

# PROVIDING EFFECTIVE NOTICE OF REGULATORY CHANGES

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# Providing Effective Notice of Regulatory Changes

Report to the Office of the Chairman, Administrative Conference of the United States

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## I. Introduction

This Office of the Chair project is a preliminary inquiry into whether there are opportunities for substantial improvement in the methods agencies use to inform interested persons and entities about significant regulatory changes. We conclude that there are significant opportunities for improvement and therefore we suggest that the Administrative Conference of the United States (ACUS) commission a follow-up study to investigate agency best practices for providing notice and to identify possible recommendations by an appropriate ACUS committee. In what follows we suggest several areas in which we think future ACUS recommendations may be warranted.

Our method was a series of interviews with both large and small enterprises, public interest groups, agency representatives, and other potentially interested persons and entities. The subjects with whom we spoke were generally in agreement that some methods for trying to provide notice are effective to some extent. However, they were also in agreement that these methods do not cover a sufficiently wide range of agency actions. Moreover, the level of satisfaction with prevailing methods of providing notice of regulatory changes varies by the size, sophistication, and “connectedness” of the persons or entities that might have an interest in receiving notice of significant regulatory changes.<sup>1</sup>

### A. Why Agencies Provide Notice of Significant Regulatory Changes

Although notice has not received much attention from policy-makers in recent years,<sup>2</sup> there are both policy and legal reasons why agencies should carefully consider their notice-

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<sup>1</sup> We define “effective” and other types of notice in Section II.B.i.

<sup>2</sup> 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,

giving practices. As a matter of policy, effective notice<sup>3</sup> can lead to greater voluntary compliance, thereby reducing the need for coercive enforcement, and more efficiently achieving agency goals. Effective notice also creates a sense of fairness, preparedness, and transparency that contributes to agency legitimacy. Effective notice can contribute to democratic engagement of the larger political community. Research shows that when agencies communicate with a community, seek community input, and understand community perspectives, that attention tends to generate more democratic engagement.<sup>4</sup>

As a matter of law, there is no single comprehensive code of when and how agencies should provide notice of significant regulatory changes. Constitutional due process requirements as well as the 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 the appendix. In addition, as we discuss in Section VI and the appendix, 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 for effective notice further in Section III, “Why Notice?”

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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>.

<sup>3</sup> We define “effective notice” and other terms in Section II.B.

<sup>4</sup> Webinar: Identifying Underserved Communities, Admin. Conf. of U.S., (Nov. 3, 2021) (presentation of Lee Raine).

## B. Scope of the Study

The focus of this study is the way agencies provide notice of significant regulatory changes. This topic requires understanding of both the methods that various agencies currently use for giving notice as well as how different parties access information about regulatory changes. Interest in certain regulatory changes can be widespread, ranging from regulated parties that are directly affected to individuals with more general interest in public policy. Our research encompasses regulated parties and regulatory beneficiaries, regardless of whether the entity is a commercial, recreational, or public interest organization.<sup>5</sup> In the follow-up research that we recommend, we believe more attention should be paid to the needs of individuals and other regulatory beneficiaries.

This report is limited to “significant regulatory changes.” Significant regulatory changes include binding agency policy such as legislative rules, certain adjudicatory decisions, and interpretive rules. It may also include some non-binding agency actions with significant practical consequences. In particular, 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.” These types of agency actions would also benefit from effective notice to potentially interested parties.<sup>6</sup> However, providing effective notice can be difficult and expensive, and too much information can also be counterproductive and result in “information overload.”

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<sup>5</sup> See Section II.

<sup>6</sup> While guidance is not technically binding from a legal standpoint, it can nevertheless have significant practical implications and therefore we consider how agencies provide notice of significant changes in their guidance that may result in changes in enforcement. The Deferred Action for Childhood Arrivals and Deferred Action for Parents of Childhood Arrivals program (DACA and DAPA), discussed in further detail below, are good examples of this principle.

For this preliminary research we initially inquired into the way different potentially interested persons and entities receive notice of significant regulatory changes, and we found that their strategies and satisfaction varied significantly based on the size of the entity. Most smaller and less resourced entities struggle with multiple aspects of obtaining notice. Although gaps exist, larger entities with greater resources report more satisfaction. One representative of a larger business acknowledged that inequity in current notice practices creates a barrier to entry that benefits the larger entities.<sup>7</sup> 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 generally known outside the agency.<sup>8</sup> The follow-up research that we are recommending should consider these potential conflicts of interest in more depth and what, if anything, can be done to overcome them.

## C. Key Findings

*Table 1: Key Interview Findings*

<ul style="list-style-type: none"> <li>• Small, less-resourced entities and individuals struggle with obtaining notice of significant regulatory changes.</li> </ul>
<ul style="list-style-type: none"> <li>• Larger entities and individuals with more substantial resources generally feel that agencies are doing a “good job” in giving notice.</li> </ul>
<ul style="list-style-type: none"> <li>• The <i>Federal Register</i> is a very effective form of notice-giving but many significant regulatory changes are not published in the <i>Federal Register</i>.</li> </ul>
<ul style="list-style-type: none"> <li>• Intermediary organizations such as trade associations play a role in providing notice.</li> </ul>
<ul style="list-style-type: none"> <li>• “Horizontal regulatory changes,” in which regulatory regimes expand to include new parties or new beneficiaries, pose special notice-giving challenges.</li> </ul>
<ul style="list-style-type: none"> <li>• Personal connections and face-to-face meetings are important aspects of notice-giving.</li> </ul>

<sup>7</sup> See generally George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971) (regulation can serve narrow industry interests rather than broad public interests).

<sup>8</sup> E.g., JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 203-204 (1990); ROBERT A. KATZMANN, *REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY* (1980). See also ADOLPH BERLE AND GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) (arguing that corporate managers may maximize their own interests rather than the interests of the organization).

- “Dispersed” regulatory regimes, in which agencies address regulatory issues in many different ways, particularly including material such as guidance and adjudicatory opinions not typically published in the *Federal Register*, pose a particular notice-giving challenge because interested persons must monitor multiple channels of communication.

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

**Across all aspects of notice, smaller entities with less internal expertise and fewer resources to hire outside advisors,<sup>9</sup> including small businesses, unions, and community and environmental groups, found it difficult to track changing agency policies.<sup>10</sup>** As described more 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 smallest and least-resourced entities say that they do not have the resources to track the publication each day or to pay lawyers and consultants to do so.<sup>11</sup> 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; maintaining 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

<sup>9</sup> We refer to less-resourced entities as “small” or “smaller” entities and better-resourced entities as “large” or “larger.”

<sup>10</sup> See Section V.

<sup>11</sup> 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](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](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.

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 in the future. However, 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 forms of regulatory notices that are published in the *Federal Register*.**<sup>12</sup> 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 initiatives, and adjudicatory decisions, are not currently published in the *Federal Register*.<sup>13</sup> Word of developments not published in the *Federal Register* may or may not be made available through other methods, such as posting on agency websites, frequently asked questions

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<sup>12</sup> See Section V.

<sup>13</sup> 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.



(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 they had the opportunity to participate in developing regulations and were therefore 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 area meriting further study and possible ACUS recommendations is whether agencies should expand the “notices” they publish in the *Federal Register* beyond those required to be published by the Federal Register Act, Freedom of Information Act, and Administrative Procedure Act.<sup>14</sup> For example, some agencies publish short “notices of availability” in the *Federal Register* identifying by title documents that they have made available on their websites and linking to those documents.<sup>15</sup>

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<sup>14</sup> See Section VI.

<sup>15</sup> *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).

Another area of dissatisfaction that even larger enterprises express is that most agencies leave it to the user to assemble various agency documents into a coherent whole, including determining which agency policies and guidance have been superseded.<sup>16</sup> Some agencies, however, make manuals, digests, or other forms of instructions available to collect their current policies and interpretations into coherent wholes. For example, EPA makes a pesticide label review manual available online that “compiles existing interpretations of statutory and regulatory provisions and reiterates existing Agency policies.”<sup>17</sup> The variety of agency practice in this area suggests that **there may be significant opportunities for improvement by further study of agency best practices for assembling policies into coherent summaries rather than imposing the cost of doing so on thousands of individual users.** This further study might address not only easing the burdens on large enterprises, but also closing the notice “equity gap” and creating a more level playing field for smaller entities.

#### D. Evaluating Notice Strategies

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.”<sup>18</sup> There is, however, surprisingly little research on which tools and strategies for getting the word out provide effective notice.<sup>19</sup> **Further study**

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<sup>16</sup> See, e.g., Rubin, *supra* note 2.

<sup>17</sup> Pesticide Registration Label Review Manual, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/pesticide-registration/label-review-manual>. See also Walker & Lee, *supra* note 2, at 44-45,

<sup>18</sup> See Section VI.

<sup>19</sup> 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](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 returned no significant findings related to the best tools for notice of regulatory changes.

**of which techniques are most effective for reaching smaller entities and individuals may lead to significant improvements in current agency practice.**

Additionally, 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 roundtable in August 2021, several agency officials stated that comprehensive plans for giving notice and evaluating which strategies are effective could be beneficial. We believe that **agency plans for providing effective notice and research into which are most effective** is another area warranting further study and possible ACUS recommendations in the future.<sup>20</sup>

*Table 2: Possible Areas for Further Study*

• Expanding Coverage in the <i>Federal Register</i>
• Digests and User Manuals Summarizing Agency Policies and Interpretations
• Search Engines and Technological Strategies
• Agency Websites
• Agency Publications
• Face-to-Face Engagement and Public Meetings
• Directed Outreach and Providing Actual Notice to Individuals and Very Small Entities
• Notice Plans and Research
• Making Guidance More Easily Accessible <sup>21</sup>

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<sup>20</sup> See Section VI.

<sup>21</sup> As Section III.B and the Appendix 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.

The next section of this report will describe 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, and Section VI offers recommendations for further study. Section VII summarizes our conclusions.

## II. Scope of the Study and Definitions

### A. Scope

The goal of this project is to determine whether there are promising opportunities to improve notice of significant regulatory changes. To what extent do current notice strategies, such as *Federal Register* publication, reach interested parties? What other methods, or combination of methods, of providing notice, including websites, press releases, and intermediaries (e.g., trade associations, trade press, lawyers, and regulatory consultants) do agencies and potentially interested entities use to facilitate notice? Are some strategies more equitable than others? Do some strategies systematically only reach certain types of parties? As we discuss more in Section VI, we believe there are numerous opportunities to improve notice-giving practices to make it more effective and more equitable.

Other ACUS projects have considered important aspects of notice such as plain language drafting,<sup>22</sup> agency guidance,<sup>23</sup> making inoperative guidance available,<sup>24</sup> and use of social media.<sup>25</sup> Each of these prior projects has informed our work but covers different aspects of notice

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<sup>22</sup> Blake Emerson & Cheryl Blake, Plain Language Regulatory Drafting (Dec. 8, 2017) (Report to Admin. Conf. of the U.S.).

<sup>23</sup> Coglianese, *supra* note 2.

<sup>24</sup> 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>

<sup>25</sup> 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>.

than we address here. Our project is focused on the *tools* that agencies use to provide information to potentially interested persons and entities rather than primarily focusing on the *contents* of the notice provided. 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 context. 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 briefly consider early engagement, as other ACUS projects address public participation in regulatory development.<sup>26</sup> In short, there has been significant prior work on certain specific aspects of providing notice of regulatory changes, but there has not been comprehensive evaluation of agency best practices for giving notice.

## B. Definitions

### i. Defining “Notice”

Notice is the process by which agencies make the public aware of changes in agency policies and practices. Well-known forms of notice include publication in the *Federal Register*,

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<sup>26</sup> 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 19.

press releases, press conferences, or publication on an agency's website. But notice can also involve more precise and individualized strategies. 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, it is also important to 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 a reasonable minimum of difficulty and expense. 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 the potential for regulatory changes that may affect them. For this reason, effective notice sometimes requires agencies to attempt to notify interested entities affirmatively 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 a given agency. In these cases, effective notice may require a different notice-giving strategy on the part of the agency.

"*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 notifies a person individually about agency action, this is what we mean by "direct notice."

"*Actual notice*" means that an interested person or entity has, in fact, received notice of an agency action. An interested person or entity may have actual notice because that entity has

direct notice based on an express communication with an agency or because the interested person or entity has seen an agency publication on, for example, 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* it is assumed that every interested person or entity has notice even if that person or entity never reads the *Federal Register* entry.

“*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.

## ii. Who needs notice? Defining “Potentially Interested Persons and Entities”

Not every person or entity will necessarily need or 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 the 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. The term includes regulated parties and regulatory beneficiaries. It also includes non-commercial entities such as recreational organizations subject to or interested in regulation. This includes hobbyists such as drone operators, motorcycle clubs, or hunters and anglers.

## iii. Defining “Significant Regulatory Changes”

A wide spectrum of agency actions may have some effect on the rights and duties of private entities. Not every agency action requires public notice. 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.<sup>27</sup> In his remarks, Frederick discussed the 50<sup>th</sup> Anniversary of the Occupational Safety and Health Administration, how COVID-19 has affected OSHA’s work, and the Biden Administration’s priorities in that area.<sup>28</sup> The content of the speech is undoubtedly useful, 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.

Continuing with an OSHA example, a 1992 letter to a lab safety officer presents a different type of agency action. In that letter, Patricia Clark, then the Director of Compliance Programs, wrote that wearing gloves while handling unopened specimen containers was “appropriate . . . although not necessarily required.”<sup>29</sup> This is not a regulatory action, and it does not purport to bind regulated parties in any way, but it does give some indication of what course of action seems “appropriate” to agency officials. One can also imagine a similar letter might substitute the word “appropriate” with “better” or even “necessary.” If a high-level OSHA official with policymaking or enforcement authority writes that gloving is “better,” the statement may not establish a new legally-binding policy, but it articulates an agency position on the question that is likely to have practical consequences. Lab safety officers are likely to begin mandating that their technicians glove 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. If OSHA writes that gloving is “necessary,” the letter might be read as a binding mandate that

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<sup>27</sup> 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>.

<sup>28</sup> *Id.*

<sup>29</sup> 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>.



OSHA requires gloving. We focus on the latter two categories of agency action that are either binding or are likely to induce parties to change behavior even if not legally binding.

Defining “significant regulatory changes” for our purposes is not a legal task, but a practical one. 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.<sup>30</sup> 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 impact, and probably will not even have a significant financial impact for regulated labs. It may nevertheless be practically significant for the regulated parties and the workers that 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:

- 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 change; would they be protected in a regulatory safe harbor; would regulatory beneficiaries have added or reduced protections; and

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<sup>30</sup> 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>.

- 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.<sup>31</sup> 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 routine basis.

The Deferred Action for Parents of Childhood Arrivals (DAPA) and Deferred Action for Childhood Arrivals (DACA) programs provide an example of the first criteria, which is focused on significant impact to 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 of time.”<sup>32</sup> DAPA and DACA beneficiaries are those classes of 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.<sup>33</sup> This example shows that policies can create

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<sup>31</sup> See *Lead Renovation, Repair and Painting Program Rules*, ENV’T PROT. ADMIN., <https://www.epa.gov/lead/lead-renovation-repair-and-painting-program-rules>.

<sup>32</sup> *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 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).

<sup>33</sup> *Texas v. United States*, 809 F.3d at 153.

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. Where the changes fall within the defined universe of “agency action” they are most likely to be significant regulatory changes. The Administrative Procedure Act recognizes a variety of specific agency actions. Although the APA treats these various agency actions differently, we believe the APA categories are a useful tool for defining “significant regulatory change.” Thus, provided that an action meets the criteria we outline above regarding significant effects on either the aggregated economy or potentially interested persons and entities, we consider an agency action to be a significant regulatory change regardless of whether it comes in the form of:

- A legislative rule subject to § 553;
- An adjudicatory order that develops or announces policy;
- A guidance document (policy statement or interpretative rule) even though exempt from § 553, such as an enforcement manual or similar codification of enforcement policies;
- Legal opinions from agency counsel that change regulatory requirements, even though not necessarily a policy statement within the APA framework.

It is also important to reiterate that, for our purposes, a “significant regulatory change” need not be a legally binding agency action. Action that comes in the form of a guidance document, for instance, may not technically bind a regulated party or court as a legal matter but

it may nevertheless be a significant change, as the DACA/DAPA example demonstrates. A further example is illustrated in *Community Nutrition Institute v. Young*, where the D.C. Circuit dealt with FDA guidance on “action levels” for potentially contaminated food.<sup>34</sup> FDA established these action levels to determine whether to seize specific lots of food that might be contaminated. 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.<sup>35</sup> In this case, despite the non-binding nature of the action levels, it is clear these levels could have an effect on regulated entities that might lead them to change their manufacturing processes to avoid triggering the action levels. If action levels have an impact on food safety, for instance, causing manufacturers to change their processes, they are also important to the public-at-large. This, therefore, 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.<sup>36</sup> 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

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<sup>34</sup> 818 F.2d 943, 948 (D.C. Cir. 1987)

<sup>35</sup> *Id.* at 948.

<sup>36</sup> *Id.* at 945.

changes. This includes individuals and organizations that benefit from regulation, such as environmental organizations, consumers, and other non-commercial 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.

### III. Why Notice?

Providing notice is both good policy and a legal requirement in some circumstances. This section briefly describes the policy rationales that should incentivize agencies to reflect on their notice practices and highlights several important legal considerations. In the appendix we survey in more detail key legal requirements for providing notice of significant regulatory changes. In addition to legal requirements, effective notice can make agencies more effective, engendering a greater sense of legitimacy and facilitating compliance with agency rules.

#### 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.<sup>37</sup> 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.<sup>38</sup>

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<sup>37</sup> 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.”)

<sup>38</sup> 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.

There is, however, anecdotal evidence. The Internal Revenue Service is an example of how notice practices can lead to 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.

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 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 a significant 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.<sup>39</sup> Second, the IRS regulates over 250 million taxpayers.<sup>40</sup> In order to carry out its statutory responsibilities, the IRS

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<sup>39</sup> 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>

<sup>40</sup> *The Agency, its Mission and Statutory Authority*, INTERNAL REVENUE SERV., <https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority>.

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 . . . ”<sup>41</sup> 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”<sup>42</sup> and certainly several of our interview subjects praised the IRS’ methods, which we discuss further in sections V and VI of this report.

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.<sup>43</sup> Agencies release guidance documents in part to coordinate actions internally, but also to alert the public to how the agency intends to carry out its responsibilities. Agencies use guidance documents in different ways, but most guidance documents are not legally binding on regulated parties, and serve as a form of notice of agency practices, creating common expectations and allowing the public to adapt.<sup>44</sup> 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.<sup>45</sup> If a defect

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *E.g.*, E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1494 (1992).

<sup>44</sup> *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>.

<sup>45</sup> 49 U.S.C § 30,101 et. seq.

were tied to specific climactic factors, such as extreme heat or rain, the manufacturers would only issue recalls in the relevant geographic areas.<sup>46</sup> NHTSA eventually released guidance approving, but circumscribing, the use of these regional recalls.<sup>47</sup> 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.<sup>48</sup> This example also illustrates that when an agency 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.<sup>49</sup> 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.<sup>50</sup> Third, effective notice will increase the number and diversity of potentially interested persons and entities engaged in agency processes.<sup>51</sup> Even if

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<sup>46</sup> *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 799 (D.C. Cir. 2006).

<sup>47</sup> *Id.* at 802-4.

<sup>48</sup> *Id.* at 811.

<sup>49</sup> Parrillo, *supra* note 44, at 20 (Oct. 12, 2017).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*



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.

## B. Legal Requirements for Notice

In addition to these policy considerations, a number of legal requirements apply to giving notice and agencies face legal risks if they do not provide notice when required. 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 provide certain requirements for providing notice of significant regulatory changes. In some cases, Congress has also provided program-specific notice requirements.

### 1. Constitutional Due Process

“Due process requires that parties receive fair notice before being deprived of property.”<sup>52</sup> The Due Process Clause thus prohibits agencies from enforcing any legally binding action against a party that did not have notice.<sup>53</sup> Publication in the *Federal Register* establishes a presumption of notice of a regulatory change, 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*.<sup>54</sup> For these sources of policy change without notice and comment, Due Process doctrine, as interpreted by the lower courts, may require agencies to give notice in some form because a party “cannot be found out of compliance [if the agency] failed to

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<sup>52</sup> Gen. Elec. Co. v. Env’t Prot. Admin., 53 F.3d 1324, 1328 (D.C. Cir. 1995).

<sup>53</sup> *Id.*

<sup>54</sup> 44 U.S.C. § 1507

give fair notice of what is required.”<sup>55</sup> The Supreme Court has not ruled directly on this issue, so the exact scope of the constitutional requirement remains open.

## 2. Statutes

The Freedom of Information Act requires that agencies publish legislative rules, certain guidance documents, and other significant regulatory materials in the *Federal Register* and on agency websites.<sup>56</sup> Case law on this subject is limited.<sup>57</sup> 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. 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.”<sup>58</sup> 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.”<sup>59</sup>

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

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<sup>55</sup> *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998).

<sup>56</sup> 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 . . .”)

<sup>57</sup> There is no Supreme Court decision on the subject.

<sup>58</sup> 5 U.S.C. § 552(a)(1)(D).

<sup>59</sup> KENNETH C. DAVIS, *ADMINISTRATIVE LAW OF THE 1970S* 75 (1976).

available, though both largely eschew requirements for affirmative outreach and publication.<sup>60</sup>

The Regulatory Flexibility Act directs agencies to conduct and publish, in certain circumstances, a “regulatory flexibility analysis.”<sup>61</sup> 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.”<sup>62</sup> The guides are meant to summarize regulatory requirements in plain language for small businesses.<sup>63</sup>

We analyze these legal requirements in more detail in the appendix.<sup>64</sup> In sum, a number of broadly-worded 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 notice-giving. This desktop research likewise surveyed caselaw, statutes, and regulations with two distinct purposes. First, we wanted to understand the current legal requirements for notice-giving. Second, we wanted to find useful examples of

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<sup>60</sup> 44 U.S.C. § 3501 note; 44 U.S.C. § 3101; 44 U.S.C. § 3102(2).

<sup>61</sup> 5 U.S.C. § 603(a).

<sup>62</sup> 5 U.S.C. § 601 note. We discuss these guides further in Section V.A as well as the appendix.

<sup>63</sup> 5 U.S.C. § 601 note.

<sup>64</sup> 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.

notice practices that go beyond trans-substantive legal requirements. In parallel with this desktop research, we conducted interviews or workshops with roughly 30 individuals. We identified interviewees in several ways. We conducted internet searches for contacts that met certain criteria, particularly with respect to perspectives that would otherwise be underrepresented in our networks. We made connections through ACUS and our own contacts. We also asked each interviewee if they recommended we speak to anybody specific and then followed-up on those recommendations. We spoke with:

- Current and former agency personnel, including personnel from single-industry focused agencies, agencies with more general focus.<sup>65</sup> This includes 10 agencies of which four are “independent” agencies;<sup>66</sup>
- 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;<sup>67</sup>
- One labor union lawyer who works with large and small unions;
- Three public-interest NGOs, including one large-national NGO, one medium-regional NGO, and a lawyer who represents both small community groups and small and medium environmental justice organizations;
- One state government official from a state environmental agency;

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<sup>65</sup> 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.

<sup>66</sup> 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.

<sup>67</sup> None of the associations, including those representing small businesses, are primarily focused on “micro-businesses” or “mom and pop” businesses.

- One lawyer who is a member of drone clubs, familiar with non-commercial, regulated, hobbyist 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; and
- 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.

Despite our efforts to collect information from a robust and representative sample, the data in this preliminary study is not necessarily descriptive of all the various perspectives, strategies, and approaches to regulatory notice. For example, while we had participation from current and former agency personnel, public-interest organization staff, and general trade associations, we had less participation from business owners themselves or associations representing minority or women-owned businesses. In retrospect, we think that individuals and very small business were not adequately represented in our sample, and in view of our findings, we think that follow-on research should make greater efforts to include them. Nevertheless, we think our investigation, although preliminary, suggests promising opportunities for agencies to improve notice of significant regulatory changes, particularly regarding smaller entities.

Rather than conducting structured interviews, we spurred conversations with each interviewee based on a dynamic 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. Further investigation into best practices is necessary, and development of ACUS recommendations may well be warranted. There is particular need to focus on ways to make notice practices more equitable between small and large entities. Congressional efforts to protect small businesses through enhanced notice requirements such as SBREFA’s mandate for “Small Entity Compliance Guides”<sup>68</sup> have only partially succeeded, and those efforts do not necessarily benefit non-business small entities. For example, a guide to aid small businesses in complying with a regulatory regime may not be as useful to a local community or environment group that is interested in environmental justice.

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, 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.

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<sup>68</sup> Sec. 212(a), Pub.L.104-121, 110 STAT. 858 (1996).

## 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, 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 advisors.** At the smallest end of the spectrum, “mom-and-pop” or “micro” businesses<sup>69</sup> 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.B, 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.

The primary resource for many smaller businesses is intermediary organizations like trade associations, both generalist and industry-specific, but many small businesses, especially micro-businesses, are not members of such organizations.<sup>70</sup> Representatives from trade associations, labor unions, and agencies all described the very critical role for these intermediary groups in gathering information from 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 *almost* all participants in agency decision-making. 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

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<sup>69</sup> The Small Business Administration defines micro-businesses as those with fewer than 10 employees. Headd, *supra* note 11.

<sup>70</sup> 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.

business organization,”<sup>71</sup> cover almost every relevant 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.<sup>72</sup> Besides generalist and industry specific trade associations, there are also identity-focused associations like the Minority Chamber of Commerce, National Black Chamber of Commerce, U.S. Black Chamber of Commerce, and the U.S. Women’s Chamber of Commerce that can facilitate this sort of notice and compliance assistance. State governments also participate in such 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 about the very smallest businesses, including trade association representatives, explained that the huge benefits of intermediary associations do not flow to the smallest businesses that are not members 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.<sup>73</sup> Our subjects consistently praised the IRS’ notice practices.

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<sup>71</sup> *About Us*, U.S. CHAMBER OF COM, <https://www.uschamber.com/about>.

<sup>72</sup> 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 V and VI.B.

<sup>73</sup> 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.



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 the area of tax policy. According to one of our interview subjects, many small businesses rely on these private companies to keep abreast 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. There may be economies of scale for intermediaries to keep abreast of regulatory changes, rather than each regulated entity doing so itself. In addition, in the future artificial intelligence and other technological developments may hold promise for making information regarding regulatory changes more easily available to individuals and even the smallest entities.

One area where we learned that intermediaries have not been of much aid is in informing small public interest organizations. 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 that these larger NGOs do not always serve the intermediary function for smaller entities. It will be helpful, in a follow-up study, to understand why NGOs do not play more of an intermediary role and to explore whether agencies can and should support increased outreach and training opportunities for non-profits. We discuss this more in Section VI.G.

Congress has made special efforts to facilitate notice of agency rules to smaller regulated entities,<sup>74</sup> but our conversations suggest that these efforts have been only partially effective. For 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, which, as 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. Many 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.<sup>75</sup> 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.<sup>76</sup> Our interviews demonstrated, however, that interested persons and entities are most in need of enhanced notice regarding regulatory regimes that are comprised of multiple sources of law such as rules, interpretations, and adjudications that evolve over time, and not merely 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

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<sup>74</sup> See the discussion of SBREFA and other small-business-focused legislation in Section III, VI, and Appendix A.

<sup>75</sup> *Resources for Small Businesses*, ENV’T PROT. ADMIN., <https://www.epa.gov/resources-small-businesses>.

<sup>76</sup> Sec. 212(a), Pub.L.104-121, 110 Stat. 858 (1996).

larger competitors have to comply with the same rules (and maybe even some additional rules, 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.”<sup>77</sup>

## B. Larger Entities

**While not entirely satisfied with existing notice practices, larger entities—large 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 tasked specifically with reading relevant notices in the *Federal Register* daily and reporting back about important regulatory changes. 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 entities did express some concerns, particularly about the difficulty of synthesizing dispersed regulatory information and gaining access to material that is not published in the *Federal Register*.

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<sup>77</sup> 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/>.

**In short, 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 stark 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 comes through the *Federal Register*.<sup>78</sup>**

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.

Second, personal connections build 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 it keeps them on the agency’s radar for direct actual notice when the agency makes a regulatory change. However, the unequal access by well-connected organizations through private calls and meetings

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<sup>78</sup> We likewise recognize, pursuant to the discussion of legal requirements in Section III.B and the Appendix, that in many cases agencies are failing to publish material in the *Federal Register* even where FOIA apparently requires such publication.

can contribute to the perception or reality that agencies have been “captured” by the interest they are supposed to regulate.<sup>79</sup>

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,<sup>80</sup> but our interviewees frequently reminded us that when interested parties are welcomed to participate in rule development they will almost necessarily know about regulatory changes because they will be part of shaping 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. In SBREFA, Congress attempted to promote similar personal connections for smaller entities by directing agencies to “answer inquiries by small entities . . . .”<sup>81</sup> Yet our conversations suggest this has not been a complete success. Whether and how agencies can facilitate such contacts for smaller entities, are all questions that might be considered in a follow-on project.<sup>82</sup> 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.

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<sup>79</sup> See generally Will Kenton, *Regulatory Capture*, <https://www.investopedia.com/terms/r/regulatory-capture.asp>.

<sup>80</sup> E.g., Carrigan & Shapiro, *supra* note 26; Sant’Ambrogio & Staszewski, *supra* note 19.

<sup>81</sup> Sec. 213, Pub.L.104-121, 110 Stat. 858 (1996).

<sup>82</sup> A preliminary question is why larger entities are more connected. Some existing research bears on this question and it suggests that larger businesses have more resources, particularly dedicated staff, to forge and maintain government connections, including by hiring former agency officials. See, e.g., Bull, *supra* note 77.

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 simply 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, poses 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. Like a common law system, these various sources of law come together to make up a single regulatory regime, and like a common law system it can be difficult to discover all the most 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.”<sup>83</sup> “Digests of agency precedents” they continue “are especially useful . . . . Some agencies could make more extensive use of them.”<sup>84</sup>

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<sup>83</sup> Walker & Wiener, *supra* note 2, at 44.

<sup>84</sup> *Id.*

Another area of significant concern even from larger entities is what we call “initial notice of horizontal regulatory changes.” By this term 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.<sup>85</sup> Another example that one interviewee described is a possible new rule from the Financial Crimes Enforcement Network (FinCEN) expanding the concept of “beneficial ownership.”<sup>86</sup> 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.<sup>87</sup> 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 mainstream press and electronic media via press releases and public service announcements. A follow-on project should consider these techniques, as well as other agency best practices for providing initial notice to large populations that have not previously been regulated by the agency and therefore are unlikely to be monitoring more specialized channels of communication such as agency websites.

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<sup>85</sup> Section II.B.iii.

<sup>86</sup> Financial Crimes Enforcement Network, Advance Notice of Proposed Rulemaking, 86 Fed. Reg. 17,557 (Apr. 5, 2021).

<sup>87</sup> *Id.* at 17,558.

This survey 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. Recommendations for Areas of Further Study

### A. Expanding Coverage in the *Federal Register*

**The Office of the Federal Register (OFR) is perhaps the most important single channel for providing notice for most agencies.** People to whom we spoke felt that the *Federal Register* was an effective form of notice for those that have the capacity to track *Federal Register* publication. Building on that endorsement, a follow-on study could explore whether OFR can offer additional mechanisms for improving notice practices. Furthermore, ACUS has already undertaken significant research and issued recommendations on public access to regulatory materials through Regulations.gov and the Federal Docket Management System.<sup>88</sup> Given the central importance of OFR and the *Federal Register*, a follow-up study should consider the 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. For example, 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.<sup>89</sup> ACUS has already addressed the difficulty in integrating these

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<sup>88</sup> 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](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).

<sup>89</sup> Admin. Conf. of the U.S., Recommendation 2018-6, Improving Access to Regulations.gov's Rulemaking Dockets (Dec. 13, 2018) at 6-9.



systems, but a follow-on study might consider whether additional recommendations are appropriate to improve these existing systems.

#### i. Notices of Availability

The Federal Register Act allows the OFR to publish a wide range of documents in the *Federal Register*.<sup>90</sup> This includes proposed and final rules, presidential proclamations, and guidance documents. It prohibits publication of things like press releases or text of agency websites.<sup>91</sup> However, the OFR sorts agency submissions into three categories: proposed rules; rules and regulations; and notices of availability. For the many documents that are not publishable in their own right, agencies can publish a notice of availability to alert the public and provide 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 availability. Agencies pay roughly \$450 per Word document page or \$150 per column in the *Federal Register*, which implies that the costs for increasing use of notices of availability of information posted on agency websites could be modest.

**A follow-up study could consider several factors related to publishing notices of availability of documents on agency websites. First, should agencies publish more notices of availability in the *Federal Register* to provide notice of material on agency websites. Second, how do the rates for publishing in the *Federal Register* affect agency decisions to publish notice of availability for precedential decisions, memos, or other documents**

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<sup>90</sup> 44 U.S.C. § 1505.

<sup>91</sup> *Id.*

**contributing to a regulatory regime? Third, would an option for electronic publication in the *Federal Register*, rather than both print and electronic publication, lower costs or make publishing notices more available?** Our preliminary work suggests 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.<sup>92</sup> Therefore, agencies must balance the interest in providing effective notice of significant regulatory changes against the costs and risks of creating information overload.<sup>93</sup> Moreover, as part of their notice plans, agencies may want to consider whether 37,000 separate guidance documents that thousands of individual users must track and assemble into coherent wholes for themselves is the most effective way for agencies to provide effective notice.

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

One concern we heard repeatedly was about horizontal regulatory expansions, by which we mean regulatory changes that impose regulatory obligation on entities that a particular agency had not previously regulated. Improved 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*. 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. Additional research could further study how the keywords are currently developed and could explore the

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<sup>92</sup> *CMS Small Entity Compliance Guides*, CTR. FOR MEDICARE AND MEDICAID SERV., <https://www.cms.gov/Regulations-and-Guidance/Guidance/SmallEntity>.

<sup>93</sup> 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.

possibility of better coordination with users to consider ways to improve the keyword system and publicize its availability with potentially interested parties who are otherwise unaware of the *Federal Register* or availability of a searchable keyword system.

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, follow-on research would have to consider the potential effect on enforcement litigation if a regulated party was 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. For this reason, it is important to study methods to promote participation in developing indexes by both agencies and potentially interested parties.

### iii. Improving Technology in the Office of the Federal Register

The OFR can also provide more 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*.<sup>94</sup> 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

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<sup>94</sup> *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>.

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. Moreover, it is not clear whether MyFR is under-utilized, or if there is anything agencies can do to publicize and promote its use.

Similarly, OFR and the Government Printing Office have created eCFR.<sup>95</sup> 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 Register*, and United States Code content.<sup>96</sup> As with the *Federal Register*, eCFR also allows users to create MyCFR accounts and create personalized notifications of updates.<sup>97</sup> 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. First, interested entities need to affirmatively seek out this information. Second, eCFR and MyCFR only provide information about material that is codified in the CFR. As the CFR only incorporates the final version of “permanent and general” regulations published in the *Federal Register*,<sup>98</sup> these technological products apply to regulatory changes about which interested persons and entities already have relatively effective notice. They do not, and legally cannot, provide notice of the full text of regulatory changes that do not appear in the *Federal Register*. **This suggests two additional questions of future research: First, because many**

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<sup>95</sup> eCFR, OFF. OF THE FED. REG., <https://www.ecfr.gov/>.

<sup>96</sup> *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).

<sup>97</sup> OFF. OF THE FED. REG., *supra* note 96; 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).

<sup>98</sup> *Help: Code of Federal Regulations*, OFF. OF THE FED. REG., <https://www.govinfo.gov/help/cfr>.

**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?**

OFR also provides an “application programming interface” (API ) to any user who wants to gather information from the electronic *Federal Register*.<sup>99</sup> An API allows software to access data and gather information from that data. For instance, a user could use an API to “scrape” FederalRegister.gov daily, capturing the text and metadata from every publication. The user can then analyze that data and search for relevant notices. OFR opens its data to this flexible tool, which might be useful for more technically savvy interested persons and entities. Yet, the requirement for some tech-savvy also makes this a somewhat exclusionary approach to notice. Both the promise of API technology and concerns about whether it favors certain users over others may deserve further study.

## B. Digests and User Manuals

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

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<sup>99</sup> *FR API Documentation*, OFF. OF THE FED. REG., <https://www.federalregister.gov/developers/documentation/api/v1>

from more synthesis of its policy. There are private companies that produce adjudication “deskbooks,” but they are costly, slow to update, and carry less weight because they do not come from the agency or agency staff. 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 enforcement in the future. **Agency-authored user manuals and digests, therefore, are a tool for providing notice that deserves more study.**<sup>100</sup>

SBREFA requires Small Entity Compliance Guides.<sup>101</sup> 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.”<sup>102</sup>

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

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<sup>100</sup> Walker & Wiener, *supra* note 2, at 44.

<sup>101</sup> 5 U.S.C § 601 note 212(a).

<sup>102</sup> Pub. L. No. 110-28 (May 27, 2007)

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. Most importantly, the guides are focused only on businesses, which are not the only relevant small entities when it comes to notice. Moreover, the guides typically do not synthesize multiple developments,<sup>103</sup> but they provide explanations only of single rules, which significantly limits their usefulness. It may be worth studying whether agencies can update these guides more regularly and, if appropriate, synthesize information from multiple guides into more comprehensive manuals.

Despite some concerns, the guides are essentially plain language summaries precisely focused 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.<sup>104</sup> 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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<sup>103</sup> Though SBREFA allows agencies to publish guides covering multiple rules. Sec. 212(a), Pub.L.104-121, 110 Stat. 858 (1996).

<sup>104</sup> Pesticide Registration Label Review Manual, 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.

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.”<sup>105</sup> The Patent and Trademark Office has similarly developed the *Trademark Manual of Examining Procedure*.<sup>106</sup> 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.”<sup>107</sup> 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.<sup>108</sup>

A potential hurdle to more use of manuals is that agencies may be concerned that the explanatory materials summarizing policies may limit their flexibility.<sup>109</sup> A follow-on study should explore why more agencies do not use manuals or instructions to synthesize diverse requirements.

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<sup>105</sup> CTR. FOR MEDICARE AND MEDICAID SERV, *supra* note 92.

<sup>106</sup> *Trademark Manual of Examining Procedure*, U.S. PAT. AND TRADEMARK OFF., (July 2021), <https://tmep.uspto.gov/RDMS/TMEP/current>.

<sup>107</sup> *Id.*

<sup>108</sup> *Trademark Manual of Examining Procedure – Files and Archives*, U.S. PAT. AND TRADEMARK OFF., <https://www.uspto.gov/trademarks/guides-and-manuals/tmep-archives>.

<sup>109</sup> See the discussion of legal requirements in the appendix and summarized in Section III.B. At least one court has 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).



## C. Search Engines and Technological Strategies

**Modern technology offers a range of opportunities for improving notice.** These strategies range from the familiar, like social media, to cutting edge, like machine interpretable regulatory text and artificial intelligence.

### i. Social Media

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. Some agencies have focused on this social media strategy particularly to reach audiences that are not English speaking.

### ii. Email Lists

Email lists and listservs are another strategy that has many 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. 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.

One 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.<sup>110</sup> This is a relatively easy

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<sup>110</sup> *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>

and useful strategy when an agency is 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. Unlike social media, it is also slightly harder for the public to sign up because interested entities will need to know that such a list exists and will need to find information for registering. Nevertheless, email lists are simple and affordable, but not all agencies use them. Follow-on research should consider what role email lists may play in an overall strategy for providing effective notice of significant regulatory changes to potentially interested parties.

### iii. Search Engine Optimization

Search engine optimization is also a strategy for improving the visibility of a website by assuring that it appears high on a list of search results that use particular keywords. We spoke with several interviewees, including one who represented environmental justice 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 or another commercially-available search engine. The problem, according to interviewees, is that many agency rules and other regulatory information do not readily appear in such searches, perhaps because agencies have not considered the best strategies for indexing their content.<sup>111</sup> The extent of this problem, and any reasons for it, as well as best practices by agencies to facilitate searches via commercial search engines, could be part of a follow-up study.

In addition, it is potentially worth further studying if agencies can audit their websites to improve “search engine optimization.” This opportunity requires more thorough consideration, but preliminarily, agencies could work with IT staff to improve the organization and indexing of

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<sup>111</sup> See, e.g., *Search Engine Optimization (SEO) Starter Guide*, GOOGLE, <https://developers.google.com/search/docs/beginner/seo-starter-guide>

their content so that it appears more readily when interested entities are searching for regulatory information. For example, rather than “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.

A related strategy is “regulatory language optimization.” The General Services Administration provides shared IT services for rulemaking agencies<sup>112</sup> 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 in the notice processes, this technological advance may nevertheless deserve further exploration. Artificial intelligence refers to the use of computers to produce information, such as summaries or answers to questions, “somewhat like humans do.”<sup>113</sup> Artificial intelligence is

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<sup>112</sup> *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>

<sup>113</sup> *Artificial Intelligence Definitions*, STAN. UNIV. HUMAN-CENTERED ARTIFICIAL INTELLIGENCE (Sept. 2020), <https://hai.stanford.edu/sites/default/files/2020-09/AI-Definitions-HAI.pdf>.

already proving to have value in regulatory compliance by, for instance, helping entities more easily gather and assess information about applicable regulations.<sup>114</sup> Moreover, agencies may be able to apply artificial intelligence strategies to supplement current notice-giving practices. While the present role and future possibilities of artificial intelligence are vast and a follow-on project may benefit from some consideration, this is subject that probably deserves more significant attention in separate projects as the technology matures.<sup>115</sup>

#### D. Agency Websites

**Agency websites can be excellent tool for providing notice.** As discussed earlier, various statutes mandate or incentivize publishing documents on websites. Given their apparent accessibility, value add, and legal importance, further study of how agencies use their websites is important.

OSHA is a good example of how agencies can present and organize material on a website. OSHA uses FAQs, guidance documents, press releases, and other methods for cutting rules into more discrete pieces 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

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<sup>114</sup> Reeve, *supra* note 77.

<sup>115</sup> 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>.

assistance, and training and educational resources.”<sup>116</sup> *Quick Takes* contains valuable content, though given the indication that OSHA email lists are insufficient, it is not clear how far-reaching *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<sup>117</sup> established requirements for the FDA to publish certain food safety measures on its website. Section 204(d) of the Act requires that when the Secretary promulgates final rules, “the Secretary shall publish the list of the foods designated . . . as high-risk foods on the Internet website of the Food and Drug Administration.”<sup>118</sup> This is a rare example of Congress directing a specific agency to publish highly salient aspects of new regulations on a website in addition to the *Federal Register*.<sup>119</sup> The Food, Drug, and Cosmetics Act further requires electronic publication of guidance “as feasible,” including opportunities for public participation in guidance development.<sup>120</sup> 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.”<sup>121</sup>

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<sup>116</sup> QuickTakes, OCCUPATIONAL HEALTH & SAFETY ADMIN., <https://www.osha.gov/quicktakes>.

<sup>117</sup> P.L. No. 111–353.

<sup>118</sup> 21 U.S.C. § 2223(d)(2)(B).

<sup>119</sup> 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 the appendix. The FDA example in the text is therefore an instance of Congress providing an explicit and program-specific notice requirement.

<sup>120</sup> 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.”)

<sup>121</sup> *Id.* § 371(h)(3).

## E. Agency Publications

### **Specialized and targeted agency publications can effectively reach a broad audience.**

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."<sup>122</sup> 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.<sup>123</sup> These are intentionally written in "plain language with actionable tips to use in day-to-day work."<sup>124</sup> The Centers for Medicare & Medicaid Services also publishes a *Quarterly Provider Update*, which "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."<sup>125</sup>

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<sup>122</sup> *Internal Revenue Bulletins*, INTERNAL REV. SERV., <https://apps.irs.gov/app/picklist/list/internalRevenueBulletins.html>.

<sup>123</sup> CTR. FOR MEDICARE & MEDICAID SERV., *supra* note 92.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

## F. Face-to-Face Engagement 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. For this reason, **a follow-on study should consider how agencies can make face-to-face and public meetings more accessible to smaller entities or whether other mechanisms should replace or supplement direct notice to some entities but not others.**<sup>126</sup>

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.

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<sup>126</sup> 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.

Another way to provide face-to-face meetings with fewer equity concerns is webinars. 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.<sup>127</sup> In addition, the EPA hosts a monthly webinar series “to translate research and share research resources and information . . . .”<sup>128</sup> 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.<sup>129</sup>

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.”<sup>130</sup> 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

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<sup>127</sup> *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>.

<sup>128</sup> *EPA Tools and Resources Webinar Series*, ENV’T PROT. ADMIN., <https://www.epa.gov/research-states/epa-tools-and-resources-webinar-series>.

<sup>129</sup> 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.

<sup>130</sup> *OSHA Alliance Program*, OCCUPATIONAL HEALTH & SAFETY ADMIN., <https://www.osha.gov/alliances>.



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.”<sup>131</sup> 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 USDA County Committee system within the United States Department of Agriculture also provides an opportunity for face-to-face connections between regulated entities (farmers, in that case) and the Agency.<sup>132</sup> The County Committees are hyper-local agencies made up exclusively of regulated farmers from the local community.<sup>133</sup>

## G. Directed Outreach and Actual Notice

Face-to-face meetings, public events, and agency press releases and media coverage provide good opportunities to share information broadly and to connect with interested persons

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<sup>131</sup> *Compliance Assistance Specialists (CAS)*, OCCUPATIONAL HEALTH & SAFETY ADMIN, <https://www.osha.gov/complianceassistance/cas>.

<sup>132</sup> 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).

<sup>133</sup> *Id.* at 1219.

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 inequity of notice access between smaller and larger entities, it is important to consider ways agencies can affirmatively engage smaller entities.**

One especially valuable method for directing notice to the entities in most need of notice is making use of intermediary organizations. 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.

Some agencies have developed programs for more targeted outreach to interested persons and entities. OSHA, again, offers a number of examples of targeted programs. There are free, on-site compliance consultations for small businesses (less than 250 employees at a site and no more than 500 nationwide) that are walled off from enforcement.<sup>134</sup> The OSHA Strategic Partnership Program works with various intermediaries, including labor organizations and trade associations, to connect with workers and employers and establish specific performance targets and strategies to improve workplace safety.<sup>135</sup> OSHA has other programs that are designed to advance direct outreach in parallel with other strategies. However, there is little empirical information regarding how effective these programs are in practice and a follow-on project might try to develop such information through targeted interviews. In Section VI.D we discuss the *QuickTakes* publication and in VI.F we address face-to-face programs through OSHA's field offices.

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<sup>134</sup> *On-Site Consultation*, OCCUPATIONAL HEALTH & SAFETY ADMIN., [www.osha.gov/consultation](http://www.osha.gov/consultation).

<sup>135</sup> *OSHA Strategic Partnership Program*, OCCUPATIONAL HEALTH & SAFETY ADMIN., <https://www.osha.gov/partnerships/>.

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 a compliance worksheet, 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 with 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 special effort to engage a wide range of participants and only holds open, public meetings. This model is a promising focus for a follow-on study as a potential best practice. A follow-on study should attempt to develop information about how successful these measures are in practice and whether they can be duplicated by other agencies. It will be important to understand whether other agencies do or could use similar models, how well they work, and, if this strategy is not widely used, whether it is possible to reduce barriers to implementation.

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 to inform both rulemaking and enforcement. In that process the examination team will alert regulated parties to compliance problems, and in so doing the SEC often provides direct actual notice 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 their process for inspecting facilities for compliance, EPA uses a similar meeting commonly called a "closing conference."<sup>136</sup> 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.<sup>137</sup>

The SEC has designed its regulatory and enforcement priorities so that this sort of direct notice is possible. Providing direct actual notice is plainly not always possible—though further study of when it is possible may be valuable. SEC focuses on financial intermediaries in part to engender self-regulation and make enforceability more achievable and effective.<sup>138</sup>

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<sup>136</sup> 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](https://www.epa.gov/sites/default/files/2019-08/documents/reinhart_-_inspection_fundamentals_2019.pdf).

<sup>137</sup> *Id.*

<sup>138</sup> Thomas K. McCraw, *With the Consent of the Governed: SEC's Formative Years*, 1 J. POL'Y ANALYSIS MGMT. 346, 352 (1982).

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,<sup>139</sup> 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<sup>140</sup> is a statutorily created office<sup>141</sup> that specifically focuses on small businesses and particularly minority-, women-, and veteran-owned businesses. Unlike, for example, the EPA Office of Environmental Justice, 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. This strategy—as compared to establishing distinct identity-focused offices—is worth further consideration.

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 Caribbean.<sup>142</sup> 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

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<sup>139</sup> *Office of Small Business Policy*, SECURITIES & EXCH. COMM’N, <https://www.sec.gov/smallbusiness/OSBP>

<sup>140</sup> *Office of the Advocate for Small Business Capital Formation*, SECURITIES & EXCH. COMM’N <https://www.sec.gov/oasb>.

<sup>141</sup> 15 U.S.C § 78d(1).

<sup>142</sup> *Caribbean Environmental Protection Division*, ENV’T PROT. ADMIN., <https://www.epa.gov/aboutepa/organization-epas-region-2-office-new-york-city#cepd>.

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.<sup>143</sup> Nonetheless, outreach offices targeting particular populations of interested parties may be a best practice in some situations, and a follow-on project may consider enumerating what factors make them particularly useful.

The follow-on research that we are recommending could assess the efficacy and costs of a variety of agency strategies for outreach and training, and, if possible, suggest best practices that other agencies should consider adopting. However, 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 consider notice plans and research into the costs and benefits of various types of outreach and training programs is to develop more information so the comparative evaluation of various agency approaches to outreach and training can be more evidence-based.

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.<sup>144</sup> Strictly speaking, these panels are not designed for providing notice, but those we talked to explained that by bringing small businesses and small business representatives into the decision-making process, agencies open channels for notice after they complete the rulemaking process.<sup>145</sup> Only EPA, OSHA, and the Consumer Financial

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<sup>143</sup> *Id.*

<sup>144</sup> 5 U.S.C. § 609(b).

<sup>145</sup> 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.

Protection Bureau are currently required to establish these panels and a follow-on project could consider whether expanding that requirement to other agencies would be beneficial.<sup>146</sup>

The USDA County Committees, introduced in the prior subsection, are also an example of an agency using intermediaries. 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.<sup>147</sup> Interestingly, these committees are themselves regulatory and adjudicatory agencies with significant power,<sup>148</sup> but the USDA primarily promotes them as intermediaries between farmers and the USDA.<sup>149</sup> Although one of us has written critically about the county committees,<sup>150</sup> as intermediaries that alert farmers to changes in USDA policy, they may play an important role.<sup>151</sup> Follow-on research might consider whether similar strategies might be adaptable to other agencies.

Finally, it will be important to study how and when agencies use press releases and other means to gain commercial media coverage for significant regulatory changes. For many potentially interested parties, and especially regulatory beneficiaries, coverage in national news media is likely to be an effective way for agencies to provide notice because it does not require the potentially interested party to have any initial knowledge of the regulatory change.

## H. Agency Notice Plans and Evaluations

One possible improvement on which there seemed to be a consensus among our interviewees was **that agencies should consider creating notice plans and study the**

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<sup>146</sup> 5 U.S.C. § 609(d)

<sup>147</sup> Galperin, *supra* note 132 (citing 16 U.S.C § 590h(b)(5)(B)(i)(I) (2012)).

<sup>148</sup> *Id.* at 1218.

<sup>149</sup> *Id.* at 1227-28.

<sup>150</sup> *Id.* (criticizing the committee structure for its reliance on majoritarianism without regard to reasoned and deliberative decision making).

<sup>151</sup> *Id.*

**effectiveness of various mechanisms for providing effective notice.** This is an important area of further study. By way of illustration, written agency notice plans could consider matters such as targeted outreach to various categories of entities and intermediaries; how the agency plans to deal with different types of regulatory changes from different origins (i.e., rulemakings, guidance, adjudications, memos, etc.); and how the agency will gather data about the efficacy of various notice-giving devices and reevaluate their existing strategies based on that data. Some interviewees further suggested that these plans should be codified as legislative rules so that agencies are bound by their plans and the public can have consistent expectations for how to gather information.<sup>152</sup> Using rulemaking to codify notice plans also deserves more study.

**A consistent refrain in our conversations was the inequitable access to notice between small and large entities. Notice plans might also address how to close this gap.** A follow-on study can evaluate how agencies can develop specific mechanisms to help smaller entities build capacity. OSHA, for instance, 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.<sup>153</sup> 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.”<sup>154</sup> The EPA likewise supports small community groups by helping them understand and access federal grants.<sup>155</sup> Along the lines of this type of capacity building,

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<sup>152</sup> See also Admin. Conf. of the U.S., Recommendation 2020-1, Rules on Rulemakings (Dec. 16, 2020), available at <https://www.acus.gov/sites/default/files/documents/Recommendation%202020-1%2C%20Rules%20on%20Rulemakings.pdf>.

<sup>153</sup> OSHA Training Institute Education Centers, OCCUPATIONAL HEALTH & SAFETY ADMIN., <https://www.osha.gov/otiec/>

<sup>154</sup> 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](https://www.epa.gov/sites/default/files/2020-03/documents/star_fact_sheet_css_final_508_0.pdf)

<sup>155</sup> *Environmental Justice: Communities*, ENV’T PROT. ADMIN., <https://www.epa.gov/environmentaljustice/communities>



agencies could 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. Future research might consider how agencies can integrate these capacity-building strategies into their plans for notice-giving.

## I. 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.<sup>156</sup> It is important to understand how agencies can strike the right balance in providing effective notice without overwhelming potentially interested parties.

There have been attempts to make guidance more available. The FDA, for instance, is subject to specific statutory standards for issuing certain guidance<sup>157</sup> and has promulgated a legislative rule meant to control how it issues and shares guidance.<sup>158</sup> During the Carter Administration, the EPA promulgated a rule requiring the Office of Air, Noise, and Radiation to develop a system for disseminating certain guidance documents.<sup>159</sup> The Office of Management and Budget issued a Bulletin for Good Guidance Practices in 2007.<sup>160</sup> Still in effect today, the Bulletin requires, among other things, that agencies make significant guidance documents available on agency websites.<sup>161</sup>

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<sup>156</sup> Coglianese, *supra* note 2.

<sup>157</sup> 21 U.S.C. § 371(h)(3).

<sup>158</sup> 21 C.F.R. § 10.115 (2018).

<sup>159</sup> 45 Fed. Reg. 85400 (Dec. 24, 1980) codified at 40 CFR 56.6; 42 U.S.C. § 7601(a)(2)(C).

<sup>160</sup> Off. of Mgmt. and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

<sup>161</sup> *Id.* at 3437

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 . . . .”<sup>162</sup> 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.<sup>163</sup> 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 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).”<sup>164</sup>

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 guidance procedures unnecessarily limit agency action.<sup>165</sup> In the wake of this revocation, some agencies were quick to repeal recent rules that implemented stricter guidance procedures.<sup>166</sup> Similarly, the Carter-era EPA rule, while plainly requiring publication of certain guidance,<sup>167</sup> appears not to have been implemented. **A question for additional study is how to balance making significant guidance more accessible with the burdens for agencies, as well as exploring any other reasons that agencies may be hesitant**

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<sup>162</sup> Promoting the Rule of Law Through Improved Agency Guidance Documents, Executive Order 13,891 (Oct. 15, 2019).

<sup>163</sup> *Id.*

<sup>164</sup> Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement Adjudication, Executive Order, 13,892 (Oct. 15, 2019).

<sup>165</sup> Revocation of Certain Executive Orders Concerning Federal Regulation, Executive Order 13,922 (Jan. 20, 2021).

<sup>166</sup> *E.g.*, 86 Fed. Reg. 16114 (Mar. 26 2021).

<sup>167</sup> 45 Fed. Reg. 15400 (Dec. 24, 1980) codified at 40 CFR 56.6.

**to make guidance available.** This will involve accommodating availability, flexibility, and usability alongside legal requirements for publishing guidance.<sup>168</sup> **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* could be considered as potentially useful tools.** In fact, in many circumstances, publication on websites and the *Federal Register* is a statutory requirement.<sup>169</sup> However, it must be borne in mind that agencies use guidance documents in different ways, and not all guidance documents involve notice of significant regulatory changes.

## VII. Conclusion

This preliminary study considered whether there are opportunities to improve the way agencies provide notice of significant regulatory changes. After extensive desktop research and interviews, we have concluded that there are many opportunities for improvement. 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 in some respects notice practices are effective. The *Federal Register* is an invaluable tool for notice, and many large entities have the resources to track *Federal Register* notices carefully. Intermediaries such as trade associations and, in some cases, private firms and non-profits, also act as clearinghouses for certain types of notice. 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.

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<sup>168</sup> See 5 U.S.C. § 552(a)(1) & (2) and further discussion of the legal requirements in the appendix.

<sup>169</sup> *Id.*

Relatedly, when regulations expand to include new industries, it is difficult for those industries to track changes because they may come from agencies not normally on that industry's radar.

Dispersed regulatory regimes and horizontal regulatory expansion deserve special attention for improving notice. We were able to identify multiple practices and emerging technologies that might serve as a basis for further investigation. 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. Perhaps most importantly, explicit outreach plans that describe how to use these tools in different circumstances will help structure agency notice practices, and these plans can include criteria for self-evaluation and adaptation. We recommend that ACUS undertake a follow-on project to explore these various opportunities more thoroughly

## APPENDIX A: Constitutional and Statutory Requirements for Notice

### A. Constitutional Due Process

“Due process requires that parties receive fair notice before being deprived of property.”<sup>170</sup> 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.<sup>171</sup> Publication in the *Federal Register* establishes a presumption of notice of a regulatory change,<sup>172</sup> 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*.<sup>173</sup> 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 . . . .”<sup>174</sup>

Although the Supreme Court has never addressed the issue directly in the context of administrative agencies, 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.<sup>175</sup> The D.C. Circuit further held that notice is sufficient when a “regulated party acting in good

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<sup>170</sup> *Gen. Elec. Co. v. Env’t Prot. Agency*, 53 F.3d 1324, 1328 (D.C. Cir. 1995).

<sup>171</sup> *Id.*

<sup>172</sup> 44 U.S.C. § 1507

<sup>173</sup> 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.

<sup>174</sup> *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.

<sup>175</sup> *Gen. Elec.*, 53 F.3d at 1329.

faith would be able to identify, with ascertainable certainty, the standards with which the agency expects the parties to conform.”<sup>176</sup> The majority of the courts of appeals have adopted this test.<sup>177</sup> However, even among courts explicitly adopting *General Electric*, there is diversity in how they apply the “ascertainable certainty” test.<sup>178</sup> Thus, the only clear rules about the constitutional baseline for notice-giving is that publication in the *Federal Register* or actual notice are sufficient.<sup>179</sup>

## B. Statutory Requirements

Direct, actual notice, however, 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.<sup>180</sup> 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,<sup>181</sup> 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.<sup>182</sup>

The Federal Register Act *permits* agencies to publish guidance documents in the *Federal Register*,<sup>183</sup> and the Freedom of Information Act (FOIA) *requires* publication of many guidance

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<sup>176</sup> *Id.*

<sup>177</sup><sup>177</sup> 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).

<sup>178</sup> *Id.*

<sup>179</sup> 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 . . .”).

<sup>180</sup> 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.”)

<sup>181</sup> 44 U.S.C. § 1507; 5 U.S.C § 552(a).

<sup>182</sup> DAVIS, *supra* note **Error! Bookmark not defined.** at 75.

<sup>183</sup> 44 U.S.C. § 1505(b).

documents.<sup>184</sup> 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*.<sup>185</sup> 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 foregoing.”<sup>186</sup> The reference to statements of general policy and interpretations of general applicability reference agency actions typically described as “guidance.”<sup>187</sup>

The FOIA publication requirement covers much, but not all guidance.<sup>188</sup> 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.<sup>189</sup> Thus, if a rule is merely a clarification of existing duties or “instructive,” publication may not be necessary.<sup>190</sup> 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.<sup>191</sup> Under this line of thinking, documents incorporating published material, such as user manuals that synthesize statutory and published legislative rules, are also likely exempt.<sup>192</sup> Regardless of the

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<sup>184</sup> 5 U.S.C. § 552(a).

<sup>185</sup> 5 U.S.C. § 552(a)(1)(D).

<sup>186</sup> *Id.* (emphasis added).

<sup>187</sup> Coglianese, *supra* note 2, at 21.

<sup>188</sup> *E.g.*, Cathedral Candle Co. v. U.S. Int’l Trade Comm’n, 400 F.3d 1352 (Fed. Cir. 2005).

<sup>189</sup> Andersen v. Butz, 550 F.2d 459 (9th Cir. 1977).

<sup>190</sup> *Id.* at 463; St. Eliz. Hosp. v. U.S., 558 F.2d 8 (Fed Cir. 1977).

<sup>191</sup> Nguyen v. United States, 824 F.2d 697 (9th Cir. 1987).

<sup>192</sup> Cathedral Candle Co., 400 F.3d.

exact line that separates those documents that agencies must publish in the *Federal Register* and those they need not, it is clear that FOIA establishes a broad expectation of agency notice-giving. 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.

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.”<sup>193</sup> 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*.<sup>194</sup> 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.<sup>195</sup> 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.”<sup>196</sup>

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<sup>193</sup> 5 U.S.C § 552(a)

<sup>194</sup> *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).

<sup>195</sup> Coglianese, *supra* note 2, 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).

<sup>196</sup> Coglianese, *supra* note 2, at 22.



The 1996 FOIA amendments present 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.”<sup>197</sup> This language covers a wide 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 chooses to publish on a website.<sup>198</sup>

The Freedom of Information Act also includes an online “reading room” requirement that mandates agencies make certain information available online.<sup>199</sup> 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.”<sup>200</sup>

The *Federal Register* publication requirement applies to any document of “general applicability.”<sup>201</sup> The website publication requirement applies to those documents “which have

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<sup>197</sup> 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.*

<sup>198</sup> By contrast, § 552(a) seems to subtract precedential weight if an agency fails to publish a document in the *Federal Register*.

<sup>199</sup> 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.”

<sup>200</sup> 5 U.S.C. § 552(a)(2).

<sup>201</sup> 5 U.S.C. § 552(a)(1)(D).

been adopted by the agency and are not published in the *Federal Register*.”<sup>202</sup> It is unclear whether the second provision is meant to cover documents that agencies *need not* publish in the *Federal Register* or whether it is an alternative option for documents that agencies *choose not* to publish in the *Federal Register*.<sup>203</sup> Regardless, FOIA clearly requires that agencies publish most regulatory material in the *Federal Register* and on agency websites.

However, compliance with and enforcement of this section are irregular, at least with respect to guidance.<sup>204</sup> Guidance documents are understood to announce agency policy without creating binding legal standards.<sup>205</sup> 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 source 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.<sup>206</sup> Because agencies cannot use guidance documents against a party regardless of publication status, the lack of practical consequences cabins the impact of the FOIA publication requirement. This may explain why compliance is limited. 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

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<sup>202</sup> 5 U.S.C. § 552(a)(2)(B).

<sup>203</sup> 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.

<sup>204</sup> Russell L. Weaver, *An APA Provision for Nonlegislative Rules?*, 56 ADMIN. L. REV. 1179, 1188 (2004).

<sup>205</sup> E.g., *Pacific Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38-9 (D.C. Cir. 1974).

<sup>206</sup> 5 U.S.C. § 552 (a)(1).

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.<sup>207</sup> Similarly, the Federal Records Act of 1950 directs agencies to make a record of agency documents in order to facilitate document production to “persons directly affected by the agency’s activities.”<sup>208</sup> The Federal Records Act further requires agencies to have procedures for public disclosure and electronic posting.<sup>209</sup> Unlike the E-Government Act, the Federal Records act directs agencies to organize their records to facilitate document availability but it does not mandate notice-giving.

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.”<sup>210</sup> An agency must issue a final regulatory flexibility analysis when it issues a final rule under the notice-and-comment process.<sup>211</sup> 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.”<sup>212</sup>

SBREFA<sup>213</sup> amended the RFA and requires agencies to create “small entity compliance guides” (SECGs).<sup>214</sup> We discuss these guides elsewhere in the body of this report. One stated purpose of the SBREFA was “to develop more accessible sources of information on regulatory

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<sup>207</sup> 44 U.S.C. § 3501, Sec. 207 note (f)(2)(A)

<sup>208</sup> 44 U.S.C. § 3101.

<sup>209</sup> 44 U.S.C. 3102(2).

<sup>210</sup> 5 U.S.C. § 603(a)

<sup>211</sup> *Id.* § 604(a).

<sup>212</sup> *Id.* § 605.

<sup>213</sup> Pub. L. No. 104-121.

<sup>214</sup> 110 Stat. 858 § 212, 5 U.S.C. 601 note.

and reporting requirements for small businesses.”<sup>215</sup> 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.”<sup>216</sup> 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.”<sup>217</sup> Additionally, the Act requires agencies to “cooperate to make available to small entities through comprehensive sources of information, the small entity compliance guides and all other available information on statutory and regulatory requirements affecting small entities.”<sup>218</sup>

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.<sup>219</sup> 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.”<sup>220</sup> 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.<sup>221</sup> While regulations and Treasury decisions (another form of IRS rules) must be

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<sup>215</sup> *Id.* § 203.

<sup>216</sup> *Id.* § 212(a).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* § 212(b).

<sup>219</sup> 26 U.S.C. §§ 6631, 6751.

<sup>220</sup> 26 U.S.C. § 7805.

<sup>221</sup> *See* 26 CFR § 601.601.

“published in the Federal Register,”<sup>222</sup> the regulations require Treasury decisions be posted in the *Internal Revenue Bulletin* as well.<sup>223</sup> 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.”<sup>224</sup> The IRS regulation also requires that the IRS publish Revenue Rulings and Revenue Procedures in the *Internal Revenue Bulletin*.<sup>225</sup>

As mentioned briefly in Section IV.D, the Food Safety Modernization Act,<sup>226</sup> which amended the Federal Food, Drug, and Cosmetic Act, established requirements for the FDA to publish certain food safety measures on its website.<sup>227</sup> Although this is just a short survey of these requirements, Congress has shown, again and again, its interest in both general and program-specific directives for notice of regulatory changes.

Taken together, from the constitutional baseline of Due Process through the Federal Register Act, various FOIA provisions, and other trans-substantive notice requirements, it is clear that various legal rules govern the way agencies give notice of significant regulatory changes. The uncertainty around the exact meaning and consequences of these provisions is yet another reason for further study, so that agencies are better positioned to avoid legal consequences. Even aside from the specific requirements of these various trans-substantive statutes, the repeated legislation in this area demonstrates congressional interest in notice-giving

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<sup>222</sup> *Id.* § 601.601(d)(1).

<sup>223</sup> *Id.* § 601.601(d)(2)(ii)(a).

<sup>224</sup> *Id.* § 601.601(2)(b)(iii).

<sup>225</sup> 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).

<sup>226</sup> P.L. No. 111–353.

<sup>227</sup> 21 U.S.C. § 2223(d)(2)(B).

and suggests possible congressional dissatisfaction. This alone may be an important reason for agencies to carefully consider notice practices.