issue adverse publicity but to domesticate it with substantive and procedural safeguards.[369]

1. Content guidelines

Agencies should adopt policies governing the content of publicity, including guidelines for condensed announcements in new media formats like Twitter. Even though agencies may be checked by internal protocols, as well as by "custom, habit, and natural bureaucratic caution,"[370] the stakes are too high to rely on these alone. Agencies with written policies tend to abuse publicity less than agencies without them.[371] Publishing policies not only would notify

365. Gellhorn, *supra* note 5, at 1384 (citing the Department of Health, Education, and Welfare's Department Staff Manual), 1388 (citing the FTC's Public Information Policy Guidebook), 1396–97 (citing various SEC memoranda).

366. O'Reilly, *The 411 on 515*, *supra* note 7, at 838 n.13 (citing only the HHS policy and a since-retracted proposed policy from the FDA in 1976).

367. *See, e.g.*, FTC v. Magui Publishers, Inc., No. CV 89-3818-RSWL, 1990 WL 132719 (C.D. Cal. Apr. 24, 1990) (alleging that the FTC violated FTC Operating Manual Ch. 17 § 2.5 but holding that the alleged violation was not severe enough to modify or vacate a preliminary injunction).

368. For example, 42 U.S.C. §§ 2000e-5(b) and 2000e-8(e) prohibit employees of the Equal Opportunity Employment Commission (EEOC) from making charges public during investigations and early adjudicatory proceedings. In *EEOC v. Sears, Roebuck & Co.*, the court refused to dismiss the EEOC's claims of unfair employment practices against Sears even though the EEOC had leaked its complaint to the public. 504 F. Supp. 241, 269–70 (N.D. Ill. 1980).

369. Gellhorn, *supra* note 5, at 1429.

370. *Id.* at 1419.

371. *Id.* at 1423 n.174 (comparing the FTC's record to the EEOC's).

regulated parties of agency standards, but would encourage agency personnel to exercise their discretion wisely, serving a prophylactic purpose.[372]

First, agency policies should instruct personnel to avoid using excessively disparaging terminology. For example, "FTC officials scrupulously avoid comments likely to prejudice the respondent's case."[373] The FDA once announced that it would avoid using "disparaging terminology" that is "not essential to the purpose of the publicity."[374] The FDA also explained that it could not avoid using disparaging terminology in all cases, particularly when warning the public about a particular company or product.[375] And in at least one recent case, a court declined to enjoin the FTC despite an announcement that described the alleged violator as a "habitual false advertiser."[376] The court noted that the press release correctly attributed the comment to a single FTC employee rather than any adjudicator or fact finder,[377] noting that "[a] cause of action does not exist under the APA every time a government official characterizes someone an agency is investigating."[378] Courts have also upheld FDA publicity when the FDA allegedly called health food and dietary supplement manufacturers "quacks" and "faddists," even though FDA disputed using those words.[379] Thus, it is important that agency policies instruct personnel not to use such language, because courts virtually never provide a remedy for its use.

Agency policies should also require that agencies clarify the nature of the action as best as possible. This is particularly important for new media, like Twitter, that make incredibly truncated announcements. Companies are rightly concerned that agency publicity can misstate the nature of the agency's action or mislead

372. Noah, *supra* note 7, at 940.

373. Gellhorn, *supra* note 5, at 1390.

374. FDA Administrative Practices and Procedures, 42 Fed. Reg. 12,436, 12,440 (Mar. 4, 1977) (codified at 21 C.F.R. pt. 2).

375. *Id.* at 12,437.

376. Trudeau v. FTC, 384 F. Supp. 2d 281, 292 (D.D.C. 2005).

377. *Id.*; Trudeau v. FTC, 456 F.3d 178, 196 (D.C. Cir. 2006).

378. *Trudeau*, 384 F. Supp. 2d at 292 n.12. Similarly, in another case, a court refused to grant a protective order against the FTC when its lead counsel sent a letter to local media inviting them to read the FTC's complaint and stating that the company's advertisements were "simply false." FTC v. Freecom Commc'ns, Inc., 966 F. Supp. 1066, 1068–1069 (D. Utah 1997).

379. Ajay Nutrition Foods, Inc. v. FDA, 378 F. Supp. 210, 212, 218 (D.N.J. 1974), *aff'd mem.*, 513 F.2d 625 (3d Cir. 1975).

the public to believe that the allegations are more definitive than they really are.[380] Agencies should adopt a policy similar to that of the FTC. When the FTC announces that it has brought a formal complaint, agency officials generally try to clarify that the case has not yet been adjudicated and explain the procedural posture.[381]

But it is not clear whether such disclaimers are effective. Regulated companies believe that FTC press releases fail to adequately emphasize "the tentative nature of the charges filed," which further invites the media and the public to interpret a complaint as a final determination of wrongdoing.[382] The public tends to believe that "where there's smoke, there's fire."[383] New media make it even more difficult to communicate legal and regulatory nuance. But agency policies should encourage announcements to inform without overstating.

Since 1973, courts have upheld the use of press release titles that imply a finding of wrongdoing when the subtitle and body clarify otherwise.[384] But agencies should be careful not to make such implications because the media can easily misconstrue them. Thus, a press release title stating that a regulated party has been "banned" from certain conduct could more accurately state that the parties "agreed" to such a ban.[385] Agencies certainly are not "obliged to repeat every word or phrase in a settlement" in press releases.[386] But they also should avoid using language in titles and headings that are likely to be misinterpreted, particularly in new media blurbs.[387]

380. *See, e.g.*, Kaiser Aluminum & Chem. Corp. v. CPSC, 414 F. Supp. 1047, 1061–62 (D. Del. 1976) (alleging that the CPSC's public statements misled the public to believe that the CPSC had made a final determination based on more solid evidence than it really had).

381. Gellhorn, *supra* note 5, at 1390–91 n.35 (noting that after the *Cinderella Schools* case the FTC included the following disclaimer in a black box on press releases announcing or implying that a firm has violated the law: "NOTE: The FTC issues a complaint when it has 'reason to believe' that the law has been violated. Such action does not imply adjudication of the matters alleged.").

382. *Id.* at 1391.

383. *Id.*

384. Trudeau v. FTC, 384 F. Supp. 2d 281, 292 (D.D.C. 2005), *aff'd*, 456 F.3d 178 (D.C. Cir. 2006) (acknowledging that "[b]y its nature, a title will not always capture the full detail of the document it is describing," and noting that the press release in that case "accurately complete[d] the picture not only once but twice").

385. *See, e.g.*, *id.* (noting that the FTC clarified the potentially misleading title twice in the subtitle and body of the press release).

386. *Id.* at 292.

387. *Id.* at 285–86. Note that although several media outlets correctly interpreted the nature of the FTC's announcement in *Trudeau*, some did not.

Courts are correct that press releases can always be written to be more objective and accurate, and that agencies "cannot be blamed because certain media reports inaccurately reported an accurate press release."[388] But agencies should strive for press releases that will not, in fact, be misinterpreted. And they should recognize that new media are extremely condensed, and that even noncondensed forms can contain inaccuracies.[389]

Agencies should also consider not only the accuracy of particular statements, but the impressions left by the announcement as a whole. In one case, the CPSC announced in a press release that although its investigation was inconclusive and there was no risk of serious harm to consumers, it remained concerned about the manufacturer's products and simply did not have the budget to substantiate its concerns.[390] The press release then included a list of precautions for consumers using that entire class of products, even though the focus of the investigation discussed in the press release was clearly limited to one manufacturer's products.[391] Agencies should avoid this type of subterfuge.

Although media outlets have been sued for libel for misinterpreting agency press releases, these claims can be very difficult to sustain against media organizations with reporting privileges, absent evidence of malice or intentional misrepresentation.[392] Agencies, of course, maintain the discretion to issue publicity, "even if there is the possibility that the information may be ignored, misinterpreted, oversimplified, overstated, or misunderstood by the media or by the public."[393]

Agencies should maintain discretion, but should not be oblivious to these concerns. Agency policies should aim for publicity that will

388. *Id.* at 293.

389. For example, in *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 817 (N.D. Cal. 1977), a debt collection company that was the subject of an FTC press release announcing charges against that company and several others sued several newspapers and wire services for libel for inaccurately stating that the FTC made certain charges against that company.

390. Reliance Elec. v. CPSC, 924 F.2d 274, 275–76 (D.C. Cir. 1991).

391. *Id.* at 281–82.

392. *Trans World Accounts*, 425 F. Supp. at 821–22 (finding no evidence that wire services incorrectly reporting an FTC press release did so intentionally or with malice, but allowing discovery of newspaper company's knowledge and motives).

393. FDA Administrative Practices and Procedures, 42 Fed. Reg. 12,436, 12,437 (Mar. 4, 1977) (to be codified at 21 C.F.R. pt. 2).

not in fact be misprocessed. To aid in this effort, press releases posted on agency websites and via new media, like Twitter, should include prominent links to any underlying documents, including complaints and orders, so that those reading the press release can appreciate that it summarizes facts and proceedings that may be far more complicated.[394]

2. Procedures for issuing adverse publicity

Given all the ways agencies can issue publicity today, it is probably more important than ever that agencies articulate procedures for doing so. The recommendations by Gellhorn and ACUS are still worth pursuing. Agencies should establish standards for determining whether to issue publicity,[395] whether it is necessary,[396] whether there are alternatives that are equally effective,[397] whether the supporting information is reliable,[398] and the likelihood of causing severe harm to the subject.[399] Policies should also make clear who within the agency may issue publicity and should direct media inquiries away from agency investigators and litigators.[400] Finally, the core recommendations—that agencies should notify private parties in advance, give those parties an opportunity to comment, and set up procedures to retract incorrect statements[401]—would go a long way towards ameliorating the problems that have persisted since 1973. Once a commitment to

394. Trudeau v. FTC, 456 F.3d 178, 182 (D.C. Cir. 2006) (noting that the FTC's press release announcing a settlement included prominent links to "Related Documents," including the Final Order that was the subject of the press release).

395. Gellhorn, *supra* note 5, at 1424.

396. *Id.* at 1425–26; Recommendations of the Administrative Conference of the United States, 38 Fed. Reg. 16,839, 16,839 (June 27, 1973) (to be codified at 1 C.F.R. pt. 305). For example, Gellhorn recommended that the FTC "limit the use of publicity to cases in which it was necessary to warn the public about imminent danger," among other circumstances. Gellhorn, *supra* note 5, at 1427.

397. Gellhorn, *supra* note 5, at 1426. ACUS urged agencies to use adverse publicity "only to the extent necessary to foster agency efficiency, public understanding, or the accuracy of news coverage." Recommendations of the Administrative Conference of the United States, 38 Fed. Reg. at 16,839.

398. Gellhorn, *supra* note 5, at 1426; Recommendations of the Administrative Conference of the United States, 38 Fed. Reg. at 16,839.

399. Gellhorn, *supra* note 5, at 1427–28.

400. *Id.* at 1430.

401. *Id.* at 1431; Recommendations of the Administrative Conference of the United States, 38 Fed. Reg. at 16,839.

these policies is in place, agencies can receive latitude to tailor these policies to fit their unique situations.

Of course, some of these recommendations leave open questions.

a. The least burdensome alternative? This Article argues that agencies should be held to an abuse of discretion standard, and when applying this standard, courts should consider whether an agency could have used less harmful options than issuing adverse publicity, keeping in mind that some industries are more sensitive to adverse publicity than others.[402]

But Gellhorn's recommendation that adverse publicity be a response of last rather than first resort has generated some debate. ACUS recommended that agencies not issue publicity when the targets could avoid harming the public by ceasing the offending practice.[403] The FDA responded to these recommendations by arguing that this resolution will rarely work for the firms it regulates because their products may already be in commerce "or in people's homes."[404] Again, agencies should be able to customize their standards.

b. The timing of publicity? The timing of publicity remains a hotly disputed topic. Publicizing the results of an official adjudication rarely generates objections; but publicizing that the agency has merely begun an investigation or filed a formal complaint can unfairly damage the parties named. Regulated parties obviously prefer that an agency notify them in private before publicizing contemplated action.[405] But at least one court has called adverse publicity part of "the expense and annoyance of litigation."[406]

This is nothing new of course. As early as 1918, the FTC adopted a policy of issuing press releases whenever it filed complaints.[407] In 1968, the D.C. Circuit upheld this practice.[408] The

402. Gellhorn, *supra* note 5, at 1410, 1416–18 (noting that the public tends to be much more sensitive to food safety hazards than automobile hazards).

403. Recommendations of the Administrative Conference of the United States, 38 Fed. Reg. at 16,839.

404. 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).

405. *See* Gellhorn, *supra* note 5, at 1394.

406. First Jersey Sec., Inc. v. SEC, 553 F. Supp. 205, 212 (D.N.J. 1982) (quoting FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 244 (1980)) (internal quotation marks omitted).

407. Gellhorn, *supra* note 5, at 1388–89.

court seemed to use a "probable cause" standard, explaining that the FTC may "alert the public to suspected violations of the law by factual press releases whenever the Commission *shall have reason to believe* that a respondent is engaged in activities made unlawful by the Act."[409] Decades later, the FTC still publicizes its allegations.[410] For example, the court in *FTC v. Freecom Communications* denied a protective order against the FTC after the agency's lead counsel sent a letter to local media describing the FTC's complaint, in part because the court found that it was obvious that the letter stated the counsel's opinion rather than any "particularized fact."[411] Another court even defended the FTC's use of such publicity, recognizing that the agency publicizes complaints in part "to induce respondents to agree promptly to remedial orders without the necessity of extended legal proceedings."[412] Congress should resolve whether these practices should be allowed given each agency's statutory authority and funding constraints.

Similarly, Congress rarely limits agency discretion to publicize preliminary actions. My research found only two federal statutes that specifically prohibit an agency from publicizing investigations. One statute prohibits the Federal Election Commission (FEC) from publicizing investigations into suspected violations of campaign finance laws due to concerns that it would be premature and unfair.[413] Another statute prohibits the Equal Employment Opportunity Commission (EEOC) from "making public" information that it obtains while investigating or negotiating with employers suspected of violating employment discrimination laws.[414]

408. *See* FTC v. Cinderella Career & Finishing Sch., Inc., 404 F.2d 1308, 1313–14 (D.C. Cir. 1968) (citing sections 5 and 6(f) of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a)–(b), 46(f) (1964)).

409. *Id.* at 1314 (emphasis added).

410. *See, e.g.*, FTC v. Freecom Commc'ns, Inc., 966 F. Supp. 1066 (D. Utah 1997).

411. *Id.* at 1068–69. Counsel's letter to the media stated: "I invite you to take a look at the evidence in the files of the District Court. That evidence shows that the defendants have misrepresented [how successful their customers have been] . . . . The defendants continue to use success stories and testimonials that are simply false." *Id.* at 1068.

412. Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814, 820 (N.D. Cal. 1977).

413. Federal Election Campaign Act, 2 U.S.C. § 437g(a)(4)(B), (a)(12)(A) (2006); Common Cause v. FEC, 83 F.R.D. 410, 412 (D.D.C. 1979).

414. 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) (holding that these sections prohibited the EEOC from disclosing information not only to the public in general, but also

Outside these two narrow contexts, most agencies "regularly publicize every significant formal action," even when doing so is not necessary to warn the public.[415] As noted above, my survey of FDA press announcements between 2004 and 2010 found that 30% of these announcements disclosed pending or preliminary actions that had not been fully adjudicated.[416]

Sometimes preliminary announcements can be justified on pragmatic grounds; for example, when agency complaints are already public. And agencies do not always have the luxury of waiting for cases to conclude, such as when announcing product recalls or other public health hazards.[417] But agencies should develop standards for publicizing pending and preliminary actions, and Congress should authorize them when necessary.

Agencies often find themselves in a no-win situation, as when they are criticized for not announcing information early enough. Gellhorn observed that NHTSA notifications of vehicle defects tended to be less damaging because they "often occur months after the defect is first suspected, and they are usually preceded by lengthy and thorough testing in which the manufacturer has a chance to participate."[418] But the NHTSA has also been criticized for *not* alerting the public earlier to suspected safety defects, such as the recent safety problems surrounding Toyota vehicles.[419]

To avoid defaulting to either extreme—disclosing too early or too late—agencies should articulate standards for *when* to release publicity, so that their decisions are at least consistent. Moreover, to the extent feasible, agencies should notify the subjects of publicity and solicit their input before the statement issues. When agencies provide basic notice and an opportunity to comment, even informally, these gestures tend to defuse concerns.[420]

to parties outside the government that brought Title VII employment discrimination charges).

415. Gellhorn, *supra* note 5, at 1392.

416. *See supra* Part IV.A (finding that 463 out of 1,542 press releases announced tentative actions rather than final, determinative actions).

417. Note that a significant portion of FDA press releases announcing pending or preliminary actions also announced product recalls or made other announcements that ostensibly could be justified on public health grounds.

418. Gellhorn, *supra* note 5, at 1418.

419. *See, e.g.*, 156 CONG. REC. S2759–60 (daily ed. Apr. 28, 2010) (statement of Sen. Barbara Boxer).

420. Gellhorn, *supra* note 5, at 1418.

Of course, regulated parties might abuse any procedural protections or appeals mechanisms that agencies make available, particularly to delay announcements.[421] Again, agencies should retain some discretion to publish announcements *before* responding to private parties—for example, by justifying publicity when the agency perceives that there is an imminent public health emergency—and courts can review agency decisions for an abuse of discretion ex post. Courts should also consider whether private parties abused these procedures.

c. Postpublication procedures? Agencies should adopt procedures for retracting and correcting any inaccurate or misleading statements with at least the same force and vigor as the initial statement. Though such retractions are infamous for going unnoticed,[422] agencies should strive for symmetry between negative and positive disclosures, much as some agencies like the FDA and SEC require from regulated parties. Currently, agencies publicize when they file complaints or bring successful enforcement actions, but rarely announce that investigations found no wrongdoing, that complaints failed, or that enforcement actions otherwise did not succeed. And when agencies do make positive announcements, they typically do not publicize them with the same vigor, nor does the media give them the same amount of attention.[423] One exception is the FTC's practice of publishing a "closing letter" if an investigation into possible regulatory violations finds no wrongdoing.[424] Other agencies should consider this type of device.

Agencies should also instruct parties how to request corrections or retractions, even if this entails filing a citizens' petition or something similar.[425] O'Reilly notes that removing disputed information is often the preferred remedy, followed closely by

421. O'Reilly, *Libels on Government Websites*, *supra* note 7, at 546–47.

422. O'Reilly, *The 411 on 515*, *supra* note 7, at 849.

423. Gellhorn, *supra* note 5, at 1391–92 (noting that the FTC failed to adequately correct or publicize its erroneous adverse publicity, announcing that DuPont deceptively marketed its antifreeze, Zerex, despite the FTC's later finding that the more serious charges it had alleged were unfounded).

424. FTC, COMMISSION CLOSING LETTERS, http://www.ftc.gov/os/closings/commclosing.shtm (last visited Aug. 19, 2011).

425. *See, e.g.*, FDA Administrative Practices and Procedures, 42 Fed. Reg. 12,436, 12,440 (Mar. 4, 1977) (to be codified at 21 C.F.R. pt. 2) (notifying parties that they may request corrections or retractions to FDA publicity through the citizens petition procedures, now available at 21 C.F.R. § 10.30 (2010)).

retraction and correction.[426] Agencies are more than capable of maintaining distribution lists and reaching the same audience twice.[427]

Agencies should also allow companies to file expedited requests. For example, the FDA's 1977 proposed publicity policy instructed parties to send expedited requests in writing to the Assistant Commissioner for Public Affairs.[428] O'Reilly suggests that agencies should have a limited time to review disputed information on websites, and his recommendation applies equally to adverse publicity.[429] Agencies should establish internal deadlines for resolving the dispute and publish such deadlines. Once agencies adopt these basic principles, they can meet their diverse needs by tailoring the guidelines to meet their reasonable policy goals.

Agencies might also use an ombudsman or a Chief Information Officer to review disputes about agency publicity.[430] Some federal agencies use an ombudsman's office to mediate disputes between private parties and the agency, and some are even required to do so by statute.[431] By taking these steps, agencies could generate more credibility with industries and the media, and perhaps deter litigation.[432]

d. Distinguishing active versus passive publicity? Another debate that seems to be more pressing today than in 1973 is whether a distinction should be made between actively and passively releasing information. Although agencies today can passively release information, this information may be quickly picked up by the trade

426. O'Reilly, *Libels on Government Websites*, *supra* note 7, at 534–36 (arguing that agencies should flag and quickly remove inaccurate data posted on websites, much like the EPA does with its national Envirofacts database of local environmental conditions).

427. Professor O'Reilly notes that agencies would have to retain precise recipient lists to do so. *Id.* at 536. However, when the cat is out of the bag, it can be exceedingly difficult to recapture it, particularly when multiple agencies are responsible for disseminating information. For an almost comical effort by federal and state law enforcement agencies to retract earlier warnings and rumors that proved to be erroneous, see *Lance Industries, Inc. v. United States*, 3 Cl. Ct. 762 (Cl. Ct. 1983).

428. FDA Administrative Practices and Procedures, 42 Fed. Reg. at 12,440–41.

429. O'Reilly, *Libels on Government Websites*, *supra* note 7, at 537.

430. *Id.* at 538–39.

431. *See, e.g.*, 15 U.S.C. § 657 (2006) (creating an ombudsman to mediate disputes between agencies and small businesses); O'Reilly, *Libels on Government Websites*, *supra* note 7, at 539.

432. O'Reilly, *The 411 on 515*, *supra* note 7, at 848.

press, law firm client alerts, and bloggers. Agencies need not aggressively publicize this information to have the same practical effect. Thus, the distinction between issuing a press release and simply releasing information, such as through a FOIA request, is less meaningful today than it was in 1973.[433]

Agencies themselves may distinguish between actively disseminating publicity that it believes "to be true and that the public should rely on," and merely releasing information passively without making any express or implicit endorsements about it.[434] Indeed, courts have recognized that FOIA responses by agencies do not carry the same "government imprimatur on the document" as affirmative statements by the agency.[435] Agencies might consider imposing more constraints on information that carries an explicit endorsement by the agency.

Ultimately, agencies must tailor these recommendations to their needs and statutory responsibilities. As the D.C. Circuit has stated, the trick is "to accommodate two separate goals of fair administrative process: protecting parties from false or unauthorized agency news releases and promoting Congress' clear mandate that government information, particularly from consumer-oriented agencies, reach the public."[436] It is essential that agencies retain discretion to alert the public, particularly when required to do so by statute, but agencies should not abuse this discretion.

C. Congress and Courts Should Hold Agencies Accountable

Contemporary scholarship concludes that neither federal statutes nor courts provide remedies for private parties injured by adverse agency publicity.[437] In this section I argue that Congress should

433. Note that in 1980, the Supreme Court rejected the distinction between active versus passive disclosures of information by the CPSC under the Consumer Product Safety Act. CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 107–08 (1980).

434. *Id.* at 107. Although this may have been merely a litigating position by the CPSC to reduce its responsibilities when responding to FOIA requests, other agencies have responded to FOIA requests with explanations or clarifications of the nature of the information. *See, e.g.*, Reliance Elec. Co. v. CPSC, 924 F.2d 274 (D.C. Cir. 1991); Pierce & Stevens Chem. Corp. v. CPSC, 585 F.2d 1382 (2d Cir. 1978) (holding that the Consumer Product Safety Act's disclosure procedures did not apply to disclosures pursuant to FOIA requests).

435. *Pierce & Stevens*, 585 F.2d at 1388.

436. Indus. Safety Equip. Ass'n v. EPA, 837 F.2d 1115, 1118 (D.C. Cir. 1988).

437. *See, e.g.*, Noah, *supra* note 7, at 889–91; O'Reilly, *The 411 on 515*, *supra* note 7, at 838; O'Reilly, *Libels on Government Websites*, *supra* note 7, at 511–12.

clarify which agencies can issue adverse publicity and when. In the more likely event that Congress fails to act with such precision, I suggest that courts (i) hold agencies to their own articulated standards, (ii) review agency publicity under the abuse of discretion standard, and (iii) hold that agency publicity is reviewable as final agency action if the private party can demonstrate some tangible harm *and* present evidence that the agency intended the publicity, at least in part, to punish or sanction.

1. Statutory reform

Ideally, Congress would clarify which agencies could issue adverse publicity, under what circumstances, and via what procedures. Gellhorn's suggestions are still worth pursuing.[438] However, I propose what might be a simpler and more straightforward legislative intervention: Congress should pass a statute, perhaps as part of the APA, that clarifies that agencies have discretion to issue publicity and notify the public (and publish written policies to this extent), but that exercising such discretion within an agency policy is subject to judicial review for an abuse of discretion.

Had this standard been in place, it might have encouraged agencies to be more careful in several of the cases above. For example, if the FDA were subject to an abuse of discretion standard in the SuperGen case,[439] the agency might have notified SuperGen of its objections before publicizing them, and this early notification might have led SuperGen to correct or retract the misleading statements about its drug. If the SEC were subject to an abuse of discretion standard in the Goldman Sachs case,[440] it might have been more careful to notify Goldman Sachs of the complaint before filing it, and it may have filed the complaint during nontrading hours to avoid the market reaction. In the recent *E. coli* and salmonella cases, the FDA might have been quicker and more careful at clarifying the scope of its warnings, which may have reduced the $200 million and $350 million fall-outs.[441]

438. Gellhorn, *supra* note 5, at 1435–39.

439. *See* discussion *supra* Part IV.A.

440. *See* discussion *supra* Part III.B.

441. *See* discussion *supra* Part II.B.

In conjunction with "abuse of discretion" review, Congress should delegate to each agency the responsibility to codify its own procedures for issuing publicity. Perhaps as a separate reform, Congress should enhance agencies' statutory enforcement authority, so that extrastatutory tactics are not clearly preferable to agencies.

On this latter point, Gellhorn noted that adverse publicity used to sanction can forestall both agencies and Congress from considering and testing other forms of sanctions.[442] There is a certain irony here—by using adverse publicity as an extrastatutory enforcement tool, agencies might deter Congress from granting more enforcement powers, or perhaps more funding to carry out existing enforcement authority that requires more resources. Agencies should not make the executive decision to grant themselves more power; Congress must do it.[443] Indeed, as was true nearly four decades ago, "[t]he best solution would be for Congress to face the choice of extending agency sanctions or of authorizing publicity as a sanction."[444]

2. Judicial review

In the more likely event that Congress does not intervene with specific reforms, courts should review agency publicity for an abuse of discretion. But this will require courts to resolve several open legal questions that have persisted since 1973, including whether agency publicity is judicially reviewable, where the cause of action resides, and whether agency decisions are immune from challenge.

a. Is agency publicity reviewable? The threshold question is whether courts may even review agency publicity. Courts and scholars have long expressed concern that without judicial review, agencies will abuse their discretion. One court worried that the FDA's practices might allow it to "effectively regulate industry without ever exposing itself to judicial review."[445]

Parties challenging agency publicity must surmount a number of obstacles. The APA allows courts to review only "agency action" that is "final."[446] Challengers must exhaust administrative remedies before

442. Gellhorn, *supra* note 5, at 1421.

443. *Id.* at 1424.

444. *Id.* at 1424 n.179.

445. Washington Legal Found. v. Kessler, 880 F. Supp. 26, 34 (D.D.C. 1995).

446. 5 U.S.C. §§ 551(13), 704 (2006).

seeking judicial ones. And their complaint must be ripe for review. Agency publicity complicates the traditional doctrinal analyses here.

Though there is a "strong presumption that Congress intends judicial review of administrative action,"[447] courts routinely decline to review adverse agency publicity,[448] finding that it is neither an "agency action" nor "final" as the APA defines those terms.

This conclusion is problematic for several reasons. First, when an agency publishes a press release to punish or deter a company, it would arguably qualify under the APA's definition of "agency action," which includes "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof."[449] Of these possibilities, courts generally find that agency publicity could qualify only 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."[450] The legislative history to the APA reveals that Congress recognized that adverse publicity could be a sanction and that this was a "troublesome subject" when the agency did not have statutory authority.[451] Although the D.C. Circuit has steadily retreated from its assertion sixty years ago that adverse agency publicity is *never* reviewable under the APA,[452] it has never encountered publicity fit to review. For example, the D.C. Circuit has noted that "adverse impact alone would not necessarily make agency publicity reviewable as a sanction," explaining that an aggrieved firm would have to show evidence that the agency intended to penalize the company or that the publicity was false.[453] The party might demonstrate intent by showing that the publicity "caused destruction of property or revocation of a license."[454]

447. Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986).

448. O'Reilly, *The 411 on 515*, *supra* note 7, at 836 (citing Doe v. United States, 83 F. Supp. 2d 833, 837 (S.D. Tex. 2000)).

449. 5 U.S.C. § 551(13).

450. *Id.* at § 551(10)(a), (g).

451. 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)).

452. Hearst Radio v. FCC, 167 F.2d 225 (D.C. Cir. 1948) (refusing to review FCC's publication of a report titled "Public Service Responsibility of Broadcast Licensees" that criticized one of Hearst's stations).

453. *Indus. Safety Equip.*, 837 F.2d at 1119.

454. *Id.* (internal quotations and citation omitted).

Otherwise, it can be exceedingly difficult to prove an agency's intent to sanction and thus qualify as "agency action."

Second, 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.[455] 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.[456] The difficulty is that when agencies issue publicity, it is virtually never intended to represent a binding or final determination.[457] Dating back to the 1948 opinion in *Hearst Radio v. FCC*,[458] the D.C. Circuit has never found an agency press release to be "final agency action."[459] Although the D.C. Circuit has backed away from this position, it has yet to hold otherwise.[460]

455. APA § 704, 5 U.S.C. § 704 (2006). Some courts treat the APA's requirement of "final agency action" as jurisdictional, but the D.C. Circuit recently took pains to clarify that it is not. Trudeau v. FTC, 456 F.3d 178, 183–85 (D.C. Cir. 2006). As the court explained, "the APA . . . is not a jurisdiction-conferring statute" and "what its judicial review provisions . . . do provide is a limited cause of action for parties adversely affected by agency action." *Id.* at 183, 185. Thus, the "final agency action" requirement speaks to a party's cause of action rather than a court's jurisdiction. Courts in most circumstances would have jurisdiction to hear such cases under the general federal question statute, 28 U.S.C. § 1331. *Id.* at 185; *see also* Ajay Nutrition Foods, Inc. v. FDA, 378 F. Supp. 210, 215–16 (D.N.J. 1974), *aff'd*, 513 F.2d 625 (3d Cir. 1975) (holding that the court had jurisdiction under 21 U.S.C. § 1331 to hear action for equitable relief against individual agency officials that issued press releases and other public statements). In fact, on appeal to the D.C. Circuit, the FTC abandoned its earlier arguments that APA §§ 702 and 704 bar jurisdiction to review the agency's press releases. *Trudeau*, 456 F.3d at 183, 185. The D.C. Circuit thus held that APA § 702's waiver of sovereign immunity applied regardless of whether the press release constituted "final" agency action under § 704. *Id.* at 187. For more discussion, see *infra* Part V.C.2.b.

456. 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).

457. O'Reilly, *Libels on Government Websites*, *supra* note 7, at 512.

458. 167 F.2d 225 (D.C. Cir. 1948).

459. *Trudeau*, 456 F.3d at 189. Note that in *Impro Products, Inc. v. Block*, 722 F.2d 845, 849 (D.C. Cir. 1983) (internal quotation marks omitted), the court did not hold that the USDA's decision to publicize adverse information was "final agency action," but declared that it was "disinclined to find that no agency action has taken place."

460. *Impro Prods.*, 722 F.2d at 849, 850 (stating that the court has "reason to question the continued validity of the *Hearst Radio* decision" and that its application barring review would be "troubling," but nevertheless finding the claim barred by the statute of limitations and declining to reconsider *Hearst*); *see also Trudeau*, 456 F.3d at 189.

Courts seem to intuit that agency publicity is not categorically unreviewable, particularly when it is false or contrary to statute.[461] But I found only one judicial opinion holding that an agency's public statements were final, and that holding was largely motivated by the company's allegations of "serious, immediate and continuing injury to its business."[462] Most courts find that a press release is not final agency action, even when the court recognizes the harms and the likelihood that agency hearings after the fact will not provide relief.[463]

In *Trudeau*, as noted above, the D.C. District Court noted that for a press release to qualify as "final," the plaintiff would have to produce at least one, and preferably two, types of evidence: first, "evidence that the agency was intent on penalizing a private party through adverse publicity"; and, second, "evidence that the press release was demonstrably or concededly false."[464]

It is not clear why the truth or falsity of the agency's press release is relevant to finality, given that the standard for finality is whether the action marks the "consummation of the agency's decisionmaking process," and either determines the private party's legal rights or obligations or has some other legal consequence.[465] A truthful and accurate press release could mark the consummation of an agency's decision-making process and determine a party's legal rights or obligations or have some other legal consequence, but a false press release might not, particularly because an agency's false statements generally do not give rise to libel or defamation claims. Nevertheless, the court in *Trudeau* recognized that courts must review agency press releases "with care," and that they reside "at the outermost boundaries of the definitions of both 'final' and 'agency action.'"[466]

461. *Impro Prods.*, 722 F.2d at 849.

462. Kaiser Aluminum & Chem. Corp. v. CPSC, 414 F. Supp. 1047, 1053–54 (D. Del. 1976).

463. Relco, Inc. v. CPSC, 391 F. Supp. 841, 846–48 (S.D. Tex. 1975). In *Relco Inc. v. CPSC*, the court seemed to conflate finality with exhaustion when it said that even though the CPSC's press release condemning the plaintiff's products was "final in its practical effect, the review of the warning must initially be brought before the agency and is not final at law until it is so brought." *Id.* at 847.

464. Trudeau v. FTC, 384 F. Supp. 2d 281, 289–90 (D.D.C. 2005) (citation and quotation omitted).

465. *Id.* at 289 (citing Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 482 (2004)); *see also* Bennett v. Spear, 520 U.S. 154, 178 (1997).

466. *Trudeau*, 384 F. Supp. 2d at 290.

Agency publicity also complicates the question of finality because publicity generally causes harm via third parties. Some courts have declined to review agency actions that cause third parties to take action against a product or company.[467] Others have been more sympathetic if the agency makes a statement about a product and a party suffers direct economic injury because of it.[468] However, most courts do not allow challenges to proceed if the agency publicity is persuasive or produces only "coercive pressures on third parties" and does not otherwise signal final agency action.[469] Agencies themselves point out that they cannot control how parties interpret the information they release or what they will do with it.[470] Thus, the erroneous agency press release that causes a firm's stock to plummet might escape review.

Third, parties must exhaust their administrative remedies before seeking judicial review, and most agencies provide no administrative remedies for adverse publicity. But sometimes parties can seek judicial review before exhausting administrative remedies if the administrative procedures and remedies cannot provide effective relief. Thus, if an agency has procedures that allow parties to ask that adverse publicity be corrected or retracted by the agency, courts

467. O'Reilly, *Libels on Government Websites*, *supra* note 7, at 513 (citing *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 313 F.3d 852, 861 (4th Cir. 2002), in which the Fourth Circuit held that the EPA publishing a report about the health risks of secondhand tobacco was not reviewable under the APA, even though independent third parties would react negatively to the report, and expressing concern that "if [the court] were to adopt the position that agency actions producing only pressures on third parties were reviewable under the APA, then almost any agency policy or publication issued by the government would be subject to judicial review"). *See also* Pharm. Mfrs. Ass'n v. Kennedy, 471 F. Supp. 1224, 1229–30 (D. Md. 1979) (finding a report by the FDA comparing certain generic to brand name drugs unreviewable for lack of "agency action" because the FDA intended to educate and inform the public, despite concerns by brand name manufacturers that consumers would purchase generics instead).

468. Tozzi v. U.S. Dept. of Health and Human Servs., 271 F.3d 301, 304 (D.C. Cir. 2001) (finding that a manufacturer had standing and that the agency's decision was reviewable by the court, but ultimately deferring to the agency's interpretation of its own regulations); O'Reilly, *Libels on Government Websites*, *supra* note 7, at 517–18.

469. Invention Submission Corp. v. Rogan, 357 F.3d 452, 458–59 (4th Cir. 2004) (quoting the PTO's argument); *Flue-Cured Tobacco*, 313 F.3d at 860–61 (holding that an EPA report classifying secondhand smoke as a carcinogen did not constitute "final agency action" under the APA because it produced "only coercive pressures on third parties" rather than any "direct and appreciable legal consequences" for the plaintiffs (quoting Bennett v. Spear, 520 U.S. 154, 178 (1997))).

470. *E.g.*, FDA Administrative Practices and Procedures, 42 Fed. Reg. 12,436, 12,439 (Mar. 4, 1977) (codified at 21 C.F.R. pt. 2).

would typically require parties to submit such a request before seeking judicial review.[471] Even if agencies do not, at least one court has allowed a company to bypass administrative procedures because it alleged that the agency's statements "have caused and will continue to cause severe damage" to the company's business.[472] Thus, courts may be sympathetic if the harm is immediate and agency procedures offer no real administrative remedies.

Fourth, even if adverse publicity constitutes final agency action, it must also be ripe for review.[473] One court rejected an agency's motion to dismiss on this ground, finding that FDA threats in a warning letter essentially "demand[ed] compliance" with the agency's position and was more definitive, final, and harmful than in most cases because the FDA said it would take action and had already "utilized the public press to enforce its determination."[474] The court found that the company was in a Catch-22—either comply with the FDA's demands or risk enforcement action.[475] But courts sometimes decline to review pre-enforcement publicity even when recognizing that it has a significant practical effect.[476]

471. O'Reilly, *Libels on Government Websites*, *supra* note 7, at 514.

472. Kaiser Aluminum & Chem. Corp. v. CPSC, 414 F. Supp. 1047, 1055 (D. Del. 1976). In that case, the CPSC made several public statements in a press release, an agency news publication, and in a Federal Register notice about problems with aluminum wiring in anticipation of initiating rulemaking to develop safety standards. Even though the statements did not mention the manufacturer or its particular products, the court held that the manufacturer should not have to exhaust the lengthy rulemaking process to challenge actions that could damage its sales, goodwill, and business relationships, explaining that a wait of over two years for the rulemaking to conclude would be "unduly harsh." *Id.* at 1050–51, 1055.

473. U.S. CONST. art. III, § 2, cl. 1; Abbott Labs. v. Gardner, 387 U.S. 136 (1967) (allowing pre-enforcement judicial review of FDA rule requiring brand name pharmaceutical manufacturers to also list the product's generic name in various situations because manufacturers either had to expend significant expense changing their labeling or risk a subsequent enforcement action by the FDA).

474. Den-Mat Corp. v. FDA, Civ. A. No. MJG-92-444, 1992 WL 208962, at *4–5 (D. Md. Aug. 17, 1992) (internal quotation marks omitted).

475. *Id.* at *5 (noting that "Den-Mat can proceed with its current business operation and risk serious civil and criminal penalties, or cease operations and suffer severe economic loss while it pursues the lengthy new drug application process (which it considers unwarranted)," but acknowledging that "[t]his dilemma may well be part of the cost of business and not an undue burden").

476. In *Relco, Inc. v. CPSC*, the court granted the CPSC's motion to dismiss, even though its press release warning consumers to immediately stop using Relco's welders "carried with it finality in its most certain and practical sense." 391 F. Supp. 841, 846–47 (S.D. Tex. 1975). The court told Relco to utilize the "full hearing after the fact" even though "it may offer no relief." *Id.* at 847.

Courts should relax these four requirements or interpret them liberally when the party can make a prima facie case that the agency has abused its discretion. This would allow courts to preview the substantive cause of action. Particularly if there is evidence that an agency *intends* for the publicity to function as a sanction, courts should treat the statement as final agency action subject to judicial review under the APA.[477] If removing this extrastatutory sanction unduly ties agencies' hands, then Congress should authorize more efficient statutory enforcement powers.

b. What cause of action? Another major unresolved question is whether there is a suitable cause of action against agency publicity. Each of the following might work, given certain factual predicates.

First, the APA itself might provide a cause of action. APA § 704 "suppl[ies] a generic cause of action in favor of persons aggrieved by agency action."[478] 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."[479] But plaintiffs relying on the APA for a cause of action can only sue if the action is "final" under APA § 704.[480] And of course, the D.C. Circuit has "never found a press release . . . to constitute final agency action under the APA."[481] Even so, the D.C. Circuit has stated that when agency publicity does cause harm, "courts have the duty to decide whether there is a remedy under the APA for the release of the information."[482] Thus, although the APA seems to provide a relatively direct path to challenge agency publicity, such challenges have yet to succeed.

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477. Lawrence A. Walke, *Federal Agency Publications: The Availability of Judicial Review*, 69 WASH. U. L. Q. 1267, 1275–76 (1991) (noting that agency intent should help determine whether agency publications are reviewable). In *American Trucking Association v. United States*, 755 F.2d 1292 (7th Cir. 1985), the court considered the Interstate Commerce Commission's intent in releasing a report on how deregulation during the 1970s and 1980s affected the trucking industry economically. Because the Commission published the report to educate and inform the public rather than affect the trucking industry's legal rights, the Seventh Circuit held that the report was not reviewable. *Id.* at 1297.

478. Md. Dep't of Human Res. v. Dep't of Health & Human Servs., 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985); *see* Bennett v. Spear, 520 U.S. 154, 175 (1997).

479. Administrative Procedure Act § 706(2)(C), 5 U.S.C. § 706(2)(C) (2006); Trudeau v. FTC, 456 F.3d 178, 188 (D.C. Cir. 2006).

480. *Trudeau*, 456 F.3d at 188.

481. *Id.* at 189 (internal quotation marks omitted).

482. Indus. Safety Equip. Ass'n v. EPA, 837 F.2d 1115, 1118–19 (D.C. Cir. 1988).

Second, the Federal Tort Claims Act (FTCA) might provide a cause of action, but scholars examining potential remedies have concluded that the FTCA provides no relief.[483] The FTCA generally waives sovereign immunity that agencies enjoy under the 11th Amendment, thus allowing private parties to sue the federal government in tort under certain defined circumstances.[484] But the FTCA specifically excludes libel, slander, and other statements by government agents that would qualify as intentional torts,[485] and courts have interpreted this as also excluding press releases.[486] O'Reilly concludes that "the consistent view of courts, commentators and career FTCA defenders is that any intentionally-caused federal agency disclosure, which causes reputational injury, is not actionable under the FTCA."[487] There is also a major exemption under the FTCA for discretionary functions, which courts have interpreted as including not only the decision to issue press releases,[488] but also the underlying data upon which agencies rely.[489] There are several cases dismissing FTCA causes of action for damaging statements to the media or other forms of adverse publicity.[490]

Third, plaintiffs unable to assert a cause of action against an agency under a general or specific statute may still bring a "nonstatutory" action if the "agency is charged with acting beyond

483. *See, e.g.*, O'Reilly, *The 411 on 515*, *supra* note 7, at 838, 849 (citing Banfi Prods. Corp. v. United States, 41 Fed. Cl. 581 (1998)); O'Reilly, *Libels on Government Websites*, *supra* note 7, at 520, 522 (analyzing whether the FTCA might provide remedies to inaccurate or misleading statements on agency websites).

484. 28 U.S.C. §§ 2671–2680.

485. *Id.* § 2680(h).

486. 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 (Cl. Ct. 1983); O'Reilly, *The 411 on 515*, *supra* note 7, at 849.

487. O'Reilly, *Libels on Government Websites*, *supra* note 7, at 522.

488. 28 U.S.C. § 2680(a); Banfi Prods. Corp. v. United States, 40 Fed. Cl. 107, 125–26 (Fed. Cl. 1997).

489. *See, e.g.*, Fisher Bros. Sales, Inc. v. United States, 46 F.3d 279, 282 (3d Cir. 1995) (dismissing action against FDA under the Federal Tort Claims Act because the FDA's decision to publicize and recall fruit imported from Chile upon an anonymous tip and faulty laboratory testing fell within the discretionary function exemption to Act).

490. *See, e.g.*, Doe v. United States, 83 F. Supp. 2d 833, 837–38 (S.D. Tex. 2000) (citing numerous cases, including those involving public statements and press releases by the U.S. Army Corps of Engineers, U.S. Attorney's Offices, the Internal Revenue Service, the U.S. Department of Agriculture, the Federal Bureau of Investigation, the General Services Administration, the Immigration and Nationality Service, and the Treasury Department).

its authority."[491] Thus, *ultra vires* actions are available, although they are "intended to be of extremely limited scope."[492] And, as noted above, such a challenge would be difficult given that most agencies can probably justify their use of publicity under extremely broad statutory grants of authority.[493]

Fourth, perhaps the most intuitive cause of action would be a procedural due process claim when an agency issues adverse publicity without notifying the subject or allowing it to respond. However, my survey of the cases since 1973 show that very few parties make due process claims,[494] and the parties that do get only superficial treatment in judicial opinions.[495] In some cases, a party seemed to have a due process claim but did not assert it. In others, the agency provided some informal mechanism for the party to comment or object beforehand. Rarely do modern agencies release adverse publicity without first notifying the private party of the agencies' objections.[496] Sometimes, agencies even allow the company that is the subject of the press release to review and comment on the press release before it is published, and even request changes or submit its own language.[497] But agency practices vary.

491. Trudeau v. FTC, 456 F.3d 178, 189–90 (D.C. Cir. 2006) (quoting Dart v. United States, 848 F.2d 217, 221 (D.C. Cir. 1988)).

492. *Trudeau*, 456 F.3d at 190 (citing Griffith v. Federal Labor Relations Auth., 842 F.2d 487, 493 (D.C. Cir. 1988)).

493. *See supra* Part II.A.

494. Only four of the twenty-six opinions surveyed involving adverse agency publicity since 1973 discussed due process claims. *See* Indus. Safety Equip. Ass'n v. U.S. Envtl. Protection Agency, 837 F.2d 1119, 1121–22 (D.C. Cir. 1988); Impro Prods., Inc. v. Block, 722 F.2d 845 (D.C. Cir. 1983); 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).

495. *Indus. Safety Equip.*, 837 F.2d at 1121–22; *Impro Prods.*, 722 F.2d at 851; *Sears, Roebuck*, 504 F. Supp. 268–70.

496. *See supra* text accompanying notes 1–4. Moreover, even when agency regulations allow the subjects of investigations to submit written statements before the agency brings a formal enforcement action, such regulations may not be mandatory and may not create any procedural rights for the subject. *See, e.g.*, Wellman v. Dickinson, 79 F.R.D. 341, 352–53 (S.D.N.Y. 1978) (holding that subject of SEC enforcement action had no constitutional or statutory procedural right to enforce SEC regulation that allowed the subjects of investigations to comment prior to formal enforcement).

497. Agencies may go to great lengths to solicit a company's feedback before issuing potentially adverse publicity. For example, in *Banfi Products Corp. v. United States*, 40 Fed. Cl. 107, 118 (Fed. Cl. 1997), the Bureau of Alcohol, Tobacco, and Firearms allowed a wine importer to review drafts of its press release and request changes and submit its own language.

It also seems more difficult than it should be for companies to show that they have a sufficient liberty or property interest that triggers due process rights. Consumer demand for products may be sensitive to real or perceived sanctioning by the government. Courts have acknowledged that negative statements about a product can affect a company's "cognizable property interest" for due process purposes, although it is much more difficult to show that an agency's statements actually deprived the manufacturer of that property interest absent some showing that the agency effectively revoked a license.[498] In other cases, courts seem to require the agency statement to be false or inaccurate in some way, as if an accurate-but-damaging statement could not deprive a party of due process.[499] My research did not find any successful due process claims.

Fifth, parties could assert more creative constitutional violations. For example, plaintiffs have alleged that agencies use publicity as retaliation, in violation of plaintiffs' First Amendment rights.[500] But courts have yet to determine whether agency publicity meets the elements of a First Amendment retaliation claim.[501] And Noah observes that "the Takings Clause imposes no serious constraints" on agencies that use adverse publicity or other forms of arm-twisting.[502] Agencies generally use adverse publicity to force companies to waive statutory rights rather than constitutional ones.[503] Plaintiffs have also asserted that agency publicity violates the Bill of Attainder Clause.[504] Each of these constitutional claims seems stretched when used to attack agency publicity.

498. *Indus. Safety Equip.*, 837 F.2d at 1119, 1122. For example, when Sears complained that the EEOC leaked its complaint to the public and "engaged in a media harassment campaign against" it, the reviewing court found that the alleged damages to its reputation and goodwill did not show "stigma plus" a more tangible liberty or property interest, such as decreased sales. *Sears, Roebuck*, 504 F. Supp. at 268–69. *See also* EEOC v. Sears, Roebuck & Co., No. 79-1957A, 1980 WL 108, at *10–11 (N.D. Ga. Mar. 14, 1980).

499. *Indus. Safety Equip.*, 837 F.2d at 1122 (noting that industry buyers who shift to other products is an "indirect effect" on the aggrieved manufacturers and if "not demonstrated to be false can hardly be said to constitute a constitutional deprivation of property.").

500. *See, e.g.*, Trudeau v. FTC, 384 F. Supp. 2d 281, 282 (D.D.C. 2005), *aff'd*, 456 F.3d 178,190 (D.C. Cir. 2006).

501. *Trudeau*, 456 F.3d at 191 & n.23.

502. Noah, *supra* note 7, at 916.

503. *Id.* at 917.

504. U.S. CONST. art. I, § 9, cl. 3. For example, Sears claimed that when the EEOC leaked its complaint against Sears and released adverse publicity, it punished Sears without a judicial trial. The court spent little time dispatching with this argument because the Bill of Attainder Clause was intended to prevent "trial by legislature," and the EEOC is an

Sixth, causes of action might arise when public statements attach to more official agency procedures, like rulemaking, though it is difficult to envision a successful case.[505]

As a last resort, some parties have tried to seek relief via private bills in Congress, by which a house of Congress adopts a specific bill asking the Court of Federal Claims to determine whether the government should compensate the party for injuries caused by a federal agency.[506] Congress then adopts a private law approving the compensation, which must be signed by the President,[507] but the Court of Federal Claims routinely denies claims against agencies for adverse publicity.[508] Because an agency's decision to issue publicity

investigative rather than a legislative agency and had not punished Sears. EEOC v. Sears, Roebuck & Co., 504 F. Supp. 241, 270 (N.D. Ill. 1980) (quoting United States v. Brown, 381 U.S. 437, 442 (1965)); EEOC v. Sears, Roebuck & Co., No. 79-1957A, 1980 WL 108, at *10–11 (N.D. Ga. Mar. 14, 1980) (refusing to determine whether the EEOC has legislative functions because its actions did not punish Sears).

505. For example, Kaiser Aluminum sued the CPSC after it made several public statements about problems with aluminum wiring, without naming Kaiser specifically. Kaiser Aluminum & Chem. Corp. v. CPSC, 414 F. Supp. 1047, 1050–52 (D. Del. 1976). The court refused to dismiss Kaiser's action for failure to exhaust administrative remedies despite Kaiser being able to comment during rulemaking, because rulemaking would not provide an adequate remedy for the CPSC's public statements. *Id.* at 1055–56. However, the court denied Kaiser's motion for a preliminary restraining order. *Id.* at 1064. FDA publicity surrounding rulemaking for health foods and dietary supplements was similarly upheld in part because the FDA's statements criticized the entire industry rather than specific manufacturers. Ajay Nutrition Foods, Inc. v. FDA, 378 F. Supp. 210, 218–19 (D.N.J. 1974) ("[T]his Court holds that an entire industry, such as the health food processing industry, cannot sue on grounds of defamation."), *aff'd mem.*, 513 F.2d 625 (3d Cir. 1975). The FDA has defended its ability to release information during rulemaking, arguing that it would be inappropriate to limit this information because "[r]ules apply generally and affect a wide number of persons." 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).

506. 28 U.S.C. § 2509 (2006); Banfi Prods. Corp. v. United States, 41 Fed. Cl. 581, 584 (Fed. Cl. 1998) (refusing to grant compensation to wine importer for FDA allegedly negligently identifying wine as a health hazard because Banfi did not have a valid legal or equitable claim against the United States); Banfi Products Corp. v. United States, 40 Fed. Cl. 107, 140 (Fed. Cl. 1997) (refusing to grant compensation to wine importer after Bureau of Alcohol, Tobacco, and Firearms requested recall and issued press release announcing allegedly tainted wine based on FDA's testing); Sperling & Schwartz, Inc. v. United States, 218 Ct. Cl. 625, 627 (Ct. Cl. 1978) (refusing to grant compensation to dish importer after FDA press releases stated that dishes were harmful); O'Reilly, *Libels on Government Websites*, *supra* note 7, at 540.

507. 28 U.S.C. § 2509; O'Reilly, *Libels on Government Websites*, *supra* note 7, at 540.

508. *Banfi*, 40 Fed. Cl. at 140; Cal. Canners & Growers Ass'n v. United States, 9 Cl. Ct. 774, 784–86 (Ct. Cl. 1986) (denying compensation to a fruit growers' association after Secretary of Health, Education, and Welfare, FDA Commissioner, and Surgeon General made public statements that artificial sweetener was carcinogenic in animals, was not generally

generally falls within exemptions under the FTCA, this also often precludes recovery in private bills.[509] As long as the agency has a rational basis for issuing the publicity and did not make an error, courts will be reluctant to grant compensation.[510] Parties rarely recover compensation this way, and some scholars speculate that an agency's offending statement "would need to be exceedingly severe in its negative impact to warrant the huge lobbying and litigation investment that a private bill would require."[511]

It should be noted that regardless of the specific cause of action, aggrieved parties will have difficulty proving their injuries. Companies often realize during litigation that it is exceedingly difficult to prove sufficiently concrete injuries that would sustain any kind of preliminary injunction or other remedies the courts might grant.[512]

Considering these causes of action, parties would seem to have the best chance of success under the APA or via the due process clause. But even these claims routinely fail.

c. Are agencies immune from suit? A final unresolved question is whether agencies are immune from challenge. When agency officials are sued in their individual capacities to avoid issues of sovereign immunity, those officials can invoke executive privilege to make public statements.[513] Moreover, at least one court has speculated that

recognized as safe, and should not be used in human foods, primarily because statements were not erroneous based on data at the time); Lance Indus., Inc. v. United States, 3 Cl. Ct. 762, 780 (Ct. Cl. 1983) (denying compensation to manufacturer of self-defense spray because federal and state enforcement agencies did not negligently fail to verify rumor that spray caused debilitating damages before the information was circulated throughout government enforcement agencies and publicized by media); *Sperling & Schwartz*, 218 Ct. Cl. at 627 (holding that dish importers did not have legal or equitable claim against the FDA for issuing press releases that identified products as harmful).

509. *Banfi*, 40 Fed. Cl. at 125–26.

510. *See, e.g.*, *Sperling & Schwartz*, 218 Ct. Cl. at 626–27.

511. O'Reilly, *Libels on Government Websites*, *supra* note 7, at 540.

512. For example, after Kaiser Aluminum sued the CPSC for public statements it made while initiating rulemaking to set standards for aluminum wiring, the court found that even if those statements damaged Kaiser's business, the damage caused would not be any greater than damage caused by the public rulemaking procedure itself. Kaiser Aluminum & Chem. Corp. v. CPSC, 414 F. Supp. 1047, 1063 (D. Del. 1976).

513. Barr v. Matteo, 360 U.S. 564 (1959) (finding executive privilege against defamation claim for press release by Acting Director of Office of Rent Stabilization announcing his intent to suspend employees). In *Ajay Nutrition Foods, Inc. v. FDA*, a district court held that the FDA Commissioner and the Secretary of the U.S. Department of Health, Education, and Welfare were protected by the executive privilege when making public statements and issuing

government agencies themselves might have a First Amendment right to issue publicity, and 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."[514]

These hurdles collectively suggest that agencies impose standards on themselves, and that courts hold agencies to these standards, reviewing for an abuse of discretion in appropriate circumstances.

VI. CONCLUSION

This Article takes a fresh look at how modern agencies use modern media against modern regulated parties. Federal agencies continue to use adverse publicity despite long-standing concerns that the publicity can be premature, excessive, misleading, or wrong. Agency announcements often bypass more formal enforcement tools—sometimes purposefully so. Most agencies do not have statutory authority to issue adverse publicity, particularly when used to sanction. And courts generally find that agency publicity is either not reviewable, or if it is, not redressable. Agencies thus enjoy virtually boundless discretion to brandish adverse publicity.

Today, the problem is magnified. Overburdened agencies have more incentives to eschew formal statutory enforcement. Adverse publicity is less costly, more effective, and essentially immune from judicial review. New media allows agencies to make announcements via their websites, or even via Facebook, Twitter, and other social media *du jour*. These truncated formats are more susceptible to being mischaracterized or misunderstood. And hyper-responsive capital markets can process adverse publicity more swiftly and hastily, which amplifies all these problems.

This Article offers several ways to cabin agency discretion. Some reiterate what Gellhorn and ACUS urged nearly four decades ago, and some are entirely new, based on developments since then. The

press releases critical of regulated industries. Key to the court's opinion was the statutory authority granted to the FDA to use its discretion to disseminate information publicly. 378 F. Supp. 210, 216–17 (D.N.J. 1974) (citing FDA's authority under 21 U.S.C. § 375), *aff'd mem.*, 513 F.2d 625 (3d Cir. 1975).

514. FTC v. Freecom Commc'ns, Inc., 966 F. Supp. 1066, 1070–71 (D. Utah 1997) (acknowledging that counsel for the government "asserted that there was no First Amendment interest" and that no courts had considered a government agency's right to speak apart from individual employees' rights).

next step is for Congress, courts, or agencies to revisit the issue, as all three seem desensitized to the problem since the original ACUS recommendations highlighted them. The legitimacy of agency actions is important. Regulated firms voluntarily comply with agency regulations as much out of respect for their necessity and legitimacy[515] as out of fear.[516]

These recommendations would undoubtedly tie agencies' hands. And in an era when agencies often struggle to fulfill their statutory responsibilities and adequately enforce their regulations, one can reasonably question why we should further constrain agencies. Resource-constrained agencies should be able to use whatever leverage they can muster.

This Article recognizes that agency publicity is part of a larger story about regulatory enforcement in imperfect conditions. Agencies should have wide discretion to issue publicity, but should not be able to abuse that power. And if this unduly constrains their ability to encourage compliance with their regulatory schemes, Congress should not only authorize agencies to take more efficient enforcement actions by statute, but should also provide them the necessary resources to do so. Until then, agencies, courts, and Congress should impose some standards on agencies.

515. TOM TYLER, WHY PEOPLE OBEY THE LAW (2006).

516. DANIEL CARPENTER, REPUTATION AND POWER: ORGANIZATIONAL IMAGE AND PHARMACEUTICAL REPUTATION AT THE FDA 654–660 (2010).