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PROVIDING EFFECTIVE NOTICE OF SIGNIFICANT REGULATORY CHANGES

Joshua Galperin
Assistant Professor of Law
Elisabeth Haub School of Law
Pace University
jgalperin@law.pace.edu

E. Donald Elliott
Distinguished Adjunct Professor
Antonin Scalia Law School
George Mason University
edonaldelliott@gmail.com

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Providing Effective Notice of Significant Regulatory Changes

Final Report to the Administrative Conference of the United States

Joshua Ulan Galperin and E. Donald Elliott

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I. Executive Summary

The governed are entitled to fair notice of the rules that they are required to obey. That is a core value of our legal system,[1] as well as a basic dictate of international law.

This report addresses how federal agencies alert people and organizations to significant regulatory changes. We outline legal and policy reasons why agencies should periodically re-evaluate and improve their practices for giving notice in view of advances in technology and the successful practices of other agencies. We describe and analyze potentially promising strategies that some agencies use to give notice. We recognize that the audiences and missions of agencies vary greatly and therefore that no "one-size-fits-all" approach to notice will work. Consequently, we suggest that the appropriate ACUS committee consider modest procedural recommendations to improve agency planning and periodic review of their methods for providing notice of significant regulatory changes. In addition, we identify potentially promising techniques that other agencies have used for possible consideration and adoption where appropriate.

Our findings are based on a series of interviews with both large and small enterprises, public interest groups, agency representatives, and others. The people to whom we spoke were generally in agreement that tools for providing notice, such as the *Federal Register* or agency websites, are effective to some extent. However, interviewees were also in agreement that the methods most agencies use to provide notice to the public are imperfect and do not cover a sufficiently wide range of agency actions. Moreover, the level of satisfaction with prevailing methods for providing notice of regulatory changes varies significantly by the size, sophistication, and "connectedness" of the persons or entities that might have an interest in

[1] *E.g.,* F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).

receiving notice.[2] We conclude there are many opportunities to improve the administrative process by improving the techniques that agencies use to give notice to interested persons and entities.

A. Agencies Should Provide Notice of Significant Regulatory Changes

Although notice has not received much attention from policy makers in recent years,[3] strong policy and legal considerations counsel that agencies should provide the best notice practical under the circumstances of significant regulatory and policy changes. Effective notice[4] promotes voluntary compliance, thereby reducing the need for coercive enforcement, and enabling agencies to achieve their objectives more efficiently. Effective notice also helps to engender a sense of fairness and transparency that contributes to agency legitimacy. Effective notice can also promote involvement and thereby encourage greater participation by the community in the agency's work. Research shows that when agencies communicate with a community, seek input, and understand its perspectives, they generate more understanding and acceptance.[5]

No single comprehensive legal code specifies when and how agencies should provide notice of significant regulatory changes. Constitutional due process requirements as well as the

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[2] We define "effective" and other types of notice in Section II.B.iii.

[3] The last major Congressional action related to regulatory notice was the Freedom of Information Act of 1966. P.L. 89-487, 80 Stat. 250 (July 4, 1966). Several ACUS projects have also addressed the issue of regulatory notice, though notice has been a secondary issue, *e.g.*, Christopher J. Walker & Matthew Lee Wiener, Agency Appellate Systems (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.) at 46, *available at* https://www.acus.gov/research-projects/agency-appellate-systems, or the question of notice has been limited to specific types of agency action. *E.g.,* Cary Coglianese, Public Availability of Agency Guidance Documents (May 15, 2019) (report to the Admin. Conf. of the U.S.), *available at* https://www.acus.gov/sites/default/files/documents/Coglianese%20Guidance%20Report%20to%20ACUS%2005.15.19%20-%20FINAL.pdf; Todd Rubin, Public Availability of Inoperative Agency Guidance Documents (Nov. 22, 2021) (report to the Admin Conf. of the U.S.) *available at* https://www.acus.gov/sites/default/files/documents/Public%20Availability%20of%20Inoperative%20Agency%20Guidance%20Documents%20Final%20Report.pdf.

[4] We define "effective notice" and other terms in Section III.B.iii

[5] Webinar: Identifying Underserved Communities, Admin. Conf. of U.S., (Nov. 3, 2021) (presentation of Lee Raine).

Federal Register Act, the Freedom of Information Act, and the Administrative Procedure Act all require agencies to make certain agency actions "available" in various circumstances, which we summarize in Section III.B and Appendix I. In addition, as we discuss in Sections III.B.2, VI and Appendix I, some program-specific notice requirements also exist. However, agencies do not always comply with these legal requirements, and even when they do, complying with these minimal legal requirements does not always result in "effective notice" to "potentially interested persons and entities" as we define those terms in Section II.B. We discuss the reasons why agencies may benefit from providing effective notice even when it is not strictly required by law in Section III.A, "Why Notice?"

B. Scope of Our Study

Improving the ways that agencies provide notice of significant regulatory changes requires understanding how agencies currently try to give notice as well as how different parties receive information about regulatory changes. Interest in regulatory changes can be widespread, ranging from regulated parties that are directly affected to individuals and groups with more general interests in public policy. This report is limited to "significant regulatory changes," which includes binding agency actions such as legislative rules and adjudicatory decisions, but the term as we define it may also include some non-binding agency actions that have significant practical consequences. For example, policy statements or agency interpretations that are likely to change a party's behavior or affect parties not previously subject to similar regulation may qualify as "significant regulatory changes." However, providing effective notice can be difficult and expensive, and too much information can also be counterproductive and result in

"information overload," so efforts to provide notice must be balanced and tempered by practicality.[6]

Potentially interested persons and entities obtain notice of significant regulatory changes in different ways, and their satisfaction with current methods for providing notice varies significantly based on their size. Smaller and less well-resourced entities struggle with multiple aspects of obtaining notice. Although gaps exist, larger entities with greater resources report greater satisfaction. One representative of a larger business opined that inequity in accessing information via current notice practices may create a barrier to entry that may benefit larger entities and work to the disadvantage of smaller ones. In addition, the human capital of agency employees and their value in subsequent employments in the private sector may be enhanced if they know agency practices and policies that are not widely known outside the agency.

C. Key Findings

Table 1: Key Interview Findings

• Small, less-resourced entities and individuals struggle with obtaining notice of significant regulatory changes.
• Larger entities and individuals with more substantial resources generally feel that agencies are doing a "good job" in giving notice.
• The *Federal Register* is a very effective method to provide notice but many significant regulatory changes are not published in the *Federal Register.*
• Intermediary organizations such as trade associations and consultants play an important role in providing notice.
• "Horizontal regulatory changes," in which regulatory regimes expand to include new parties or new beneficiaries, pose special challenges.
• Personal connections and face-to-face meetings are also important channels for providing notice.
• "Dispersed" regulatory regimes, in which agencies address regulatory issues in multiple ways that are not published in the *Federal Register* pose a particular challenge because interested persons must monitor multiple channels of communication.

[6] *See* note **Error! Bookmark not defined.** and accompanying text for a discussion of the due process standard requiring that agencies provide the best notice practical under all the circumstances.

i. Smaller, Less-Resourced Entities Are Less Satisfied with Current Notice Mechanisms.

Smaller entities such as small businesses, unions, and community and environmental groups found it more difficult to track changing agency policies[7] *because they typically have less internal expertise and fewer resources to hire outside advisors.*[8] As described below, the *Federal Register* is a critical tool for agencies to provide notice. Large, better-resourced entities generally find the *Federal Register* effective. But the smaller entities typically report that they do not have the resources to track the publication each day or to pay lawyers and consultants to do so.[9]

Material not published in the *Federal Register* is even more difficult to access. Some agencies have implemented strategies for providing notice of significant regulatory changes not published in the *Federal Register*, including posting on agency websites, news releases and listservs, appearances at conferences, telephone hotlines, and publishing standardized lists of keywords and terms to facilitate electronic searches. These strategies also tend to work better for larger than for smaller enterprises because larger entities have the connections and resources to take advantage of them. Developments in information technology may help improve the ability of even under-resourced users to search, access, and understand agency documents. However,

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[7] *See* Section V.

[8] We refer to entities with lesser resources as "small" or "smaller" entities and better-resourced entities as "large" or "larger." Throughout this report we use italics to indicate key findings and bold typeface to highlight key recommendations.

[9] We acknowledge an important qualification when we discuss "small" entities and "small businesses." In many cases entities that fall under official designations of "small," such as certain "small businesses" under Small Business Administration definitions can have 1,500 employees and over $40 million in annual receipts or $600 million in assets. The smallest "small business" cutoff is around $1 million in annual assets and 100 employees. Small Bus. Admin., *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 19, 2019), https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf. These businesses are substantially larger than what we might think of as a "mom and pop" business or "micro businesses" with fewer than ten employees. Brian Headd, The Role of Microbusinesses in the Economy, SMALL BUS. ADMIN, https://www.sba.gov/sites/default/files/Microbusinesses_in_the_Economy.pdf. Of course, even a micro business could be extremely well resourced and a business with many employees does not necessarily have access to expert consultants and lawyers.

interviewees expressed concern that some of these techniques may exacerbate inequity by providing greater access to groups that are "plugged in" to the agency or have access to the necessary technological expertise.

ii. Larger, Well-Resourced Entities Are Generally Satisfied.

In general, we found a high degree of satisfaction by larger enterprises and trade associations regarding rulemakings as well as other regulatory notices that are published in the Federal Register.[10] Larger enterprises report that they have systems of intermediaries such as trade associations, outside law firms and consultancies, as well as internal staff that track and interpret developments that appear in the *Federal Register*. However, many potentially significant changes in agency policy and interpretations, such as guidance documents, enforcement policies, FAQs and adjudicatory decisions, may not be published in the *Federal Register*.[11] Word of developments not published in the *Federal Register* may sometimes be made available through other methods, such as posting on agency websites, frequently asked questions (FAQs), emails and listservs, webinars, telephone hotlines, and appearances by agency personnel at conferences and other events.

Many large enterprises also describe the importance of regular, face-to-face engagement with agency staff. Our interviewees reported the most satisfaction with regulatory notice when

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[10] *See* Section VI.

[11] Federal Register Act of 1935, 44 U.S.C. § 1505. In October 2019, then-President Trump issued an executive order requiring agencies to provide notice of guidance documents on their websites. Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents, Executive Order 13,891, 84 Fed. Reg. 55,235 (Oct. 9, 2019) ("Each agency . . . shall establish or maintain on its website a single, searchable, indexed database that contains or links to all guidance documents in effect . . . ."). Though the Executive Order made more agency documents available, there was some criticism that it overtaxed agency resources and did not practically improve notice because the quantity of information made available without filtering or synthesis was overwhelming. *E.g.,* Susan Webb Yackee, *Guidance on Regulatory Guidance: What the Government Needs to Know and Do to Engage the Public*, IMB Center for the Business of Government 18-19 (2021) *available at* https://www.businessofgovernment.org/sites/default/files/Guidance%20on%20Regulatory%20Guidance.pdf. President Biden rescinded the Trump Executive Order on the grounds that it unnecessarily restricted agency action. Revocation of Certain Executive Orders Concerning Federal Regulation, Executive Order 13,922, 86 Fed. Reg. 7,049 (Jan. 20, 2021). We discuss these issues in more detail *infra* at pp. 64-65.

they were in direct contact with agencies in advance of the regulatory changes. All these strategies are important for providing notice, but our research suggests many are disproportionately effective for larger entities, which tend to have more resources to devote to monitoring changes in government regulation.

Although large enterprises are generally satisfied with their ability to get notice of significant regulatory changes, and, indeed, may benefit competitively when information is less accessible to potential competitors, larger enterprises nevertheless had concerns. *There is widespread concern about notice of regulatory changes that are not published in the* Federal Register. The Office of the Federal Register permits agencies to publish notice of a wide range of agency activities. Thus, one of our proposed recommendations is that agencies expand the "notices" they publish in the *Federal Register* beyond those required by the Federal Register Act, Freedom of Information Act, and Administrative Procedure Act.[12] For example, some agencies publish short *notices of availability* in the *Federal Register* identifying by title and subject documents that they have made available on their websites and providing links to those documents.[13] This technique may be particularly useful for guidance documents that the agency chooses to make available to the public. See Section VI.A for a discussion of how agencies can develop general notice plans that address guidance documents.

Another area of dissatisfaction that even larger enterprises express is that most agencies leave it to each individual user to assemble various agency policy documents into a coherent whole, including determining which agency policies and guidance have been superseded.[14] Some

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[12] *See* Section VI.B.
[13] *E.g.*, Food and Drug Admin., Notice of Availability, Manufacture of Blood Components Using a Pathogen Reduction Device in Blood Establishments: Questions and Answers; Guidance for Industry, 84 Fed. Reg. 60,834 (Nov. 4, 2021); Env't Prot. Agency, Notice and Opportunity for Public Comment, Withdrawal of Two Answers to Frequent Questions About Property Management Companies and Toxic Substances Control Act Lead-Based Paint Renovation, Repair, and Painting Rule, 86 Fed. Reg. 60,812 (Nov. 4, 2021).
[14] *See, e.g.*, Rubin, *supra* note 3.

agencies, however, make manuals, digests, or other compilations of instructions available to collect their current policies and interpretations into a more comprehensible form. For example, the Environmental Protection Agency (EPA) makes a pesticide label review manual available online that "compiles existing interpretations of statutory and regulatory provisions and reiterates existing Agency policies."[15] The variety of agency practice in this area suggests that **assembling policies into coherent summaries, rather than imposing the cost of doing so on thousands of individual users, might be an effective strategy in some situations**. According to our interviewees, summaries would not only ease the burdens on large enterprises, but also help to provide the notice more equitably. Larger and wealthier organizations typically have attorneys who can summarize and explain agency policies but smaller and under-resourced organizations often do not. Agency summaries can, therefore, put individuals and smaller organizations on more level playing field. On the other hand, some agencies are concerned not only with the resource burden, but also that any errors or omissions in such compilations might restrict the agency's flexibility in enforcement litigation.[16]

D. Agencies Should Regularly Re-Evaluate Their Methods for Providing Notice.

Enhancing notice and understanding of agency policies and positions can be helpful to increase voluntary compliance with the agency's policies, and some agencies have made substantial investments in "getting the word out."[17] There is, however, surprisingly little research

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[15] Pesticide Registration Label Review Manuel, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/pesticide-registration/label-review-manual. *See also* Walker & Lee, *supra* note 3, at 44-45,

[16] For example, EPA once operated a hotline for questions about the Resource Conservation and Recovery Act but cancelled the program reportedly because of concerns that erroneous information provided on the hotline might have an adverse effect on enforcement litigation. A related concern is that some may feel that it may not be appropriate for agencies to interpret policy for private parties but should leave providing legal advice about government requirements to private lawyers and consultants

[17] *See* Section VI.

on which tools and strategies are most successful in providing effective notice.[18] **For this reason, we propose agencies periodically re-evaluate the effectiveness of their techniques, as well as those used by other agencies, to understand which are most effective and to pay particular attention to which are most effective for reaching smaller and other underserved entities and individuals**.

Our research did not identify any agencies that have comprehensive and publicly available policies for providing notice nor have we found systematic practices for evaluating the efficacy of various agency notice-giving strategies. Yet, at the ACUS interagency roundtables in August 2021 and March 2022, many agency officials agreed that comprehensive plans for giving notice and evaluating which strategies are effective could be beneficial. We propose that **agencies should develop and periodically review agency policies and plans for providing effective notice; to the extent feasible, agencies should also research which methods for providing notice are most effective at reaching underserved groups and individuals**.[19]

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[18] *E.g.*, Michael Sant'Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking 152 (Nov. 19, 2018) (report to the Admin. Conf. of the U.S.), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3615830. A preliminary review of political science and other non-legal literature, as well as discussions with two scholars of political science and administrative governance, has retuned no significant findings related to the best tools for notice of regulatory changes.

[19] *See* Section VI.

Table 2: Strategies for Agencies to Give Effective Notice of Significant Regulatory Changes

• Notice Plans and Periodic Re-evaluation.
• Expanding Coverage in the *Federal Register*
• Digests and User Manuals Summarizing Agency Policies and Interpretations
• Search Engines and Technological Strategies
• Agency Websites
• Agency Publications
• Face-to-Face Engagement, Phone Calls, and Public Meetings
• Directed Outreach and Providing Actual Notice to Intermediaries, Individuals, and Very Small Entities
• Making Guidance More Easily Accessible[20]

The next section previews our proposed recommendations to frame the issues that we discuss in the balance of the report.

E. Proposed Recommendations

1. Assessing Strategies for Providing Effective Notice

A. Agencies should assess their strategies for providing notice in a way that allows entities to access information of interest to them with only such difficulty and expense as is reasonable under the circumstances ("effective notice"). Such assessment should focus on persons and entities who actually desire notice or would desire notice if they knew about the regulatory change in question ("potentially interested persons or entities"). Likewise, assessments should apply to all "significant regulatory changes," including not only

[20] As Section III.B and Appendix I discuss, by law much guidance is supposed to be publicly available and/or published in the *Federal Register*. Agencies do not always follow statutory and regulatory requirements to this effect and guidance that is technically "available" is not always easily accessible.

changes that are legally binding but also those agency interpretations and statements of policy that might reasonably be expected to change behavior. Such changes may include:

a. Notices of rulemaking, including advance notices of potential rulemaking, notices of potential rulemaking, and final rules;
b. Agency guidance documents including enforcement policies and priorities;
c. Precedential adjudicatory decisions; and
d. Any other final agency action that might provide notice to regulated parties or beneficiaries of a change in regulatory provisions.

B. In assessing how to improve their notice strategies, agencies should consider which individuals or entities may be potentially interested parties and the particular needs of each category of potentially interested persons or entities. Such parties may include:

a. Entities subject to regulatory requirements, including
    1. Large, well-resourced entities;
    2. Small or under-resourced entities;
    3. Individuals; and
    4. Entities not previously regulated.
b. Regulatory beneficiaries, including
    1. Parties represented by legal entities;
    2. Parties assisted by advocacy groups; and
    3. Unrepresented and unassisted individuals.
c. Intermediary organizations, such as representative organizations, advocacy groups, citizens organizations, and nonprofit organizations.

2. Developing Strategies for Providing Effective Notice

A. In assessing how to improve their notice strategies, agencies should evaluate which specific notice practice(s) are appropriate for the potentially interested parties identified. Some practices to consider may include:

a. Press releases and public service announcements;
b. Listservs and email notices to those who have indicated an interest in an area;

c. Posting printed notices where potentially interested individuals are likely to see them, such as at docks for recreational boaters or in places of employment for notices to workers;
d. Manuals, digests and other summaries of agency policies and interpretations.
e. Brief notices of availability published in the *Federal Register* with links to documents on agency websites, including policy statements and interpretative rules, posted on agency websites or otherwise made available.
f. Using hashtags, keywords and other methods to facilitate agency material appearing on commercial search engines.
g. Public meetings and meeting with representatives of interested parties;
h. Outreach offices to underserved groups and interests.
i. Partnering with intermediary organizations.
j. Technological developments for making agency websites and notices in the *Federal Register* easier to find and navigate, including standardizing search terms, hashtags and indicating in agency publications and announcements what categories persons and entities are most likely to be potentially interested.

B. In assessing which notice practice(s) to employ, agencies should consider the effectiveness of those practices, particularly whether they:
    a. Are cost effective;
    b. Increase voluntary compliance and reduce the need for coercive enforcement;
    c. Reach underserved groups, including small and micro business, citizens and advocacy groups and other regulatory beneficiaries and those whose primary language is not English;
    d. Reduce transaction costs for regulated parties to assemble and interpret regulatory requirements for themselves;
    e. Increase participation in regulatory development;
    f. Increase satisfaction and the perceived legitimacy of the agency's regulation; and
    g. Have proven effective when used by other agencies to provide actual notice.

3. Assessment and Oversight

A. Agencies should develop *notice plans* for significant regulatory changes to document the strategies employed for providing effective notice. Notice plans should:

   h. Identify the regulatory change and what makes it significant;
   i. Identify the potentially interested parties;
   j. Set out the practices that the agency proposes to use to provide notice; and
   k. Identify metrics to measure the effectiveness of the notice practices.

B. To improve planning and coordination, agencies should consider designating a new or existing agency official or office as its *Chief Outreach Officer*, who shall:

   a. Be responsible for evaluating the effectiveness of the agency's *notice plan*;
   b. Keep abreast of technological developments;
   c. Evaluate practices of other agencies for providing notice for potential adoption; and
   d. Make recommendations for improving the agency's practices and procedures to better provide effective notice of significant regulatory changes to potentially interested parties.

C. Agencies should retrospectively review which strategies are most effective at notifying potentially interested parties. Agencies should:

   a. Review and revise their *notice plans* to reflect which are most effective in practice as well as which provide equitable access and do not favor certain groups over others;
   b. Obtain feedback from interested persons and entities regarding which methods for providing notice they considered most effective; and
   c. Participate in *interagency notice working groups*, or other collaborative forums, to share experience, best practices, and information regarding the effectiveness, cost-effectiveness and equity of various notice techniques and strategies.
      i. The Administrative Conference of the United States should support collaboration and information sharing about effective notice practice such as by periodically convene interagency meetings at which agencies can

share information about their innovations, successes, and failures in providing effective notice;

4. **Public Disclosure and Transparency**

   Agencies should make public all elements of their notice-giving strategies, including:

   a. Draft *notice plans*, prior to effectuation, with allowance for public comment;
   b. Final *notice plans*;
   c. Instructions for how potentially interested parties may opt-in to receive notices; and
   d. The results of retrospective reviews.

The next section describes the scope of the study and the key definitions. Section III explains the importance of notice as a matter of law and policy. Section IV describes our methods. Section V presents the findings of our research, Section VI offers strategies for giving notice. Section VII summarizes our conclusions. Section VIII reiterates our proposed recommendations with more detail.

II. Scope of the Study and Definitions

A. Scope

The goal of this project is to identify promising opportunities to improve notice of significant regulatory changes. To that end, we discuss to what extent prevailing methods for providing notice reach interested parties. We also consider methods in addition to the *Federal Register* for providing notice, including websites, press releases, and intermediaries (e.g., trade associations, trade press, lawyers, and regulatory consultants). We ask: Are some practices more equitable than others, or do they only reach certain types of parties?

Other ACUS projects have considered important aspects of notice such as plain language drafting,[21] agency guidance,[22] making inoperative guidance available,[23] and use of social media.[24] Each of these prior projects has informed our work but covers different aspects of notice than we address here. Our project is focused on the *communication tools* that agencies use to provide information to potentially interested persons and entities rather than on the *contents* of the notice. We recognize, of course, that to reach groups more remote from government, who struggle most with obtaining notice, it is also essential to provide notice in a way that is accessible to diverse recipients. These groups include, among others, those for whom English is not a primary language and those with disabilities that make access to computers or written text difficult or impossible.

Our interviews indicate that no "one size fits all" approach is likely to achieve agency objectives, which will vary from agency to agency depending upon the purposes and audiences receiving notice. Likewise, because the centerpiece of our inquiry is regulatory *changes* rather than regulatory *development*, we mention but do not discuss in detail agency strategies for engaging interested persons and entities in rule development. As described in Section V, a number of our interview subjects noted the importance of "front end" engagement for "back end" notice of changes. We therefore only briefly consider early engagement, as other ACUS projects address public participation in regulatory development.[25]

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[21] Blake Emerson & Cheryl Blake, Plain Language Regulatory Drafting (Dec. 8, 2017) (Report to Admin. Conf. of the U.S.).
[22] Coglianese, *supra* note 3.
[23] Admin. Conf. of the U.S., Recommendation 2021-7, Public Availability of Inoperative Agency Guidance Documents (Dec. 16, 2021) *available at* https://www.acus.gov/recommendation/public-availability-inoperative-agency-guidance-documents
[24] Michael Herz, Using Social Media in Rulemaking: Possibilities and Barriers (Nov. 21, 2013) (Report to the Admin. Conf. of the U.S.), *available at* https://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf.
[25] Christopher Carrigan & Stuart Shapiro, Developing Regulatory Alternatives through Early Input (Jun. 4, 2021) (report to the Admin Conf. of the U.S.); Sant'Ambrogio & Glen Staszewski, *supra* note 18.

B. Definitions

i. Defining "Significant Regulatory Changes"

A variety of agency actions may affect the rights and duties of private entities. Not every agency action requires public notice. A regulatory change is significant where the consequences are substantial enough that agencies would reasonably anticipate entities to have a substantial interest in learning about the change. For instance, on June 21, 2021, the Acting Assistant Secretary of Labor for Occupational Safety and Health, James Frederick, gave a speech to the On-Site Consultation Training Conference.[26] In his remarks, Frederick discussed the 50th Anniversary of the Occupational Safety and Health Administration (OSHA), how COVID-19 has affected OSHA's work, and the Biden Administration's priorities in that area.[27] The speech may be useful to provide context, and OSHA has made it publicly available. However, the speech does not make or announce any regulatory changes and therefore would not fall within the ambit of this study.

The position or title of the official issuing a document is also important to determining whether an agency action is a significant regulatory change. For example, a letter from OSHA to a lab safety officer illustrates this point. In this letter, Patricia Clark, then the Director of Compliance Programs, wrote that wearing gloves while handling unopened specimen containers was "appropriate . . . although not necessarily required."[28] This was not formally a regulatory action, and it does not purport to bind regulated parties, but it does give a strong indication of

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[26] James Frederick, Acting Assistant Sec. of Labor for Occupational Safety and Health, Speech to the On-Site Consultation Training Conf., OCCUPATIONAL HEALTH & SAFETY ADMIN. (Jun. 21, 2021), *available at* https://www.osha.gov/news/speeches/06212021.
[27] *Id*.
[28] Patricia K. Clark, *Opinion Letter on Guidance on Wearing Gloves*, OCCUPATIONAL SAFETY & HEALTH ADMIN., (Apr. 15, 1992), https://www.osha.gov/laws-regs/standardinterpretations/1992-04-15-0.

what precautions the agency considers "appropriate." By contrast, if OSHA had written that gloving is "necessary," the letter might be read as a binding mandate.

Nonetheless, we consider significant regulatory changes to include such statements by high-level officials with policymaking or enforcement authority when the statements articulate an agency position that is likely to have practical consequences. It is not necessary that the statement establish a new legally binding policy. Lab safety officers are likely to begin mandating that technicians wear gloves in order to avoid the risk of non-compliance with OSHA requirements such as the "general duty" clause for employers to provide a safe workplace.

Existing policy considers certain types of regulatory changes "significant" or "major" if they are projected to have an aggregate annual effect on the economy of $100 million or more.[29] Regulatory changes in these categories are also significant for our purpose. However, in addition, regulatory changes can be significant for narrower groups of potentially interested entities. Mandating more widespread gloving in certain OSHA-regulated labs is unlikely to have a significant economic effect and may not even have a significant financial impact for regulated labs. It may nevertheless be practically significant for the regulated parties and the workers who benefit from the enhanced protection. The overarching consideration is whether the consequences of a regulatory change are substantial enough that regulated parties or other interested parties would reasonably be anticipated to have a substantial interest in learning about the change. This involves the following factors:

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[29]A rule is "significant" for the purposes of OIRA review if it will impose annual costs of $100 million, create certain inconsistencies, adversely affect the economy, jobs, competition, or the environment, impact the federal budget in certain ways, or raise novel legal issues. E.O. 12,866 § 3(f). A rule is a "major rule" for the purposes of review under the Congressional Review Act if it will have "an annual effect on the economy" of $100 million or more, as well as several other circumstances. 5 U.S.C. § 804(2). See generally a recent CRS report that includes a variety of definitions. CONG RSCH. SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* (2019) https://fas.org/sgp/crs/misc/R43056.pdf.

- The potential consequences of the change: for example, would regulated parties be subject to enforcement or other sanctions if they failed to change their behavior in response to the regulatory change; would they be protected in a regulatory safe harbor; would regulatory beneficiaries have added or reduced protections; and
- Does the change affect parties not previously subject to regulation by the agency and therefore less likely to monitor its policies and interpretations?

As an example of this second category, which we call "horizontal regulatory expansion," in 2008 EPA promulgated detailed rules regulating repair and renovation of properties built before 1978 that may contain lead paint.[30] This brought within the ambit of EPA regulation thousands of small contractors and landlords that the EPA did not previously regulate and thus would not be expected to monitor EPA announcements in the *Federal Register* on a regular basis.

The Deferred Action for Parents of Childhood Arrivals (DAPA) and Deferred Action for Childhood Arrivals (DACA) programs provide another example of regulatory changes that have significant effects on interested people and entities even if not for the entire economy. The Department of Homeland Security describes DACA as an announcement "that certain people who came to the United States as children and meet several guidelines may request consideration of deferred action." Deferred action is a use of prosecutorial discretion to defer removal action against an individual for a certain period."[31] DAPA and DACA beneficiaries are those classes of

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[30] *See Lead Renovation, Repair and Painting Program Rules,* ENV'T PROT. ADMIN., https://www.epa.gov/lead/lead-renovation-repair-and-painting-program-rules.

[31] *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP AND IMMIGR. SERV., https://www.uscis.gov/DACA. Despite the government's description of the programs as merely a shift in enforcement priorities, the Fifth Circuit held that DAPA was a violation of the Administrative Procedure Act because it was a substantive rule that changed the rights of many individuals and had financial impacts on, at least, the state of Texas but did not go through the notice and comment process. Texas v. United States, 809 F.3d 134, 176-177, *aff'd by an equally divided court*, United States v. Texas, 136 S.Ct. 2271 (2016). The Trump

immigrants who are now less likely to face prosecution and deportation. The state of Texas and property owners near the border are also interested persons or entities who claim injuries from relaxed immigration enforcement.[32] This example shows that policies can create benefits and burdens that are significant for segments of the population if not the entire nation or entire industries.

These two criteria (potential consequences for interested persons and entities regardless of economy-wide consequences, and horizontal regulatory expansion into new industries) help define regulatory changes that are likely to be significant to some potentially interested persons and entities.

A further example is illustrated in *Community Nutrition Institute v. Young*, where the D.C. Circuit dealt with Food and Drug Administration (FDA) guidance on "action levels" for potentially contaminated food.[33] The FDA established these action levels to determine whether to seize specific lots of food that might be contaminated. The FDA did not intend to use the action-level thresholds to bind food manufacturers but, instead, to serve as a guide for internal decision-making. Should the FDA seize food and begin an enforcement proceeding, the FDA recognized that it would have to establish contamination according to the Food, Drug, and Cosmetic Act and legislative rule standards, and that the "action levels" would not have any precedential value in the enforcement proceeding or Article III courts.[34] In this case, despite the non-binding nature of the action levels, they could have a significant effect on regulated entities by causing them to change their manufacturing processes to avoid triggering the new action

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Administration attempted to rescind DACA, which the Supreme Court held, 5-4, was also a violation of the Administrative Procedure Act. Dept. Homeland Sec. v. Regents of Univ. of Cal., 140 S. Ct. 1891 (2020).

[32] *Texas v. United States*, 809 F.3d at 153.

[33] 818 F.2d 943, 948 (D.C. Cir. 1987)

[34] *Id*. at 948.

levels. If action level changes would cause some manufacturers to change their processes, they are also of interest to the public-at-large. Therefore, this change in policy would fall within our definition of "significant regulatory changes."

The *Community Nutrition* example also raises the issue of "who gets notice?" In that case, the regulated industry was certainly interested in FDA's action levels, though the case stemmed from a challenge by a citizens' group that was concerned the action levels were insufficiently protective.[35] While regulated parties are obviously interested in changes in the rules that regulate their behavior, others may also be interested in receiving notice of regulatory changes. This includes individuals and organizations that benefit from regulation, such as environmental organizations, consumers, and non-commercial, recreational entities.

It does little good to evaluate notice strategies based simply on how many people they might alert. Rather, what is important is whether "potentially interested persons and entities" receive effective notice.

ii. Defining "Potentially Interested Persons and Entities"

Not every person or entity will necessarily want notice of every government action. Broad and frequent notice to everyone would be impossible as well as waste the time of both agencies and recipients. In addition, too much notice of changes that are not interesting to various entities can result in information overload, thereby becoming "spam." We focus our inquiry on "potentially interested persons and entities" who either actually desire notice or would desire notice if they knew about the regulatory change in question. This includes entities subject to regulations and entities intended to benefit from regulation. It also includes non-commercial

[35] *Id*. at 945.

entities with recreational interests, such as hobbyists drone operators, motorcycle clubs, or hunters and anglers.

iii. Defining "Notice"

Notice is the process by which agencies make the public aware of changes in agency rules, policies, practices and interpretations. Well-known forms of notice include publication in the *Federal Register*, press releases, press conferences, or publication on an agency's website. But notice can also involve more precise and individualized communication. In some cases, agencies will contact entities directly to alert them to certain agency actions, such as a potential enforcement proceeding if a regulated entity does not change its behavior. Thus, while the basic concept of "notice" is straightforward, we distinguish between different kinds of notice.

When we use the term *"effective notice"* we mean that interested entities can access information of interest to them with only such difficulty and expense as is reasonable under the circumstances.[36] Effective notice is about assuring that potentially interested persons and entities can access the information they want and need. In some cases, interested persons and entities are not aware that they need information because they are unaware of regulatory changes that may affect them. For this reason, effective notice sometimes requires agencies to attempt to notify potentially interested entities pro-actively even if those entities make no independent attempts to seek out notice. For instance, a person or entity that may be affected may not review an agency website or the *Federal Register* if the entity has no reason to expect a regulatory change from

[36] For example, potentially interested entities may have difficulty accessing information because of language barriers. Agencies should provide notice in languages potentially interested parties can understand, when doing so is reasonable under all the circumstances. For example, if regulations change immigration policies that affect a large number of people who only speak Spanish, agencies should consider providing notice in Spanish as well as English. *See generally* John C. Sumberg, El Derecho de Avisio: Due Process and Bilingual Notice, 83 YALE L.J. 385 (1973).

that agency may affect them. In these cases, effective notice may require a different strategy for providing notice.

"*Direct notice"* means that the agency communicates information to an interested person or entity personally, rather than posting or publishing it. For example, if an agency sends an email or letter, or makes a phone call and tells someone about changes in agency requirements or policies, this is what we mean by "direct notice."

"Actual notice" means that an interested person or entity has in fact received notice of agency action. An interested person or entity may have actual notice because that entity has direct notice based on a communication from an agency or because the interested person or entity has seen an agency publication on an agency website.

"Constructive notice" or "*legal notice*" refers to the legal fiction that an interested person or entity has notice even when that entity does not necessarily have actual notice. For instance, when an agency publishes notice in the *Federal Register* the law may treat every interested person or entity as having received notice even if that person or entity never actually reads the *Federal Register* entry.[37]

"*Initial notice"* means when an agency provides notice to persons or entities that have not previously signed up or otherwise indicated a desire to receive notice.

III. Why Notice?

Providing notice is both good policy and, in many circumstances, a legal requirement. This section briefly describes the policy rationales that should cause agencies to re-examine their

[37] 44 U.S.C. § 1507.

notice practices and highlights several important legal considerations. In Appendix I we survey in more detail key legal requirements for providing notice of significant regulatory changes.

A. Policy Reasons for Notice

i. Compliance

Effective notice can facilitate compliance. Simply put, only when regulated entities are aware of agency rules can those parties make intentional efforts to comply.[38] It seems probable then that agencies with the better notice practices are able to generate more voluntary compliance and better accomplish their mission, but there is little systematic research to back up these surmises.[39]

There is, however, anecdotal evidence. The Internal Revenue Service (IRS) is an example of how notice practices can facilitate voluntary compliance. Among the people we interviewed, several pointed to the IRS as a model of excellent notice practices. For example, both a former government lawyer with deep knowledge of IRS and a representative of a large trade association singled out the IRS for providing effective notice of significant regulatory changes. The trade association representative described taxes as the single biggest regulatory burden for most small businesses and—although not discounting the burden—he volunteered that IRS has dedicated significant thought to providing notice of regulatory changes in order to promote voluntary compliance.

As we discuss more in Section VI, the IRS' techniques are diverse, well-staffed, and integrated into the Service's mission. For example, the IRS publishes its own, tailored, periodical

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[38] *E.g.*, Edward F. Novak and Charles W. Steese, *Survey of Federal and State Environmental Crime Legislation*, 34 ARIZ. L. REV. 571, 589 (1992); Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 928 (2008) ("[A]gency activity cannot be hidden if agencies expect anyone to comply with their rules.")

[39] Westlaw searches in the secondary sources database, and Google Scholar searches for "notice," and either "compliance" or "regulatory compliance" in the same paragraph returned no relevant results.

of regulatory changes called the *Internal Revenue Bulletin*. The *Bulletin* includes agency documents along with pertinent external materials such as executive orders, legislation, and court decisions. The *Bulletin* is not a synthesis of all existing requirements and policies, but it is a clearinghouse for a wide array of pertinent material. The IRS also has an extensive outreach program that focuses on getting notice to specific intermediaries like tax preparers and tax attorneys. It relies on working groups to generate both outreach and input. Overarching all of this is staff and budget dedicated specifically to outreach and a culture that integrates outreach into almost every aspect of the Service's work.

It is understandable that IRS has given much thought to how it provides notice of significant regulatory changes. First, changes to the tax code are common.[40] Second, the IRS regulates over 250 million taxpayers.[41] In order to carry out its statutory responsibilities, the IRS needs each of those 250 million taxpayers to be aware of changing requirements and able to comply. For this reason, the IRS describes its mission, in part, as "[p]rovid[ing] America's taxpayers top quality service by helping them understand and meet their tax responsibilities . . . "[42] With a staff dedicated specifically to outreach and notice, and regular, formalized, notice practices, the IRS' attention to notice of regulatory changes has paid off. It may "be one of the world's most efficient tax administrators"[43] and certainly several our interview subjects praised the IRS' methods, which we discuss further in sections V and VI of this report.

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[40] *E.g.*, Jan M. Rosen, *Tips for Coping with Changes in the Tax Code*, N.Y. TIMES (Feb. 23, 2018) https://www.nytimes.com/2018/02/23/business/tips-for-coping-with-the-changes-in-the-tax-code.html
[41] *The Agency, its Mission and Statutory Authority,* INTERNAL REVENUE SERV., https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority.
[42] *Id*.
[43] *Id*.

Debates over the role of agency guidance further emphasizes the point that effective notice can advance an agency's mission by facilitating voluntary compliance. Guidance documents, particularly policy statements, are essentially a form of advance advice about how an agency plans to act as well as directions to agency staff about agency policy.[44] Agencies release guidance documents in part to coordinate actions internally, but also sometimes to alert the public to how the agency intends to carry out its responsibilities. Agencies use guidance documents in different ways, but guidance documents are typically not legally binding. They may, however, serve as a form of notice of agency practices, thereby creating common expectations and allowing the public to adapt.[45] For example, the National Highway Traffic Safety Administration Authorization Act of 1991 provides a process for car manufacturers to begin voluntary recalls when a car is manufactured with a defect or is otherwise not in compliance with various standards.[46] If a defect were tied to specific climactic factors, such as extreme heat or rain, the manufacturers would only issue recalls in the relevant geographic areas.[47] NHTSA eventually released guidance approving, but circumscribing, the use of these regional recalls.[48] Despite the avowedly non-binding nature of the NHTSA guidance, the agency expected that automakers would voluntarily comply "in order to avoid any risk of the agency initiating" an enforcement proceeding.[49] This example also illustrates that when an agency

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[44] *E.g.*, E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1494 (1992).
[45] *Id*. at 1491, 1494. *See also* Nicholas R. Parrillo, Federal Agency Guidance: An Institutional Perspective 28 (Oct. 12, 2017) (Report to the Admin. Conf. of the U.S.), *available at* https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf; Blake Emerson and Ronald M. Levin, Agency Guidance Through Interpretive Rules: Research and Analysis 8 (May 28, 2019), *available at* https://www.acus.gov/sites/default/files/documents/ACUS%20IR%20final%20report.5.28.2019.pdf.
[46] 49 U.S.C § 30,101 et. seq.
[47] Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 799 (D.C. Cir. 2006).
[48] *Id.* at 802-4.
[49] *Id.* at 811.

provides clear notice of its policies and expectations, voluntary compliance is a likely consequence for at least some parties.

ii. Effective Notice Promotes Fairness and Legitimacy

Regulatory compliance, however, is not the only reason for agencies to provide effective notice of significant regulatory changes. Effective notice can improve the perceived fairness of agency actions, the preparedness among regulated parties, transparency for all interested entities, and can increase the overall sense of legitimacy.

Although he was writing specifically about the notice and comment process, Professor Parrillo describes three ways that effective notice can lead to greater legitimacy.[50] First, effective notice alerts interested persons and entities that agencies are attentive to their needs. Second, effective notice can rebuff charges that an agency is biased by demonstrating that an agency is seeking to alert all interested persons and entities of regulatory changes and is not providing notice only to an inner circle or only to those entities with the resources to hire consultants, lawyers, or join trade associations.[51] Third, effective notice will increase the number and diversity of potentially interested persons and entities engaged in agency processes.[52] Even if these considerations apply with stronger force to pre-decisional processes in which an agency is developing policy rather than providing notice of changes to policy, they can nevertheless inform notice practice because each contributes to the public trust and democratic engagement in the administrative process.

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[50] Parrillo, *supra* note 45, at 20 (Oct. 12, 2017).
[51] *Id.*
[52] *Id*.

B. Legal Requirements for Notice

In addition to these policy considerations, a number of legal requirements apply to giving notice. The Due Process clause, Administrative Procedure Act, Freedom of Information Act, e-Government Act of 1996, Federal Register Act, Small Business Regulatory Enforcement Fairness Act Regulatory Flexibility Act, and Federal Records Act all impose requirements to provide notice of significant regulatory changes in certain circumstances, which we describe in more detail in this part and Appendix I. In addition, Congress has also legislated some program-specific notice requirements.[53] However, overarching these specific legal requirements is the larger constitutional principle that government should provide the most effective notice practical under the circumstances and agencies are running significant legal risks if they do not do so.

i. Constitutional Due Process

"A fundamental principle in our legal system," according to Supreme Court precedent, "is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[54] By its terms, the Due Process Clause of the Fifth Amendment requires due process of law, including notice, before anyone is "deprived of life, liberty or property."[55] Most agency enforcement proceedings may result in deprivations of liberty or property, and accordingly, the D.C. Circuit has held that agency requirements cannot be enforced in the absence of "fair notice."[56] Thus, the Due Process Clause prohibits agencies from enforcing any legally binding requirements against a party if that party did not have "fair notice,"[57] which

[53] *See*, *e.g.*, the discussion of the statutory requirements that apply to FDA guidance in Section V and for a discussion of requirements that apply to IRS, see Appendix I.
[54] F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).
[55] U.S. CONST., Amendment V
[56] Gen. Elec. Co. v. Env't Prot. Admin., 53 F.3d 1324, 1328 (D.C. Cir. 1995).
[57] *Id.*

means either actual notice or an attempt to provide notice using the means most likely to be effective that is practical under the circumstances.[58]

As a statutory matter, publication in the *Federal Register* establishes a presumption of notice of a regulatory change.[59] As a constitutional matter, however, publication alone may be insufficient. In *Mullane v. Central Hanover Bank & Trust*, the Supreme Court held that constructive notice via publication was insufficient in some circumstances because "[a]n elementary and fundamental requirement of due process…is notice reasonably calculated [to provide actual notice], under all the circumstances . . . ." [60]

Mullane stands for the proposition that compliance with statutory and regulatory requirements that direct how agencies give notice may not always be sufficient to comply with due process requirements. In that case, the Court held 7-1 that publication in a general circulation newspaper, although permitted by statute, was not sufficient to comply with the due process requirements for notifying potentially interested parties about a legal proceeding that might affect their rights because more effective alternatives such as notice by mail were practical under the circumstances:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information . . . . But if, with due regard for the practicalities and peculiarities of the case, these conditions are reasonably met, the constitutional requirements are satisfied.[61]

Mullane did not address changes in administrative regulation directly, but at least one court has applied its requirement that notice be "reasonably calculated [to provide actual notice]

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[58] *Id*. at 1329 citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).
[59] 44 U.S.C. § 1507
[60] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).
[61] 339 U.S. at 314-15 (emphasis supplied; citations omitted).

under all the circumstances" in a regulatory context.[62] In *Higashi v. United States*, the Federal Circuit applied the *Mullane* test but found the government satisfied it when repealing an executive order. The court relied not only on publication in the *Federal Register* but also "media dissemination of the news" that was "reasonably likely to reach the many individuals who should have been informed."[63] However, because the *Mullane* inquiry depends upon what is practical under all the circumstances, agencies run a serious risk that courts may hold agency procedures for providing notice unconstitutional as newer technologies become practical to provide notice through devices such as emails, social media and websites that did not exist in 1936 when the *Federal Register* was created.[64]

Due process principles also apply when significant regulatory changes occur through policy statements, interpretative rules, and other agency actions that are not published in the *Federal Register*. For these types of policy changes that are typically made without notice and comment or publication, due process doctrine, as interpreted by the lower courts, may require agencies to have given effective notice before the agency may enforce the requirements because a party "cannot be found out of compliance [if the agency] failed to give fair notice of what is required."[65] The Supreme Court has not ruled directly on this issue,[66] but Supreme Court decisions applying the Due Process clause outside of the administrative context require effective notice to the extent that it is reasonably practical to provide it and therefore in our judgment

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[62] Higashi v. United States, 225 F.3d 1343, 1348-1349 (Fed. Cir. 2000) (holding that *Mullane* applies in the case of recission of an executive order but finding, as a factual matter, that the agency provided adequate notice under the *Mullane* standard.)
[63] *Id.*
[64] Technological changes are not the only circumstances that may affect what due process requires. For example, a law journal note argues that if an agency knows that interested parties are not English-speaking but provides legal notices only in English, due process as interpreted by *Mullane* may require translation into their native language. John C. Sumberg, El Derecho de Avisio: Due Process and Bilingual Notice, 83 YALE L.J. 385 (1973).
[65] United States v. Chrysler Corp., 158 F.3d 1350, 1354 (D.C. Cir. 1998).
[66] *But see*, Karem v. Trump, 960 F.3d 656, 664-665 (D.C. Cir. 2020) (summarizing and quoting several instances in which the Supreme Court has touched on the issue).

agencies are running a significant risk if they do not provide the most effective notice practical under the circumstances.[67]

ii. Statutes

The Freedom of Information Act (FOIA) requires that agencies publish legislative rules, certain guidance documents, and other significant regulatory materials in the *Federal Register* and on agency websites.[68] Case law on this subject is limited.[69] Some courts have interpreted FOIA as providing significant exceptions to the publication requirement, but the decisions have come from lower courts and there is a risk that if presented with the question, the Supreme Court could demand stricter adherence to the publication requirements.[70] This is important because the language of the statute mandates that agencies "publish in the Federal Register . . . statements of general policy or interpretations of general applicability."[71] However, this apparently broad requirement is more honored in the breach than in the observance. In the words of Kenneth Culp Davis, "many, many federal agencies have failed to comply with [FOIA's publication requirements] yet the requirements are clear."[72]

Other statutes also apply to agency procedures for giving notice. The E-Government Act of 2002 and the Federal Records Act of 1950 each direct agencies to establish processes for

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[67] *Mullane*, 339 U.S. 306.
[68] 5 U.S.C § 552(a). FOIA requires that agencies publish rules and guidance documents of "general applicability" in the *Federal Register*. 5 U.S.C. § 552(a)(1). The Act then directs that agencies shall post documents on their websites if the documents are not published in the *Federal Register*. 5 U.S.C. § 552(a)(2). It is not clear whether the second provision for website publication allows agencies to choose between forms of publication or is meant as a catchall for documents that the first provision does not require agencies to publish in the *Federal Register*. *See, e.g.*, Anderson v. Butz, 550 F.2d 459 (9th Cir. 1977) (holding that agency staff may avoid *Federal Register* publication if they publish documents in a reading room.) Note that this case interpreted the provision prior to the 1996 amendments that added "electronic format," i.e., "website" publication, to FIOA. *But see* Appalachian Power v. Train, 566 F.2d 451 (4th Cir. 1977) ("[R]easonable availability is not a substitute for publication; it is one of two conjunctive requirements . . . .")
[69] We are not aware of any Supreme Court decision on this point.
[70] As the prior part explains, there is also a possibility that under the right circumstances the Supreme Court would find that even strict adherence to the publication requirement would fall short of due process demands.
[71] 5 U.S.C. § 552(a)(1)(D).
[72] KENNETH C. DAVIS, ADMINISTRATIVE LAW OF THE 1970S 75 (1976).

making documents available, though both largely eschew requirements for affirmative outreach and publication.[73] The Regulatory Flexibility Act directs agencies to conduct and publish, in certain circumstances, a "regulatory flexibility analysis."[74] The analysis does summarize the content of a regulation, though the purpose is to guide agency decisionmaking rather than to provide public notice. The Small Business Regulatory Enforcement Fairness Act (SBREFA) requires that agencies develop "small entity compliance guides."[75] The guides are meant to summarize regulatory requirements in plain language for small businesses.[76]

We analyze these legal requirements in more detail in Appendix I.[77] In sum, a number of broad constitutional and statutory provisions would appear to require agencies to provide notice of agency policies and interpretations and agencies may be running significant legal risks if they do not comply.

IV. Methods

Our methods for this research involved three parts. First, we limited the scope of our project and defined key terms. Next, we gathered data on two parallel tracks. With the help of law-student research assistants, we conducted desktop research to search for any literature, including ACUS reports, that addresses the process of agencies providing notice of regulatory changes. This desktop research likewise surveyed caselaw, statutes, and regulations with two distinct purposes. First, we wanted to understand the current legal requirements for notice.

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[73] 44 U.S.C. § 3501 note; 44 U.S.C. § 3101; 44 U.S.C. § 3102(2).
[74] 5 U.S.C. § 603(a).
[75] 5 U.S.C. § 601 note. We discuss these guides further in Section VI as well as Appendix I.
[76] 5 U.S.C. § 601 note.
[77] In fact, the list of trans-substantive statutes with provisions related to notice goes on beyond this sampling. We focus on these statutes but recognize that the Small Business Regulatory Enforcement Fairness Act, Regulatory Flexibility Act, Unfunded Mandates Reform Act, Unified Regulatory Agenda, and the Paperwork Reduction Act all have some impact how agencies provide notice of regulatory changes. This further emphasizes the point that notice deserves careful attention lest agencies risk running afoul of legal requirements.

Second, we wanted to find useful examples of notice practices that go beyond legal requirements. In parallel with this desktop research, we conducted interviews or workshops with 60 individuals. We identified interviewees in several ways. We conducted internet searches for contacts that could supplement the perspectives that were already represented in our personal networks. We made connections through ACUS and our own contacts. We also asked each interviewee if they would recommend that we speak to anyone else and then followed-up on those recommendations. We spoke with:

- Current and former agency personnel, including personnel from single-industry focused agencies, and agencies with more general focus.[78] This includes 19 agencies of which six are "independent" agencies;[79]
- Four trade associations, one generalist association representing businesses of all sizes but focused on larger businesses, two generalist associations focused on small businesses, and one industry-specific trade association representing mostly small businesses;[80]
- One micro-business owner;
- One labor union lawyer who works with large and small unions;
- Eight public-interest NGOs, including one large-national NGO, one medium-regional NGO, two small, national NGOs, five community-oriented NGOs, an international humanitarian organization, a lawyer who represents both small community groups and

[78] By single-industry agencies we mean, for example, the Federal Aviation Administration which deals with the aerospace industry, which even broadly defined is narrow compared to, for example, the Environmental Protection Agency or the Occupational Safety and Health Administration.
[79] For the purposes of our study we have not considered whether independent agencies and executive departments should take different approaches to giving notice of significant regulatory changes.
[80] None of the associations, including those representing small businesses, are primarily focused on "micro-businesses" or "mom and pop" businesses.

small and medium environmental justice organizations, and another lawyer who represents environmental justice organizations;

- Two state government officials from state environmental agencies;
- Two people who are members of non-commercial, regulated organizations. One who is a member of drone clubs and another who is part of canine rescue organizations;
- Three private practitioners who have represented regulated entities, one of whom represented both private industry and regulatory beneficiaries and at least two of whom represented small as well as large and medium-sized regulated companies;
- Three law, governance, and political science scholars, including an expert in European administrative law, and two American scholars, one specializing in administrative law and social movements, and another in administrative politics; and
- A scholar and expert on how government uses technology, with a focus on artificial intelligence.

Our interviews were robust and diverse, although we acknowledge that they could not include all the perspectives, strategies, and approaches to regulatory notice. Nevertheless, we think our investigation identified a wide range of concerns and promising opportunities for agencies to improve notice of significant regulatory changes.

Rather than conducting structured interviews, we spurred conversations with each interviewee based on a list of topics. We explained that nothing the subjects said would be taken as an official or attributable statement but that we would use the content in our report. We further assured that we would not identify any of the subjects by name or entity and would only refer in generalities such as “lawyer for a large public interest group” or “former agency official.”

V. Findings

Our overarching finding is that multiple opportunities exist to improve agency practices for providing notice of significant regulatory changes. In particular, we found that larger entities are more satisfied with current notice practices than smaller, lesser-resourced ones. Congressional efforts to protect small businesses through enhanced notice requirements such as SBREFA's mandate for "Small Entity Compliance Guides"[81] have only partially succeeded, and those efforts do not necessarily benefit non-business small entities. For example, as our interviews have shown, a guide to aid small businesses in complying with a regulatory regime is less useful to a local environmental group interested in environmental justice or a group supporting local immigrant communities.

Those we spoke with agreed that while some existing notice strategies are reasonably effective, these strategies do not cover a wide range of agency activities and their effectiveness varies by the size, sophistication, and "connectedness" of the potentially interested entity. The smallest entities expressed concern with all types of notice-giving. Larger entities were content with some aspects, such as direct communications and *Federal Register* publication, but struggled with regulatory regimes that emerged from dispersed actions such as combinations of rules, memos, adjudications, enforcement or declination decisions, and guidance. Interviewees further raised concerns about "horizontal" regulatory expansion where entities are subject to new regulatory areas in which they do not have prior experience.

A. Smaller Entities Struggle to Obtain Effective Notice

Smaller entities struggle with many of the same challenges as larger entities, which we discuss below, but smaller entities also have special difficulties**.** *Unlike large enterprises,*

[81] Sec. 212(a), Pub.L.104-121, 110 STAT. 858 (1996).

smaller entities typically do not have in-house regulatory affairs staff to track the Federal Register *or engage in-person with agencies or the resources to hire outside experts*. At the smallest end of the spectrum, "mom-and-pop" or "micro" businesses[82] and small community groups are most likely to have small staffs and limited infrastructure for tracking regulatory changes. As we discuss further in Section VI.C, although Congress has made efforts to improve notice to small businesses, there is an opportunity for Congress and agencies to do more, particularly regarding smaller entities that are not businesses.

Smaller entities often rely on intermediary organizations to get notice of significant regulatory changes. Intermediary organizations include trade associations, organizations that support specific identity groups such as the National Black Chamber of Commerce or the National Association of Women Business Owners, and other non-governmental organizations like environmental or consumer advocacy groups. However, many smaller entities, particularly micro-businesses, are not members of intermediary organizations.[83] Representatives from trade associations, labor unions, and agencies all described the critical role for these intermediary groups play in gathering information from the government, sharing that information with smaller interested entities, and then doing the same in reverse—gathering information from interested entities and relaying that to government. It is hard to overstate how important intermediary groups seem to be for many potentially interested parties. Many businesses participate in multiple trade associations and access agency notices for different aspects of their businesses in this way. Groups like the U.S. Chamber of Commerce, "the world's largest business

[82] The Small Business Administration defines micro-businesses as those with fewer than 10 employees. Headd, *supra* note 9.
[83] Notably, 70 percent of all businesses are on the small end of micro-businesses, having four or fewer employees. *Counts by Company Size*, NORTH AMERICAN INDUS. CLASSIFICATION SYS. ASS'N, https://www.naics.com/business-lists/counts-by-company-size/. According to our interviews, the smallest entities are least likely to be engaged with intermediary organizations.

organization,"[84] cover almost every agency, but they tend to prioritize major issues that affect many of their members.

As one interviewee described it, small businesses want direction on compliance, and this is a role that intermediaries can play through devices such as compliance fact sheets, check lists, webinars, and other practical resources.[85] State governments also participate in intermediary organizations. For instance, we spoke with a former state agency leader who praised the role of groups like Northeast States for Coordinated Air Use Management (NESCAUM), an association of state clean air agencies. Just as with the private sector, these intermediaries provide technical advice, and an efficient, two-way, channel to the EPA.

There are, however, holes even in this large net of intermediary organizations. Subjects who spoke for the very smallest businesses, including trade association representatives, explained that the huge benefits of intermediary associations do not flow to the smallest businesses. They are often not members of such groups and are therefore left to their own devices for obtaining notice of significant regulatory changes that may affect them.

One small-business representative said that taxes are the most significant regulatory burden for most small businesses.[86] Our subjects consistently praised the IRS' notice practices. IRS has developed its processes for providing notice with an awareness that it must notify relatively small and disconnected taxpayers. At the same time, private, for-profit tax preparers and computer tax programs also serve an intermediary function in tax policy. According to one of our interview subjects, many small businesses rely on these private companies to keep abreast

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[84] *About Us*, U.S. CHAMBER OF COM, https://www.uschamber.com/about.
[85] In some cases agencies can and do provide resources of this nature. In particular, the Small Business Regulatory Enforcement Fairness Act (SBREFA) requires Small Business Compliance guides. We discuss these strategies in more detail in Section VI.C.
[86] Though certainly this does not mitigate the overarching problem that the smallest businesses struggle to get notice of significant regulatory changes other than tax changes.

of changes to the tax rules and to properly complete the business' taxes with those changes in mind. Thus, at least with respect to the IRS, even the smallest businesses do have a means of finding out about, and complying with, tax changes. This might serve as a useful model for other efforts to notify the smallest businesses of regulatory changes through intermediaries.[87]

One area where we learned that intermediaries have not been as active is in informing small environmental advocacy organizations about policy changes. In many areas, especially environmental policy, there are large and medium-sized public interest NGOs that *might* serve as intermediaries. However, in our conversations, we learned these larger NGOs do not always serve the intermediary function for smaller entities. On the other hand, small "service-focused" organizations, such as those providing support and resources for immigrant communities, report that larger entities play an essential role in sharing information about regulatory changes. We spoke with representatives of immigrant-support NGOs, for instance, who said almost all their information about regulatory changes comes through networks of intermediaries.

Several interviewees confirmed that *advocacy*-focused NGOs do not play more of an intermediary role because their mission is, often, to advocate for policy change rather than provide direct services. *Service-focused* NGOs, on the other hand, rely on information about the current state of the law to support and guide the individuals and communities with which they work. Given the important role of intermediary organizations, in Section VI.I we consider how agencies can give more effective notice by building capacity within these intermediary networks.

Congress has made special efforts to facilitate notice of agency rules to smaller regulated entities,[88] but our interviews indicate that these efforts have been only partially effective. For

[87] Section VI.I includes more detailed recommendations about how agencies can interact with intermediary organizations to provide effective notice.
[88] See the discussion of SBREFA and other small-business-focused legislation in Section III, VI, and Appendix I.

instance, the Small Entity Compliance Guides introduced in Section III, and discussed in further detail below, are designed to provide regulatory notice and guidance to small entities. However, many of them focus only on regulated entities and not on small interested-persons and entities like community groups. These intended beneficiaries often struggle with obtaining effective notice of significant regulatory change. Many of the people we interviewed identified the guides as "small *business*" compliance guides, implying a more limited audience than Congress intended when calling them "small *entity*" guides. Some agencies have similarly narrowed the scope of their outreach programs to assist small entities by focusing primarily on small businesses. EPA, for example, has numerous resources for "small businesses" but non-commercial entities seem to get less attention.[89] Importantly, not one of the subjects we interviewed mentioned these small entity guides unprompted, suggesting that they are not a prominent source of notice and perhaps agencies should do more to publicize them. Finally, although SBREFA permits agencies to publish guides that address multiple related rules, in practice the guides generally focus on only a single rule. [90] Our interviews demonstrated, however, that interested persons and entities are most in need of notice about regulatory regimes that are comprised of multiple sources of law such as rules, interpretations, adjudications, and enforcement decisions. These regimes are complex, evolve over time, and not fully captured in stand-alone rules published in the *Federal Register*.

There are nuances to the dissatisfaction among less-resourced, smaller entities, but one over-arching issue sums up their concerns: In the words of Reeve Bull, "The [small] firm's much larger competitors have to comply with the same rules (and maybe even some additional rules,

[89] *Resources for Small Businesses*, ENV'T PROT. ADMIN., https://www.epa.gov/resources-small-businesses.
[90] Sec. 212(a), Pub.L.104-121, 110 Stat. 858 (1996).

since small businesses are sometimes exempt), but their revenues are so much higher that they can more easily pay an expert to figure it out."[91]

B. Larger Entities

While not entirely satisfied with existing notice practices, larger entities such as trade associations, unions, NGOs, and attorneys representing private businesses were generally satisfied with most aspects of current agency practices for providing notice. Every representative of a large organization we spoke with described in-house staffs or outside lawyers and consultants who were reading relevant notices in the *Federal Register* daily and reporting back about important regulatory changes. Attorneys from a sophisticated public-interest NGO explained that they have a staff of legal assistants trained to sort through the *Federal Register* to gather relevant summaries. One interviewee, a lawyer who had represented large private businesses, said that "rarely, if ever" would his clients have difficulty obtaining notice of regulatory changes that were published in the *Federal Register*. Another interview subject said trade associations, big unions, and big NGOs are "highly sophisticated players" that "keep close tabs" on everything relevant agencies are doing. Larger entities that do not have in-house regulatory staffs for tracking the *Federal Register* often pay law firms to do that work, and many firms circulate notices of regulatory changes for free to clients and potential clients to advertise their expertise and obtain business. Those larger potentially interested entities that do not have in-house staff or law firms will typically be part of a trade association that alerts members to regulatory changes. However, even larger entitles did express some concerns, particularly about

[91] Reeve T. Bull, *How to Account for Small Business Interests in President Biden's Modernizing Regulatory Review Initiative* (Sept. 29, 2021), https://www.brookings.edu/blog/up-front/2021/09/29/how-to-account-for-small-business-interests-in-president-bidens-modernizing-regulatory-review-initiative/.

the difficulty of synthesizing dispersed regulatory information and gaining access to material that is not published in the *Federal Register*.

Providing notice by announcing changes in the Federal Register *is effective to the extent interested persons and entities know to track the* Federal Register *and have the resources to do so. The differences between larger and smaller entities are especially apparent in this respect.* Federal Register *publication is a valuable tool, but only for those with the resources to track and absorb the large volume of information that appears in the* Federal Register.[92] Tracking the *Federal Register* requires not only knowledge and resources, but regular internet and computer access. Developments in technology, such as improvement in search engines and artificial intelligence, may hold promise for narrowing these gaps in obtaining notice. We discuss later measures that agencies can take to facilitate improving access to agency documents by smaller entities and individuals.

According to our interviews, *personal contacts at the agency are also quite effective for larger entities but much harder to access for smaller organizations*. According to a lawyer for a large public interest NGO, under the current system, "personal contacts are the best way to get notice." Trade association and private lawyers echoed this statement. Trade group representatives especially emphasize this point, explaining that having personal connections with agency personnel serve a variety of purposes.

First, personal connections allow interested persons and entities to call or email an agency official and ask about forthcoming changes. In some cases, interview subjects reported having regular calls with agency staff to check-in on various projects.

[92] We likewise recognize, pursuant to the discussion of legal requirements in Section III.B and Appendix I, that in many cases agencies are failing to publish material in the *Federal Register* even where FOIA apparently requires such publication.

Second, personal connections develop trust. Two trade association representatives explained that when business owners and business leaders know the people who write the rules, they feel more comfortable calling to ask questions. In addition, when they call to ask questions, the contact keeps them on the agency's radar for direct notice when the agency makes a regulatory change. However, the unequal access by well-connected organizations through private calls and meetings can contribute to the perception or reality that agencies have been "captured" by the interest they are supposed to regulate.[93] In contrast to agency capture, some interviewees said personal connections are impossible because there is too little trust between regulated individuals and government actors. In areas like immigration, the threat of arrest or deportation hinders personal connections. When we described programs like the OSHA compliance consultation program, in which consultation staff are "walled-off" from enforcement staff,[94] these interviewees were skeptical because the lack of trust ran too deep for a bifurcated arrangement of this nature to be effective in their area.

Finally, personal connections can help interested persons and entities participate in regulatory development, which in turn positions them well to get notice when changes become official. Several interviewees said that the biggest problem for them was not lack of "back end" notice of regulatory changes. Instead, the biggest problem was getting "front end" notice when agencies begin the process of deliberating on regulatory changes. ACUS has addressed participation in regulatory development elsewhere,[95] but our interviewees frequently reminded us that when interested parties participate in rule development they will almost necessarily know

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[93] *See generally* Will Kenton, *Regulatory Capture*, https://www.investopedia.com/terms/r/regulatory-capture.asp.
[94] We describe this program further in Section VI.H.
[95] *E.g.*, Carrigan & Shapiro, *supra* note 25; Sant'Ambrogio & Staszewski, *supra* note 18.

about regulatory changes because they are aware those changes from the beginning. Personal connections are an important way to gain invitations into early-stage development.

In short, our research strongly suggests that personal connections are an important conduit for notice and that larger entities can take better advantage of this channel of communication.[96] In SBREFA, Congress attempted to promote similar personal connections for smaller entities by directing agencies to "answer inquiries by small entities . . . ."[97] Yet our conversations suggest this has not been a complete success. As we discuss more in Section VI, there are some promising strategies such as the use of webinars, user manuals, and notice planning that specifically targets smaller entities.

Despite high satisfaction with the *Federal Register* and personal connections, there are nevertheless aspects of notice practice that still pose challenges for large entities. *Our interview subjects complained about the difficulty in tracking changes that are neither published nor announced via notices of availability in the* Federal Register. Their complaints took two forms. First, there is more difficulty in accessing information that is not published in the *Federal Register*. Second, this alternative regulatory material, when available, may require sophisticated analysis and synthesis. These challenges apply to smaller entities, regulatory beneficiaries, and interested citizens as well.

"*Dispersed" notice of regulatory changes, or regulatory regimes that emerge not from a single legislative rule but a combination of agency materials, or from multiple agencies,*[98] *poses*

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[96] Some existing research suggests larger businesses have more resources, particularly dedicated staff, to establish and maintain government connections, including by hiring former agency officials. *See, e.g.*, Bull, *supra* note 91.
[97] Sec. 213, Pub.L.104-121, 110 Stat. 858 (1996).
[98] Policy changes can emerge from multiple agencies in different ways. In some cases, Congress delegates overlapping regulatory authority to multiple agencies. Jody Freeman and Jim Rossi call this "shared regulatory space." Jody Freeman and Jim Rossi, *Agency Coordination in Shared Regulatory Space,* 125 HARV. L. REV. 1131, 1136 (2012). For instance, in 2009 EPA and the National Highway Transportation Safety Administration issued a joint rule to limit greenhouse gas emissions from automobiles. *Id*. at 1169. Our interviewees highlighted another

a challenge even for the most well-resourced and sophisticated entities. A lawyer from a large labor union, for example, noted that with the National Labor Relations Board, the source of regulatory changes is rarely legislative rules in the *Federal Register* and is instead typically adjudicatory decisions from the Board as well as documents titled "operations memos" and "advice memos" that come from the agency general counsel. These various sources of law come together to make up a single regulatory regime it can be difficult to discover all the important sources of law and interpret them. It can be difficult to interpret how the universe of documents fits together. As Chris Walker and Matt Wiener have written, some agency "adjudication decision making requires substantial engagement with an extensive body of doctrinally complex agency precedent."[99] "Digests of agency precedents," they continue, "are especially useful . . . . Some agencies could make more extensive use of them."[100]

Our interviews demonstrate that dispersed agency policy is primarily a problem within a single agency, such as the NLRB example above. However, there are times when multiple agencies regulate a single issue area and potentially interested persons and entities must collect and analyze information from multiple agencies. One interviewee explained the struggle LGBTQ organizations encountered trying to understand the status of legal protections for LGBTQ people when those protections were the subject of changing regulation in DOJ, HHS, the Department of Education, and elsewhere.[101] On the other hand, some agencies have collaborated on joint

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form of "shared regulatory space" in which multiple agencies are not collaboratively developing and issuing a new policy but are instead issuing distinct policies that impact the same group of potentially interested persons or entities. See the text accompanying note 121 for more details on the example of different agency actions impacting LGBTQ people.

[99] Walker & Wiener, *supra* note 3, at 44.

[100] *Id.*

[101] *E.g.,* Selena Simmons-Duffin, *'Whiplash' of LGBTQ Protections And Rights, From Obama to Trump*, NAT'L. PUB. RADIO (Mar. 2, 2020) *available at* https://www.npr.org/sections/health-shots/2020/03/02/804873211/whiplash-of-lgbtq-protections-and-rights-from-obama-to-trump (describing policy changes in the Department of Education, military, and Department of Justice.)

manuals, such as the wetland delineation manual developed jointly by EPA and the Army Corps of Engineers.

Another area of significant concern even from larger entities is "obtaining initial notice of horizontal regulatory expansions." By this we mean regulatory changes that cover industries and entities that have not historically been on the lookout for regulations from the agency in question. This report earlier described EPA's 2008 lead repair and renovation rules as an example of a horizontal expansion that brought thousands of small contractors and landlords within EPA's regulatory scope for the first time.[102] Another example that one interviewee described is a possible new rule from the Financial Crimes Enforcement Network (FinCEN) expanding the concept of "beneficial ownership."[103] This rule would require businesses to report the natural persons who profit from the business in order to prevent terrorists and other criminals from laundering money. The rule, however, would cover almost every business in the United States and not only financial institutions.[104] The sense of our interviewee was that the burdens of this rule were not substantial but because of the reach of the regulation, there would be many sectors and individual businesses that would simply have no expectation or awareness of the regulatory change.

Notifying a large population of potentially interested parties that have not previously been regulated by an agency presents difficult challenges. However, some agencies have been successful to some degree by getting the word out through the traditional and electronic media via press releases and public service announcements. Several interviewees explained that commercial media is their best source of information, which we discuss further in Section VI.G.

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[102] Section II.B.ii.
[103] Financial Crimes Enforcement Network, Advance Notice of Proposed Rulemaking, 86 Fed. Reg. 17,557 (Apr. 5, 2021).
[104] *Id*. at 17,558.

Elsewhere in Section VI we consider other strategies to provide initial notice to a wide array of potentially interested entities and individuals.

Our research demonstrates that there are multiple opportunities for improvements in how agencies provide notice of significant regulatory changes, especially regarding providing more effective notice to smaller entities.

VI. Strategies for Effective Notice of Significant Regulatory Changes

This section describes and evaluates the potentially promising practices for giving effective notice that we have encountered in our research. Importantly, our research shows that agencies will not provide effective notice merely by selecting the "best" single tool. Face-to-face meetings, for instance, may be a very effective tool in some situations but may not be appropriate for agencies in other situations. As we have learned, certain vulnerable communities will not engage in face-to-face meetings but many business leaders prefer this method for obtaining notice. Effective notice requires that agencies understand their audiences and consider which tools are most effective in light of the type of regulatory change and the type of potentially interested persons or entities the agency wants to reach.

Agencies should develop plans for giving effective notice. They should have a nuanced approach, gather data on effectiveness, and regularly re-evaluate which tools they are using. This section begins by describing the process and contents of agency notice plans. It then identifies tools for providing effective notice of significant regulatory changes that have been used successfully by other agencies which agencies may wish to consider as parts of their notice plan.

A. Agency Notice Planning and Evaluations

Agencies should create general notice plans tailored to their audience and mission and study the effectiveness of various mechanisms for providing notice. General, written notice plans should consider matters such as:

- targeted outreach to different categories of entities and intermediaries;
- how the agency plans to deal with different types of regulatory changes from different origins (i.e., advanced notices of proposed rulemaking, proposed and final rules, guidance, adjudications, enforcement or non-enforcement decisions, memos, etc.);
- the costs of different strategies for giving notice; and
- how the agency will gather data about the efficacy of various strategies and reevaluate their existing strategies based on that data.

Agencies can apply the principles of their general notice plans to develop specific plans for each significant regulatory change.

In limited circumstances, agencies may have reason to keep certain guidance documents confidential. General notice plans should describe the categories of documents the agency will not make publicly available. The plans should also explain the agency's reasoning for not providing public notice of the contents of these confidential documents.

A consistent refrain in our conversations was the inequitable access to notice between small and large entities. Notice plans should address how to close this gap. An agency's notice plan should evaluate how the agency can develop specific mechanisms to reach smaller entities and individuals.[105]

[105] Throughout Section VI we discuss several techniques agencies have used to successfully reach small entities.

A critical aspect of notice plans is research to gather empirical data about the effectiveness of various notice strategies and then reevaluating strategies in light of the data. Interviewees were optimistic about notice plans because the plans can serve as a transparent and proactive way to develop and improve an agency strategy. Having the clear articulation of a notice strategy will allow potentially interested parties to understand how an agency provides notice of significant regulatory changes. It will also allow agencies to evaluate their efforts in a more systematic way. Our research reveals that there is too little information about the effectiveness of different notice strategies. Because there is so little data about the effectiveness and cost of different strategies, notice plans can help build more quantitative knowledge to support agency decision-making in the future. Thus, **each notice plan should establish processes for gathering data and evaluating the effectiveness of agency strategies for providing notice.** ACUS may wish to revisit this subject in several years to identify agency best practices for developing and re-evaluating notice plans. We also recommend periodic agency roundtables to share information about what works best. ACUS may be an appropriate host.

Several agency officials discussed the different roles of program staff and outreach staff. Program staff are subject matter experts who are most likely to know, and have connections with, key interested entities and intermediaries. Outreach staff are in the best position to make material useable and publicly available. Notice plans can help to coordinate different offices with different perspectives within an agency.

Some interviewees suggested agencies should codify these plans as legislative rules so that agencies are bound by their plans and the public can have consistent expectations for how to gather information.[106] There was no consensus that codifying notice plans in a legislative rule

[106] *E.g.,* Recommendation 2020-1, Rules on Rulemaking (Dec. 16, 2020) (Addressing rules that "set[] forth the policies and procedures [agencies] will follow when conducting informal rulemakings…").

was desirable, but there was a consensus that regardless, **notice plans should be open to public comment and easily accessible on agency websites**.

Some of the people we interviewed suggested that agencies should appoint chief outreach offices or officers to help develop and implement notice plans. The Federal Regulatory Commission is launching an Office of Public Participation that would perform this function, among others.[107] Other agencies expressed concerns, including that staff were already overburdened. We think appointing an existing official or office as a chief outreach officers may be a potentially promising strategy to make sure that someone is responsible for thinking about and improving notice. We also recognize that more experience, such as with FERC's Office of Public Participation, may be useful in determining how effective this strategy can be and that it may be helpful for some but not other agencies.

While some agencies report that they do develop plans for some significant regulatory actions, we did not learn of any agencies that currently have comprehensive notice plans or strategies. Nevertheless, agency officials were generally receptive to experimenting with notice planning.

B. Expanding Coverage in the *Federal Register*

The Office of the Federal Register (OFR) is the most important single channel for providing notice for most agencies.[108] Most people to whom we spoke felt the *Federal Register*

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[107] About OPP, Office of Public Participation, Fed. Trade Comm'n., *available at* https://www.ferc.gov/OPP.

[108] ACUS has already undertaken significant research and issued recommendations on public access to regulatory materials through Regulations.gov and the Federal Docket Management System. Admin. Conf. of the U.S., Recommendation 2018-6, Improving Access to Regulations.gov's Rulemaking Dockets (Dec. 13, 2018); Todd Rubin, Regulations.gov and the Federal Docket Management System (Dec. 3, 2018) (Report to the Admin. Conf. of the U.S.), *available at* https://www.acus.gov/sites/default/files/documents/Proposed%20Recommendation%20for%20Plenary%20%28Regulations.gov%29%20OFFICIAL%20REDLINE%20FOR%20PACKET%2012%2010%202018_0.pdf. This is outside the scope of this research but given the importance of the OFR and the *Federal Register*, ACUS may

was an effective form of notice for those who have the capacity to track *Federal Register* publications. For individuals, non-English speakers, and the smallest organizations, the *Federal Register* is less effective. Many individuals are unaware of the publication. Those without sufficient computer access have trouble using FederalRegister.gov on a cell phone. The smallest organizations do not have the resources to regularly review the *Federal Register*. These shortcomings, as well as the potential constitutional concerns we describe in Section III.B.i and Appendix I, should not dissuade agencies from taking advantage of the *Federal Register*, which is a largely effective way to provide notice. Instead, we note these shortcomings to remind agencies that the *Federal Register* is just one among a suite of tools for effective notice.

i. Notices of Availability

The Federal Register Act allows the OFR to publish a wide range of documents in the *Federal Register*.[109] This includes proposed and final rules, presidential proclamations, and guidance documents. The OFR sorts agency submissions into three categories: proposed rules; rules and regulations; and notices of availability. A *notice of availability* alerts the public to a new document, summarizes the document, and provides a reference to where the full document is available. As information technology has changed and agency websites have become more important, these notices of availability are taking on increasing importance because they may provide a title and sometimes a short description and a link to a document or information on a website. Of course, there is a cost to publishing in the *Federal Register*, including notices of

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continue to address ways in which agencies and potentially interested parties use systems designed to make regulatory material more accessible, such as Regulations.gov, Federalregister.gov, and Reginfo.gov. As one of our interview subjects complained, a member of the public seeking information on a rulemaking may find certain information on Federalregister.gov. The individual may not find the same rulemaking docket available on Regulations.gov, or if they did, they might find different information on each website. *See also* Admin. Conf. of the U.S., Recommendation 2018-6, Improving Access to Regulations.gov's Rulemaking Dockets (Dec. 13, 2018) at 6-9.

[109] 44 U.S.C. § 1505.

availability. Agencies currently pay $450 per Word document page. Thus, the costs for increasing use of notices of availability of information posted on agency websites would be relatively modest. **Agency notice plans should consider, and re-evaluate periodically, expanded use of publishing notices of availability in the *Federal Register* for documents posted on agency websites that announce significant regulatory changes.** This technique can be particularly useful for making guidance documents available to the public.

Based on our interviews, it is our opinion that **agencies should use the *Federal Register* to publish notices of availability for material such as significant guidance documents. The agencies should publish the full text of these documents on their websites and provide a link in the *Federal Register* notice. Notices of availability will provide clear direction on how to find important documents and allow agencies to give useful summaries. Finally, it helps control costs by publishing longer, full-text documents on agency websites.**

Our research demonstrates that expanded use of notices of availability and links to agency websites may be one of the most effective avenues to provide notice of significant regulatory changes in the years ahead. However, we recognize that the volume of information on agency websites requires agencies to be thoughtful about what information they notice in the *Federal Register*. For instance, the Centers for Medicare and Medicaid Services has over 37,000 guidance documents posted on its website.[110] Agencies should balance the interest in providing effective notice of significant regulatory changes against the costs and risks of creating information overload.[111]

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[110] *CMS Small Entity Compliance Guides*, CTR. FOR MEDICARE AND MEDICAID SERV., https://www.cms.gov/Regulations-and-Guidance/Guidance/SmallEntity.

[111] Indeed, the possibility of information overload and notice becoming ineffective if it reaches the point of "spam" is an overarching concern in developing recommendations for improving notice of significant regulatory changes.

ii. Improving Indexing of *Federal Register* Entries for Searchability

One concern we heard repeatedly was how to obtain *initial notice* of *horizontal regulatory expansions*, by which we mean changes that impose regulatory obligations on entities that an agency had not previously regulated. Improved Office of Federal Register (OFR) indexing practices can help in this respect. The OFR currently maintains a keyword thesaurus to help make indexing more consistent across the *Federal Register* and *Code of Federal Regulations*.[112] Consistent indexing will help users search for relevant terms even when those terms appear in a publication from an agency not usually associated with the industry. One interviewee said that agencies are largely unaware of the indexing process. When agencies work together they can share information, so interagency collaboration on notice practices might generate more awareness of this indexing service.

Although it is not a current practice, our conversations suggested that OFR might be able to expand indexing so it covers not only keywords for a rule, but also a list of potentially interested entities. This approach would allow potentially interested persons and entities to search a listing for their area of interest or expertise. However, we recognize, as a countervailing consideration, the potential effect on enforcement litigation if a regulated party were not listed. Currently, interested entities must determine which agencies are most likely to undertake relevant regulatory action and review notices from those agencies. Agency listings of categories of entities likely to be affected would allow potentially interested parties to search across various agencies for any action that potentially impacts their interests. The OFR does not add any content to agency submissions and is not authorized to make any substantive decisions, including how to tag and index documents.

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[112] *Thesaurus of Indexing Terms*, OFF. OF THE FED. REG, HTTPS://WWW.ARCHIVES.GOV/FEDERAL-REGISTER/CFR/THESAURUS.HTML.

iii. Improving Technology in the Office of the Federal Register

The OFR also provides technical tools for improving notice of significant regulatory changes. OFR operates a program called MyFR, which allows personal account management within the electronic *Federal Register*.[113] This allows users to conduct more sophisticated searches, to save those searches in their own account, and, perhaps most importantly, to establish their own set of keywords and then receive automated notices whenever a document is published in the *Federal Register* using those keywords. MyFR is open to any user and provides a variety of services, but it is dependent on agencies providing keywords to make some of the services functional. Most of our interviewees were not aware of MyFR. However, one interviewee, from a small non-profit, was very positive about the value of MyFR and described it as her primary tool for gathering information from the *Federal Register*. This suggests that MyFR may be underutilized and agencies as well as the OFR should consider how they might publicize its availability on their websites, through social media, or by helping intermediary organizations understand and explain MyFR to individuals and smaller organizations.

Similarly, OFR and the Government Printing Office have created eCFR.[114] Broadly speaking, eCFR is an electronic version of the Code of Federal Regulations (CFR) that allows for easy browsing, searching, and navigability. eCFR also provides valuable innovations related to notice. For instance, eCFR allows users to easily identify recently updated regulatory text, compare current and prior versions of regulations, and link between related CFR, *Federal*

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[113] *Subscription Options and Managing Your Subscriptions*, OFF. OF THE FED. REG., https://www.federalregister.gov/reader-aids/using-federalregister-gov/subscription-options-and-managing-your-subscriptions.
[114] *eCFR*, OFF. OF THE FED. REG., https://www.ecfr.gov/.

Register, and United States Code content.[115] As with the *Federal Register*, eCFR also allows users to create MyCFR accounts and create personalized notifications of updates.[116]

All of these technological services are valuable in their own right because they make it easier for interested persons and entities to access information about regulatory changes. There are, however, two shortcomings.[117] First, interested entities must know about these tools before they can use them. Second, eCFR and MyCFR only provide information about material that is codified in the CFR. The CFR does not include guidance documents, advance notices of proposed rulemaking, information requests, and other important material that is not the final version of "permanent and general" regulations published in the *Federal Register*.[118]

OFR also provides an "Application Programming Interface" (API) to any user who wants to gather information from the electronic *Federal Register*.[119] An API allows a software agent to access and collect data hosted in the database or from a wider data repository. For instance, a user could use an API to "scrape" FederalRegister.gov daily, capturing the text and metadata from every publication. That can be done with specific filters or as a general "data dump" of everything that is accessible through the web protocol. Users can then analyze that data

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[115] *Getting Started*, OFF. OF THE FED. REG., https://www.ecfr.gov/reader-aids/using-ecfr/getting-started; *see also* Email from John Hyrum Martinez, Director of Publications and Services Division, Off. of the Fed. Reg., Sept. 23, 2021 (on file with authors).

[116] OFF. OF THE FED. REG., *supra* note 115; *see also* Email from John Hyrum Martinez, Director of Publications and Services Division, Office of the Federal Register, Sept. 23, 2021 (on file with authors).

[117] A third shortcoming, though outside the scope of this report, is also worth noting. An interviewee at a litigation-focused NGO commented that one problem with the eCFR is that it sometimes incorporates the text of promulgated regulations but when courts later stay the regulation or the agency delays the effective date, the eCFR fails to update accordingly. In this respect the tool can be a source of *inaccurate* notice.

[118] *Help: Code of Federal Regulations*, OFF. OF THE FED. REG., https://www.govinfo.gov/help/cfr. This raises two questions for future ACUS research: First, because many significant regulatory changes are not published in the *Federal Register*, can OFR's tools expand to include material not codified in the Code of Federal Regulations? This question could focus especially on material published on agency websites or published in the *Federal Register* as a notice of availability rather than a legislative rule. Second, are statutory changes necessary, or appropriate, to expand the scope of OFR's technology and other tools for providing effective notice?

[119] *FR API Documentation*, OFF. OF THE FED. REG, https://www.federalregister.gov/developers/documentation/api/v1

further and search for relevant notices. OFR opens its data to this flexible tool, which might be useable for more technically savvy interested persons and entities but not for all users. Yet, the requirement for some tech-savvy also makes this a somewhat exclusionary tool for providing notice.

Agencies should experiment with developing handbooks—and perhaps even supporting training and publicity—to make these types of advanced technological tools more widely available.

C. Digests and User Manuals

In our opinion, agencies should consider creating **agency-authored user manuals and digests** that synthesize and summarize regulatory regimes.[120] One interviewee from within the government said that notice is particularly a problem for "docket agencies." The interviewee used the term "docket agencies" to describe agencies that make policy primarily through adjudications. In these agencies, adjudicatory policymaking is piecemeal, making it is more difficult to follow. For instance, a person with whom we spoke noted that at least one "independent" board that makes policy through adjudication would benefit from more synthesis of its policy. Private companies produce "deskbooks" summarizing policy and practice in different agencies. The deskbooks are costly, slow to update, and carry less weight because they do not come from the agency. However, countervailing considerations may include whether interpreting the implications of agency rulings is an appropriate use of agency resources and whether statements in such manuals and digests might impede agency flexibility or have an adverse effect on enforcement litigation.

[120] Walker & Wiener, *supra* note 3, at 44.

Some interviewees also mentioned the difficulty of tracking regulatory changes that cover an identifiable class of individuals or businesses but emerge from different agencies, such as changes to LGBTQ protections coming from the Department of Education, Department of Justice, and other agencies. One of these interviewees explicitly said that interagency summaries describing related regulatory changes would be very helpful.[121]

SBREFA requires Small Entity Compliance Guides.[122] These guides assist small entities in complying with an agency rule and are meant to simplify the process as compared to distilling requirements from the Code of Federal Regulations. The compliance guides come with specific requirements for accessibility, including "posting [] the guide in an easily identified location on the website of the agency," "distribution of the guide to known industry contacts, such as small entities, associations, or industry leaders affected by the rule," and establishing dates for publishing the guides, "including the posting and distribution of the guide," when the rule is published "or as soon as possible after that date," and "not later than the date on which the requirements of that rule become effective."[123]

As noted earlier, none of the people we interviewed mentioned these guides unprompted, suggesting that they are not currently a major source of notice of regulatory changes. When specifically asked, a few subjects said that small businesses seem to benefit from the guides. One government official said "there have been no complaints from agencies" when we asked about the time or resources necessary for agencies to produce them. However, another interview subject said that while the guides are useful, they are not as useful as trade associations when it comes to communicating the details of rules. The guides are focused only on businesses, which

[121] For further details on "shared regulatory spaces" in which multiple agencies regulate the same subjects, see note 98.
[122] 5 U.S.C § 601 note 212(a).
[123] Pub. L. No. 110-28 (May 27, 2007)

are not the only relevant small entities when it comes to notice. The guides typically do not synthesize multiple developments,[124] providing explanations only of single rules, which limits their usefulness. Agencies might consider whether they can update these guides more regularly and, if appropriate, synthesize information from multiple guides into more comprehensive manuals.

Despite some shortcomings,[125] the guides are essentially plain language summaries on how to comply with a specific rule. A synthesis manual is a similar strategy: a plain language summary that does not simply convey details of a single rule, but that synthesizes a dispersed policy regime that includes rules, guidance, statutes, and other sources of law or policy. This is one of the weak spots of current notice practices and large and small entities alike say they have difficulty assembling diffuse agency materials into coherent wholes.

The EPA Pesticide Registration Label Review Manual is a good example of synthesizing multiple regulatory developments into a coherent whole.[126] The manual compiles existing law and interpretations in eighteen chapters which include references to primary documents, making this diffuse regime accessible and searchable all in one place. EPA provides an overarching table of contents and then an additional table of contents for each chapter, making it easy to pinpoint relevant provisions rather than sorting through all 289 pages. We discussed this manual as an example of a potential strategy for improving notice of significant regulatory changes with many of our interview subjects, and those who were aware of it praised it. One interviewee described it

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[124] Though SBREFA allows agencies to publish guides covering multiple rules. Sec. 212(a), Pub.L.104-121, 110 Stat. 858 (1996).

[125] Another potential shortcoming in the use of manuals is that agencies may be concerned that the explanatory materials summarizing policies may limit their flexibility if it is categorized as guidance and therefore requires publication. At least one court implied that a synthetic manual would escape statutory publication requirements, holding that documents merely incorporating regulatory standards published elsewhere do not themselves need to be published. Cathedral Candle Co. v. U.S. Int. Trade Comm'n., 400 F.3d 1352 (Fed. Cir. 2005).

[126] Pesticide Registration Label Review Manuel, ENV. PROTECTION AGENCY, https://www.epa.gov/pesticide-registration/label-review-manual.

as "a great explainer of the law." In addition, the manual provides links to controlling law so that users can reference primary documents. Interviewees from one litigation-focused NGO preferred primary legal sources rather than summaries but said that if summaries contained citations to primary sources, they could be very useful.

Other agencies offer similar user manuals. The Centers for Medicare and Medicaid Services have "created a comprehensive manual system that presents compliance information on virtually all CMS regulations. The manual chapters pull together all the issuances on a particular topic . . . and provide integrated and cohesive statements of operational policy."[127] The Patent and Trademark Office has developed the *Trademark Manual of Examining Procedure*.[128] According to PTO, "The Manual is published to provide trademark examining attorneys in the USPTO, trademark applicants, and attorneys and representatives for trademark applicants with a reference work on the practices and procedures relative to prosecution of applications to register marks in the USPTO."[129] A notable feature of PTO's publication of the Manual is that it also makes archived versions available, allowing users to compare current guidance to past guidance going back as far as 2005.[130]

Several considerations may help agencies produce the most effective user manuals and digests. Agencies should consider the target audience and design manuals with that audience in mind. For example, a manual may provide information specifically for practitioners and focus on agency rules of procedure. Alternatively, a manual could summarize substantive rules and standards and be useful for regulated entities planning for compliance. When agencies identify

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[127] CTR. FOR MEDICARE AND MEDICAID SERV, *supra* note 110.
[128] *Trademark Manual of Examining Procedure*, U.S. PAT. AND TRADEMARK OFF., (July 2021), https://tmep.uspto.gov/RDMS/TMEP/current.
[129] I*d.*
[130] *Trademark Manual of Examining Procedure – Files and Archives*, U.S. PAT. AND TRADEMARK OFF., https://www.uspto.gov/trademarks/guides-and-manuals/tmep-archives.

their target audiences, they can also publicize the manuals and digests directly to those audiences.

Manuals and digests should also include tables of contents and indexes. These documents can be hundreds of pages long. These tools will not be effective if users must read through the entire length of the document to find the information most pertinent to them.

Digests and user manuals can be important tools for providing effective notice but it is important for agencies to balance this against the potential costs. Manuals will require regular updates as agency policy changes. The staff time to keep manuals updated may be significant. But without regular updates manuals could become a source of misinformation. Manuals can include information about how often, and under what circumstances, they will be updated, which can mitigate the risk of misinformation.

As noted at the beginning of this part, digests and user manuals run the risk of hampering enforcement litigation if litigants rely on incorrect information in the manual. To address this concern, manuals should prominently include the date on which the manual was last updated. In addition, manuals should cite and link to key authoritative documents such as the Code of Federal Regulations and relevant agency guidance and interpretations.

D. Search Engines and Technological Strategies

Emerging technologies offers a range of opportunities for improving how agencies give notice. These strategies range from the familiar, such as social media, to the cutting edge, like machine interpretable regulatory text and Artificial Intelligence (AI). There is a difficulty, however, in assessing these strategies or recommending them as best practices. Digital technology changes rapidly. Social media is an important tool today but may not be tomorrow,

just as telephone calls and even email have become less important to younger generations.[131] Some interviewees said they relied on social media platforms, particularly Twitter, to learn about significant regulatory changes. Others lamented that it is harder than it once was to connect with agency personnel over the phone. For these reasons, agencies should periodically reconsider the effectiveness of different technological approaches in updating their notice plans.

i. Social Media Platforms

Some interview subjects reported some agencies have been using social media, especially Twitter, as a tool for notice. Twitter is inexpensive and far-reaching, allowing interested entities to effectively "sign-up" for notice by following agencies of interest. A variety of interviewees from small and medium-sized NGOs, said Twitter was efficient and effective. Some agencies have focused on social media to reach audiences that are not English speaking. Interviewees who work with immigrant communities noted that some people can only access the internet using cell phones. The brevity of tweets[132] therefore makes Twitter much more accessible on a phone than the *Federal Register*, agency websites, and any other platform with more text. Moreover, the analyses of social media data could be a beneficial source of insights for gauging public responses to policies and overall behavioral trends. Recently, social media platforms have been scrutinized due to many cases of misinformation and disinformation, a problem that agencies can also partly tackle by providing notices of regulatory changes through official governmental social media channels. Lastly, there is a constant digital migration between platforms (such as Facebook to Twitter, and more recently towards TikTok). Agencies should track these

[131] *E.g.*, Sophia June, *Could Gen Z Free the World from Email?*, N.Y. TIMES (Jul. 10, 2021) https://www.nytimes.com/2021/07/10/business/gen-z-email.html.
[132] Tweets cannot exceed 280 characters.

migrations and become familiar with a variety of platforms in order to adapt quickly to changes in the platforms that their intended audiences are using.

ii. Email Lists

Email lists and listservs are another strategy that has benefits. Agencies can use email lists at very low cost to reach parties who have signed up to receive notice as well as those the agency can identify as likely to be interested persons and entities. Moreover, interested parties can sign up for subject-specific lists within a given agency, narrowing communications to the areas that are most relevant because mail alerts are possible for specific updates on specific policies. The EPA, for example, has an email subscription process that allows users to customize the emails they receive based on language, region, and over one dozen specific interest areas.[133] "EPA e-mail lists can be gold for small community groups," said one lawyer who was a state environmental regulator and represents environmental justice groups. In addition, emails can be short and simply inform the recipients of new developments and call to their attention where more detailed information is available, and recipients can opt out if they find the emails are not useful to them.

Email listservs are most valuable when an agency has a "fairly stable and small population" said one agency official. For example, an interviewee suggested that the Federal Aviation Administration can probably reach every airport manager in the country, including all the smallest airports, with a single blast email. The number of recipients on that email list is probably around 5,000.[134] This is a relatively easy and useful strategy when an agency is

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[133] Email Subscriptions for EPA News Releases, Env. Prot. Agency, *available at* https://www.epa.gov/newsroom/email-subscriptions-epa-news-releases.

[134] *Number of Public and Private Airports in the United States From 1990 to 2020*, STATISTA, https://www.statista.com/statistics/183496/number-of-airports-in-the-united-states-since-1990/#:~:text=In%202020%2C%20there%20were%205%2C217,period%20from%2011%2C901%20to%2014%2C702.

providing notice to a discrete and defined audience like airport managers. It becomes more difficult when an agency like the IRS needs to reach a pan-industry group of millions. Interested entities would need to know that such a list exists and how to sign up for it. This means the technique is difficult to apply to horizontal expansions to new parties that were not previously regulated. Interviewees from a small litigation-focused NGO and the owner of a micro-business all explained that they do not use government email lists because they worry about agencies sending too many "spam" emails, making it difficult to focus on the most important information. Interviewees at small NGOs that are not primarily legal were more enthusiastic about the value of email lists. This comparison demonstrates that the effectiveness of different notice strategies can vary with the type of organization an agency is trying to reach.

iii. Search Engine Optimization

Search engine optimization is also a strategy for improving the online visibility and searchability of a website by assuring that it appears high on a list of search results that use particular keywords or key phrases. We spoke with several interviewees, including one who represented environmental justice communities, and several who are part of immigrant communities, who noted that when somebody is aware that they need information from a given agency that person is likely to start with a simple search using Google, Bing, or any other commercial (for-profit) search engine. The problem, according to interviewees, is that sometimes agency regulatory material does not readily appear in such searches. Our interviewees offered several possible reasons for this. Internet searches can return so many results that it is hard for people to find the most relevant. In the immigration arena, both scammers and language barriers are a constant hurdle. For example, we ran Google searches for terms like "temporary protected status" and "visa renewal" and although official government websites were always among the

results, for-profit and non-governmental websites were inevitably intermingled. As noted earlier, it is easier to sort through a long list of results on a computer screen than a phone screen but in some cases individuals can only access the internet on phones. Among other things, the difficulty some people face when using search engines suggests that agencies should consider the best strategies for indexing their content so that it is "optimized" for commercial search engines.[135] Commercial search engines already tend to "favor government websites over others" but webmasters must still "tell[] the search engines what keywords the page should be ranked for…"[136] When webmasters "optimize" their websites in this way, the websites are more likely to appear in searches based on "the specific keywords which users are typing into Google, Bing or other search engines."[137] Accordingly, a search engine that only returns official government documents could be a useful tool. (This would be similar to Google Scholar, which returns results only from academic publications.)

One interviewee noted another possible problem with commercial searches for government documents. Many important documents are only available in PDF format. If the PDF document is not machine readable, searches for keywords within these documents may not appear in a search.

Search engine companies are constantly updating their algorithms, but nonetheless agencies should review their websites to improve "search engine optimization." Agency IT staff should evaluate the organization, indexing, and file format of their content so that it appears more readily when interested entities are searching for regulatory information. Rather than

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[135] *See, e.g.*, *Search Engine Optimization (SEO) Starter Guide,* GOOGLE, https://developers.google.com/search/docs/beginner/seo-starter-guide

[136] *Why Government Websites Need SEO*, DIGITAL.GOV, https://digital.gov/2013/05/02/why-government-websites-need-seo/#:~:text=Search%20engines%20such%20as%20Google,algorithms%20may%20take%20into%20consideration.

[137] *Id.*

"reinventing the wheel" by developing internal search technology, agencies might consider working with existing search engine providers to understand how to utilize existing resources to optimize their searchability. For example, agencies should identify keywords that would increase the probability of search hits that would help land their webpage on the top of a search list.[138]

A related strategy is "regulatory language optimization." The General Services Administration provides shared IT services for rulemaking agencies[139] and has undertaken a promising project on machine interpretability of agency rules. The technological background for this project is complex and the details are beyond the scope of this report, but the core idea is that while humans have the intellectual capacity to read and interpret regulations, the human resource capacity is limited and machines could help in this process. If agencies produce rules with the right vocabulary, experts in machine interpretability ("ontology engineers") can add metadata to each rule that makes it more accessible for computers, and the computers can work like a digital assistant to help interested entities more easily search and understand the large universe of regulatory changes. Projects of this type are worth of revisiting in the future as the technology develops and more experience is available, but it is probably premature to consider them in detail as part of the recommended follow-on project.

iv. Artificial Intelligence

Although our research and interviews did not uncover significant use of Artificial Intelligence (AI) in the notice processes, this technological advance may nevertheless deserve

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[138] Other more technical examples of search engine optimization might include: (1) using featured snippets in agency websites. These are items that appear in what is defined as *position zero*, or at the very top of the page; (2) Taking measures to manage the reputation of the agency's "brand" on the web. This helps with overall search engine rankings of the agency's website; (3) Keeping the website updated, creating new content, and avoiding outdated materials including images.

[139] *Services for Federal Rulemaking Agencies,* U.S. GEN. SERV. ADMIN., https://www.gsa.gov/policy-regulations/regulations/managing-the-federal-rulemaking-process/services-for-federal-rulemaking-agencies

further exploration. AI refers to the use of data and machine intelligence to produce knowledge and support decision making, such as summaries, classifications, or answers to questions, "somewhat like humans do."[140] AI is already proving to have value in regulatory compliance by, for instance, helping entities more easily gather and assess information about applicable regulations.[141] While the present role and future possibilities of AI are vast, this subject probably deserves more attention in separate projects as the technology matures.[142]

E. Agency Websites

Agency websites can be excellent tool for providing notice provided that they are well organized and provide clear instructions about where to find information. As discussed earlier, various statutes mandate or incentivize[143] publishing documents on websites. Likewise, on a number of occasions ACUS has recognized to the value of websites for providing notice of agency activity.[144] Despite their value, there are also concerns about the ability to navigate

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[140] *Artificial Intelligence Definitions*, STAN. UNIV. HUMAN-CENTERED ARTIFICIAL INTELLIGENCE (Sept. 2020), https://hai.stanford.edu/sites/default/files/2020-09/AI-Definitions-HAI.pdf.

[141] Reeve, *supra* note 91.

[142] Indeed, ACUS has already begun the process of studying artificial intelligence. Admin. Conf. of the U.S., Statement #20, Agency Use of Artificial Intelligence (Dec. 16, 2020), *available at* https://www.acus.gov/research-projects/agency-use-artificial-intelligence.

[143] Professor Coglianese, for instance, describes FOIA as providing "self-enforcing incentives" by prohibiting agencies from using documents in enforcement proceedings if FOIA requires agencies to publish those documents in the *Federal Register,* but agencies fail to do so. Coglianese, *supra* note 3 at 46. We discuss this in further detail in Appendix I. Congress and agencies may also consider more creative incentives, such as a government-wide prize for agencies that achieve the greatest improvements in providing notice.

[144] *E.g.* Todd Rubin, Public Availability of Inoperative Agency Guidance Documents (Nov. 22, 2021) (report to the Admin Conf. of the U.S.) *available at* https://www.acus.gov/sites/default/files/documents/Public%20Availability%20of%20Inoperative%20Agency%20Guidance%20Documents%20Final%20Report.pdf; Cary Coglianese, Public Availability of Agency Guidance Documents (May 15, 2019) (report to the Admin. Conf. of the U.S.), *available at* https://www.acus.gov/sites/default/files/documents/Coglianese%20Guidance%20Report%20to%20ACUS%2005.15.19%20-%20FINAL.pdf; Jeremy Grayboyes and Mark Thomson, Public Access to Agency Adjudicative Proceedings (Nov. 22, 2021) (report to the Admin. Conf. of the U.S) *available at* https://www.acus.gov/sites/default/files/documents/Public%20Access%20Final%20Report%2011.21.21.pdf; Mark Thomson, Report on Agency Litigation Webpages (Nov. 24, 2020) (report to the Admin. Conf. of the U.S.) *available at* https://www.acus.gov/sites/default/files/documents/Agency%20Litigation%20Webpages%20Report%2011.24.20_2.pdf.

websites and easily access information. One agency official commented that some agencies have effective website search functions while others are "clunky."

OSHA is a good example of how agencies can present and organize material on a website. OSHA uses FAQs, guidance documents, and press releases, and makes these materials available on its website. OSHA also relies heavily on email listservs, though an interviewee who was not affiliated with OSHA opined that the value of these lists is limited because OSHA regulates such a large range of businesses. More promisingly, OSHA has specific webpages dedicated to each of its regulatory programs and uses webpage banners on related pages to "advertise" the presence of webpages for associated rules. OSHA further has a bi-weekly newsletter called *Quick Takes* that reports not only on rulemakings but also on enforcement actions, "outreach activities, compliance assistance, and training and educational resources."[145] *Quick Takes* contains valuable content, but it is not clear how well known *Quick Takes* is. For instance, one lawyer who had significant OSHA-related practice was unaware of *Quick Takes*. A follow-on project might therefore consider what forms of publicity are best for informing potentially interested persons about such tools.

The Food Safety Modernization Act[146] requires the FDA to "publish the list of the foods designated . . . as high-risk foods on [its] Internet website."[147] This is a rare example of Congress directing an agency to publish portions of new regulations on its website in addition to the *Federal Register*.[148] The Food, Drug, and Cosmetics Act further requires electronic publication of guidance "as feasible," including opportunities for public participation in guidance

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[145] QuickTakes, OCCUPATIONAL HEALTH & SAFETY ADMIN., https://www.osha.gov/quicktakes.
[146] P.L. No. 111–353.
[147] 21 U.S.C. § 2223(d)(2)(B).
[148] We note that 5 U.S.C § 552(a)(2) requires agencies generally to publish material on websites even if *Federal Register* publication is not required. See further discussion in Appendix I. The FDA example in the text is therefore an instance of Congress providing an explicit and program-specific notice requirement.

development.[149] Similarly, the Act provides that "[t]he Secretary, acting through the Commissioner, shall maintain electronically and update and publish periodically in the Federal Register a list of guidance documents. All such documents shall be made available to the public."[150]

A micro-business owner with whom we spoke described the FDA's website as her key source of notice of regulatory changes. She regularly reviews FDA warning letters and uses those letters to help guide her own business practices. There are nearly 3,000 warning letters available in the FDA database,[151] but this business owner said she can search because she sorts the database by the subject of the warning letter, allowing her to focus only on those letters that relate to her business. The database is also sortable by the FDA office that issued the letter, further allowing her to focus on the most relevant documents. In short, the flexibility of the search and sort functions allows users, even in the smallest businesses, to effectively access information. Other agencies should consider improving the searchability of their websites by including keywords, dates, identification of the issuing office within the agency, type of document, and other information that may help users identify the documents that are most important for them. One shortcoming, according to our interviewee, is that people must know this material is available, or it will not be an effective source of notice. Agencies should provide clear information on their homepage to help potentially interested entities understand the type of

[149] 21 U.S.C. § 371(h)(1)(A) ("The Secretary shall develop guidance documents with public participation and ensure that information identifying the existence of such documents and the documents themselves are made available to the public both in written form and, as feasible, through electronic means. Such documents shall not create or confer any rights for or on any person, although they present the views of the Secretary on matters under the jurisdiction of the Food and Drug Administration.")
[150] *Id.* § 371(h)(3).
[151] Warning Letters, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/compliance-actions-and-activities/warning-letters.

information the agency provides on the website and how to access it. Indiana's "virtual file cabinet" is a good example of one way to do this, as we explain below.[152]

Agency websites are not effective tools for notice of significant regulatory changes unless they are well organized and maintained. Some interviewees related stories of dead links or links that do not lead to the correct destination. Another interviewee complained that online databases of agency material are sometimes not searchable or the search function does not work properly. Another person described a new CDC policy related to importation of dogs from countries in which rabies are endemic. According to this person, while the CDC published the new policy in the *Federal Register*, some significant controversy prompted the CDC to respond with various changes and new communications. However, the CDC did not publish the changes in the *Federal Register* or on a single webpage, "but rather, on more than a dozen separate webpages."

Websites are generally accessible and affordable tools for providing notice, but our interviewees' complaints demonstrate that websites will not achieve their full potential unless agencies understand their audience, what types of information that perspective audience is seeking, and what problems they have encountered accessing it. For example, agencies might consider voluntary surveys of users to better understand their problems and suggestions for improvement, as many commercial enterprises already do. Agency staff should maintain the websites to keep links up-to-date and to post new material. Websites should be searchable, especially where they house databases of material such as guidance documents and adjudicatory decisions. Likewise, some interviewees suggested that websites might include "how-to" instructions for accessing information. As an example of an excellent website tool, one of our subjects described the "Virtual File Cabinet" that the Indiana Department of Environmental

[152] Appendix II contains a sample of the "how to" guide for the Virtual File Cabinet.

Management maintains.[153] The website includes prominent and explicit instructions on the front page and the Virtual File Cabinet itself has a simple search feature that covers the full spectrum of agency public records.[154]

Well organized and maintained websites can be very effective when paired with other forms of notice, such as social media. Agencies can post information about regulatory changes and then provide links to relevant documents housed on the agency website. Interviewees spoke highly of this strategy. Interviewees also reported that agencies are effective when they post short notices of availability in the *Federal Register*, which describe regulatory changes and provide a web address for full-text material on agency websites. As we described in VI.A, above, agencies should develop comprehensive notice plans. One important element of these plans might be considering how best to notify users of where to find material on an agency website. One interviewee highly recommended that agencies prominently post a brief document on their homepages to serve as a guide to users about where to find the information they are seeking. This interviewee described her experience searching an agency website for a particular case file. She began her search on a database of similar files but was unable to find what she was looking for. She eventually found the case file on another section of the website. She remarked that if agencies provided clearer direction on website navigation, she, and others, would not "get lost" on agency websites.

Some agencies host blogs on their websites and report that this can be an effective technique for tailoring notice to the interests and needs of particular groups. The Federal Trade Commission reports that it tailors blogs to different categories of potentially interested persons

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[153] Virtual File Cabinet, IND. DEPT. OF ENV. MANAGEMENT, https://www.in.gov/idem/legal/public-records/virtual-file-cabinet/.
[154] Appendix II contains a sample of the "how to" guide for the Virtual File Cabinet.

and entities.[155] Blog posts are drafted in language accessible to the targeted audience. For example, some are tailored to consumers and others to businesses. Postings typically contain links to official documents such as *Federal Register* publications or records of Commission decisions.

F. Agency Publications

Targeted agency publications can effectively reach identifiable audiences. The IRS is a good example. The IRS has a variety of publications for communicating regulatory changes, each of which is accessible through the Service's website. The *Internal Revenue Bulletin* is a weekly publication that is "the authoritative instrument for announcing official rulings and procedures of the IRS and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest."[156] The *Bulletin* is unusual because it reports not only on internal agency policy changes, but also on outside documents such as legislation, judicial opinions, and executive orders, thereby giving readers a more holistic understanding of the regulatory landscape. Each year IRS collects these weekly publications into an *Annual Cumulative Bulletin*.

The Centers for Medicare & Medicaid Services also offers a different array of publications. The Medicare Learning Network is a series of training and compliance materials including articles, brochures, and fact sheets along with internet-based courses.[157] These are intentionally written in "plain language with actionable tips to use in day-to-day work."[158] The Centers for Medicare & Medicaid Services also publishes a *Quarterly Provider Update*, which

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[155] FTC Blogs, Fed. Trade Comm'n, *available at* https://www.ftc.gov/news-events/blogs.
[156] *Internal Revenue Bulletins*, INTERNAL REV. SERV., https://apps.irs.gov/app/picklist/list/internalRevenueBulletins.html.
[157] CTR. FOR MEDICARE & MEDICAID SERV., *supra* note 110.
[158] *Id.*

"is intended to make it easier for providers, suppliers, and the general public to understand the changes [they] are proposing or making in the programs [they] administer."[159]

G. Commercial Media Outreach

Agencies should use commercial media to alert the public to significant regulatory changes, especially horizontal regulatory expansions. Most of the small organizations with which we spoke said that press releases and commercial media coverage were effective ways for them to get actual notice of significant regulatory changes. For many potentially interested parties, coverage in national news media is likely to be an effective way for agencies to provide actual notice because it does not require the potentially interested party to have any initial knowledge of the regulatory change. This is particularly true for the general public that is intended to benefit from regulatory changes but is not likely to be monitoring agency websites and publications. Most agencies with which we spoke already have public affairs offices that issue press releases and attempt to obtain coverage in both the relevant trade press and in general purpose media. In addition, some agencies including OSHA, the CDC and the Department of Homeland Security have been successful in getting their messages about new regulations or other initiatives covered as "public service announcements."[160] This is a technique that others might consider using in appropriate circumstances.

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[159] *Id.*

[160] Many agencies use public service announcements. For example, the Department of Labor has issued ten public service announcement videos, in various languages, about COVID-19. Coronavirus Public Service Announcements, U.S. Dept. of Labor, Wage and Hour Division, *available at* http://www.dol.gov/agencies/whd/pandemic/public-service-announcements. OSHA has created public service announcements in the form of video and audio messages related to fall prevention, COVID-19, storm recovery, and more. Public Service Announcements, U.S. Dept. of Labor, Occupational Safety and Health Administration, *available at* https://www.osha.gov/psa. The Department of Homeland Security provides radio and video public service announcements, in English and Spanish, promoting the "If you See Something Say Something" program.

H. Face-to-Face Engagement, Phone Calls, and Public Meetings

Large and small entities alike said that personal connections are important to the current regime of how agencies provide notice of significant regulatory changes, although these connections also present equity problems. Larger entities were generally satisfied with the opportunities for direct interactions while smaller entities felt that such interactions tended to benefit larger enterprises. Although some smaller entities did report direct connections to agencies, most felt the staff resources necessary to build and maintain those connections were too high or there was a deep lack of trust in government agents and therefore an unwillingness to engage in direct connections.[161]

Many agencies attend conferences; for example, the IRS regularly participates in the American Bar Association Tax Section's annual meeting. Attending conferences is a longstanding tradition, and many agencies engage with the public in this way. In-person meetings help to establish personal relationships and create a dynamic back-and-forth to make sure that the public not only has notice but understands that notice. However, there are risks and downsides to in-person meetings. The conversations at these meetings are exclusive as not all potentially interested entities will be invited to all conferences. In many cases conference attendance requires a substantial registration fee. Moreover, the statements agency officials make at these conferences may rise to the level of guidance and, to the extent there are special procedures for issuing guidance, what an agency official says will either be limited to prepared remarks or will become "spoken guidance" only available to a limited universe of parties.

[161] Another ACUS project on "automated legal guidance" will provide a complementary approach to one-on-one interactions. Admin. Conf. of U.S., Automated Legal Guidance at Federal Agencies, https://www.acus.gov/research-projects/automated-legal-guidance-federal-agencies. That project looks at technologies such as "chatbots" and "virtual assistants." These technological approaches to one-on-one interaction hold promise and may deserve more attention in a follow-on study.

Where remarks by agency officials at a conference or in a speech are significant, agencies should consider making them available to a wider audience thru devices such as press releases and/or posting on websites.

Another way to provide face-to-face meetings with fewer equity concerns is webinars that are open to all interested parties. Since the beginning of the COVID-19 pandemic, real-time, interactive, but remote "Zoom meetings" have become much more commonplace. This change should make a webinar strategy easier than it might have been just two years ago. Webinars can be *ad hoc*, addressing a specific new rule, for example, or they can be regularly scheduled, allowing interested parties to check-in with an agency for general updates. For example, the EPA hosts a variety of webinars. In the last year the EPA offered a series of ad hoc webinars to discuss the regulation of the "forever chemical" PFAS.[162] In addition, the EPA hosts a monthly webinar series "to translate research and share research resources and information . . . ."[163] One agency hosts regularly scheduled "Q&A sessions" on line several times a week during which agency staff are available for interested parties to ask questions. Both regularly scheduled and ad hoc webinars may help potentially interested entities gain access to information more equitably than in-person meetings, although alerting the public to the webinars is also an important aspect of this notice.[164]

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[162] *PFAS Science Webinars for EPA Region 1 and State & Tribal Partners,* ENV'T PROT. ADMIN., https://www.epa.gov/research-states/pfas-science-webinars-epa-region-1-and-state-tribal-partners.
[163] *EPA Tools and Resources Webinar Series*, ENV'T PROT. ADMIN, https://www.epa.gov/research-states/epa-tools-and-resources-webinar-series.
[164] In addition to simply sharing information with the broader interested public, webinars can serve as training tools, to help train intermediaries and other experts in how to comply with a given regulation. Agencies might also develop training programs for regulatory schemes in which intermediaries help carry out the requirements. The EPA's lead repair and replacement rule provides a good example because contractors, painters, landlords, and other intermediaries are responsible for compliance. Local training programs to help prepare these parties could provide notice of the regulation and guidance on how to comply. A European administrative law scholar noted that such training programs are common in Europe and that governments sometimes pay for training.

OSHA is also attentive to the value of face-to-face communications. The OSHA Alliance Program "enables the agency to develop voluntary, collaborative working relationships with organizations that are committed to workplace safety and health."[165] The Alliance program engages trade associations, unions, community groups and other government entities to both share information about OSHA and to gather input from participants. OSHA likewise provides specialty outreach trainings for regional staff so these staff can provide "boots on the ground" support for regional businesses.

Regional field offices are another resource for face-to-face engagement and may help provide such engagement more equitably. OSHA also provides an example field office program. "Compliance Assistance Specialists in OSHA's Regional and Area Offices around the country provide outreach to a variety of groups free of charge."[166] The Compliance Assistance Specialists run seminars and workshops and can provide general information about both regulatory requirements and compliance assistance. By situating these programs in regional offices OSHA thereby creates opportunities for repeated interactions with potentially interested persons and entities that do not have a presence in Washington, D.C. Such interactions can build the personal connections that many private-sector interviewees praised. Because these interactions are based on proximity to regional offices rather than high-level connections in Washington, D.C., they may also be more equitable.

The County Committee system within the United States Department of Agriculture (USDA) also provides an opportunity for face-to-face connections between regulated entities

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[165] *OSHA Alliance Program*, OCCUPATIONAL HEALTH & SAFETY ADMIN., https://www.osha.gov/alliances.
[166] *Compliance Assistance Specialists (CAS)*, OCCUPATIONAL HEALTH & SAFETY ADMIN, https://www.osha.gov/complianceassistance/cas.

(farmers, in that case) and the Agency.[167] The County Committees are hyper-local agencies made up exclusively of regulated farmers from the local community.[168]

As with many techniques that agencies use to give notice, our interviews demonstrated that larger and more well-resourced entities made more use of local connections than smaller and less well-resourced entities. One interviewee said that EPA regional offices were effective and have good relationships with local organizations, but most interviewees were either unaware of local operations or saw those operations as a threat rather than an opportunity.[169] However, in several instances, smaller organizations reported that simply having the ability to make a phone call to local offices would be very helpful. We reviewed a handful of agency websites, including OSHA[170] and EPA[171] regional offices, USDA county offices,[172] United States Citizenship and Immigration Services,[173] and the Department of Education Office of Civil Rights.[174] Phone numbers were available on the landing page of OSHA, EPA, and USDA offices. The Department of Education required only one click to find a phone number. USCIS was the only agency where contact information was not readily available.

Phone calls can be especially useful when individuals do not have regular access to the internet. Another practice some agencies use to give notice that does not rely on the internet is posting hard-copy notices in particular physical venues. Hard copy postings are effective when

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[167] *See generally* Joshua Ulan Galperin, *The Life of Administrative Democracy*, 108 GEO. L.J. 1213 (2020) (surveying the unique mechanics of County Committees in the context of the modern administrative state).
[168] *Id.* at 1219.
[169] Some agencies have intentionally "walled-off" outreach programs and local offices from enforcement programs. Unfortunately, some interviewees, particularly those supporting immigrant communities, said that a formal separation of the enforcement program would not increase trust in other staff.
[170] Region 2, OCCUPATIONAL SAFETY AND HEALTH ADMIN., https://www.osha.gov/contactus/bystate/region2.
[171] EPA Region 3 (Mid-Atlantic), ENV. PROT. AGENCY, https://www.epa.gov/aboutepa/epa-region-3-mid-atlantic.
[172] Service Center Locator, U.S. DEPT. OF AGRIC., https://offices.sc.egov.usda.gov/locator/app?service=page/ServiceCenterSummary&stateCode=09&cnty=009.
[173] U.S. Citizenship and immigration Services, https://www.uscis.gov/.
[174] Office of Civil Rights, U.S. DEPT. OF EDUC., https://www2.ed.gov/about/offices/list/ocr/index.html

agencies know potentially interested individuals frequent a specific space and will see the postings. For example, OSHA requires employers to posts notices in workplaces and the Coast Guard posts on docks where recreational boaters are likely to see the notices.

I. Intermediaries, Directed Outreach, and Actual Notice

Face-to-face meetings and public events provide good opportunities to share information broadly and to connect with interested persons and entities. However, like many other strategies, they typically put the burden on interested entities to develop connections with the agency. **In view of the fact that larger entities are more satisfied with current notice practices than smaller, lesser-resourced entities, agencies should make special efforts to engage smaller entities through direct contacts, including making online and telephonic contacts available.**

i. Intermediaries

One especially valuable method for directing information to the entities in most need of notice is using intermediary organizations as additional channels of communication to multiply the agency's efforts to provide notice. This may include agency training programs and outreach offices. As described above in Section V, intermediaries like trade associations, lawyers, consultants, commercial and non-profit trainers, and newsletters may play a critical role in the private sector—but they only reach certain entities, which typically do not include regulatory beneficiaries or the smallest businesses.

There are, however, examples of ways that agencies can identify intermediary organizations and work with those organizations to provide effective notice. OSHA facilitates OSHA Training Institute Education Centers. Within this program OSHA authorizes a national network of organizations to provide private-sector health and safety trainings aimed at

employers, employees, and supervisors.[175] The EPA provides capacity-building grants to help universities "stimulate and support scientific and engineering research that advances EPA's mission to protect human health and the environment."[176] The EPA likewise supports small community groups by helping them understand and access federal grants.[177] State governments can also be intermediaries. For instance, an employee of a small landscaping business explained that he and his colleagues learn about changes to EPA pesticide regulations through the state government. The state issues chemical application licenses and all licensees must attend a state-run training course that includes updates on changes in federal regulations. Notice plans should consider possible uses of intermediaries, including states, and evaluate their effectiveness.

Many smaller and under-resourced interviewees expressed the need for funding to help them build capacity as intermediaries. Those interviewees who played a role as intermediaries between government and individuals were emphatic that with modest funding, they could more effectively help provide notice. These organizations stated that they could train individuals how to use agency websites, fill out forms, use apps, access the *Federal Register*, or the organizations could put together their own public service announcements, translate material, and explore other tools to facilitate effective notice. In some cases, our interviewees thought it was essential for intermediaries to deliver these sorts of services because many individuals would not trust information that came directly from the government.

The agency notice plans we describe in Section VI.A can identify potential intermediary partners, the needs of those partners, and strategies—such as trainings, public service

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[175] *OSHA Training Institute Education Centers*, OCCUPATIONAL HEALTH & SAFETY ADMIN., https://www.osha.gov/otiec/

[176] Off. of Rsch. & Dev., *Science to Achieve Results (STAR) Research Grants Program*, ENV'T PROT. ADMIN. (Mar 2020), https://www.epa.gov/sites/default/files/2020-03/documents/star_fact_sheet_css_final_508_0.pdf

[177] *Environmental Justice: Communities*, ENV'T PROT. ADMIN., https://www.epa.gov/environmentaljustice/communities

announcements, or joint public meetings—on which the agency and intermediary partner can collaborate. The plans could describe how agencies will facilitate information sharing among smaller groups, train groups in how to use the tools of the Office of Federal Register, or help larger NGOs play a role as intermediaries.

A micro-business owner with whom we spoke said in her community most micro-businesses get notice through local networks of business leaders. These business leaders are connected broadly and join smaller groupings for different business types. She communicates with others in the network by text message and when anybody learns of important regulatory developments, they will send text messages to the entire group. Our interviewee said this was effective but only when people learn of regulatory changes, which she sees as the most difficult problem. In short, sharing information is easy but getting notice is harder. Agencies should work to identify and then provide targeted outreach to different networks and intermediaries to capitalize on these existing structures for sharing notice of regulatory changes.

ii. Directed Outreach and Actual Notice

Some agencies have developed programs for more targeted outreach to interested persons and entities. This can be a very effective technique in circumstances in which an agency can identify an interested group and has a good way of communicating with them.

For example, OSHA offers examples of targeted programs. OSHA offers free, on-site compliance consultations for small businesses that are walled off from enforcement.[178] The OSHA Strategic Partnership Program works with various intermediaries, including labor organizations and trade associations, to connect with workers and employers and establish

[178] *On-Site Consultation*, OCCUPATIONAL HEALTH & SAFETY ADMIN., www.osha.gov/consultation. Compliance consultations are available to entities with fewer than 250 employees at a site and no more than 500 employees nationwide.

specific performance targets and strategies to improve workplace safety.[179] OSHA has other programs that are designed to advance direct outreach in parallel with other strategies.[180] However, there is little empirical information regarding how effective these programs are in practice and how equitably they reach different potentially interested persons and entities. If agencies use notice plans as we propose in the next part, these plans should include systems for evaluating programs that provide direct notice.

IRS tax forms and accompanying instructions are also a method of providing notice of complex regulations to many persons and entities. After changes to the Internal Revenue Code or tax regulations, IRS has a staff dedicated specifically to translating these regulatory changes into comprehensible and functional forms that help taxpayers understand their obligations. Not only do the forms serve, essentially, as compliance worksheets, IRS understands that many taxpayers rely on intermediaries for tax preparation. For this reason, IRS completes form updates well in advance of tax season and provides them to tax preparers and software companies so these intermediaries can program their software with new tax forms in mind.

To facilitate making the forms and other outreach material useable for intermediaries and the public, IRS has established user working groups. These working groups provide the opportunity for a dialogue in which IRS shares notice of regulatory changes and outreach plans and work-group participants can give feedback. IRS is aware that these working groups can be exclusive to the best positioned potentially interested entities and, for that reason, makes a

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[179] *OSHA Strategic Partnership Program*, OCCUPATIONAL HEALTH & SAFETY ADMIN., https://www.osha.gov/partnerships/.

[180] In Section VI.F we discuss the *QuickTakes* publication and in VI.G we address face-to-face programs through OSHA's field offices.

special effort to engage a wide range of participants and only holds open, public meetings. This approach may be something for other agencies to consider.

The SEC also tries to provide initial notice directly to parties. Although challenging, initial and direct notice are important strategies. When parties are unaware of their own need to seek information, initial notice is critical, and when an agency can provide that notice directly, the agency does not rely on potentially interested entities and persons learning of obligations on their own initiative.

The SEC's Division of Examinations serves an important notice-giving as well as an enforcement function. The Division conducts on-site examinations of regulated entities, particularly financial intermediaries like broker-dealers. The purpose of these examinations is to understand how industry players behave, but also to inform them of rulemaking, interpretations and enforcement trends. In that process the examination team will alert regulated parties to compliance problems, and in so doing the SEC often provides *direct notice* of significant regulatory changes to parties. This notice is not necessarily about regulatory changes, but when parties are out of compliance *because* they are unaware of regulatory requirements, this post-examination direct notice effectively serves as notice of a regulatory change about which the firm was unaware. As part of its process for inspecting facilities for compliance, EPA uses a similar meeting commonly called a "closing conference."[181] At the closing conference the inspector will answer questions and share information, will verify that their tentative findings are correct, and will describe follow-up actions.[182]

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[181] Roger Reinhart, *Fundamentals for Conducting Compliance Inspections*, ENV'T PROT. ADMIN., (July 2019), https://www.epa.gov/sites/default/files/2019-08/documents/reinhart_-_inspection_fundamentals_2019.pdf.
[182] *Id.*

The SEC has designed its regulatory and enforcement priorities so that this sort of direct notice is possible. Providing direct notice is plainly not always possible, so agencies should consider when the added effort is worthwhile. For instance, the SEC focuses direct outreach efforts on financial intermediaries in part to engender self-regulation and make enforcement more effective.[183]

When engaging with the much more numerous and diverse world of small businesses engaged in capital development, the SEC uses a different approach, aiming to provide robust support that can avoid the need for eventual enforcement actions. This strategy involves efforts to provide notice of significant regulatory changes. The Office of Small Business Policy, within the Division of Corporate Finance,[184] conducts outreach specifically to small businesses. It develops plain language summaries of rules around capital formation, alerts businesses to opportunities for raising capital and then helps these businesses understand the regulatory requirements that come with those opportunities. The Office of Advocate for Small Business Capital Formation[185] is a statutorily created office[186] that specifically focuses on small businesses and particularly minority-, women-, and veteran-owned businesses. The SEC Office of Advocate for Small Business Capital Formation is primarily substance focused with a sub-mission to help certain marginalized business owners and managers.

Agency offices dedicated specifically to outreach and connections to otherwise unconnected interested persons and entities may also be effective tools for notice-giving. The EPA, for instance, established an outreach office specifically for Puerto Rico and the

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[183] Thomas K. McCraw, *With the Consent of the Governed: SEC's Formative Years*, 1 J. POL'Y ANALYSIS MGMT. 346, 352 (1982).
[184] *Office of Small Business Policy*, SECURITIES & EXCH. COMM'N, https://www.sec.gov/smallbusiness/OSBP
[185] *Office of the Advocate for Small Business Capital Formation*, SECURITIES & EXCH. COMM'N https://www.sec.gov/oasb.
[186] 15 U.S.C § 78d(1).

Caribbean.[187] The office was designed to build connections between Puerto Rico and EPA and is particularly focused in helping Puerto Rico establish compliance by building connections with local communities and with making connections to communities, regulated entities, and Puerto Rico government officials. This sort of tailored effort will likely be effective in other contexts as well but is expensive and not likely to be adaptable to reaching all underserved interested person and entities.[188] Nonetheless, outreach offices targeting particular populations of interested parties may be a best practice in some situations.

Based on our interviews, such offices may be especially valuable when they are "walled-off" from enforcement programs. This separation may make regulated entities more comfortable engaging with an agency. If outreach offices provide intermediaries with instructions or trainings on how to access agency information, intermediaries can effectively share information with smaller entities, providing a buffer between the most vulnerable communities and the government. By supporting intermediary organizations in this way an agency may provide effective notice even to communities that do not trust the agency.

Yet another means of direct outreach and face-to-face engagement is incorporation of some entities in the "front end" of regulatory development. SBREFA, for instance, requires that certain "covered agencies" establish small business panels to gather input from small businesses on the front end of rule development.[189] Strictly speaking, these panels are not designed for providing notice, but those we talked to explained that by bringing small businesses, small business representatives, and NGOs into the decision-making process, agencies open channels

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[187] *Caribbean Environmental Protection Division*, ENV'T PROT. ADMIN., https://www.epa.gov/aboutepa/organization-epas-region-2-office-new-york-city#cepd.
[188] *Id*.
[189] 5 U.S.C. § 609(b).

for notice after they complete the rulemaking process.[190] Only EPA, OSHA, and the Consumer Financial Protection Bureau are currently required to establish these panels but agencies could consider whether there would be any benefit to voluntarily adopting that strategy.[191] The SBREFA framework is not the only one for generating engagement early on the process of regulatory development. Many interviewees, particularly businesses and larger NGOs, described the importance of early knowledge of the rulemaking process through Advance Notices of Proposed Rulemakings and other early-stage notice of pending regulatory changes. When engaged early in agency processes, our interviewees said they were more likely to have actual notice of the final changes because of their ongoing engagement with agency staff.[192]

The USDA County Committees, introduced in the prior subsection, are also an example of an agency using intermediaries to help provide actual notice. In this case, the intermediaries—the farmers—are integrated directly into the federal agency because Congress has established a program in which regulated farmers elect other farmers from their own ranks to work *within* the agency.[193] Interestingly, these committees are themselves regulatory and adjudicatory agencies with significant power,[194] but the USDA primarily promotes them as intermediaries between farmers and the USDA.[195] Although one of us has written critically about the county committees,[196] as intermediaries that alert farmers to changes in USDA policy, they may play an

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[190] It is notable that in our conversations we detected some conflict over who should be part of these panels. Agencies seem to prefer participation from actual businesses while trade associations, perhaps as one would expect, think that they can bring more experience and knowledge to the table. Agencies see some benefit from direct input and direct experience while trade associations point to their aggregate knowledge and political expertise.
[191] 5 U.S.C. § 609(d)
[192] Recommendation 2018-7, Public Engagement in Rulemaking, (Feb. 6, 2019); Michael Sant'Ambrogio & Glen Staszewski, Public Engagement with Agency Rulemaking 152 (Nov. 19, 2018) (report to the Admin. Conf. of the U.S.), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3615830.
[193] Galperin, *supra* note 167 (citing 16 U.S.C § 590h(b)(5)(B)(i)(I) (2012)).
[194] *Id.* at 1218.
[195] *Id.* at 1227-28.
[196] *Id*. (criticizing the committee structure for its reliance on majoritarianism without regard to reasoned and deliberative decision making).

important role.[197] Small and under-resourced organizations have praised this sort of local connection but were also wary of such connections if they perceived them a creating an enhanced risk of enforcement. If agencies were to separate enforcement staff from outreach staff, and communicate that separation to the public, this might help increase trust. However, some interviewees said that even with separate enforcement programs, they would not trust local offices or outreach staff.

To date, we have found little or no data documenting how effective or ineffective these various strategies are in practice. One reason for agencies to develop and periodically re-evaluate notice plans, as we described in part VI.A, is to research the costs and benefits of various types of outreach and training programs to develop more information so the comparative evaluation of various agency approaches to outreach and training can be more evidence-based.

J. Guidance

Guidance serves multiple purposes, but one function is providing notice about changes in agency requirements and policy to persons inside and outside of the agency. On the other hand, huge volumes of guidance can be counterproductive to the goal of effective notice by making too much information available and therefore difficult to access and assess.[198] The notice plans described above, by establishing a proactive planning process, can help agencies strike the right balance in providing effective notice without overwhelming potentially interested parties.

For guidance documents that announce significant regulatory changes, a combination of user manuals, publication on agency websites, and notices of availability in the *Federal Register* are potentially useful tools and, in their notice plans, agencies should

[197] *Id.*
[198] Coglianese, *supra* note 3. In Appendix I we provide a summary of recent congressional and presidential efforts to make guidance documents more available to the public.

articulate how they make guidance documents available. In fact, in many circumstances, publication on websites and the *Federal Register* is a statutory requirement.[199] As our analysis of constitutional due process indicates, courts, including the Supreme Court, have recognized that the government has a responsibility to provide people with fair notice of significant changes to regulatory requirements. However, agencies use guidance documents in different ways, and not all guidance documents raise issues of notice of significant regulatory changes.

VII. Conclusion

This study considers practices agencies can use to improve the ways in which they provide notice of significant regulatory changes. Notice is important because it is an essential ingredient in good governance and because there are a variety of legal requirements for agencies to issue meaningful notice. Our interviews demonstrated that current notice practices are only partially effective. The *Federal Register* is a valuable tool for notice, and many large entities have the resources to track *Federal Register* notices regularly. Intermediaries such as trade associations and other organizations also act as additional channels of communication that multiply the agency's notice by relaying it to their members and others. However, smaller entities do not always benefit from these forms of notice. Further, many important regulatory changes are not announced in the *Federal Register*, or are dispersed across multiple agency documents, and are therefore hard to access and interpret. Small and large entities alike struggle with this dispersed material. Relatedly, when regulations expand to include new subjects, it is difficult for affected and interested parties to track changes because they may come from

[199] *Id.*

agencies they are not already following. Dispersed regulatory regimes and horizontal regulatory expansion also deserve special attention for improving notice.

We were able to identify multiple practices that might improve the way agencies provide notice. User manuals, email lists, social media, improved indexing and searchability, and face-to-face interactions both ad hoc and scheduled, are all promising tools worthy of further exploration. Notice plans that describe how the agency intends to use these tools in different circumstances will help structure agency notice practices. These plans should also include procedures and criteria for evaluation and adapting the notice plan in the light of experience, and strategies for reaching underserved audiences.

The proposed recommendations below reflect our findings. The material in italics below reflects explanations and examples that could be addressed in the preamble rather than in the text of the recommendations that ACUS might adopt.

VIII. Proposed Recommendations

1. Assessing Strategies for Providing Effective Notice

A. Agencies should assess their strategies for providing notice in a way that allows entities to access information of interest to them with only such difficulty and expense as is reasonable under the circumstances ("effective notice"). Such assessment should focus on persons and entities who actually desire notice or would desire notice if they knew about the regulatory change in question ("potentially interested persons or entities"). Likewise, assessments should apply to all "significant regulatory changes," including not only changes that are legally binding but also those agency interpretations and statements of policy that might reasonably be expected to change behavior. Such changes may include:

   a. Notices of rulemaking, including advance notices of potential rulemaking, notices of potential rulemaking, and final rules;
   b. Agency guidance documents including enforcement policies and priorities;

c. Precedential adjudicatory decisions; and
d. Any other final agency action that might provide notice to regulated parties or beneficiaries of a change in regulatory provisions.

B. In assessing how to improve their notice strategies, agencies should consider which individuals or entities may be potentially interested parties and the particular needs of each category of potentially interested persons or entities. Such parties may include:
   a. Entities subject to regulatory requirements, including
      1. Large, well-resourced entities;
      2. Small or under-resourced entities;
      3. Individuals; and
      4. Entities not previously regulated.
   b. Regulatory beneficiaries, including
      1. Parties represented by legal entities;
      2. Parties assisted by advocacy groups; and
      3. Unrepresented and unassisted individuals.
   c. Intermediary organizations, such as representative organizations, advocacy groups, citizens organizations, and nonprofit organizations.

2. Developing Strategies for Providing Effective Notice

A. In assessing how to improve their notice strategies, agencies should evaluate which specific notice practice(s) are appropriate for the potentially interested parties identified. The following list includes some promising practices agencies may consider. The material in italics is explanatory only and the committee may choose to delete it or include in the preamble to its recommendations:

   a. Press releases and public service announcements;
      1. *Some agencies find press releases and public service announcements particularly useful to alert potentially interested parties concerning new or expanded regulatory requirements that have not previously affected them.*

2. *Under-resourced organizations that are less likely to receive notice through personal connections or the* Federal Register *praise press releases and commercial media coverage as effective devices for receiving notice.*

b. Listservs and email notices to those who have indicated an interest in an area;

1. *Some community and advocacy groups say signing up for list servs is a particularly useful, low-cost way for them to track regulatory developments*.
2. *Others avoid agency list servs because they worry about the volume of emails they may receive*. *This suggests that agencies should consider allowing users to opt-in to narrowly defined topics.*

c. Posting hard copy notices where potentially interested individuals are likely to use a specific venue;

1. *Some agencies use hard copy postings to alert regulated parties or beneficiaries who are likely to be in a specific physical space such as OSHA postings in an employee breakroom or Coast Guard postings on boat docks.*
2. *Although hard copy postings will be most useful in situations in which the target audience is likely to see them in particular venues, posting notices may be particularly useful for reaching potentially interested parties that may not regularly access the internet.*

d. Manuals, digests and other summaries of agency policies and interpretations.

1. *Potentially interested parties praise agency manuals and summaries that assemble numerous guidance documents, interpretations and policies in a single, convenient reference rather than requiring each user to assemble the pieces of a complex regulatory puzzle. Successful examples are the Environmental Protection Agency's* Pesticide Registration Label Review Manual *and the Patent and Trademark Office's Trademark* Manual of Examining Procedure.

2. *Such manuals involve costs in terms of agency time as well as potential adverse effects on enforcement cases if statements in an agency summary are incorrect or policies change.*

e. Brief notices of availability published in the *Federal Register* with links to documents on agency websites, including policy statements and interpretative rules, posted on agency websites or otherwise made available.

   1. *Although publishing in the* Federal Register *is not free, notices of availability and links to the full documents on agency websites alerts many parties and makes it easier for potentially interested persons to find information on agency websites. Such notices of availability are typically short, which limits their cost as the Office of Federal Register charges based on length of publications*;

f. Using hashtags, keywords and other methods to facilitate agency material appearing on commercial search engines.

   1. *Potentially interested entities, particularly the smallest and least resourced, often find it difficult to access agency material using commercial search engines. Agencies can address this problem at a low cost by providing a list of keywords or hashtags with definitions of their scope on their websites and using them consistently on websites, manuals and in notices of availability in the* Federal Register;

g. Public meetings and meeting with representatives of interested parties;

   1. *While in-person meetings can be costly in terms of staff-time and administration, many interested persons, large and small, praised the opportunity for face-to-face meetings*.
   2. *During the recent COVID pandemic, many people and agencies became more familiar and comfortable with internet-based meeting software (such as Zoom, Webex and Microsoft Teams). These tools can make it easier for agencies to meet with potentially interested parties. However, even if not covered by the Advisory Committee Act, we caution that such meetings should be offered on an equal basis to interested parties, and if it is not*

practical to accommodate all interest parties, to a representative sampling of different categories of interested parties.

h. Outreach offices to underserved groups and interests.

1. *Potentially interested parties spoke about the value of local and regional offices. Establishing new offices presents a large cost but creating outreach programs within existing regional offices may be an effective and lower cost strategy, particularly if the outreach program is walled off from enforcement programs to increase trust.*

i. Partnering with intermediary organizations.

1. *Several agencies develop ongoing relationships with key intermediaries so those intermediaries can help disseminate notice through their networks. The Internal Revenue Service, for example, has an extensive outreach program aimed at tax preparers and attorneys who can effectively transmit information about regulatory changes to individual taxpayers.*
2. *One of our interviewees reported that the European Commission sometimes hires intermediary organizations to provide training to interest parties*.
3. *Both OSHA and EPA require training in certain areas (such as reducing exposure to lead paint dust in repair and renovation of properties) and certify commercial firms approved to provide such training*.

j. Technological developments for making agency websites and notices in the *Federal Register* easier to find and navigate, including standardizing search terms, hashtags and indicating in agency publications and announcements what categories persons and entities are most likely to be potentially interested.

1. *The Office of the Federal Register maintains a keyword thesaurus to help facilitate searches, but agencies do not always use the standardized terms.*
2. *Including potentially interested entities and agencies in developing the standardized keywords may help make search tools more intuitive and effective*.

B. In assessing which notice practice(s) to employ, agencies should consider the effectiveness of those practices, particularly whether they:

a. Are cost effective;
b. Increase voluntary compliance and reduce the need for coercive enforcement;
c. Reach underserved groups, including small and micro business, citizens and advocacy groups and other regulatory beneficiaries and those whose primary language is not English;
d. Reduce transaction costs for regulated parties to assemble and interpret regulatory requirements for themselves;
e. Increase participation in regulatory development;
f. Increase satisfaction and the perceived legitimacy of the agency's regulation; and
g. Have proven effective when used by other agencies to provide actual notice.

3. Assessment and Oversight

A. Agencies should develop *notice plans* for significant regulatory changes to document the strategies employed for providing effective notice. Notice plans should:

a. Identify the regulatory change and what makes it significant;
b. Identify the potentially interested parties;
c. Set out the practices that the agency proposes to use to provide notice; and
d. Identify metrics to measure the effectiveness of the notice practices.

B. Agencies should consider designating an agency office or official as its *Chief Outreach Officer*, who shall:

a. Be responsible for evaluating the effectiveness of the agency's *notice plan*;
b. Keep abreast of technological developments;
c. Evaluate best practices of other agencies for providing notice; and
d. Make recommendations for improving the agency's practices and procedures to better provide effective notice of significant regulatory changes to potentially interested parties.

C. Agencies should retrospectively review which strategies are most effective at notifying potentially interested parties. Agencies should:

a. Review and revise their *notice plans* to reflect which are most effective in practice as well as which provide equitable access and do not favor certain groups over others;

b. Obtain feedback from interested persons and entities regarding which methods for providing notice they considered most effective; and

c. Participate in *interagency notice working groups* to share experience, best practices, and information regarding the effectiveness, cost-effectiveness and equity of various notice techniques and strategies.

4. Public Disclosure and Transparency

Agencies should make public all elements of their notice-giving strategies, including:

a. Draft *notice plans*, prior to effectuation, with allowance for public comment;

b. Final *notice plans*;

c. Instructions for how potentially interested parties may opt-in to receive notices; and

d. The results of retrospective reviews.

APPENDIX I: Constitutional and Statutory Requirements for Notice

A. Constitutional Due Process

"Due process requires that parties receive fair notice before being deprived of property."[200] In the administrative law context, this principle emerges in the "fair notice" or "fair warning" doctrine. These doctrines prohibit agencies from enforcing any legally binding action against a party who did not have notice.[201] Publication in the *Federal Register* establishes a statutory presumption of notice of a regulatory change,[202] but many significant regulatory changes can occur through policy statements, interpretative rules, and other agency actions that are not necessarily published in the *Federal Register*.[203] For these sources of policy change, if an agency seeks to enforce the policy against a party, due process doctrine requires agencies to give notice in some form because a party "cannot be found out of compliance [if the agency] failed to give fair notice of what is required . . . ."[204] In some cases, due process may require more than publication in the *Federal Register*.

Although the Supreme Court has never addressed the issue directly in the context of administrative agencies, the Court has indicated the importance of notice of significant regulatory changes. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[205] Notice, the

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[200] Gen. Elec. Co. v. Env't Prot. Agency, 53 F.3d 1324, 1328 (D.C. Cir.. 1995).
[201] *Id.*
[202] 44 U.S.C. § 1507
[203] 5 U.S.C. § 553(b)(A). However, there is some uncertainty, described below, about whether the Freedom of Information Act requires agencies to publish certain guidance documents in the *Federal Register*. 5 U.S.C. § 552(a)(1)). It is also worth noting that agencies can and do use a notice and comment process and publish material in the *Federal Register* even if that material is not strictly subject to such requirements.
[204] United States v. Chrysler Corp., 158 F.3d 1350, 1354 (D.C. Cir. 1998). It appears to be rare for an agency to seek to enforce unpublished policy against a party. In most enforcement actions an agency will reference statutory authority or authority found in published regulations and codified in the Code of Federal Regulations. Alternatively, an agency may provide direct notice to a party in advance of enforcement proceedings.
[205] F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).

Court has said, is not limited only to prohibited conduct. Regulated parties should also have notice "of the severity of the penalty"[206] In *Mullane v. Central Hanover Bank & Trust*, the Supreme Court held, 7-1, that "[a]n elementary and fundamental requirement of due process…is notice reasonably calculated, under all the circumstances…" and ruled that constructive newspaper publication was insufficient in some circumstances.[207] *Mullane* did not involve notice of significant regulatory changes, but at least one federal court has applied *Mullane* to federal regulation.[208]

In *Higashi v. U.S.*, the Federal Circuit ruled that *Mullane* applied to the recission of an executive order. The court found that, on the facts of that case, the government had given effective notice "reasonably calculated, under all the circumstances" because the government published the recission in the *Federal Register* and there was significant, nationwide, news coverage.[209] *Higashi*, however, was looking back at the circumstances that constituted effective notice in 1944.[210] Today, however, what is the best notice practical under the circumstances may have changed because new technologies such as email, websites and social media are now available to provide effective notice at relatively low cost. The principle that due process requires the best notice practical under the circumstances means that agencies run a serious risk

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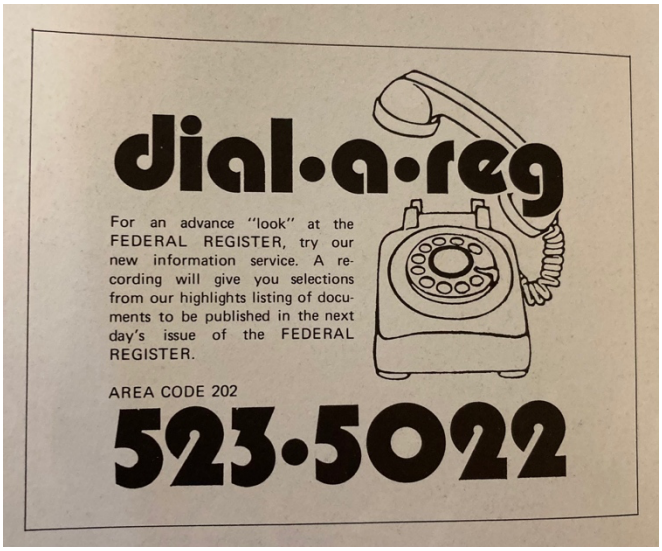
[206] BMW of North America, Inc. v. Gore, 517 U.S. 559, 574 (1996).
[207] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). *See also, Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J., concurring) ("The 30-day limitation on judicial review imposed by the Clean Air Act would afford precariously little time for many affected persons even if some adequate method of notice were afforded. It also is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register."); Arthur Sapper, *The Little Statute that Gets No Respect: How Courts Have Ignored the Administrative Procedure Act with Respect to Whether Pre-Enforcement Challenge Provisions are Exclusive*, 35 BYU J. PUB. L. 1 (2020).
[208] Higashi v. U.S., 225 F.3d 1343 (Fed. Cir. 2000)
[209] *Id.* at 1348-1349.
[210] *Id*. at 1345.

that procedures for providing notice may be held unconstitutional under *Mullane* if they are not updated to take advantage of these newer technologies.



Source: U.S. Office of the Federal Register, "The Federal Register: What it is and how to use it" (1977).

Lower courts have addressed the overlap of due process and regulatory notice more directly. In *General Electric v. Environmental Protection Agency* the D.C. Circuit noted that pre-enforcement communication with a regulated entity will, like publication in the *Federal Register*, provide sufficient notice to satisfy Due Process notice requirements.[211] The D.C. Circuit further held that notice is constitutionally sufficient when a "regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects the parties to conform."[212] The majority of the courts of appeals have adopted this test.[213] However, even among courts explicitly adopting *General Electric*, there are differences in how they apply the "ascertainable certainty" test.[214] Thus, to date most lower courts hold that publication in the *Federal Register* or actual notice are sufficient to comply with due process.[215] However, Supreme Court decisions applying the Due Process clause outside of the administrative context place a high value on taking reasonably practical measure to provide effective notice. Therefore,

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[211] *Gen. Elec.*, 53 F.3d at 1329.
[212] *Id.*
[213] Petition for a Writ of Certiorari at 13-18, SNR Wireless LicenseCo v. Fed. Commc'n Comm'n, No. 15-1330 (D.C. Cir. 2017) , *cert. denied* SNR Wireless LicenseCo v. Fed. Commc'n Comm'n, 138 S.Ct. 2674 (2018).
[214] *Id.*
[215] One district court opinion might suggest that when an agency publishes a document on its website, that website availability may suffice as due process notice. Fuentes v. Azar, 468 F.Supp.3d 83, 91 (D.D.C. 2020) ("But Plaintiff fails to explain how the right to a fair and open hearing compels Defendants to grant Plaintiff access . . . to records that . . . were already available on the agency's website . . . .").

in our judgment, agencies are running a significant risk if they do not provide the most effective notice practical under the circumstances.[216] In some circumstances, publication in the *Federal Register* may not be the most effective notice practical under the circumstances.

B. Statutory Requirements

Actual notice is not realistic in many situations where agencies engage with a huge number of entities. The Federal Register Act provides an alternative by creating the *Federal Register* and declaring publication therein constructive notice.[217] Because legislative rules can have no binding effect if an agency does not either publish in the *Federal Register* or give an entity actual notice,[218] there is widespread understanding that agencies must publish legislative rules in the *Federal Register*. There is also widespread compliance with this requirement. The same is not true for regulatory changes that emerge from other agency actions.[219]

The Federal Register Act *permits* agencies to publish guidance documents in the *Federal Register*,[220] and the Freedom of Information Act (FOIA) *requires* publication of many guidance documents.[221] There is some uncertainty about publication requirements for guidance documents, however. As an initial matter, FOIA clearly states that agencies must publish certain guidance in the *Federal Register*.[222] Specifically, the statute reads: "(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public— . . . (D) . . . *statements of general policy or interpretations of general applicability* formulated and adopted by the agency; and (E) each amendment, revision, or repeal of the

[216] *Mullane*, 339 U.S. 306.
[217] 44 U.S.C. § 1507 ("The publication in the Federal Register of a document creates a rebuttable presumption that the agency has fulfilled its legal requirements under the statute.")
[218] 44 U.S.C. § 1507; 5 U.S.C § 552(a).
[219] DAVIS, *supra* note 72 at 75.
[220] 44 U.S.C. § 1505(b).
[221] 5 U.S.C. § 552(a).
[222] 5 U.S.C. § 552(a)(1)(D).

foregoing."[223] The reference to statements of general policy and interpretations of general applicability reference agency actions typically described as "guidance."[224]

The FOIA publication requirement covers much, but not all guidance.[225] Lower courts have held that guidance only triggers the publication requirement if it is both "generally applicable" and has a "significant impact" on regulated parties.[226] Thus, according to the 9th Circuit, if a rule is merely a clarification of existing duties or "instructive," publication may not be necessary.[227] In this way, the threshold for publication seems to turn on questions around binding impact, which are very similar to those that dictate whether a document is a legislative rule or guidance document for Administrative Procedure Act purposes. For instance, one court has held that FOIA only requires *Federal Register* publication if the document is "conclusive in the agency's decision" but not if the document informs parties about binding rules that come from other sources.[228] Under this line of thinking, documents incorporating published material, such as user manuals that synthesize statutory and published legislative rules, are also likely exempt.[229] Regardless of the exact line that separates documents that agencies must publish in the *Federal Register* and documents they need not publish, it is clear that FOIA establishes an expectation that agencies give notice via publication in the *Federal Register*. Moreover, there is limited case law on the subject, all of which is from lower courts. If the Supreme Court has reason to address whether FOIA requires *Federal Register* publication of guidance documents, it is possible that the Court may read the expansive language as mandating more publication of guidance.

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[223] *Id*. (emphasis added).
[224] Coglianese, *supra* note 3, at 21.
[225] *E.g.*, Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352 (Fed. Cir. 2005).
[226] Andersen v. Butz, 550 F.2d 459 (9th Cir. 1977).
[227] *Id.* at 463; St. Eliz. Hosp. v. U.S., 558 F.2d 8 (Fed Cir. 1977).
[228] Nguyen v. United States, 824 F.2d 697 (9th Cir. 1987).
[229] Cathedral Candle Co., 400 F.3d. 1352.

In addition to the *Federal Register* publication requirement, FOIA also provides a "built in" incentive for compliance. The Act states: "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be require to resort to, or be adversely affected by, a matter required to be published in the *Federal Register* and not so published."[230] Thus, if there is not timely and actual notice, an agency cannot use a document against a party unless the document is published in the *Federal Register*.[231] As Professor Coglianese notes, this creates some incentive for agencies to publish in the *Federal Register* in order to use documents as precedential authority for enforcement action.[232] But because agencies do not always rely on guidance for precedential authority, the "self-enforcing legal structure" built into the law "fits less well in the context of documents that are avowedly non-binding."[233]

The 1996 FOIA amendments utilize a similar structure: "A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than the agency only if—(i) it has been indexed and either made available or published as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof."[234] This language covers a wide

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[230] 5 U.S.C § 552(a)

[231] *E.g.,* Northeast Env. Def. Center v. Brennen, 558 F.2d 930 (9th Cir. 1990); Kennecott Utah Copper Corp. v. Dept. of Interior, 88 F.3d 1191, 1203 (D.C. Cir. 1996) (stating that Congress created an "incentive" for publication). There may also be a judicial presumption in favor of finding that a party had actual notice and therefore reducing the incentive to publish in the *Federal Register*. *See* Tex. Alliance for Home Care Serv. v. Sebelius, 811 F.Supp.2d 76, 103 (D.D.C. 2011) (reiterating that publication is only necessary if there is not actual notice and finding that where there was a dedicated website with relevant information, a party must explain why it did not get actual notice through that website).

[232] Coglianese, *supra* note 3, at 22. When FOIA does not require *Federal Register* publication of guidance documents it generally requires agencies to make documents available on an agency website for public inspection. 5 U.S.C. § 552(a)(2).

[233] Coglianese, *supra* note 3, at 22.

[234] 5 U.S.C. § 552(a)(2)(E). The drafting in this section is unclear and there is little relevant caselaw to shine light on the matter. *But see* Marsh v. J. Alexander's LLC, 905 F.3d 610, 627 (9th Cir. 2018); Dep't of Pub. Welfare v. Sebelius, No. CIV.A. 09-808, 2010 WL 2976119, at *7 (W.D. Pa. July 28, 2010). The question remains whether the ability to "rel[y] on, use[], or cite[] as precedent…" as laid out in (a)(2)(E) is only available to documents identified in that subsection or to any "final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public . . . ." *Id.*

range of documents that might make significant regulatory changes, and while it does not require publication on websites, it provides that when an agency does publish on its website, a document can carry precedential weight. In short, this provision might *add* precedential weight to a document if the agency choses to publish on a website.[235]

The Freedom of Information Act also includes an online "reading room" requirement that mandates agencies make certain information available online.[236] In addition to requiring publication in the *Federal Register*, the Freedom of Information Act states that agencies "shall make available for public inspection in an electronic format" various regulatory documents, including "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register."[237]

The *Federal Register* publication requirement applies to any document of "general applicability."[238] The website publication requirement applies to those documents "which have been adopted by the agency and are not published in the *Federal Register*."[239] It is unclear whether the second provision is meant to cover documents that agencies *need not* publish in the *Federal Register* of whether it is an alternative option for documents that agencies *choose not* to publish in the *Federal Register*.[240] Regardless, FOIA clearly requires that agencies publish most regulatory material in the *Federal Register* and on agency websites.

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[235] By contrast, § 552(a) seems to subtract precedential weight if an agency fails to publish a document in the *Federal Register*.
[236] Prior to the 1996 amendments the statute required documents be made "available for public inspection and copying…" Freedom of Information Act of 1966, PL 89-487 (Jul. 4, 1966), thus the historic phrase "reading room."
[237] 5 U.S.C. § 552(a)(2).
[238] 5 U.S.C. § 552(a)(1)(D).
[239] 5 U.S.C. § 552(a)(2)(B).
[240] *See, e.g.*, Anderson v. Butz, 550 F.2d 459 (9th Cir. 1977) (holding that agency staff may avoid *Federal Register* publication if they publish documents in a reading room). *But see* Appalachian Power v. Train, 566 F.2d 451 (4th Cir. 1977) ("Reasonable availability is not a substitute for publication; it is one of two conjunctive requirements . . . ") Note that both cases were decided prior to the 1996 amendments that added the website publication requirement, but there is no reason to think that has changed the meaning of the statutory language.

Compliance with and enforcement of this section are irregular, at least with respect to guidance.[241] Guidance documents are understood to announce agency policy without creating binding legal standards.[242] In other words, when an agency seeks to enforce policy, the agency must base its enforcement action on a statute, legislative rule, adjudicatory opinion, or other sources of binding law. An agency may not rely solely on a guidance document. Where FOIA requires agencies to publish material in the *Federal Register*, the consequence for failing to publish is that the agency may not use the unpublished material against a party.[243] Because agencies cannot use guidance documents against a party regardless of publication status, the lack of practical consequences limits the impact of the FOIA publication requirement. This may explain why compliance is lacking. Regardless of compliance, there is a clear standard that agencies publish guidance documents in the *Federal Register* and on agency websites.

Other statutes also provide trans-substantive notice requirements, although these requirements tend to be more narrowly focused or flexible. Section 207(f)(2) of the E-Government Act of 2002 requires agencies to "establish a process for determining which Government information the agency intends to make available and accessible to the public on the Internet," "develop priorities and schedules," make "final determinations, priorities, and schedules available for public comment," post such information on the internet, and update it as needed.[244] Similarly, the Federal Records Act of 1950 directs agencies to make a record of agency documents to facilitate document production to "persons directly affected by the agency's activities."[245] The Federal Records Act further requires agencies to have procedures for

[241] Russell L. Weaver, *An APA Provision for Nonlegislative Rules?, 56* ADMIN. L. REV. 1179, 1188 (2004).
[242] *E.g.*, Pacific Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38-9 (D.C. Cir. 1974).
[243] 5 U.S.C. § 552 (a)(1).
[244] 44 U.S.C. § 3501, Sec. 207 note (f)(2)(A)
[245] 44 U.S.C. § 3101.

public disclosure and electronic posting.[246] Unlike the E-Government Act, the Federal Records Act directs agencies to organize their records to facilitate document availability.

The Regulatory Flexibility Act (RFA) requires that agencies release a preliminary regulatory flexibility analysis when the agency "is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule."[247] An agency must issue a final regulatory flexibility analysis when it issues a final rule under the notice-and-comment process.[248] However, analyses are not required if "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[249]

SBREFA[250] amended the RFA and requires agencies to create "small entity compliance guides" (SECGs).[251] We discuss these guides in Sections V and VI of this report. One stated purpose of the SBREFA was "to develop more accessible sources of information on regulatory and reporting requirements for small businesses."[252] SBREFA requires that, for every rule that requires a final regulatory flexibility analysis, agencies must also publish "small entity compliance guides" that "explain the actions a small entity is required to take to comply with a rule or group of rules" in "sufficiently plain language."[253] The Act notes that "[a]gencies may prepare separate guides covering groups or classes of similarly affected small entities, and may cooperate with associations of small entities to develop and distribute such guides."[254] Additionally, the Act requires agencies to "cooperate to make available to small entities through

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[246] 44 U.S.C. 3102(2).
[247] 5 U.S.C. § 603(a)
[248] *Id.* § 604(a).
[249] *Id.* § 605.
[250] Pub. L. No. 104-121.
[251] 110 Stat. 858 § 212, 5 U.S.C. 601 note.
[252] *Id.* § 203.
[253] *Id.* § 212(a).
[254] *Id.*

comprehensive sources of information, the small entity compliance guides and all other available information on statutory and regulatory requirements affecting small entities."[255]

In addition to these trans-substantive statutory requirements, there are program-specific statutory requirements as well. For example, the Internal Revenue Code includes notice requirements for individual taxpayers regarding interest and penalties.[256] However, the Code's "Rules and regulations" provision provides that "the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue."[257] The statute, therefore, does not actually mandate enhanced notice procedures for significant regulatory changes.

However, the IRS regulation on "Rules and regulations" more explicitly outlines notice requirements.[258] While regulations and Treasury decisions (another form of IRS rules) must be "published in the Federal Register,"[259] the regulations require Treasury decisions to be posted in the *Internal Revenue Bulletin* as well.[260] The *Bulletin* aims to "promote correct and uniform application of the tax laws by Internal Revenue Service employees and to assist taxpayers in attaining maximum voluntary compliance by informing Service personnel and the public of National Office interpretations of the internal revenue laws, related statutes, treaties, regulations, and statements of Service procedures affecting the rights and duties of taxpayers."[261] The IRS

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[255] *Id* § 212(b).
[256] 26 U.S.C. §§ 6631, 6751.
[257] 26 U.S.C. § 7805.
[258] *See* 26 CFR § 601.601.
[259] *Id.* § 601.601(d)(1).
[260] *Id.* § 601.601(d)(2)(ii)(a).
[261] *Id.* § 601.601(2)(b)(iii).

regulation also requires that the IRS publish Revenue Rulings and Revenue Procedures in the *Internal Revenue Bulletin*.[262]

As mentioned briefly in Section VI.E, the Food Safety Modernization Act,[263] which amended the Federal Food, Drug, and Cosmetic Act, established requirements for the FDA to publish certain food safety measures on its website.[264]

Although this is just a short survey of statutory requirements, Congress has shown, again and again, its interest in how agencies give notice of regulatory changes.

C. Executive Order 12898

One central finding of our research is that small, less-resourced entities have the most difficulty getting effective notice of significant regulatory changes. Our interviews show that the groups struggling to get effective notice include communities where English is not the primary language, immigrant communities, and environmental justice communities. Executive Order 12898, from 1994, establishes a variety of directives related to environmental justice.[265] Among these directives is a general call to improve the way agencies give notice to marginalized communities.[266] Section 5-5 states that "Federal agencies may, whenever practicable and appropriate, translate crucial public documents, notices, and hearings relating to human health or the environment for limited English speaking populations." This is not a mandate, but it is a reminder that effective notice may require agencies to translate certain documents from English.

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[262] *See Understanding IRS Guidance - A Brief Primer*, INTERNAL REVENUE SERV., https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer; 26 C.F.R. § 601.601(d)(2).
[263] P.L. No. 111–353.
[264] 21 U.S.C. § 2223(d)(2)(B).
[265] Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Executive Order 128,98 (Feb. 16, 1994).
[266] *Id*.

The Executive Order continues, "Each Federal agency shall work to ensure that public documents, notices, and hearings relating to human health, or the environment are . . . readily accessible to the public." This mandatory language imposes a requirement on agencies to make important public information accessible. While the Executive Order requires only that agencies "work to ensure" such accessibility, it nevertheless directs agencies to prioritize effective notice to marginalized persons and entities.

Taken together, from the constitutional baseline of due process through the Federal Register Act, various FOIA provisions, and other trans-substantive notice requirements, various legal rules govern the way agencies give notice of significant regulatory changes. The uncertainty around the exact meaning of these provisions is yet another reason for agencies to evaluate and, when necessary, improve their practices for giving notice. Doing so may help agencies avoid legal consequences. Even aside from the specific requirements of these trans-substantive statutes, the repeated legislation in this area demonstrates congressional interest in how agencies give notice and suggests possible congressional dissatisfaction. This alone may be an important reason for agencies to improve their notice practices as technology evolves.

D. Guidance

Guidance documents advise the public about how agencies interpret their legal authority and how they plan to use their discretionary power.[267] Thus, making guidance publicly available is important to providing notice of significant regulatory changes. Yet agencies do not consistently share guidance documents. Congress and presidents have tried to address this

[267] Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective* 23 (Report to the Admin. Conf. of the U.S.) (Oct. 12, 2017) *citing* Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947).

problem. This part provides a summary of recent laws and policies related to how agencies make guidance documents publicly available.

The FDA is subject to statutory requirements for issuing certain guidance[268] and has promulgated a legislative rule meant to control how it issues and shares guidance.[269] During the Carter Administration, the EPA promulgated a rule requiring the Office of Air, Noise, and Radiation to develop a system for disseminating guidance documents.[270] The Office of Management and Budget issued a Bulletin for Good Guidance Practices in 2007.[271] Still in effect today, the Bulletin requires, among other things, that agencies make significant guidance documents available on agency websites.[272] However, we have found that not all agencies are complying with these and similar requirements.

In 2019 President Trump issued two executive orders related to guidance. The first Executive Order mandated, in line with the 2007 OMB Bulletin, that each agency "shall establish or maintain on its website a single, searchable, indexed database that contains or links to all guidance documents . . . ."[273] That executive order further required that agencies review guidance documents, "rescind those guidance documents that it determines should no longer be in effect," and promulgate rules governing issuance of new guidance.[274] The second executive order, issued the same day, focused more narrowly on the role of guidance in enforcement actions, and, among other things, prohibited an agency from citing guidance documents unless "it has notified the public of such document in advance through publication, either in full or by citation if publicly

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[268] 21 U.S.C. § 371(h)(3).
[269] 21 C.F.R. § 10.115 (2018).
[270] 45 Fed. Reg. 85400 (Dec. 24, 1980) codified at 40 CFR 56.6; 42 U.S.C. § 7601(a)(2)(C).
[271] Off. of Mgmt. and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).
[272] *Id*. at 3437
[273] Promoting the Rule of Law Through Improved Agency Guidance Documents, Executive Order 13,891 (Oct. 15, 2019).
[274] *Id*.

available, in the *Federal Register* (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect)."[275]

President Biden revoked President Trump's two executive orders, stating that agencies should be "equipped with flexibility to use robust regulatory action to address national priorities," implying that added procedures to make guidance available unnecessarily limited agency action.[276] In the wake of this revocation, some agencies were quick to repeal recent rules that implemented stricter guidance procedures.[277] Similarly, the Carter-era EPA rule, while plainly requiring publication of certain guidance,[278] appears not to have been implemented. A question that has influenced executive action on the availability of guidance is how to balance making significant guidance more accessible against the burdens for agencies. It is also important to understand any other reasons that agencies may be hesitant to make guidance available.[279] This will involve accommodating availability, flexibility, and usability alongside legal requirements for publishing guidance.[280]

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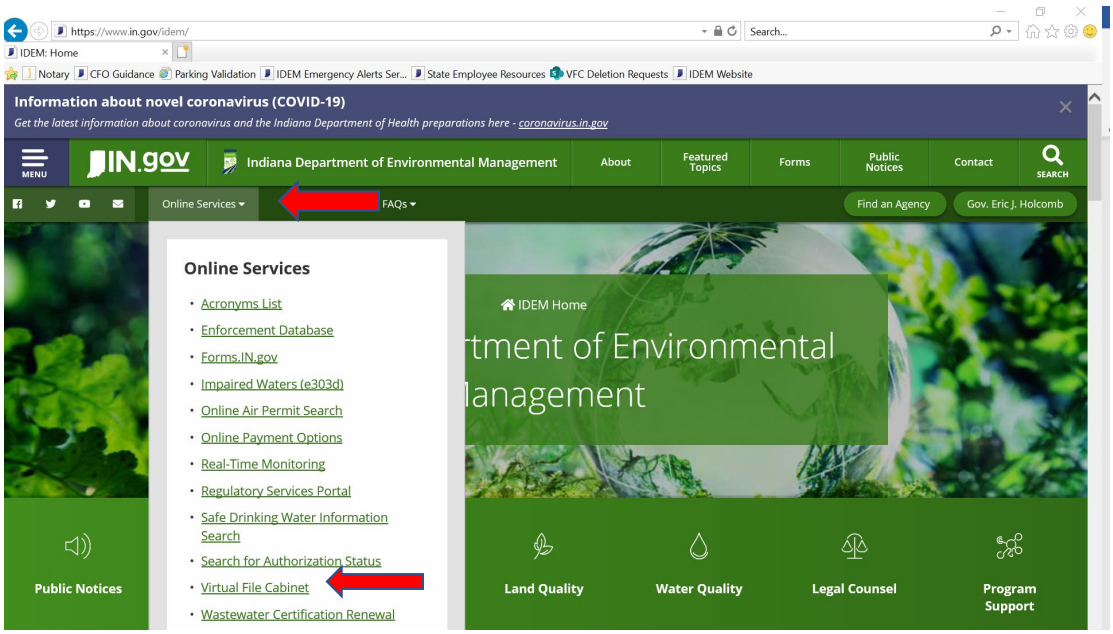
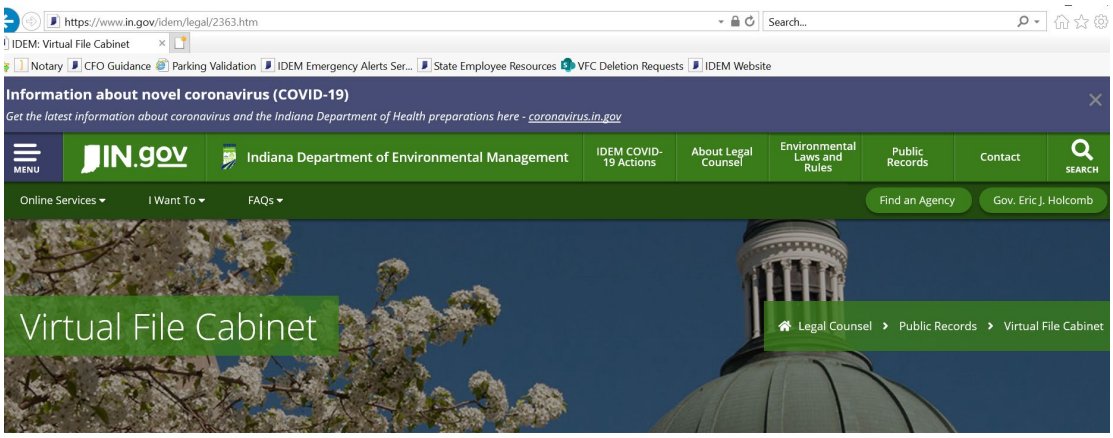
[275] Promoting the Rule of Law Through Transparence and Fairness in Civil Administrative Enforcement Adjudication, Executive Order, 13,892 (Oct. 15, 2019).
[276] Revocation of Certain Executive Orders Concerning Federal Regulation, Executive Order 13,922 (Jan. 20, 2021).
[277] *E.g.*, 86 Fed. Reg. 16114 (Mar. 26 2021).
[278] 45 Fed. Reg. 15400 (Dec. 24, 1980) codified at 40 CFR 56.6.
[279] One interviewee surmised that a possible reason why some agency staff may be reluctant to publish guidance is that staff can benefit from "insider knowledge" in future employment in the private sector. Some academic literature would tend to support this notion. *See generally* JERRY L. MASHAW &DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (Harvard, 1990)(arguing that decisions by some agency officials may be influenced by enhancing their post-government career prospects).
[280] See 5 U.S.C. § 552(a)(1) & (2) and further discussion of the legal requirements in Appendix I.

APPENDIX II: Indiana Department of Environmental Management's Virtual File Cabinet "How To" Guide

www.in.gov/idem

Online Services
Virtual File Cabinet





IDEM provides internet access to more than 2 million agency public records 24 hours a day, seven days a week through its Virtual File Cabinet (VFC). Instant access to agency public records exceeds the requirements of Indiana's Access to Public Records Act. IDEM diligently strives to maintain current and accurate information in this electronic public record repository, and its staff continues to scan and add records daily.

Virtual File Cabinet

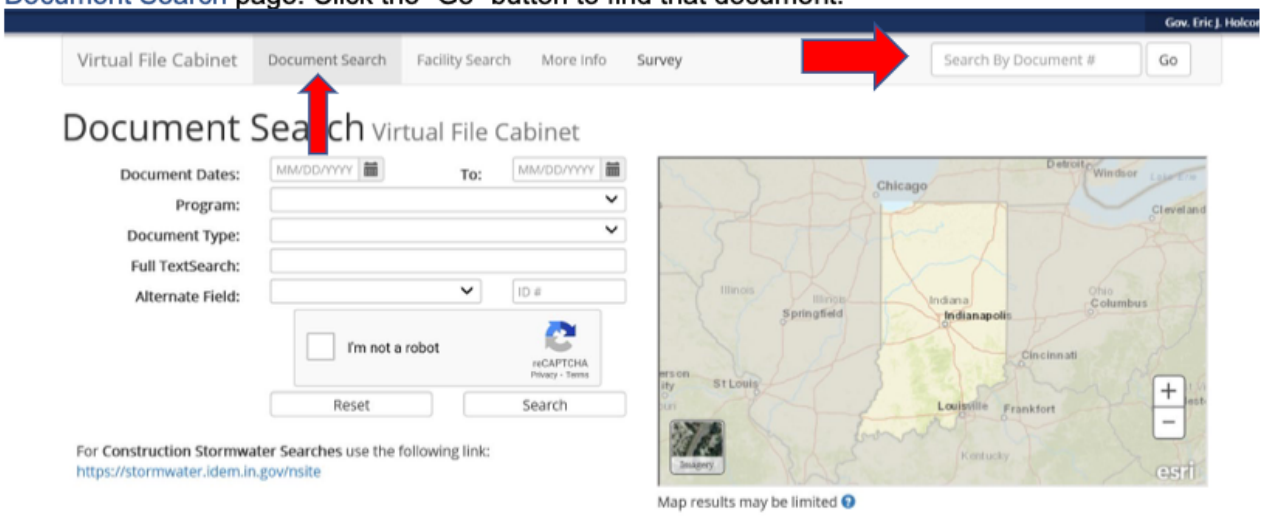
Document Search Tips

1

Document Search Tips

When using "Document Search," the system will search Virtual File Cabinet to provide results based on the search criteria.

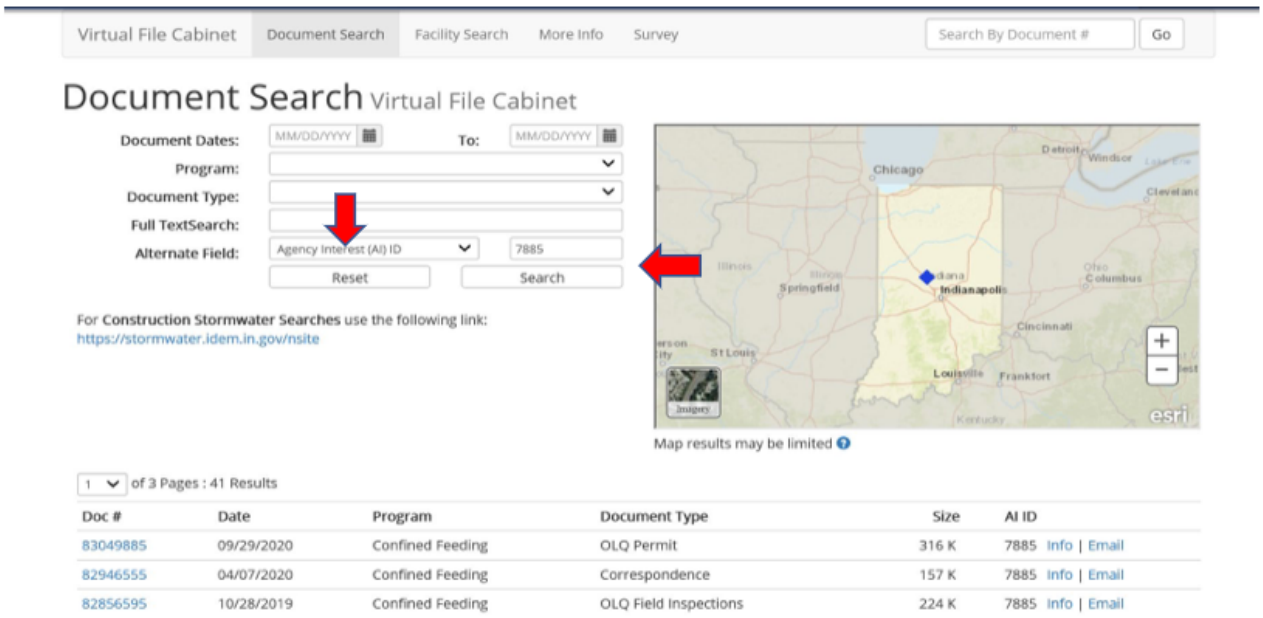
If you know the Document #, enter it in the "Search By Document #" field at the top right of the VFC's Document Search page. Click the "Go" button to find that document.



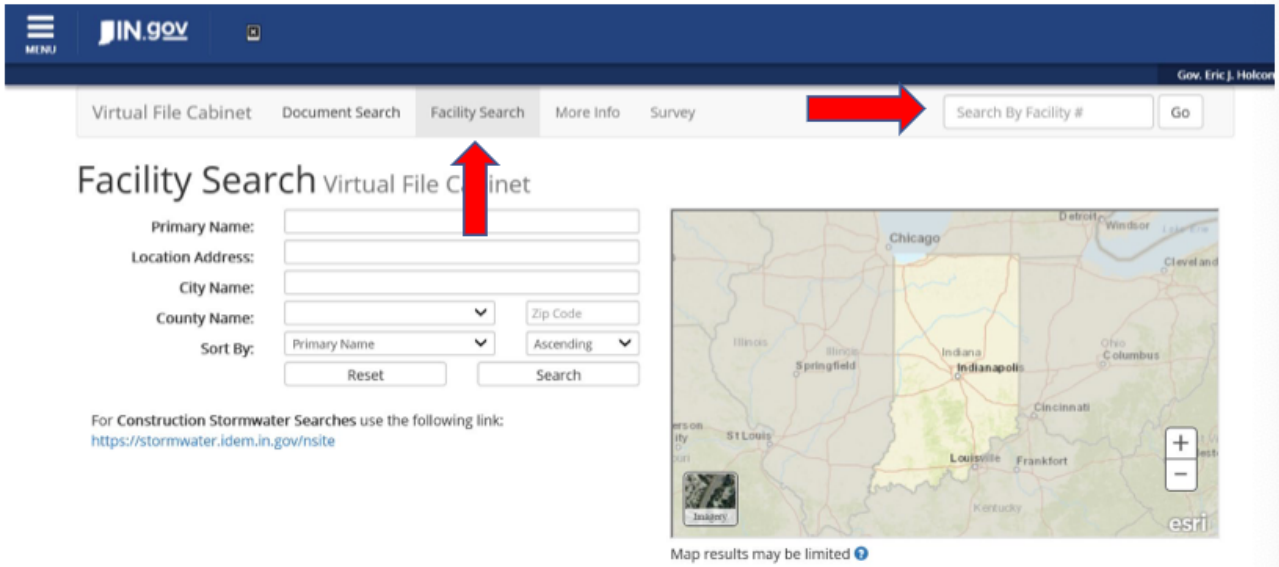
If you want to find all documents related to a specific location, you can search by Agency Interest ID # (a unique value that IDEM uses to identify a specific location). *If you don't know the Agency Interest ID #, you can find it via a "Facility Search" (see instructions under "**Facility Search Tips**" on page __ of this document).*

If you know the Agency Interest ID # you have two options for searching.

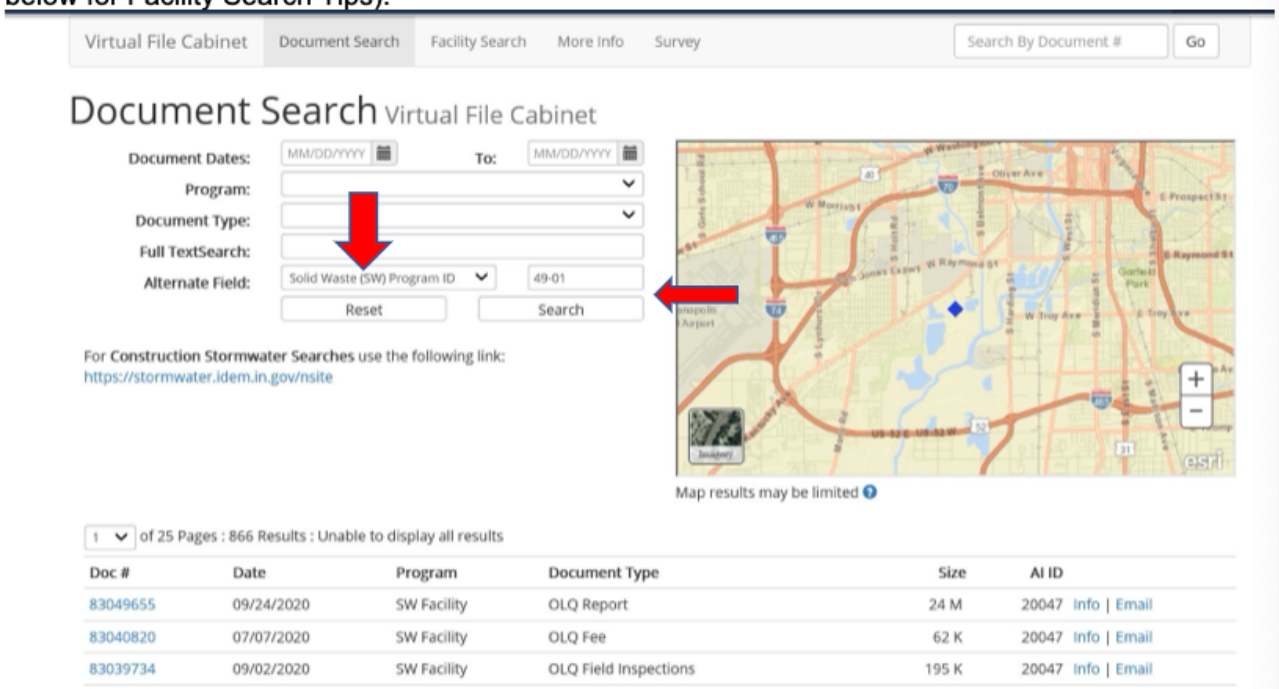
1. Select "Agency Interest ID" in the dropdown menu next to "Alternate Field" on the left. Enter the Agency Interest ID # in the "ID #" field to the right. Click on the "Search" button to obtain the results.



2. The Agency Interest ID # can also be entered in the “Search By Facility #” field at the top right of the VFC’s Facility Search page. Click the “Go” button to find all documents related to a specific location.



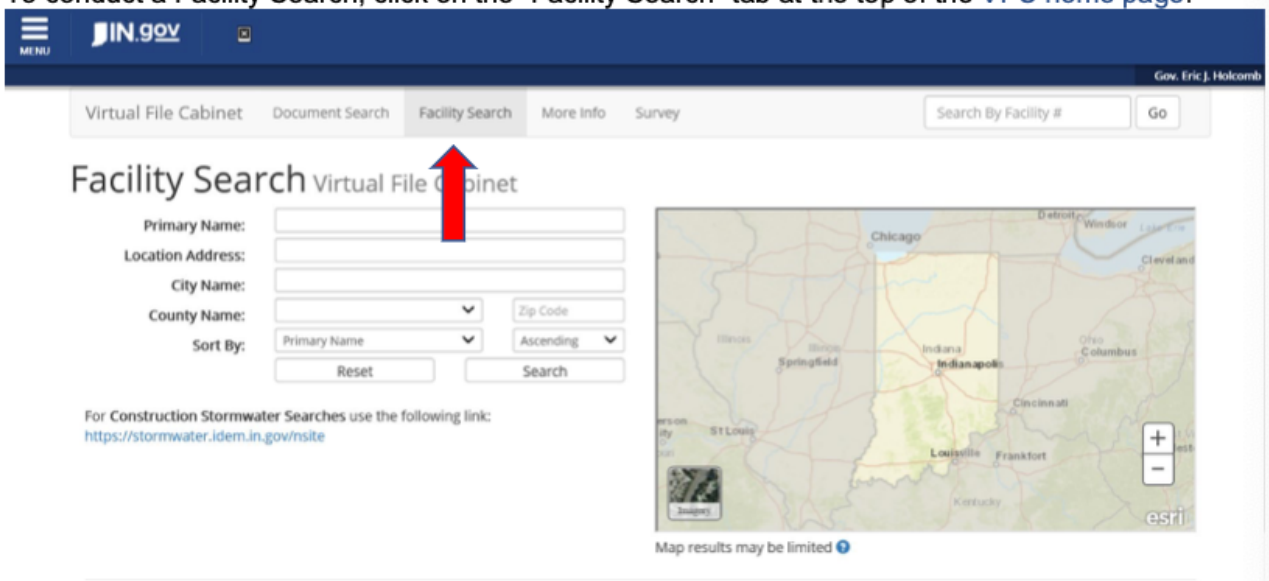
If you want to find all documents related to a specific program area, you can search by the program-specific ID #. If you don’t know the program-specific ID #, you can find it via a “Facility Search” (see below for Facility Search Tips).



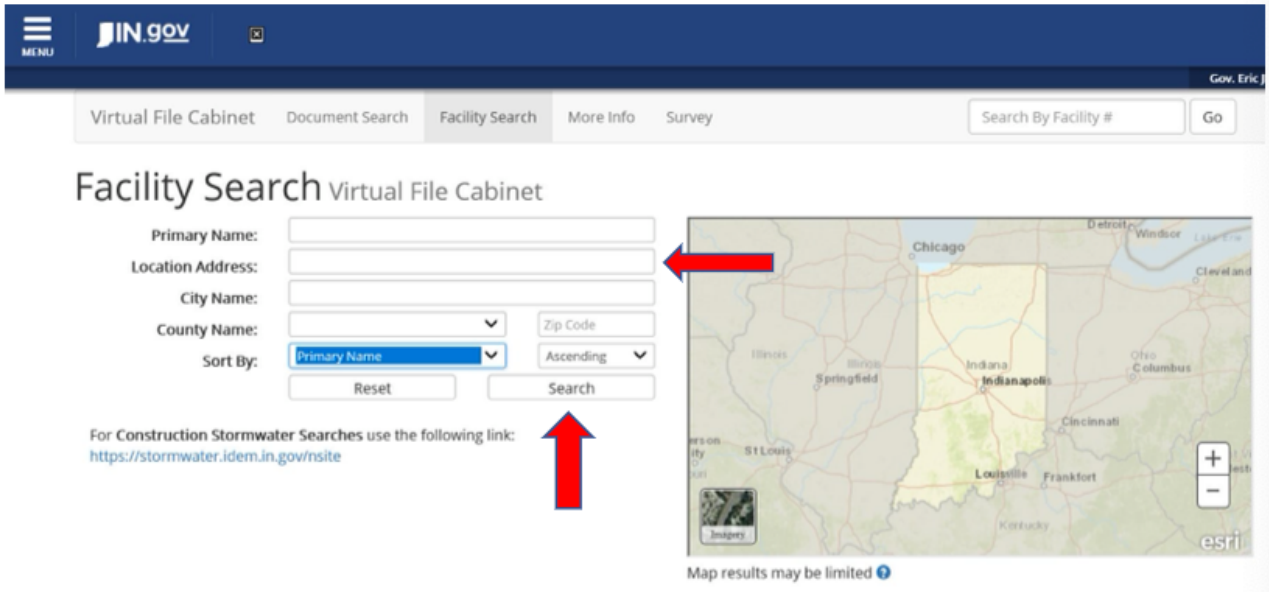
Facility Search Tips

When using "Facility Search," the system will search the Agency's database to provide results based on the search criteria. Therefore, it is helpful to begin a search by entering a partial value in one search field. For example, in the "Location Address" field enter "123" instead of "123 Way Street," or in the "Primary Name" field enter "XYZ" instead of "XYZ Factory Corporation."

To conduct a Facility Search, click on the "Facility Search" tab at the top of the VFC home page.



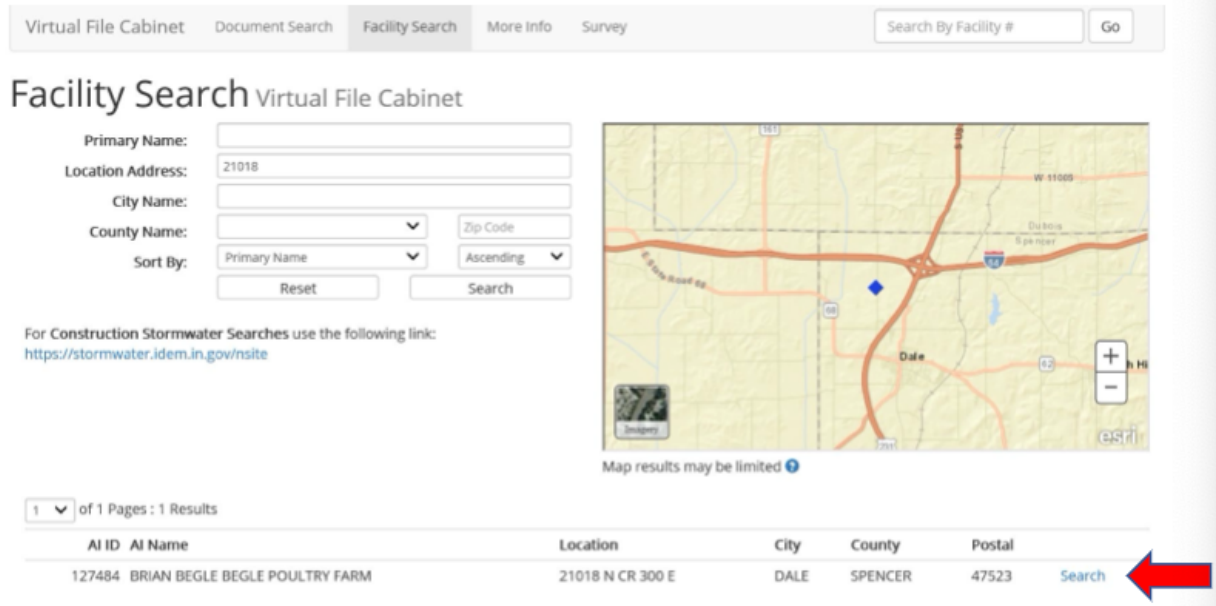
To begin a Facility Search, either enter the numerical part of the address in the "Location Address" field. Click on the "Search" button for the results.

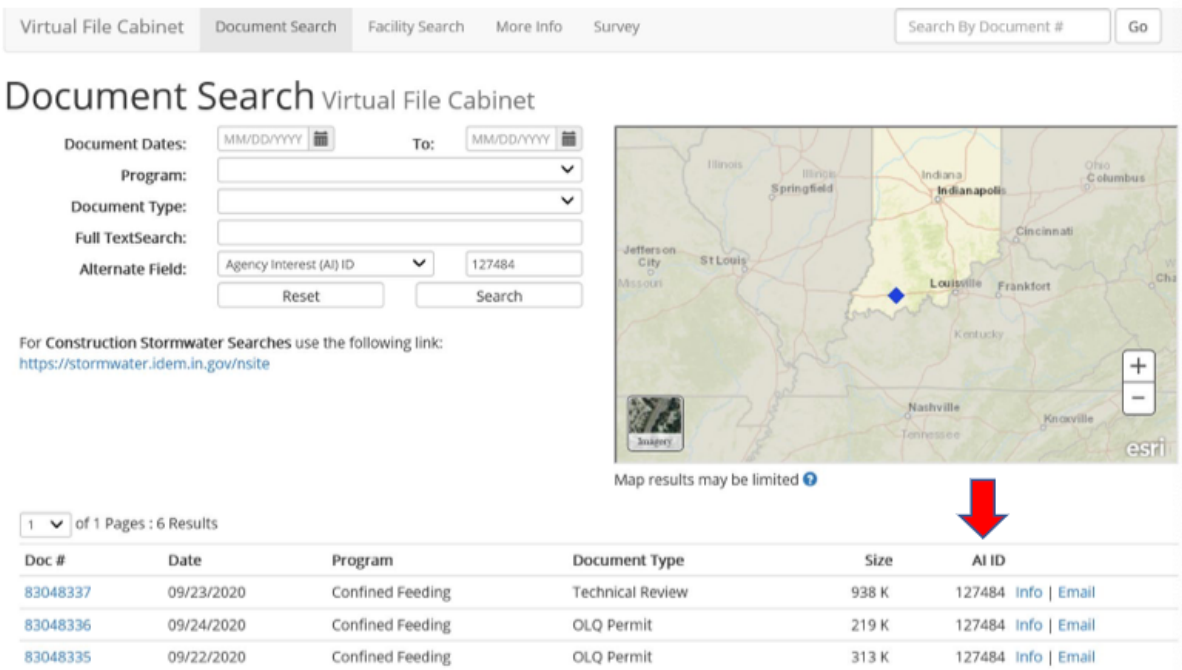


If the list is so large that you cannot find what you are looking for, refine your search by entering a city name in the "City Name" field. Then click on the "Search" button.

If you need to refine your search further, enter part of the facility's name in the "Primary Name" field and click on the "Search" button. Continue refining your search as needed.

If you are looking for the Agency Interest ID # (AI ID), click Search and it will be in the right column of the results.





Keep in mind that:

Properties can be sold or transferred, and names can change over time. Call IDEM's Office of Records Management if you need assistance.

Indiana Department of Environmental Management
Office of Records Management
Indiana Government Center North, Room 1207
100 North Senate Avenue
Indianapolis, IN 46204
Note: If you are visiting the office in person, take the **east** elevators to the 12th floor.
Phone: 317-232-8667
Fax: 317-233-6647
Email: idemfileroom@idem.IN.gov

The list of facility locations used by the VFC includes all past and present agency-interest locations, some of which do not have documents in the VFC. Sometimes facilities appear in the results when there are no actual documents available to view.

There may be documents relating to a "Location Address" that are not in the VFC. If you want to be certain that you obtain all potential documents relating to a "Location Address," you will need to submit a public record request.

Redacted Records
IDEM sometimes receives records that contain both public and confidential information. The agency is required to make the public portions of the records available for inspection and copying. IDEM will add such records to the VFC with confidential information redacted (i.e., the agency will black out confidential information to make it illegible).

Public Record Requests
If you want to view or receive copies of IDEM public records, please consult the Office of Records Management's Public Records page for instructions on how to make a public record request. If you need assistance with locating documents in the VFC, please contact the Office of Records Management.

Searching Using Digital Maps
There are two public website options for seeing environmental sites/activities on a map. Both websites can search by address.

IndianaMap – Official Indiana state GIS atlas hosted by the Indiana Geological and Water Survey. IDEM provides limited-attribute datasets of the agency's sites which they classify as part of the Environment Layer Gallery. Public users can see site locations, but information about the status and regulatory history of the sites is not shown on the site.

EnviroMapper – EPA's environmental mapping site using data derived from EPA databases. The site doesn't include information from IDEM's state-regulated programs, but does provides the ability to get more detailed information about sites from within the application which can't be done in IndianaMap.
IndianaMap (https://maps.indiana.edu/) - IndianaMap is Indiana's official online atlas.

Adding IDEM Data on the Map

To add data to your IndianaMap, click the **Add Content** button and click on a category to expand it. IDEM data is in the **Environment** category. Check the box next to any dataset you want on your map. When you are done selecting layers, click the **Add Content** button or the Close box to close the content selector.

Click the Legend button to toggle the map legend on or off to see what the map icons and colors represent.

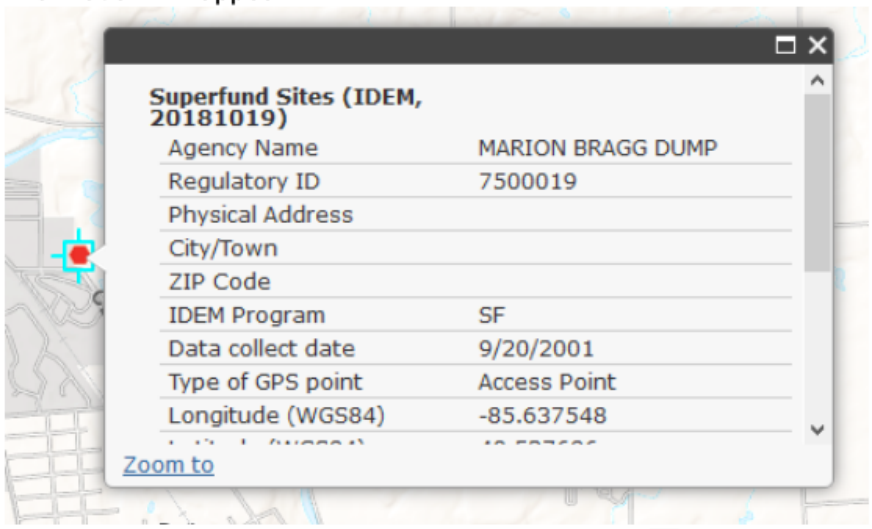
Navigating the Map

Zoom – You can make the map larger or smaller by using your mouse scroll wheel, trackpad vertical swipe, or the zoom control on the left side of your IndianaMap.
Pan – You can move the map area by clicking on the map and holding the left button on your mouse or trackpad while you drag the map area.

Map Tools

The top menu bar has several useful tools for customizing your map.

Identify tool – Displays detailed information about a selected item
Click on the Identify tool icon, then click on the map icon of interest and a box showing more information will appear.



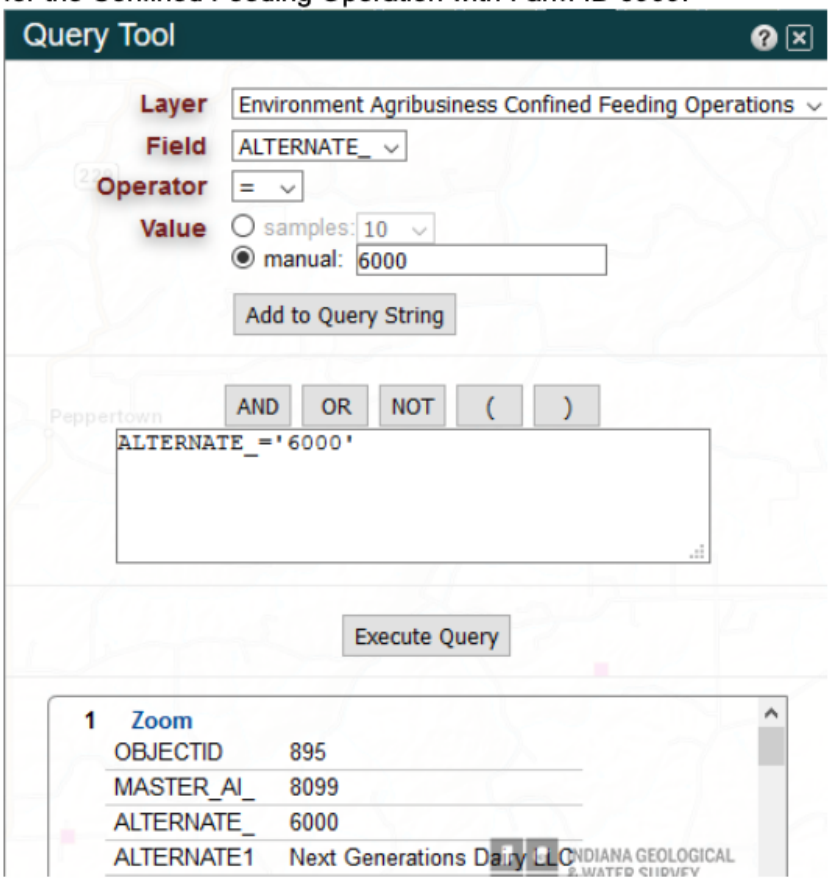
To close the information box, click the Close button in the upper right of the window.

Draw tool – Add graphic and text annotation to your map. You can also create a custom buffer around a point, line, or area by setting the buffer distance, clicking the **Buffer** button and then clicking the spot that you want to buffer.

Measure tool – Measure areas and distances or get the spatial coordinates of a location.

Query tool – Create a custom query to search for data within a layer.

1. Click the Query Layers button to open the tool
2. Select the Layer you want to query.
3. Select the Field you want to query.
4. Select the Operator. For well-defined values such as a permit number or program ID, use "=" for searching names use "LIKE."
5. Set the Value.
    a. Select a value from the "samples" drop down; or
    b. Click the Value Manual button and enter the value you are searching for in the box.
6. Click "**Add to Query String.**"
7. Click **Execute Query** to run the query and show results. The example below shows a search for the Confined Feeding Operation with Farm ID 6000.



8. You can add additional criteria to your query by building another query string and adding it using "AND," "OR," or "NOT" logic to your query.

Share Map Tool – Create a custom link to share with others

The tool captures the active layers as well as the map extent and zoom level in a URL that can be opened in a web browser. **Note: any annotation that you have added with the Draw tool will not appear with the shared link. To share annotation, you have added to the map, use the Print tool.**

1. Click the Share Map button
2. Copy (Ctrl C or right mouse click and select copy) either the “Detailed Link” or the “Short Link”
3. Paste the URL into an email to share with others or into another document to save to access the map at another time

Print tool - Print a custom map; add a title, author, and select from a list of layouts by downloading a PDF, PNG32, or JPG file to print

1. Click the Print Tool button.
2. The print tool will open a map preview window.
3. Enter the Map Title, Author Name, and select the desired layout.
4. Click the “Download Your Map” button.