Notice Risk and Registered Agency

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ABSTRACT

To sue a firm is to sue an artificial person, making the most reliable service method—physically handing papers to the defendant—unusable. This problem illustrates notice risk: if a plaintiff's service obligations are loose, it is advantaged (because the defendant may never receive notice), whereas if they are strict, the defendant is advantaged (because the plaintiff may struggle to effect service). For litigation involving corporate defendants, civil procedure and corporate law mitigate this problem through a technology for managing notice risk: registered agency. A firm using this technology, because it cannot be served directly, appoints an agent who will accept papers and forward them to management. By serving an intermediary, the plaintiff shifts to the defendant the risk that actual notice fails. Although registered agency was once an innovative solution to corporate-defendant notice risk, this Article scrutinizes it in a contemporary light, using state corporate data to estimate that it imposes more than a quarter-billion dollars each year in avoidable costs on business, public administration, and civil process. To tackle these costs, it proposes model legislation for a less expensive, more reliable notice technology: email.

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I. INTRODUCTION

Registered agents have been a workaday feature of American corporate law for over a century. Despite their long history, this Article is the first to be focused on them as a scholarly topic.[1] And given that it proposes to do away with them, it should also perhaps be the last.

Appointing a registered agent is an early and familiar step in forming a business entity.[2] The agent has a simple, but occasionally important, job: be available to accept service of process on behalf of the business entity and forward those papers on to its management.[3] If they prefer to skip this intermediary, plaintiffs are generally free to serve a defendant firm's officers or directors directly.[4] Personal service can be challenged, however, by not knowing who a firm's officers or directors are, much less where they are located. Because serving officers or directors is challenging, if not infeasible, a technology is needed to make serving corporate defendants both reliable and efficient, i.e., defendant firms' decision-makers receive actual notice of actions against the firm and plaintiffs perfect service with minimal expense or uncertainty.[5] Registered agents fill that role. Because agents' names and addresses are centrally filed with state corporate administrators and are freely accessible to the public and lawyers, plaintiffs can readily "find" and serve firms without knowing the names or whereabouts of their officers or directors, or needing to litigate later whether the person who received the papers was the right person to do so.[6]

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1. They are a peculiar feature, though. Unlike other provisions of business-entity statutes they do not deal with the capital structure or internal governance of the firm, but rather they address how plaintiffs—who, most often, are corporate outsiders—can litigate against it. *See* Carliss N. Chatman, *Judgment Without Notice: The Unconstitutionality of Constructive Notice Following* Citizens United, 105 KY. L.J. 49, 89 (2016) (explaining the necessity of serving corporations via registered agents, officers, or directors due to corporations' "non-corporeal" form).

2. *See, e.g.*, DEL. CODE ANN. tit. 8, § 131–32 (2020) (requiring each Delaware corporation to have an in-state registered office and a registered agent).

3. *See id.* at § 132(b)(3) (requiring registered agents to "[a]ccept service of process and other communications directed to the corporations for which it serves as registered agent and [to] forward same to the corporation to which the service or communication is directed"); *see also* N.C. GEN. STAT. § 55D-30(b) (2002) ("The sole duty of the registered agent to the entity is to forward to the entity at its last known address any notice, process, or demand that is served on the registered agent."); MODEL REGISTERED AGENTS ACT—A SUMMARY 2 (2006) (UNIF. L. COMM'N, revised 2011) ("A registered agent has one principal duty, to provide an entity with notice of any service, and of notice required by law or other demand made upon the agent on behalf of the entity."). Agents can be either natural persons or corporations formed for the purpose of providing registered-agency services; although an officer or employee is permitted to fill this role, attorneys and for-profit service providers are also commonly used. *See id.* For more discussion on who registered agents are, see Section II.B.

4. *See, e.g.*, MODEL BUS. CORP. ACT § 5.04(b) (2010) (AM. BAR ASS'N, revised 2016) (outlining the process for serving a corporation by mail in states that have adopted the act); DEL. CODE ANN. tit. 8, § 321 (2010) ("Service of legal process upon any corporation of this State shall be made by delivering a copy personally to any officer or director of the corporation in this State, or the registered agent . . . .").

5. *See* MODEL BUS. CORP. ACT § 5.01 cmt. (observing that registered-agent requirements are "based on the premises that at all times such a corporation should have an office where it may be found and a registered agent at that office to receive any notice or process required or permitted by law to be served").

6. Sandra Feldman, *The Risks of Using an Individual as Your Registered Agent*, WOLTERS KLUWER (Aug. 19, 2020), https://ct.wolterskluwer.com/resource-center/articles/review-potential-problems-not-appointing-dedicated-registered-agent [https://perma.cc/S5UP-KGUZ]. Firms that hire commercial registered agents also benefit by channeling service away from their officers—who have other things to do—and onto a specialized

Despite being an ingenious and elegant solution to the problem of serving business entities, registered agency is a nineteenth-century technology in a twenty-first-century world.[7] It has, no doubt, seen some enhancements along the way. For example, commercial registered agents[8] now routinely scan served papers and post them to online customer portals, rather than forwarding them via U.S. mail. Despite some modern touches, though, this technology is still a manual one that imposes unnecessary costs and risks on business, public administration, and civil process. That is not to say, however, that there is no longer a need for a technology that makes service on firms reliable and efficient. The incumbent technology may be outdated, but the need for its functionality remains. With these points in mind, this Article proposes replacing registered agency with a less expensive, more reliable notice technology: email.

The Article's first part explains the beneficial role of registered agency as a technology for managing notice risk in civil litigation. The second part estimates the costs and risks registered agency imposes on business, public administration, and civil process. The last part shows how email can replace registered agency and answers likely objections to its doing so. As a final word, the Appendix proposes model legislation—the Electronic Entity-Service Act—that states can use to begin making the switch.

II. NOTICE RISK AND NOTICE TECHNOLOGY

Registered agency helps manage notice risk in civil litigation. As this Part shows, that function is as important today as it was a century ago.

Although registered agency is a feature of every state's corporate law, Delaware is a good starting point for thinking about the registered agent's role. When it first adopted the General Corporation Law in 1899, Delaware required process to be served either personally on the corporation's president or "by leaving the [papers] at the [president's] dwelling house or usual place of abode."[9] If the president lived out of state, then the corporate secretary or a director could be served,[10] either personally or by substitution.[11]

That kind of notice system would be fairly workable in an economy of small, locally focused firms.[12] A supplier to a factory, for example, might personally know and interact with the company's president; it would not be so difficult to perfect personal service on the president in a dispute over unpaid invoices. Needless to say, the scale and geography of enterprise have changed since 1899. A supplier to Walmart, Inc. or Facebook, Inc., or another large company incorporated in Delaware, would have a hard time finding or serving its president, secretary, or one of its directors.[13] In 1925, Delaware addressed this

vendor.

7. *See generally infra* note 14 (discussing the earliest state registered agency statutes).

8. *See* MODEL REGISTERED AGENTS ACT § 2 cmt. 1 (2006) (UNIF. L. COMM'N, revised 2011) ("A commercial registered agent is an individual or entity that is in the business of serving as a registered agent . . . ").

9. 21 Del. Laws 458 (1899).

10. *Id.*

11. *Id.*; *see also Service*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "substituted service" as "[a]ny method of service allowed by law in place of personal service, such as service by mail").

12. *See* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2312 (2013) (explaining that early general corporations were meant not as "massive [interstate] business enterprises but rather as local 'incorporated partnerships'").

13. As of 2018, 1.4 million legal entities were organized in Delaware, with 216,000 newly formed in that year alone. Two-thirds of the companies on the Fortune 500 list are Delaware corporations, as well as eighty

who-and-where challenge by introducing two innovations for serving a corporation: service on a "resident" agent (which itself could be a corporation) or substituted service on the Delaware Secretary of State.[14] Those provisions remain conceptually in place today.[15]

These innovations effected a legal technology that facilitated the civil-procedural task of allocating notice risk between plaintiffs and defendants. Due process requires that defendants have notice of actions so that they may participate in the litigation.[16] For defendants, notice risk is the risk that actions proceed without their knowledge, preventing them from participating in the actions or exercising rights they may have.[17] For plaintiffs, it is the risk that if defendants' notice rights are violated, an action might be dismissed, preventing substantive claims from being vindicated. Allocating notice risk means balancing the interest of defendants in having actual notice against plaintiffs' interest in litigation going forward and avoiding incentives for defendants to evade service.[18] In the context of litigation against firms, that balancing means that plaintiffs should not gain an advantage because defendants' officers are unaware of actions or learn of them at the last moment.[19] Nor should corporate defendants be advantaged because their incorporeal

percent of all companies that go public. *See* Jeffrey W. Bullock, *Annual Report Statistics*, DEL. DIV. CORPS. (2018), https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2018-Annual-Report.pdf [https://perma.cc/Y295-TCPW].

14. 34 Del. Laws 284 (1925). The concept of appointing an agent to accept service of process predated this advance by Delaware. In 1888, for example, Pennsylvania adopted procedures for out-of-state insurance companies to do business in that state, requiring them to "legally designate a person or agent residing in this state to receive service of process. . . ." 80 PA. P.L. § 7 (June 5, 1883), *in* FRANK F. BRIGHTLY & JOHN PURDON, A DIGEST OF THE STATUTE LAW OF THE STATE OF PENNSYLVANIA FROM THE YEAR 1700 TO 1894 1058 (12th ed. 1894), https://babel.hathitrust.org/cgi/pt?id=pst.000018431506&view=1up&seq=1085&q1=legally%20designate%20a%20person%20or%20agent%20residing%20in%20this%20state%20to%20receive%20service%20of%20process [https://perma.cc/DKH3-PT6W]. Decades earlier, Virginia required insurance companies chartered by the state legislature to "by a written power of attorney, appoint some citizen of this commonwealth, resident therein, its agent or attorney, who shall accept service of all lawful processes against such company in this commonwealth . . . ." 1855 VA. Acts 26, c. 8 § 1, *in* GEORGE W. MUNFORD, THIRD EDITION OF THE CODE OF VIRGINIA 366 (1873), https://books.google.com/books?id=rtBOAQAAIAAJ&printsec=frontcover&source=gbs_ViewAPI#v=onepage&q&f=false [https://perma.cc/PB56-CHUW]. *The Commercial and Financial Chronicle* archives maintained by the St. Louis Federal Reserve offer another early reference to a "resident agent": J. Bannister Hall was announced as the resident agent of the newly formed Ward Food Products Corporation, a Maryland corporation. William B. Dana, *Suit Based on a Misapprehension of Facts, Says Ward—"Trust" Not Contemplated—The Plan Outlined*, COM. & FIN. CHRON., Feb. 13, 1926, at 838.

15. *Compare* 34 Del. Laws 284 (1925), *with* DEL. CODE ANN. tit. 8, § 321 (2010).

16. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

17. *See* Robin J. Effron, *The Lost Story of Notice and Personal Jurisdiction*, 74 N.Y.U. ANN. SURV. AM. L. 23, 27 (2018) (describing notice doctrine as focused on "ensuring that a party is aware of a pending action so that she may participate and defend or vindicate her rights before a court issues a binding judgment").

18. *See* Jones v. Flowers, 547 U.S. 220, 226 (2006) ("Due process does not require that a property owner receive *actual notice* before the government may take his property.") (emphasis added); Dusenbery v. United States, 534 U.S. 161, 181 (2002) (Ginsburg, J., dissenting) ("The majority is surely correct that the Due Process Clause does not require 'heroic efforts' to ensure actual notice."); Kidd Int'l Home Care, Inc. v. Prince, 917 A.2d 1083, 1086 (D.C. 2007) ("'Adequate' notice, rather than 'actual' notice, is all that the Constitution guarantees." (citing Chavis v. Heckler, 577 F. Supp. 201, 205 (D.D.C. 1983))).

19. *See* Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., 616 F.3d 413, 417 (4th Cir. 2010) ("We have repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits.").

nature makes serving them too hard, or leaves the effectiveness of service too uncertain.[20]

To balance these interests, civil procedures provide rules for allocating notice risk between parties.[21] First, plaintiffs must serve papers in accordance with procedures "reasonably calculated"[22] to ensure that defendants receive actual notice. They bear the risk, including the potential of dismissal, if service fails to follow these procedures and, as a result, defendants do not receive notice.[23] After plaintiffs have followed those procedures, though, defendants bear the risk of having actual notice, i.e., the papers getting to the person who will need to make active decisions about the litigation.[24] For defendants, this risk includes default judgment or having less time to prepare a response.[25]

To illustrate notice risk, imagine a rule that papers need only be sent by mail to any address where the plaintiff reasonably believes that the defendant conducts business. Such a rule could be justified on the ground that plaintiffs should not be required to guess who the appropriate decisionmaker to serve is, knowledge that may exist only within the defendant firm. But this rule would risk that organizationally complex defendants would not receive actual notice, giving plaintiffs tremendous advantages in litigation. For example, mailing service to a branch of a national chain would at least slow down the materials getting to the appropriate decision-makers, and it could cause a failure of notice altogether (e.g., an inattentive branch manager neglects to forward the papers).[26] In turn, the defendant could face consequences as severe as default judgment.[27]

Contrast that hypothetical rule with one requiring that "the chief corporate legal decision-maker" must have actual notice for service to be effective.[28] A justification for

20. *Cf.* McDonald v. Mabee, 243 U.S. 90, 92 (1917) ("To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done.").

21. *See, e.g.*, FED. R. CIV. P. 3–4 (detailing how to commence an action and serve a summons); FIN. INDUS. REGUL. AUTH. RULE 12300 (2017) (requiring most parties to securities-industry disputes to serve arbitral claims via a portal maintained by FINRA).

22. In the case of federal actions, that procedure is designed by the Advisory Committee on Rules of Civil Procedure and is promulgated by the Supreme Court. *See* U.S. JUD. CONF., PROCS. FOR THE JUD. CONF.'S COMM. ON RULES OF PRAC. & PROC. & ITS ADVISORY RULES COMMS. § 440 (2011); *see also* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950) (establishing the "reasonably calculated" standard).

23. *See* FED. R. CIV. P. 4(m) (permitting courts to dismiss complaints without prejudice if service is not perfected within 90 days of filing, absent a showing by a plaintiff of good cause for the failure).

24. Even after an action has begun, notice risk remains. For example, if one party files a motion, the other party must be given an opportunity to oppose it. To enable opposition, moving parties must send documents they file with the court to nonmovants, and they must certify to the court that they have done so. *See generally* FED. R. CIV. P. 5 (providing rules for serving motions). They may do so by mail, an old, but still-working, notice technology. *Id.* at 5(b)(2)(C). But postage costs, and mail gets lost. Alternatively, federal courts now allow a cheaper, more reliable method for intra-litigation notice: filing documents on electronic-case-filing (ECF) systems. *See, e.g.*, *id.* at 5(b)(2)(E). Once a filer *successfully* transmits a document to the court's ECF system, notice risk shifts to non-filing parties, who are responsible for reading what is filed on the ECF system. *Id. But see id.* at advisory committee's note to 2018 amendment ("[A] filer who learns that the transmission failed is responsible for making effective service.").

25. FED. R. CIV. P. 55(a) ("When a party against whom a judgment . . . is sought has failed to plead or otherwise defend . . . the clerk must enter the party's default.").

26. *Cf.* FED. R. CIV. P. 5(b)(2)(F) (providing that a paper may be served by "delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery").

27. FED. R. CIV. P. 55(a).

28. Compare this rule to the earlier Delaware rule requiring service on a corporate president. 21 Del. Laws 458 (1899).

this rule would be that the person who makes legal decisions for the firm should personally know about litigation it faces. Yet under this rule, a plaintiff might diligently attempt to perfect service while having no way to know whether the chief corporate legal decision-maker ever received the papers. Indeed, the plaintiff might have no way of knowing who that person is.[29] If it guesses wrongly, its claim could be dismissed.

In these hypotheticals, either the defendant or the plaintiff is harmed by failures of actual notice. A service rule loose about actual notice will disadvantage defendants, while one that is strict will disadvantage plaintiffs.[30] Civil procedures allocate this risk between the two sides through rules, like Civil Rules 4 and 5, that approximate actual service.[31] In other words, these rules provide service procedures that are "reasonably certain to inform those affected" by a legal action.[32]

In the corporate context, that is where registered agents come in. The firm chooses the agent and can instruct it on what to do with the service it accepts.[33] The plaintiff satisfies its burden by serving the agent, who is responsible for getting the papers to the firm. The risk for a failure of actual service is thus allocated to the firm because it chose the agent for this specific task and can police the agent's performance by appointing a new one.[34]

Registered agents are thus a technology by which plaintiffs can reliably and efficiently give corporate defendants notice that they are being sued.[35] "Actual notice" has residual uncertainty in the case of artificial persons: how can it be known whether papers have found their way to the appropriate decision-maker? Despite that residual uncertainty, this notice technology allows plaintiffs confidence that they have perfected service, while it gives defendants control (in the form of appointing and replacing their agents) over their ability to receive actual notice. More, it accounts for the variability in what "actual notice" means in the context of a given firm; an entity's officers, directors, or partners speak for it,

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29. Although the chief executive officer or president might play this role (depending how a firm operates), it could also be the chair of the board of directors, a board committee, a partner who manages legal issues, or an officer like a general counsel or a non-officer in-house counsel. The role might also vary with the type of action: a junior in-house lawyer might make all decisions for minor claims, whereas a special board committee would take shareholder-derivative actions. *See* Brooks v. Univ. City, Inc., 225 P.3d 489, 491–92 (Wash. Ct. App. 2010) (involving papers being forwarded to a defendant's employee who was not the appropriate internal recipient (i.e., not the legal department)).

30. *Cf.* Jane K. Stoever, *Access to Safety and Justice: Service of Process in Domestic Violence Cases*, 94 WASH. L. REV. 333 (2019) (explaining that strict service rules can act as a procedural barrier to substantive relief); Andrew C. Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. COLO. L. REV. 167 (2019) (highlighting issues and proposing solutions to the difficulty that current service rules pose to "low-income, pro se litigants").

31. The rules advisory committee performs this approximation at the federal level. *See* FED. R. CIV. P. 3–4 (detailing how to commence an action and serve a summons).

32. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950). As Christine Bartholomew observes, though, "reasonable certainty" is often an aspirational standard. *See* Christine P. Bartholomew, *E-Notice*, 68 DUKE L.J. 217, 225 (2018) ("Perhaps an apt description of notice requirements is simply 'do your best under the circumstances.'").

33. For example, "forward served papers to the care of our general counsel at the following address," or "email served papers to our managing partner at the following email address."

34. *See* RESTATEMENT (THIRD) OF AGENCY § 5.02(1) (2006) (AM. L. INST., updated 2020) ("A notification given to an agent is effective as notice to the principal if the agent has actual or apparent authority to receive the notification . . . .").

35. *See* FED. R. CIV. P. 4(h)(1)(B) (providing that service may be made on a corporation or unincorporated association by "delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process . . .").

but who directs its legal affairs will vary among firms. Given this inherent informational asymmetry (i.e., external uncertainty who the officers are, who among them will manage the litigation, or where they physically are), allocating the residual notice risk to defendant firms is a reasonable procedural balance that should be preserved. But that leaves a question: is there a better technology out there to do it?

III. THE COSTS OF REGISTERED AGENCY

The last Part described the registered agent's benefits; this one considers its costs.

Imagine an entrepreneur who forms an LLC that she uses to manage a small business or to hold rental property. She pays an annual fee to a commercial registered agent to accept any process on behalf of the LLC and to scan and post those papers to an online portal. The steps for forming the LLC required her to identify and hire the agent before filing articles of organization. If she ever wanted to appoint a new registered agent, she would have to pay the state in which her LLC is organized a separate fee to do so.[36] The annual fee she pays to the agent is about $100, much lower than the hundreds of dollars some commercial registered agents charge.[37] She has no reason to believe her LLC's agent has failed to upload served papers to its online portal, so it has done its duty. But, of course, she would rather have that fee back in her pocket.

This hypothetical roughly describes millions of people who use business entities to manage small businesses and other aspects of their financial affairs.[38] This Part asks what is the social cost of registered agency in terms of (A) fees paid by firms, (B) personnel-hours in public administration, and (C) notice risk and civil-litigation costs?

A. Costs to Business

One measure for assessing whether registered agency should be replaced as a notice technology is how much it costs businesses compared to an alternative. At first blush, if business entities pay a few hundred dollars a year for a registered agent's services, the per-firm and aggregate costs might not seem so great in absolute terms. Most business entities, however, are small—often new—enterprises, or they are formed by individuals who find value in using an LLC to structure their affairs.[39] Small operators are likely not indifferent to an annual $100 fee, more or less, in additional business expense, even if larger concerns are.[40] This Part presents an estimate that U.S. businesses spend more than a quarter-billion

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36. *See, e.g.*, *infra* note 58 and accompanying text (providing an example of a form and fee to change a company's registered agent with the Secretary of State, in this case that of Texas).

37. For example, CT Corporation, a leading commercial provider of registered-agent services, advertises its basic services at $279 per year. *CT Corporation*, WOLTERS KLUWER, https://www.wolterskluwer.com/en/solutions/ct-corporation/change-of-registered-agent [https://perma.cc/667B-8LJ7] (last visited Sept. 8, 2020).

38. *See infra* note 52 and accompanying text.

39. The everyday-use cases for LLCs are legion: an entrepreneur starting a restaurant or software company, a professional opening a side consulting practice, or a real-estate investor operating rental units. Even money launderers—perhaps especially money launderers—have uses for LLCs. *See, e.g.*, Max Parrott, *Manafort Trial Is an Explainer in New York Real Estate Money Laundering*, CITY & STATE N.Y. (Aug. 1, 2018), https://www.cityandstateny.com/articles/politics/new-york-state/manafort-trial-new-york-real-estate-money-laundering.html [https://perma.cc/36VQ-8Z98].

40. Even larger businesses may not be indifferent to this category of expense. For example, if a complex enterprise is organized into numerous subsidiaries, or if it registers to do business as a foreign entity in numerous

dollars annually on registered-agent services. If there were a more reliable notice technology that would cost less, then replacing the incumbent is an opportunity for reducing a cost that falls most heavily on small and new businesses.

To understand the scope of registered agency's direct costs to business, I took a deep look at registered agents in one large state: Texas. Texas is home to 28 million people[41] and nearly two million domestic business entities.[42] An additional 127,736 foreign for-profit corporations and LLCs are registered to do business there.[43] Given its population and economic significance,[44] it offers a meaningful view into the business costs associated with the registered-agent technology.

For this analysis I obtained bulk corporate data from the Texas Secretary of State.[45] The data include every business entity organized or authorized to do business in Texas, a total 1,905,602 million records. In addition to for-profit corporations and LLCs, there were other entity types, including non-profit corporations, partnerships, professional associations, statutory trusts, and others. For-profit corporations and LLCs made up 82% of all records, and I focused my analysis on them because of their share of Texas entities and their role as the two major business forms in the United States.

The analysis classifies registered agents along three categories:

Internal agents are officers, directors, or employees of the firm, or persons affiliated with those individuals (e.g., spouses). They serve as registered agents as part of their ongoing relationship with firms and presumably do not receive separate fees for doing so. One example would be a sole proprietor who organizes an in-state LLC and serves as its registered agent.[46]

Non-commercial external agents are persons not directly associated with firms on a regular basis, but who serve as their registered agents (charging fees for doing so), and for whom this service is not a substantial part of their business. One example would be a lawyer who provides this service as a client accommodation.

Commercial external agents are persons or organizations that are in the business of providing registered-agent services, even if they provide other services as well.

Table 1 provides the counts as of June 2019. I counted an entity as having an internal

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states, it will pay registered-agent fees many times each year.

41. *Table 1. Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico*, U.S. CENSUS BUREAU (Dec. 19, 2018), https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html [https://perma.cc/FNB2-HMPU] (stating that the population of Texas in 2018 was 28,701,845 people).

42. *See infra* note 45. Texas—along with California, Delaware, Florida, and New York—is among the top five states for corporation and LLC formations. REPORT TO THE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMM. ON HOMELAND SEC. & GOV'T AFFS., U.S. SENATE, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-376, COMPANY FORMATIONS: MINIMAL OWNERSHIP INFORMATION IS COLLECTED AND AVAILABLE 10 (2006) [hereinafter GAO Report].

43. *See infra* note 45.

44. Press Release, Bureau of Econ. Analysis, Gross Domestic Product by State, Fourth Quarter and Annual 2018, at 8 (May 1, 2019), (available at https://www.bea.gov/system/files/2019-04/qgdpstate0519_4.pdf [https://perma.cc/6QVL-RQC3]).

45. These data were sent to me as a comma-separated-values file containing the Texas Secretary of State's database as of July 2019. I removed unneeded fields and cleaned the remaining data to remove typographic inconsistencies that could cause undercounting (e.g., "Acme, Inc." versus "Acme Inc"). Counts were generated with statistical software.

46. *See, e.g.*, TEX. BUS. ORGS. CODE § 5.201(b)(2)(A) (West 2011).

agent if the agent served as agent to no more than two entities.[47]

All other entities were treated as having either a non-commercial or commercial external agent. An entity was counted as having a non-commercial external agent if its registered agent served fifty or fewer firms.[48] Because states are naturally most interested in the costs their laws impose on local businesses, I break out these numbers by domestic and foreign corporations and LLCs.[49]

Table 1. Texas registered agents as of June 2019

	Registered-Agent Category	Corporations	LLCs
Domestic	Internal Agent	282,405	676,787
	Non-Commercial External Agent	57,861	247,981
	Commercial External Agent	21,098	151,515
Foreign	Internal Agent	477	17,049
	Non-Commercial External Agent	3234	6430

From the data above, assuming an average annual agent fee of $100, in-state Texas corporations and LLCs pay $48 million per year for registered-agent services, while foreign corporations and LLCs pay $11 million per year for these services *for Texas*. $27 million of those fees went to commercial providers. The top ten commercial agents together capture only 13.27% of the addressable Texas market, however, suggesting that there is a lack of significant potential lobbying interest to protect the incumbent technology.

Table 2. Top ten commercial registered agents as of June 2019

Commercial Agent	Entities	Market Share*
United States Corporation Company	51,839	3.31%
CT Corporation System	49,280	3.15%
Corporation Service Company	36,801	2.35%
Registered Agents Inc.	16,681	1.07%
Legalinc Corporate Services Inc.	14,087	0.90%
Capitol Corporate Services, Inc.[50]	10,552	0.67%
National Registered Agents Inc.	9977	0.64%
Incorp Services, Inc.	8446	0.54%
Cogency Global Inc.	4956	0.32%

47. This proxy is imperfect. It assumes that in numerical terms, the vast majority of entities with internal agents are small, closely held concerns, and that small operators likely would not have more than two business entities in Texas at one time.

48. Although Texas corporate law has no similar definition, Delaware defines "commercial registered agent" as being the "registered agent for more than 50 entities." DEL. CODE ANN. tit. 8, § 132(c) (2020).

49. This breakdown is not a perfect proxy for in-state versus out-of-state businesses. An enterprise might base all its operations in Texas but be organized in another state. Another enterprise that has little activity in Texas might nevertheless have a local subsidiary organized there.

50. Capitol Corporate Services, Inc. is an affiliate of the law firm Duane Morris LLP. *Capitol Corporate Services, Inc.*, DUANE MORRIS, https://www.duanemorris.com/site/capitolcorporateservices.html [https://perma.cc/9XRD-3XK5] (last visited Sept. 23, 2020).

Registered Agent Solutions, Inc.	4848	0.31%

* Based on 1,565,383 domestic or foreign corporations or LLCs.

I then looked to Internal Revenue Service (IRS) data to roughly extrapolate the Texas data nationally.[51] For 2015—the most recent year of business-return data provided by the IRS—the agency received tax returns for 6.1 million corporations, nearly 1 million general and limited partnerships, and 2.5 million LLCs taxed as partnerships.[52] There were an additional 25 million non-farm sole-proprietorship returns, an unknown number of which were single-member LLCs classified as disregarded entities for tax purposes (many that will have registered agents).[53] Taking just the corporations and known LLCs, if a third used domestic external or commercial registered agents (as in Texas), and the average annual agent fee was $100, that implies over a quarter-billion dollars was spent on registered-agent services in 2015.[54] Given that (1) the number of business entities grows yearly,[55] (2) some of the tens of millions of sole proprietorships are disregarded LLCs, and (3) some entities pay registered agents in multiple states (i.e., in their state of formation and other states where they are authorized to do business), total yearly registered-agent fees likely well exceed a quarter-billion dollars. This annual spending can be compared to another old-fashioned business technology: the United States spends around $110 million annually on paper clips.[56]

B. Costs to Public Administration

Although registered agency imposes significant costs on civil process and business, those costs are less concentrated than in the public-administration context. Public agencies that administer state entity laws serve as the central registrar of registered agents, and it is they who chiefly bear the burden of maintaining the technology.

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51. This extrapolation is intended to provide a rough estimation of aggregate registered-agent fees. It relies on assumptions, including that the average cost of registered-agent services is $100 per entity per year and that Texas is representative of other states, that introduce error. It is still useful, however, in at least providing an order-of-magnitude view of the annual costs, e.g., it is much more than tens of millions of dollars, but it is probably less than a billion dollars.

52. *SOI Tax Stats—Integrated Business Data*, INTERNAL REVENUE SERV., https://www.irs.gov/statistics/soi-tax-stats-integrated-business-data [https://perma.cc/MDA5-QMMG] (Mar. 5, 2020).

53. *Id. See also* U.S. DEP'T. OF THE TREAS., I.R.S. PUB. 3402, TAXATION OF LIMITED LIABILITY COMPANIES 2 (2016) ("If an LLC has only one member and is classified as an entity disregarded as separate from its owner, its income, deductions, gains, losses, and credits are reported on the owner's income tax return.").

54. ((6.1 million + 2.5 million) ÷ 3) × $100 = ~$287 million.

55. *See* GAO Report, *supra* note 42, at 10 (finding that nearly two million corporations or LLCs were formed nationwide in 2004 alone).

56. James R. Hagerty, *Mousetraps, Maybe, but Can You Build a Better Paper Clip?*, WALL ST. J. (Aug. 29, 2011), https://wsj.com/articles/SB10001424053111903327904576524671643378078 [https://perma.cc/D3QS-TS6Q] (noting that paper clips have been around for "more than a century" and retail "for about a penny" and that U.S. sales are estimated at 11 billion paperclips annually). It can also be compared to the dollars associated with securities litigation, a well-covered topic in the business-law and civil-procedure scholarships: registered-agent services were at least 7.8% of the average $3.68 billion in annual securities-litigation settlements from 2015 through 2019. *See* CORNERSTONE RESEARCH, *Securities Class Action Settlements: 2019 Review and Analysis* 3, tbl.2 (2019), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2019-Review-and-Analysis [https://perma.cc/ZEA3-5FAR] (depicting graphically total settlements, in dollar terms, of securities litigation in the United States annually from the years 2010 to 2019).

Managing changes in registered agents is a good example of this burden. Firms are free to replace their registered agents, a power that allows them to monitor their agents and mitigate the notice risk created by that relationship.[57] That feature of the registered-agency technology means that state corporate administrators must constantly update their records to reflect changes in agents, a significant administrative cost.

Let Texas again illustrate. Texas provides a two-page form for entities to change their registered agent.[58] The form's instructions direct that it be submitted by mail, fax, or in person, along with a $15 fee paid by check, money order, or debit or credit card.[59] In other words, this is not a wholly automated process; someone in the Texas Secretary of State's office must review each form and payment. Assume that the average change takes about ten minutes, including opening and reviewing forms, updating agency databases, and processing payments. As Table 3 shows, in 2018 that would imply nearly 8,000 employee-hours were spent just on processing corporation/LLC agent-change forms. These hours were resources that could not be spent on other public purposes.

Table 3. Texas changes of registered agent/office, 2014–2018*[60]

	2018	2017	2016	2015	2014
Domestic	41,133	37,637	36,847	38,214	34,716
Foreign	5171	4986	5380	4937	4463
Total #	46,304	42,623	42,227	43,151	39,179
Total $ (000s)**	$694	$639	$633	$647	$588

* These data cover only corporations and LLCs.
** Based on a $15 filing fee.

Of course, the cost of employee-hours was offset by filing fees. In 2018, Texas received nearly $700,000 in revenue for processing agent changes. However, if it no longer needed to process these forms, then it could recoup that revenue by raising franchise taxes or annual fees by 45¢/entity across its 1.6 million domestic and foreign corporations and LLCs.[61] If it did so, it would not only collect the same revenue, but it would also have the benefit of nearly 8,000 additional employee-hours.

57. *See* RESTATEMENT (THIRD) OF AGENCY § 3.06(5) (AM. L. INST. 2006) ("An agent's actual authority may be terminated by . . . a manifestation of revocation by the principal to the agent . . . ").

58. TEX. SEC'Y OF STATE, FORM 401—GENERAL INFORMATION (CHANGE OF REGISTERED AGENT/OFFICE) 1, 4–5 (May 2011), https://www.sos.state.tx.us/corp/forms/401_boc.pdf [https://perma.cc/G7P8-DR6Y].

59. *Id.* at 3.

60. Email from Carmen Flores, Dir., Bus. & Pub. Filings Div., Texas Sec'y of State, to author (June 28, 2019) (on file with author).

61. *See generally* TEX. COMPTROLLER OF PUB. ACCTS., *Texas Franchise Tax Report Information and Instructions* (Apr. 2019), https://comptroller.texas.gov/forms/05-907.pdf [https://perma.cc/A4JU-WRRB] (outlining requirements for franchise taxes in Texas).

C. Costs to Civil Process

Law disfavors default judgement[62] and waste in civil process.[63] Scrutinizing registered agency requires accounting for those two values. Section II.C.1 explains how registered agents help manage overall notice risk but also derivatively generate notice risk for defendants. On the plaintiff side, Section II.C.2 suggests that although registered agency provides reliable means for serving defendants, because it is a largely manual system, it still imposes avoidable process costs that in aggregate are fairly substantial.

1. Default Costs for Defendants

For defendants, the civil-process cost of registered agency is chiefly the risk of default judgment.[64] A firm incurs this cost when the agent accepts service (and thereby transfers notice risk from the plaintiff onto the defendant firm), yet the served papers never make it to the person who should be making decisions for the firm.

This cost can be thought of as a (1) suit's expected default-judgment amount multiplied by (2) (a) the probability that the notice fails (b) minus the probability that a failure to respond will be excused.[65] A failure can be agent-based (e.g., the agent fails to forward papers), mutual (e.g., miscommunication impedes notice), or client-based (e.g., the agent does its duty, but the papers get lost from the client's mailroom). Failed notice need not be caused by negligence on anyone's part. Rather it reflects that each additional step in a process is a potential point of failure.[66] There are many moving parts in using registered agents as a notice technology. This section shows where they can break.

a. Agent Failure

The most obvious point of failure to the registered-agency system is that an agent might accept service but fail to forward the papers to the defendant. This negligence, in turn, is imputed to the defendant, and so the defendant risks default judgment just as sure as if it itself received the papers and then set them aside until it was too late to act.[67]

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62. *See, e.g.*, Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., 616 F.3d 413, 417 (4th Cir. 2010) ("We have repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits.").

63. *See, e.g.*, Henry v. Champlain Enters., Inc., 212 F.R.D. 73, 81 n.5 (N.D.N.Y. 2003) ("Surely, judicial and litigation economy and efficiency, the intended and vital purpose of Requests to Admit, were not promoted by these parties. A word to the wise to the parties: if this type of conduct persists, sanctions will assuredly be pursued *sua sponte*.").

64. The level of this risk is hard to quantify and is perhaps modest, but it nevertheless is real and has caused firms to suffer default judgment. *See infra* notes 67, 69, 71, 81 and accompanying text.

65. The more frequently the defendant is sued, the greater the cost. Imagine a firm that faces on average 147 suits at a time. *Cf. Nearly 90 Percent of U.S. Corporations Juggle Multiple Lawsuits*, INS. J. (Nov. 7, 2005), https://www.insurancejournal.com/magazines/mag-features/2005/11/07/62341.htm#:~:text=Nearly%2090%20percent%20of%20U.S.%20corporations%20are%20engaged%20in%20some,at%20home%20soars%20to%20147 [https://perma.cc/8AP9-FC6K]. For example, if the average demand were $500,000 and the registered-agent process failed 0.1% of the time, then the expected notice-related exposure to the defendant would be $73,500 annually (147 × $500,000 × 0.1%).

66. *See* Richard I. Cook, *How Complex Systems Fail*, UNIV. OF CHI. COGNITIVE TECHS. LAB'Y 1 (last revised 2018), https://www.researchgate.net/publication/228797158_How_complex_systems_fail [https://perma.cc/6FL7-R25Q] ("Complex systems contain changing mixtures of failures latent within them.").

67. *See* Brooks v. Univ. City, Inc., 225 P.3d 489, 491–92 (Wash. Ct. App. 2010) (affirming a default order

A firm might believe that it can avoid this risk by hiring a commercial registered agent, which presumably will have adopted procedures and safeguards to ensure it fulfills its sole purpose of accepting service and forwarding the papers.[68] Yet major commercial providers can fail in this duty too, leading to default judgments against their clients.[69] Even if a commercial registered agent has good procedures in place, service under registered agency remains a manual undertaking that is susceptible to failure at each step, including human error on the part of its employees.[70] Of course, this risk is mitigated if an agent has errors-and-omissions or malpractice coverage, or unencumbered assets, sufficient to compensate its client for any service failures it caused. The possibility of agent liability could thus reduce, although not eliminate, the notice risk faced by would-be corporate defendants.

b. Mutual Failure

Communication barriers and similar frictions between agents and their clients can also cause notice failures. Ordinary things like changing the name or principal address of a business might confound an agent. In *United Airlines, Inc. v. McCubbins*, a plaintiff served a commercial registered agent with a suit against its client, United Airlines.[71] The plaintiff identified the airline by an outdated corporate name (United Airlines Corporation) and principal business address.[72] The papers never made it to United Airlines, Inc.[73] The Mississippi Court of Appeals nevertheless held that a registered agent's failure to send the papers to the right company should be imputed to its client, making the service proper and sufficient to justify a default judgment.[74]

Notice mishaps can also arise when a firm decides to change its registered agent. *International Environmental Management, Inc. v. United Corporate Services, Inc.* recounts one such mishap between a firm, IEM, and its former registered agent, UCS.[75] IEM notified UCS that CT Corporation was its new registered agent and that it was terminating UCS's services.[76] The Missouri Secretary of State, however, was never told of this change, and

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against a defendant whose registered agent forwarded papers to the wrong employee at the defendant, instead of to its legal department); Rose v. Forester, No. COA09-427, 2009 WL 3818848, at *3 (N.C. Ct. App. Nov. 17, 2009) (holding that an agent's failure to forward papers to a defendant firm "was inexcusable and clearly imputable to [the defendant]" and thus did not justify relief from default judgment). *But see Colleton Preparatory*, 616 F.3d at 421 (holding that the district court abused its discretion in denying relief from default judgment against a corporate defendant whose commercial registered agent gave a satisfactory explanation why it forwarded the papers to the wrong party).

68. *Cf.* Feldman, *supra* note 6 (marketing a commercial registered-agency service by noting that individual agents like a firm's attorney or owner might be away from the office, fail to update their address information in a timely manner, or ignore or mishandle process).

69. *See* Delphi Corp. v. Orlik, 831 N.E.2d 265, 266–67, 269 (Ind. Ct. App. 2005) (affirming default judgment against a corporate defendant after a poorly performing employee at its registered agent failed to forward a complaint and summons).

70. *Id.*

71. United Airlines, Inc. v. McCubbins, 262 So. 3d 536 (Miss. Ct. App. 2018).

72. *Id.* at 539.

73. *See id.* ("Because the summons and complaint misnamed United, CT did not forward the documents to United, [and] United did not answer . . . ").

74. *Id.* at 544, 546. *But see id.* at 546–47 (holding that default judgement should be set aside on separate equitable grounds).

75. Int'l Env't Mgmt., Inc. v. United Corp. Servs., Inc., 858 F.3d 1121 (8th Cir. 2017).

76. *Id.* at 1124.

so IEM's Missouri plaintiffs continued to serve UCS.[77] UCS, having been told by IEM that it was terminated as agent, did not forward a personal-injury action against IEM to the former client.[78] IEM first learned of that suit when the plaintiff began enforcing his default judgment.[79]

c. Client Failure

There may be a notice failure even when the agent performs dutifully. The agent is responsible for accepting service and forwarding the papers "to the entity at its last known address."[80] Once the papers arrive, the defendant is responsible for getting actual notice to the proper decision-maker. If papers are lost in the mailroom,[81] or if they are misrouted and never make it to the company's legal department,[82] the firm might not learn of the suit until after a default judgment has been entered.

2. Compliance Costs for Plaintiffs

Registered agency is in some sense an accommodation for plaintiffs. It provides a reliable, predictable technology for satisfying their service obligations. It is not costless for plaintiffs, though. They must spend time looking up the name and address of the agent, preparing the summons and complaint, mailing the materials or giving them to a process server, and ensuring that any affidavit or other proof of service is completed. These steps all take the time of an attorney or paralegal.

How much could these steps cost plaintiffs? One Small Business Administration analysis estimates that the number of suits against firms was at the very least 356,473 in 1992, a count that has surely grown considerably in the last 28 years.[83] Just using the 1992 estimate, if it is assumed that an average plaintiff's attorney spends thirty minutes tending to service, and if that attorney's hourly fee is $358,[84] that implies plaintiffs annually spend $64 million sending papers to an intermediary who will then forward them to the intended recipient. If process servers were hired to physically deliver those papers, at $40 per service,[85] that would imply at least an additional $14 million in direct costs.[86] Some of this

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77. *Id.*

78. *Id.*

79. *Id.*

80. N.C. GEN. STAT. § 55D-30(b) (2002).

81. *See* Park Corp. v. Lexington Ins. Co., 812 F.2d 894, 897 (4th Cir. 1987) (holding that the "unexplained disappearance" of a summons and complaint from a mailroom did not constitute grounds for relief from default judgment).

82. *See* Brooks v. Univ. City, Inc., 225 P.3d 489, 491–92 (Wash. Ct. App. 2010) (holding that an improperly processed summons, forwarded to the wrong employee, did not constitute grounds for relief from default judgement).

83. KLEMM ANALYSIS GRP., IMPACT OF LITIGATION ON SMALL BUSINESS 3–4 (2005), https://www.sba.gov/sites/default/files/files/rs265tot.pdf [https://perma.cc/8F8K-6BTU].

84. *See* U.S. ATT'Y'S OFF. FOR D.C., CIV. DIV., *USAO Attorney's Fees Matrix—2015–2019*, DOJ, https://www.justice.gov/usao-dc/file/796471/download [https://perma.cc/D9LZ-2TG6] (listing $358 as a 2018–2019 lodestar hourly fee for an attorney with six to seven years' experience).

85. *See Costs of Hiring a Process Server*, NAT'L ASS'N OF PRO. PROCESS SERVERS, https://napps.org/faq/how-much-does-it-cost-to-hire-a-process-server.aspx [https://perma.cc/R64S-B2DW] (last visited Sept. 23, 2020) (estimating a national range of $20 to $100 per service).

86. This Article proposes replacing registered agents with email, but it is not a total savings over the costs of registered agency. The new notice technology would remove much of the physical or manual aspects of serving

time, of course, would still be spent if email were to replace registered agency as the predominant notice technology. But email is usually more efficient than sending a letter or hiring a process server. Avoiding the cost of stamps, after all, is not the only reason email is widely used.

IV. REPLACING REGISTERED AGENCY

Part III estimated that U.S. businesses spend well over a quarter-billion dollars a year to have others accept papers on their behalf and forward them on. It also showed that there are considerable public-administration and civil-process costs to maintaining this intermediary system. This Part explains how these costs could be mostly avoided if registered agency was replaced with a widely available, reliable, and inexpensive notice technology: email.

Email is not, of course, the only technology that could be proposed as replacement for registered agency. The Financial Industry Regulatory Authority maintains a portal for initiating and managing securities arbitrations, for example.[87] This Article recommends email, though, because it is already widely deployed and tested for business-critical uses. Courts have cautiously begun to approve email notices to plaintiffs in class actions, along with other forms of e-notice.[88] Email is used almost universally in business and by attorneys, costs almost nothing, and presents fewer points of failure than registered agency (e.g., it does not rely on human intermediaries to do anything, nor does it require sending anything via mail). Law firms and their clients already trust email as a notice technology. Commercial agreements, for example, often specify that notices between contracting parties are to be sent to specific email addresses, e.g., the general counsel's address.[89]

Of course, central filing to a repository maintained by a state corporate administrator, with email notices sent to registered email addresses, would be even more robust because data relating to service would be captured by a single source of truth (i.e., a state database). A state might find that the cost of developing that sort of system would outweigh its benefits, however, and so determine that adopting registered email for statutory service would be more legislatively and administratively straightforward. Doing so would mean

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firms. Even with service by email, though, plaintiffs would still need to take time to look up the proper email address, to prepare and send the email, and complete any required affidavits or proofs of service.

87. *See* FIN. INDUS. REGUL. AUTH., *supra* note 21 and accompanying text.

88. *See* Bartholomew, *supra* note 32, at 242–44 (discussing the use of email in class-action notices, as well as the reluctance of some courts to embrace notice by email). *See also generally* Jennifer Mingus, *Email: A Constitutional (and Economical) Method of Transmitting Class Action Notice,* 47 CLEV. ST. L. REV. 87 (1999) (discussing the use of email to provide notice of class actions); Adrian Gottshall, *Solving Sewer Service: Fighting Fraud with Technology*, 70 ARK. L. REV. 813, 831 n.114 (2018) (collecting literature on the use of email and other electronic methods for service of process). *But see* 58 AM. JUR. 2D *Notice* § 32 (2020) for the general, but outdated, proposition that "[w]here a written notice is required, an electronic mail message is insufficient to satisfy the requirement, and where the statute allows service by electronic means, the e-mail must be followed up by a mailed written notice" and that a "plaintiff may not generally resort to service of process by e-mail on his or her own initiative but must seek approval from the court for the use of such an alternative means of process."

89. For example, Bristol-Myers Squibb's $74 billion cash-and-stock acquisition of Celgene Corporation was the largest public-company merger in 2019. Section 11.01 of the merger agreement provides for notices to be sent to the email accounts of the two companies' general counsels. *See* Agreement and Plan of Merger (Bristol-Myers Squibb Co./Celgene Corp.), at *111–12 (Jan. 2, 2019), available in Bristol-Myers Squibb Co., Current Report, Ex. 2.1 (Form 8-K) (Jan. 4, 2019).

adopting legislation to allow entities the *option*[90] of specifying a registered email address at which they consent to accept service or other legal notices; the legislation would also empower a state's corporate administrator to issue rules or technical standards for the registered-email-address system.[91]

For plaintiffs, a copy of a sent email would serve as a superior forensic proof of service than an "honor code" certificate or affidavit. Email would make engaging in fraudulent or "sewer" service comparatively more difficult (protecting defendants), and it would be expected to reduce potential service-related disputes between parties.[92] It would, after all, provide a forensically sound record of exactly what was served and when. Of course, just as under Civil Rule 4 a failed or returned email does not satisfy a notice obligation, emailed process that bounces back would need to be sent again.[93] If a service address is simply not functional, plaintiffs would have a fallback technology, e.g., substituted service on a secretary of state, just as they do now when registered agency fails.[94]

Registered email as a notice technology would reduce notice risk compared to registered agency, but it would not eliminate it. Although email is reliably used to send hundreds of billions of messages daily, it can fail.[95] In edge cases, parties might still dispute the sufficiency of service. Law governs what happens when notice fails or service disputes arise, and adopting this new technology need not change how it deals with those problems. The registered email address would simply substitute for a registered agent; when problems arise with service, courts should, as far as practicable, apply existing statutes or case law related to registered agency to the new notice technology. Treating registered email addresses the same as registered agents is particularly important for the stable application of personal-jurisdiction precedent to firms that opt for the new notice technology.[96] Section

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90. For example, the Texas Supreme Court recently amended that state's civil rules to allow substituted service via email or social media, which trial courts are authorized to permit if "the technology actually belongs to the defendant and whether the defendant regularly uses or recently used the technology." Order Amending Texas Rules of Civil Procedure 106 and 108a, Misc. Docket No. 20-9103 (Tex. Aug. 21, 2020), https://www.txcourts.gov/media/1449613/209103.pdf [https://perma.cc/292M-UZSM]. In that light, a firm that *opts* into receiving service via email would be presumed to "regularly use" that notice technology. Indeed, the transition from registered agency to email need not happen overnight. Organizers of firms, or management of existing firms, would be expected to gradually switch to the new technology that offers cost savings but also greater convenience and less notice risk.

91. The Article provides a model act that states may use or adapt to this purpose. *See infra* Appendix.

92. *See* Gottshall, *supra* note 88, at 855–63 (discussing the due-process deficiencies with "honor code" proof of service in consumer-debt cases and proposing technological mitigations for service error and fraud).

93. *See supra* note 24 for discussion.

94. MODEL BUS. CORP. ACT § 5.04 (2010) (AM. BAR ASS'N, revised 2016) (providing that its listed methods are not "the only means, or necessarily the required means, of serving a corporation").

95. *See generally Email Statistics Report, 2015–2019*, RADICATI GRP., INC. (2015), https://www.radicati.com/wp/wp-content/uploads/2015/02/Email-Statistics-Report-2015-2019-Executive-Summary.pdf [https://perma.cc/6ZHE-Y9KP] (demonstrating that tools like read-receipt and open tracking can mitigate potential failures). *See also* Amanda M. Rose, *ClassAction.gov*, 88 U. CHI. L. REV (forthcoming 2020) (manuscript at 19) (on file with author) (discussing the potential use of class-action email notices from a recognizable government address, which may use features like return-to-sender and email-open trackers).

96. For instance, a firm is "at home" in its states of incorporation and principal business operation, which "afford[s] plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." Daimler AG v. Bauman, 571 U.S. 117, 137 (2014). The use of registered email addresses for firms that register to do business in foreign states might, however, undermine the proposition that registering to do business and appointing an agent in a state amount to consent to general personal jurisdiction in that state. *See* Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L.

3 of this Article's model act provides for this clean substitution and declares the substitution of the old notice technology for the new to be a strong public policy.[97] For example, if a plaintiff sought to sue a firm incorporated in State X whose principal place of business was in State Y, and the firm opted under either state's law to designate a registered email address in lieu of an in-state agent, a court should treat service to that email address the same as if papers had been physically handed to an in-state agent. Or, if a firm neglected to check the inbox for its registered email address, a court should treat that failure the same as if a real-life agent received papers but failed to forward them, or if papers got lost in the firm's mailroom. Firms would thus bear the responsibility for ensuring that their registered email addresses are working and that the accounts are checked.[98]

States might want to take practical steps to prevent misuse of registered email addresses, say, by spammers. Simple steps might include not allowing bulk searches or downloads of service addresses and exempting them from open-records production. They might also direct their corporate administrators to adopt technical standards to mitigate security or other concerns, which would need to be amended from time to time to address technological change.

Potential costs or cautions to this transition must be kept in mind, too.

This Article proposes reallocating the fees collected by registered agents back to firms. But where does that leave the agents? Under this proposal, the commercial registered-agent industry would certainly take a hit; if email were universally adopted as a notice technology, the registered-agent industry would disappear.[99] Transitioning to email, however, is unlikely to take food off registered agents' tables.[100] Many of the largest commercial providers, for example, are owned by Wolters Kluwer, a major Dutch information-services company that would continue to have lucrative business lines in the legal, business, tax, accounting, finance, audit, risk, compliance, and healthcare markets.

The potential savings and benefits of registered email addresses will vary among entities. For some, it might not be worth the switch. A striking observation from the Texas data is that for in-state entities, most (66.72%) have internal registered agents.[101] These entities would not benefit financially from an option to designate a registered email address because they likely do not currently pay their registered agents. They might gain quite a bit in convenience, though. Many businesses—caterers, landscapers, construction contractors, freelancers—do not keep regular hours at a fixed registered office, meaning that an internal

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REV. 1343, 1377–1401 (2015) (confronting and casting doubt on the proposition that a firm's registration to do business in a state effects consent to the state's general jurisdiction over the firm). In that case, perhaps firms would designate registered email addresses when they register to do business in a foreign state—not just to avoid the costs of registered agency but also to resist arguments that the foreign state has general jurisdiction by virtue of that registration.

97. *See infra* Appendix § 3(b)–(d).

98. Acme Corporation, for example, might designate its service address as legalnotice@acmecorporation.com and set the account to forward emails to several people in the legal department as a way of ensuring nothing is missed.

99. Noncommercial registered agents might be indifferent to or even welcome this change. An attorney who serves as a client's registered agent, for example, might do so purely as an accommodation to the client.

100. Still, commercial registered agents stand to lose over a quarter-billion dollars annually. *See supra* note 54 and accompanying text. They might be expected to lobby state legislatures against adopting registered email. Registered agents' loss would be in-state businesses' gain, however, so chambers of commerce or other business associations might have the stronger hand if they come to support the adoption of registered email.

101. *Supra* Table 1.

registered agent could not be consistently present to accept service. With registered email addresses, there would be no need for that. Indeed, it is likely that smaller and more on-the-go businesses will be the most likely to opt for registered email addresses, both for the cost savings but also the convenience. In Texas at least, it appears that they are the ones who do not use commercial registered agents.[102] Larger firms, in contrast, might find value in the possibility that a commercial registered agent could indemnify it for the agent's failures, or that the agent could serve as a credible third-party witness if disputes over service ever arose.

As Section III.B discusses, states receive revenue for processing changes in registered agents. They will be reluctant to part with it if there is no offset elsewhere. However, replacing registered agency could earn states more net revenue. There would be a net benefit to public administration if states replace forgone agent-change-processing revenue with small increases to the franchise taxes or annual fees they charge entities organized or doing business in their states. As Section III.B shows, that increase could easily be below a dollar a year per entity, not great enough to alter chartering decisions or harm the state's proprietary interest in attracting entity formations.[103] More, at the margin, reducing the need for registered agency would offer an advantage in the national competition for chartering revenue. Entities that previously used an external registered agent and switched to registered email would save many times the slightly higher annual fees because they would no longer need to pay an agent. Meanwhile, entity organizers who are otherwise indifferent between two states might be expected to choose the one that provides for the convenience of registered email. That competitive advantage would in turn allow an early-adopting state to reap higher chartering revenue and annual fees or taxes. For any state that wants to take the step, the Appendix provides model legislation to do so.

V. CONCLUSION

Notice risk is always present when a suit is filed against a business entity. That risk can be managed, however, through notice technologies that give plaintiffs reliable and efficient means for effecting service and defendants means for reasonably ensuring that they receive actual notice of litigation. For well over a century, registered agency has served as that notice technology. But times change. Business communications are (mostly) no longer hand delivered or sent via mail. Cheaper, more reliable technologies have emerged to take the place of those two methods, and among those technologies, email dominates. Legal notice given intra-litigation and under private commercial agreements have also increasingly shifted toward electronic means. This Article is the first contribution to the scholarly literature on registered agency, and it concludes that what was an innovative notice technology in the past has been rendered comparatively obsolete by newer technologies. It is time, then, to transition to a cheaper, more reliable notice technology: email.

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102. *See id.* (showing that 5.8% of Texas domestic corporations and 14.1% of Texas domestic LLCs use commercial agents).

103. Daniel M. Häusermann, *For a Few Dollars Less: Explaining State to State Variation in Limited Liability Company Popularity*, 20 U. MIA. BUS. L. REV. 1, 46–47 (2012) (finding that upfront registration costs have more impact on LLC-formation decisions than the levels of subsequent annual fees).

APPENDIX

Introductory comment: This model act is intended to overlay a state's business-entity statutes. It does not amend the registered-agency provisions of those statutes, but rather it allows entities to substitute a registered agent with a registered email address. Sections 3(b)–(d) provide that the only change effected by the act is technological: registered email addresses should be treated and understood as filling the same role as registered agents. Sections 2(a), 4, and 5 future proof the model act by allowing a corporate administrator to adopt rules and standards for administering it that can adapt the model act's purpose to future technological changes. Section 6 delays effectiveness, allowing the corporate administrator time to prepare and to adopt appropriate rules and technical standards.

(1) Short title.

This Act may be referred to as the "Electronic Entity-Service Act."

(2) Definitions.

(a) Terms used in this [chapter] with respect to any entity incorporated, formed, or organized under [the] [Stock Corporation Act], [Limited Liability Company Act], [Limited Partnership Act], or [•] have the same meaning as in the statute under which the entity was incorporated, formed, or organized.

(b) "Entity" means any entity incorporated, formed, or organized under [the] [Stock Corporation Act], [Limited Liability Company Act], [Limited Partnership Act], or [•].

(c) "Registered email address" means a publicly accessible means or address for transmitting electronic messages using the simple mail transfer protocol, or a successor protocol designated by the [Administrator], provided that the address is capable and enabled to receive graphic copies of any summons, complaint, filing, or other document.

(3) Registered email addresses.

(a) [1.] An entity that is required or permitted under [the] [Stock Corporation Act], [Limited Liability Company Act], [Limited Partnership Act], or [•] to appoint a registered agent or to designate a registered office may substitute that appointment or designation by designating a registered email address to the [Administrator]. [2. An entity designating a registered email address under this section is deemed to be its own registered agent.]

(b) An entity making the designation provided for under Section 3(a) of this [chapter] (1) consents to receive any service, notice, demand, claim, filing, or other document at its registered email address on like terms as it would receive service, notices, demands, claims, filings or other documents through service on a registered agent and (2) any person is entitled to rely on a current designation of a registered email address on file with the [Administrator] as a written consent for these purposes.

(c) It is the strong policy of this [chapter] that, to the extent practicable, for all purposes service to a registered email address shall be treated as equivalent to service on a registered agent, including in the application of any statute, rule of court, judicial precedent, or contract.

(d) Any person may perfect service on an entity that has designated a registered email address by transmitting electronic copies of any summons, complaint, demand, claim, filing, or other document to the entity's registered email address, provided that this [chapter] does not affect or prohibit service by other means permitted by any statute, rule of court, or contract. Service made under this [chapter] is complete upon successful transmission.

(4) Data protection.

[The open-records statute] notwithstanding, the [Administrator] may restrict the production or disclosure of registered email addresses in the [Administrator]'s possession or control to only persons who have a bona fide intention to use them for the purposes of this [chapter].

(5) Administration.

The [Administrator] may issue rules, regulations, procedures, and technical standards for the administration of this [chapter].

(6) Effective date.

This [chapter] is effective on [•].