

Adverse Publicity by Administrative Agencies

ACUS PROJECT OUTLINE

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Biography. I am an Associate Professor and Associate Dean for Research at Southern Methodist University's Dedman School of Law in Dallas. I teach Administrative Law, Legislation, Health Law, and Food & Drug Law. My relevant research includes: *The Food and Drug Administration's Evolving Regulation of Press Releases: Limits and Challenges*, 61 FOOD & DRUG L.J. 623 (2006) (with William Vodra and David Korn); *Can Speech by FDA-Regulated Firms Ever Be Noncommercial?*, 37 AM. J. L. & MED. 388 (2011); *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L. REV. 1371 (2011); *Do Graphic Tobacco Warnings Violate the First Amendment?*, 64 HASTINGS L.J. 1467 (2013); and *Regulating Disruptive Innovation*, 29 BERKELEY TECH. L.J. 173 (2014). I have presented my research to regulators, professional societies, and at industry conferences and several law schools, including Harvard, North Carolina, Texas, Wisconsin, and Yale. My research is also frequently featured in the media, including the Associated Press, CBS News, the Chicago Tribune, CNN, the Huffington Post, the Los Angeles Times, the New Republic, NPR, Politico, Slate, and WIRED. I received a B.A. in Philosophy, Politics, and Economics from the University of Pennsylvania and a J.D. from Stanford Law School. Before entering academia, I practiced at Arnold & Porter in Washington D.C., where I represented clients in front of federal and state agencies and Congress.

I. EXECUTIVE SUMMARY

- A. *The Basic Challenge.* I will begin by summarizing the basic problem: agencies must retain wide discretion to inform and warn the public, but there is a risk that agencies may sometimes stretch that discretion to pressure or sanction alleged regulatory violators. A much more detailed discussion will follow in Part II below.
- B. *Conference Recommendation 73-1.* I will briefly revisit the Conference's 1973 recommendations, explaining (to the extent possible) what agencies did in response. Although it may be difficult to find the agency

decisionmakers who considered Recommendation 73-1 in the 1970s, the Conference did send me a large implementation file. I am in the process of speaking with lawyers who worked at the FDA in the 1970s, but will need help identifying their counterparts at the FTC during that time.

- C. *Methodology.* I will explain my basic methodology, which includes (i) a literature review, updated since my 2011 article, (ii) a survey of federal cases in which a private party challenged an agency’s use of adverse publicity, again updated since 2011 (and to be attached as Appendix C), and (iii) case studies of three agencies (the FDA, FTC, and CFPB), including interviews with agency personnel.
- D. *Findings.* This section will summarize the findings in Parts III (Case Studies) and IV (Current Agency Best Practices) below.
- E. *Recommendations.* This section will summarize recommendations for potential reforms in Part V below.

II. THE BENEFITS AND BURDENS OF ADVERSE PUBLICITY

A. Why Agencies Issue Adverse Publicity

- 1. *To Inform or Warn.* I will emphasize that most agencies must warn or inform the public—often by statutory mandate. These uses confer clear public benefits and must not be taken for granted when considering potential ways to cabin agency discretion to issue adverse publicity. The push for “smart disclosure” is the most recent manifestation of these core agency functions.
- 2. *To Pressure or Sanction.* I will describe the more controversial practice of using adverse publicity to pressure alleged regulatory violators or to amplify the agency’s investigatory and enforcement powers. I hope to put these uses in context by describing modern pressures on agencies, including declining budgets and increased regulatory burdens.

B. Problematic Adverse Publicity

- 1. *Premature Publicity.* Publicity can be premature, such as when an agency publicizes that it has begun investigating a party without also clarifying that the allegations have not been proven or the matter fully adjudicated. For example, in 2010, the SEC’s Office of Inspector General (OIG) investigated whether the SEC had violated its own internal policies in publicizing its complaint against Goldman Sachs.¹ Of course, many agencies must also alert

¹ SEC OFFICE OF INSPECTOR GEN., REPORT OF INVESTIGATION NO. OIG-534: ALLEGATIONS OF

the public to health or consumer risks in the face of incomplete information and scientific uncertainty. But even these announcements can be premature,² warranting procedural safeguards. For example, in 2008 the FDA and Centers for Disease Control and Prevention (CDC) incorrectly identified tomatoes (rather than peppers) as the source of a salmonella outbreak, costing the tomato industry an estimated \$200 million.³

2. *Excessive Publicity.* Publicity can be excessive when an agency uses pejorative language or goes beyond factual reporting. The most commonly cited example is a 1959 press conference at which the Secretary of Health, Education, and Welfare (HEW, the precursor to HHS) warned the public to not eat cranberries that might contain carcinogens; the warning was punctuated with a statement that the Secretary personally would not be eating cranberries that Thanksgiving.⁴ The Secretary also failed to clarify that only cranberries from Washington and Oregon might be unsafe, costing the industry \$21.5 million in lost surplus that year—\$8.5 million of which was indemnified by Congress.⁵ More recently, in 2010, a plaintiff challenged a press release by the SEC in which the agency announced a civil enforcement action against the plaintiff for running a “Ponzi scheme.” The plaintiff argued that the SEC press release included two gratuitous (and false) references to the plaintiff’s alleged mail order pornography business.⁶ Recommendation 73-1 directed agencies to limit adverse publicity to factual content that is accurate and does not contain disparaging terminology.⁷
3. *Punishment via Publicity.* There is also a long history of agencies using publicity to punish or pressure alleged regulatory violators, often as an extrastatutory form of “arm-twisting.”⁸ Even if

IMPROPER COORDINATION BETWEEN THE SEC AND OTHER GOVERNMENTAL ENTITIES CONCERNING THE SEC’S ENFORCEMENT ACTION AGAINST GOLDMAN SACHS & CO. (Sep. 30, 2010), at <http://www.sec.gov/foia/docs/oig-534.pdf>.

² Administrative Conference of the United States (ACUS), Conference Recommendation 73-1 ¶ 3 (adopted June 8, 1973); 38 Fed. Reg. 16,389 (Jun. 27, 1973); 1 C.F.R. § 305.73-1 (recommending that adverse publicity, except in certain limited circumstances described in paragraph 2, “should issue only after the agency has taken reasonable precautions to assure that the information stated is accurate and that the publicity fulfills an authorized purpose.”).

³ Denis G. Maki, *Coming to Grips with Foodborne Infection—Peanut Butter, Peppers, and Nationwide Salmonella Outbreaks*, 360 NEW ENG. J. MED. 949 (2009).

⁴ Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1408 (1973).

⁵ *Id.* at 1409-10 n.118.

⁶ *Barry v. SEC*, 2012 WL 760456 (E.D.N.Y. 2012) (finding the press release to be non-reviewable under the APA).

⁷ Recommendation 73-1, *supra* note 2, at ¶ 1.

⁸ The example cited in a 1941 report of the Attorney General’s Commission on Administrative Procedures alleged that the Federal Alcohol Administration abused its power by threatening to issue

publicity serves as an effective sanction, the damage is often indeterminate, as agencies cannot easily define the upper limit or otherwise calibrate the damage done. In 2003, for example, the FDA publicly reprimanded a company for misrepresenting the benefits and risks of its drug, without first warning the company in private.⁹ Such use is particularly problematic when primarily intended to coerce rather than inform, and when not subject to judicial review.¹⁰

4. *Inaccurate Publicity.* Finally, agency announcements simply may be inaccurate, as demonstrated by the 2008 FDA and CDC announcements above,¹¹ or by the series of inaccurate product safety warnings by the CPSC that led Congress to amend the Consumer Product Safety Act in 1981.¹² Recommendation 73-1 urges agencies to issue retractions or corrections in such cases.¹³

C. The Modern Context

1. *More Agency Incentives to Use Adverse Publicity.* Today, agencies struggling with resource constraints and increased regulatory burdens may find that issuing publicity is even more convenient and effective than using traditional statutory tools that must satisfy multiple procedural requirements.¹⁴
2. *More Ways to Issue Adverse Publicity.* Modern agencies can also use their web sites and social media platforms to disseminate adverse publicity more quickly and more casually than traditional press releases to the lay media or trade press.

adverse publicity as an extra-legal sanction “even when the validity of its dictates was not free from doubt.” FINAL REPORT OF THE ATT’Y GEN.’S COMM’N ON ADMIN. PROCEDURES, S. DOC. NO. 77-8, at 135 (1941). Lars Noah also examined the use of publicity as an extrastatutory tactic in *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 874.

⁹ FDA, Talk Paper T03-18: FDA Warns Public About Misrepresentations in Marketing Claims About Drug to Treat Cancer (Mar. 14, 2003). Typically, before the FDA publishes a Warning Letter or similar public notice of alleged regulatory violations, the FDA will contact the party privately to offer a chance to come into compliance. The lack of prior notice may increase the punitive impact of adverse publicity, or perhaps reveal the agency’s punitive intent.

¹⁰ Gellhorn, *supra* note 4, at 1383, 1419-20.

¹¹ Maki, *supra* note 3.

¹² Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 703 (1981) (amending the Consumer Product Safety Act); *see also* James T. O’Reilly, *Libels on Government Websites: Exploring Remedies for Federal Internet Defamation*, 55 ADMIN. L. REV. 507, 542-43 (2003).

¹³ Recommendation 73-1, *supra* note 2, at ¶ 5.

¹⁴ I posit that there is a connection between increased agency responsibilities under stagnant budgets and the use of relatively low-cost tools like adverse publicity. Testing the causal connection empirically, however, may be difficult without a control or a baseline. Still, I hope to reveal agency rationales for relying on adverse publicity during interviews with agency personnel.

3. *More Opportunities to Misinterpret Publicity.* Announcements via social media also tend to be extremely truncated (like Twitter’s 140-character limit), increasing the risk that audiences will misread or mischaracterize the message.

4. *Hyper-Responsive Capital Markets.* The Internet also enables capital markets to process agency announcements more swiftly and perhaps more hastily, multiplying the magnitude for potential damage to company reputation, stock price, and the like. In the 2003 FDA publicity example discussed above, at II.B.3, the affected company’s stock price dropped almost 25% within hours of the FDA’s announcement.¹⁵

5. *Recent “Open Government” and “Smart Disclosure” Initiatives.* A more recent development worth examining is the Obama Administration’s “open government,” “smart disclosure,” and “open data” initiatives that encourage agencies to post more information online.¹⁶ For example, online databases that publish consumer complaints and other preliminary reports on agency web sites and can be adverse to identified parties. Examples include the Occupational Safety and Health Administration’s (OSHA’s) proposal to publish workplace injury records¹⁷ and the Consumer Financial Protection Bureau’s (CFPB’s) consumer complaint database,¹⁸ among others. Note, however, that Conference Recommendation 73-1 was careful to distinguish agency statements that “invite public attention ... from the mere decision to make records available to the public rather than preserve their confidentiality,”¹⁹ as those decisions are governed by the Freedom of Information Act (FOIA). Similarly, my 2011 article excluded from analysis “reverse FOIA” cases in which private parties sued to prevent agencies from publishing information, often in response to FOIA requests. Although my 2011 article observed that the distinction between active publicity and more passively releasing information to the public was a less meaningful one than in 1973,²⁰

¹⁵ *FDA Responds in Kind to SuperGen: Talk Paper Answers Press Release*, “THE PINK SHEET,” Mar. 17, 2003, at 7.

¹⁶ Executive Office of the President, National Science and Technology Council, *Smart Disclosure and Consumer Decisionmaking: Report of the Task Force on Smart Disclosure* (May 2013), at http://www.whitehouse.gov/sites/default/files/microsites/ostp/report_of_the_task_force_on_smart_disclosure.pdf.

¹⁷ Jenna Greene, “OSHA’s Proposed Database Draws Fire,” *THE AMERICAN LAWYER* (Jan. 27, 2014), at <http://www.americanlawyer.com/id=1202639865807/OSHA's-Proposed-Database-Draws-Fire>.

¹⁸ CFPB, *Consumer Complaint Database*, at <http://www.consumerfinance.gov/complaintdatabase/>. See also Ian Ayres, Jeff Lingwall, & Sonia Steinway, *Skeletons in the Database: An Early Analysis of the CFPB’s Consumer Complaints* (draft), at <http://islandia.law.yale.edu/ayres/CFPB%20paper%20v10.pdf>.

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

²⁰ Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 *BYU L. REV.* 1371, 1439.

most courts conclude that FOIA responses by agencies do not carry the same “government imprimatur on the document” as affirmative statements by agencies.²¹ I seek input on whether this distinction remains meaningful.

III. CASE STUDIES

- A. *Food and Drug Administration (FDA)*. The FDA is worth studying for a few reasons. First, the FDA seemed to be the only agency to propose a rule in response to Recommendation 73-1. Second, the FDA is a frequent litigant in these matters. Third, the agency must alert the public to health risks in the face of incomplete facts and scientific uncertainty. Finally, FDA was also the focus of my 2011 research—I reviewed over 1500 FDA “press announcements” from 2004 to 2010.
- B. *Federal Trade Commission (FTC)*. The FTC is notable because its internal policies and procedures were praised by Professor Gellhorn’s report for ACUS, and because it is a traditional enforcement agency frequently involved in litigation surrounding press announcements. The FTC is also presently involved in FOIA litigation over non-disclosure of consumer complaint information that it aggregates in an internal database.²²
- C. *Consumer Financial Protection Bureau (CFPB)*. The CFPB is worth studying because it is a new agency operating under a new statute and in some ways is leading the “smart disclosure” trend.²³ For example, the Bureau’s consumer complaint database, <http://consumerfinance.gov>, allows customers to submit complaints identifying companies that provide mortgages, bank accounts, student loans, consumer loans, credit reporting, debt collection, money transfers, and payday loans.²⁴ The database lists the type of product, the primary and secondary complaints, the name of the company, the company’s response, and whether the company’s response was timely and further disputed by the customer. The Bureau states on the site that “We don’t verify all the facts alleged in these complaints but we take steps to confirm a commercial relationship

²¹ *Pierce & Stevens Chem. Corp. v. CPSC*, 585 F.2d 1382, 1388 (2d Cir. 1978) (holding that the Consumer Product Safety Act’s disclosure procedures did not apply to proactive disclosures pursuant to FOIA requests).

²² Complaint, *Ayuda, Inc. v. Fed. Trade Comm’n*, No. 1:13 Civ. 1266 (D.D.C. filed Aug. 20, 2013).

²³ A 2001 law required the Office of Management and Budget (OMB) to publish guidelines to help agencies ensure the “quality, objectivity, and integrity of information” published by agencies online. See 44 U.S.C. §§ 3504(d)(1), 3516. This became known as the “Data Quality Act” or “Information Quality Act.” Although OMB guidelines exclude agency press releases and charges made during adjudications, 67 Fed. Reg. 369, 371 (Jan. 3, 2002), they might cover online databases.

²⁴ See CFPB, Consumer Complaint Database, at <https://data.consumerfinance.gov/dataset/Consumer-Complaints/x94z-ydhh?> (last visited Nov. 4, 2014).

between the consumer and company.”²⁵ In July 2014, the Bureau proposed publishing the narrative comments by consumers, with a public comment period that ended September 22, 2014.²⁶ This proposal is being contested by several industry and free-market groups, which questioned the Bureau’s statutory authority and raised other concerns similar to the ones raised about adverse publicity, such as unnecessary harm to a company’s reputation.²⁷ I will examine the parallels and assess the adequacy of the Bureau’s proposed procedures, particularly its proposal to also publish company responses along with consumer narratives within 15 days.²⁸

IV. CURRENT BEST PRACTICES BY AGENCIES

- A. *Written Agency Policies?* This section will examine which agencies have written policies to guide agency staff and what these policies entail. For example, do agency policies address (i) the content of adverse public announcements, (ii) procedures for making such announcements, and (iii) procedures for correcting or retracting mistakes?
- B. *Advance Notice to Subjects?* This section will discuss whether, and under what circumstances, agencies provide advance notice to the subjects of adverse publicity. I will also look for exemptions made for emergencies and other justifications in the public interest. I will take care to consider the downsides (and possible abuses) of giving advanced notice to the parties publicly named in agency adverse announcements.
- C. *Corrections and Retractions?* I will examine which agencies have policies that allow parties to request corrections or retractions to adverse publicity, and what those policies entail. Again, I will take care to consider the downside to agencies and the risk of parties abusing these procedures. Again, I will consider whether the Data Quality Act’s provisions that require agencies to create mechanisms for affected parties to seek corrections apply to agency publicity.²⁹
- D. *Publicizing Investigations, Complaints, and Other Preliminary Actions?* How do agencies discipline themselves when publicizing preliminary actions like investigations and complaints, or the results of internal agency adjudications? Should there be different rules depending on whether the

²⁵ CFPB, Consumer Complaint Database, at <http://www.consumerfinance.gov/complaintdatabase/> (last visited Nov. 4, 2014).

²⁶ Disclosure of Consumer Complaint Narrative Data, Notice of Proposed Policy Statement with Request for Public Comment, 79 Fed. Reg. 42,765 (Jul. 23, 2014).

²⁷ See, e.g., Public Interest Comment, Mercatus Center, George Mason University (Sep. 10, 2014), at <http://mercatus.org/sites/default/files/Peirce-Soliman-CFPB-Consumer-Complaint-PIC-091014.pdf>.

²⁸ 79 Fed. Reg. at 42,768.

²⁹ Jim Tozzi and the Center for Regulatory Effectiveness argue that the Data Quality Act does apply to agency press releases, notwithstanding the OMB’s policy stating otherwise.

agency is discussing a criminal or civil matter? And again, what reasonable exemptions are there in the public interest?

- E. *Social Media Announcements?* Do agency policies address negative announcements made via social media, like Twitter? If so, how do these policies operate in practice, and do they address the concerns posed here?
 - F. *Procedures Governing Smart Disclosure?* My main question here is whether the Data Quality Act of 2001 and resulting OMB rules govern these new online complaint databases. If so, the information would be subject to minimum standards for accuracy and objectivity, and would require procedures for parties to request corrections.³⁰ Otherwise, these databases might present problems akin to more traditional publicity.
- V. RECOMMENDATIONS FOR UPDATED REFORMS. In 1973, the Conference recommended that agencies adopt written internal procedures for publishing adverse actions or policies, and that agencies “should balance the need for adequately serving the public interest and the need for adequately protecting persons affected by adverse agency publicity.”³¹ Part V will highlight recommended updates or additions to Conference Recommendation 73-1.
- A. *Improving Agency Procedure.* This section will consider reforms to internal agency practices and procedures, incorporating not only the best practices identified in Part IV, but also potentially recommendations that go beyond those practices. My 2011 article addressed several recommendations to agencies, many reiterating Professor Gellhorn’s prior observations and Conference Recommendation 73-1, and some updating these recommendations for the Internet era.³²
 - 1. *Content Guidelines.* My 2011 article recommended that agency policies address the content of announcements by (i) requiring announcements to be factually-supported and not unnecessarily pejorative, (ii) fully explaining the nature of the agency’s action, particularly when it is preliminary (as in the case of investigations or complaints) or when announced via social media, and (iii) taking care to avoid making statements that will be misunderstood or misinterpreted by the media or lay public. I will revisit these recommendations in light of new findings.
 - 2. *Procedural Guidelines.* My 2011 article recommended that agencies adopt procedures that (i) require agencies to consider as a threshold matter whether publishing adverse publicity is appropriate, particularly for preliminary matters, (ii) identify who

³⁰ See *supra* note 23.

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

³² I discuss these recommendations in detail in the 2011 article. See Cortez, *supra* note 20, at 1429-39.

within the agency is authorized to issue adverse publicity, including any necessary preclearance procedures, (iii) discuss when it is appropriate to notify identified parties in advance, including any opportunities to comment before publication, and (iv) allow identified parties to request timely corrections and retractions, in addition to other post-publication procedures as necessary. The 2011 article also urged consider adopting reasonable exemptions for emergencies and the like, tailored to the agency's individual needs and statutory authorities. I would like feedback on whether an agency's grant of relief or refusal to grant relief would be "final" agency action subject to judicial review under the APA, and whether it would be preferable for courts to review agency remedies or the underlying publicity itself.

3. *Public Availability.* I plan to recommend that agencies make their internal policies public, but would like feedback from agencies on the potential downsides to publication.

B. *Legislative Reforms.* The academic literature concludes that neither federal statutes nor judicial review provide remedies for private parties injured by adverse agency publicity.³³ Professor Gellhorn recommended that Congress specify which agencies could issue adverse publicity, under which circumstances, and via which procedures.³⁴ Although Conference Recommendation 73-1 asked agencies to "take reasonable precautions" to ensure that adverse publicity "fulfills an authorized purpose,"³⁵ it stopped short of Professor Gellhorn's recommendations. But because Professor Gellhorn's recommendations would require Congress to legislate agency-by-agency, with a fair bit of specificity, I proposed a simpler statutory reform—amend the APA to clarify that agencies do have discretion to issue publicity and notify the public, but require agencies to adopt written procedures and subject agency discretion to judicial review for an abuse of discretion. My 2011 article also urged Congress to consider enhancing agencies' statutory enforcement powers (and resources) if these new constraints on adverse publicity unnecessarily hamstring agencies.

C. *Judicial Review Reforms.* My 2011 article reviewed 26 federal court opinions in which a private party challenged a federal agency's use of adverse publicity. These cases confirm the 1973 warning by ACUS that such publicity "is almost never subject to effective judicial review."³⁶ Courts routinely hold that agency publicity is not reviewable because it is

³³ See, e.g., Noah, *supra* note 8, at 889-91; James T. O'Reilly, *The 411 on 515: How OIRA's Expanded Information Roles in 2002 Will Impact Rulemaking and Agency Publicity Actions*, 54 ADMIN. L. REV. 835, 838 (2002); O'Reilly, *Libels on Government Web Sites*, *supra* note 12, at 511-12.

³⁴ Gellhorn, *supra* note 4, at 1435-39.

³⁵ 38 Fed. Reg. at 16,839.

³⁶ Recommendation 73-1, *supra* note 2.

not “agency action” or is not “final,” or both, under the APA.³⁷ A notable recent decision is *Trudeau v. FTC*, 456 F.3d 178 (D.C. Cir. 2006), in which an infomercial producer challenged a press release by the FTC describing its settlement with Trudeau for charges of false and misleading advertising. The D.C. Circuit held that Trudeau did not have a valid cause of action under the APA, observing that the circuit had “never found a press release of the kind at issue here to constitute ‘final agency action’ under the APA.”³⁸ The D.C. Circuit did not categorically bar such an action, but found that the FTC’s press release was neither false nor misleading, concluding that “no reasonable person could misinterpret the press release in the ways that Trudeau suggests.”³⁹ My 2011 article criticizes some of these opinions (but not *Trudeau*), arguing that agency publicity intended as a sanction should qualify as “agency action” under APA §§ 551(13) and 551(10).⁴⁰ Although the D.C. Circuit has hinted that adverse agency publicity might be reviewable if a party could show that the agency intended it as a sanction, or that it was false, the court has never found publicity fit to review under these two criteria.⁴¹ My review also found that courts are exceedingly reluctant to categorize adverse publicity as “final,” as finality has been construed to mean the consummation of an agency’s decisionmaking process that determines a party’s legal rights or obligations, or otherwise imposes some legal requirement on a party.⁴² Again, although the D.C. Circuit has hinted that adverse publicity that is intended to sanction, or is demonstrably false, could be “final,” it has never encountered such a case.⁴³ Moreover, judicial review raises unresolved questions about exhaustion of administrative remedies, ripeness, the appropriate cause of action (including the suitability of the Federal Tort Claims Act), and sovereign immunity.⁴⁴ I argue, notwithstanding these questions, that courts should review agency publicity when the party can establish a prima facie case that the announcement was intended at least in part as a sanction. Of course, without congressional action to clarify these matters via statute, there remain significant doctrinal barriers to effective judicial review. I solicit the Committee’s and Conference’s thoughts on judicial review.

³⁷ 5 U.S.C. §§ 551(13), 704.

³⁸ 456 F.3d at 189.

³⁹ 456 F.3d at 192, 197.

⁴⁰ APA § 551(13) defines “agency action” to include “the whole or part of an agency rule, order, license, *sanction*, relief, or the equivalent or denial thereof” (emphasis added). APA § 551(10)(a), (g) defines “sanction” as a “prohibition, requirement, limitation, or other condition affecting the freedom of a person[, or] ... taking other compulsory or restrictive action.”

⁴¹ Cortez, *supra* note 20, at 1442.

⁴² *Id.* at 1443 (citing cases).

⁴³ *Id.* at 1444 (citing cases, including one possible exception, a 1976 case in Delaware District Court, *Kaiser Aluminum & Chem. Corp. v. CPSC*, 414 F. Supp. 1047, 1053-54 (D. Del. 1976)).

⁴⁴ *Id.* at 1445-51.

APPENDICES

- Appendix A: Nathan Cortez, *Adverse Publicity by Administrative Agencies in the Internet Era*, 2011 BYU L. REV. 1371 (2011).
- Appendix B. Administrative Conference of the United States, Conference Recommendation 73-1 (adopted June 8, 1973); 38 Fed. Reg. 16,389 (Jun. 27, 1973); 1 C.F.R. § 305.73-1
- Appendix C: Table of Federal Cases (1974-2014)
- Appendix D: Table of Survey of FDA Press Releases (2004-2010)
- Appendix E: [Reserved for FTC case study]
- Appendix F: [Reserved for CFPB case study]