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STRATEGIC RULEMAKING DISCLOSURE

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Congressional enactments and executive orders instruct agencies to publish their anticipated rules in what is known as the Unified Agenda. The Agenda's stated purpose is to ensure that political actors can monitor regulatory development. Agencies have come under fire in recent years, however, for conspicuous omissions and irregularities. Critics allege that agencies hide their regulations from the public strategically, that is, to thwart potential political opposition. Others contend that such behavior is benign, perhaps the inevitable result of changing internal priorities or unforeseen events.

To examine these competing hypotheses, this Article uses a new dataset spanning over thirty years of rulemaking (1983-2014). Uniquely, the dataset is drawn directly from the Federal Register. The resulting findings confirm that agencies substantially under-report their rulemaking activities — about 70 percent of their proposed rules do not appear on the Unified Agenda before publication. Importantly, agencies also appear to disclose strategically with respect to Congress, though not with respect to the President. The Unified Agenda is thus not a successful tool for Congress to monitor and influence regulatory development. The results suggest that legislative, not executive, innovations may help to augment public participation and democratic oversight, though the net effects of more transparency remain uncertain. The findings also raise further inquiries, such as why Congress does not render disclosure requirements judicially enforceable.

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INTRODUCTION

The regulatory process begins long before the notice of proposed rulemaking makes its public appearance. Drafting a proposed rule can take months, even years, of internal debate and effort.[1] Agency staff must draft regulatory text along with legal justifications and cost-benefit analyses. They must thus gather the requisite data to make informed decisions. For this purpose, agencies often invite informal input from potentially-affected interest groups and regulated entities.[2] These interactions, however, are

[1] *See* William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 69-70 (2004) (finding that average length of the proposal development period for the study's 42 rules was more than 5 years).

[2] *See* CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING 75-82 (4th ed. 2011); Cary Coglianese, Richard Zeckhauser, Edward Parson, *Seeking Truth for Power: Informational Strategy and Regulatory*

often "informal and idiosyncratic."[3] They can range from meetings with stakeholders to casual phone calls with individual contacts.[4] These communications are rarely public and often occur behind the scenes.[5]

Yet this stage of the rulemaking process — when agencies formulate their agendas and policy proposals — is one of the most critical.[6] Determining which regulatory options are onscreen and off can shape the remainder of the rulemaking. Because of the pre-proposal period's importance, both Congress and the President have required agencies to notify the public more generally about rules in the pipeline. In particular, these statutes and executive orders instruct rulemaking agencies to publish their regulatory agendas every fall and spring — essentially the regulations they anticipate issuing in the near future. Generally speaking, these agenda entries should reveal planned regulatory actions for the upcoming year, though agencies can disclose more long-term efforts as well.[7] The Regulatory Information Service Center (RISC) then complies these individual agendas into what is known as the Unified Agenda of Regulatory and Deregulatory Actions ("Unified Agenda").

Agencies have recently come under fire, however, for conspicuous omissions and irregularities.[8] Under President George W. Bush, Democratic

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Policymaking, 89 MINN. L. REV. 277, 281-85 (2004); West, *supra* note 1; Wendy Wagner et. al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 110-13 (2011); William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC'Y 576, 577 (2009).

[3] West, *supra* note 2, at 577.

[4] *See id*. at 591.

[5] *See* Kimerbly D. Krawiec, *Don't Screw Joe the Plumber: Sausage Making of Financial Reform*, 55 AZ. L. REV. 53, 71 (2014) (noting that "research on the preproposal stage of the rule development process has traditionally been impeded by a lack of information; Administrative Procedure Act docketing and other transparency requirements are generally limited to the period after publication of the proposed rule").

[6] Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 67 ADMIN L. REV. (forthcoming 2016) (manuscript at 2) ((noting that stage preceding "rule promulgation and enforcement . . . is one where some of the most critical decisions are made to define what issues will eventually make it to the important later stages of [the regulatory process")..

[7] The activities included in individual agency agendas are primarily those currently planned to have an Advance Notice of Proposed Rulemaking (ANPRM), a Notice of Proposed Rulemaking (NPRM), or a Final Rule issued within the next 12 months. However, to keep users better informed of opportunities for participation in the rulemaking process, an agency may list in the "Long-Term Actions" section of its agenda those rules it expects will have the next regulatory action more than 12 months after publication of the agenda. Off. of Info. & Reg. Affairs, *About the Unified Agenda, available at* http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA_About.jsp

[8] CURTIS W. COPELAND, THE UNIFIED AGENDA: PROPOSALS FOR REFORM 11-14 (April 13, 2015) (compiling examples) (hereinafter, UNIFIED AGENDA REFORM, *available at* https://www.acus.gov/sites/default/files/documents/Unified%20Agenda%20Draft%20Report%20041315%20FINAL_0.pdf.

legislators questioned as "highly unusual" the Occupational Safety and Health Administration's failure to include in the Agenda a regulation regarding risk assessments.[9] The Government Accountability Office found numerous errors in samples prepared by prominent agencies, including entries that should have appeared in previous editions of the Agenda, entries that reported the wrong date of regulatory action or otherwise incorrectly reported the status of rules.[10] Similarly, the Congressional Research Service and the Administrative Conference of the United States, in work spearheaded by Curtis Copeland, revealed that a substantial fraction of "significant" proposed rules was not preceded by an agenda entry.[11] Copeland's most recent work also finds that a number of "significant" final rules were published in the first half of 2014 without notice in the Unified Agenda.[12]

Republican committee members and other observers have also criticized President Obama's administration for not publishing a separate spring and fall Agenda. Instead, the Unified Agenda was released as an unprecedented single edition just days before Christmas.[13] The spring

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[9] *Key Lawmakers Question OSHA's Secrecy in Drafting Risk Assessment Rule*, 15 InsideOSHAOnline (July 21, 2008) (on file with authors).

[10] *See* U.S. GEN. ACCOUNTING OFFICE, GAO-01-1024, ACCURACY OF INFORMATION IN THE UNIFIED AGENDA (2001), *available at* http://www.gao.gov/assets/90/82893.pdf. More specifically, the GAO study analyzed a sample of agendas prepared by the Departments of Commerce and Health and Human Services (HHS), the Federal Communications Commission (FCC), and the Securities and Exchange Commission (SEC) for April and October of 1999 and 2000, as well as for April 2001.

[11] *See* CURTIS W. COPELAND, THE UNIFIED AGENDA: IMPLICATIONS FOR RULEMAKING TRANSPARENCY AND PARTICIPATION (2009), *available at* http://fas.org/sgp/crs/secrecy/R40713.pdf (from a sample of 231 significant proposed rules in 2008, finding that "there were no 'proposed rule' Unified Agenda entries for about one-quarter of the proposed rules before they were published in the Federal Register"); COPELAND, *supra* note 8 (from a sample of 88 significant proposed rules from the first half of 2014, finding that 94% were "preceded by a 'proposed rule stage' entry in the previous edition of the Unified Agenda"). In addition, out of 22 likely-significant rules from independent agencies during the same time period, Copeland finds that "only seven (32%) of the 22 proposed rules examined had any . . . prior agenda entry").

[12] *Id.* at 50 (from a sample of 55 significant final rules from the first half of 2014, finding that one-quarter were not "immediately preceded by a 'final rule stage' entry in the Unified Agenda"). As for independent agencies during the same time period, Copeland examines 20 potentially significant rules and finds that "only 7 (35%) had 'final rule stage' entries in the preceding Unified Agenda." *Id.* at 53.

[13] Press Release, Committee Leaders Request Information on Agencies' Missing Regulatory Agendas, U.S. House of Representatives Documents (May 24, 2013). *See also* Hester Pierce, *More Sensible Regulations Require Predictable Disclosure* (Jan. 3, 2013), *available at* http://www.realclearmarkets.com/articles/2013/01/03/more_sensible_regulations_require_predictable_disclosure_100067.html ("The Spring 2012 edition was never released, thus breaking a nearly two-decade practice of agencies telling the public twice a year which regulations are under consideration"). *See also* http://dailycaller.com/2012/10/11/missing-regulatory-transparency/

agenda the following year was not published until the summer.[14] Interest groups and legislators accordingly charged agencies with playing "regulatory hide and seek."[15] One accusation was that agencies were releasing their agendas during time periods — such as the holidays or the summer — when external monitors were less likely to pay attention.[16] Another claim was that agencies were acting strategically to keep regulations off the radar for as long as possible. The longer an agency could shield its internal machinations, the less time those opposed to the rule would have to mobilize against it. Indeed, Professors Jacob Gersen and Anne O'Connell posit that agencies often raise the monitoring costs for their opponents in just this manner. Specifically, they point out that agencies can game the release of regulatory decisions to raise monitoring costs, particularly for those actions that are less regularly monitored such as rule withdrawals.[17]

The prospect of strategic disclosure by agencies is troubling in large part because of the Unified Agenda's intended function: to alert monitors and interested parties of an agency's regulatory activity before it publishes its notice of proposed rulemaking (NPRM).[18] Many interest groups and trade associations indeed rely on the Agenda to monitor rules of concern.[19] This worry is heightened given that the most significant policy decisions may be made during this stage of regulatory development.[20] Such concerns mirror those in other contexts of potentially strategic disclosure such as in

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[14] *Unified Agenda: 3,503 Federal Regulations, 739 affecting small businesses*, *available at* http://www.sensibleregulations.org/2013/07/unified-agenda-3503-federal-regulations-739-affecting-small-businesses/

[15] *Id.*

[16] *See, e.g.*, Clyde Wayne Crews Jr., *Big Sexy Holiday Fun With the Unified Agenda of Federal Regulations*, *available at* http://www.forbes.com/sites/waynecrews/2013/12/02/big-sexy-holiday-fun-with-the-unified-agenda-of-federal-regulations/

[17] *See* Jacob E. Gersen & Anne Joseph O'Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. CHI. L. REV. 1157, 1173-75, 1185. (2009).

[18] *See infra* Part I. *See also*, Letter from James W. Conrad, Jr., Chair of ABA Section of Administrative Law and Regulatory Practice, to Boris Bershteyn, Acting Administrator of OIRA, "Re: Spring and Fall 2012 Unified Regulatory Agenda," November 30, 2012 (noting that "The Unified Regulatory Agenda is an integral part of the Federal regulatory process. Its semiannual publication enables regulated entities, consumers, workers, and other interested persons to understand and prepare for new rules that are planned or under development. As the Section noted in its 2000 Report to the President-Elect, the Agenda provides important information to agency heads, centralized reviewers, and the public at large, thereby serving the values of open government. The timeliness of its publication is especially important given that the information it contains is not updated consistently in any other fashion") (internal quotations omitted).

[19] *See* COPELAND, *supra* note 11, at 10 (noting that Associated General Contractors of America, financial industry publications, and consulting firms use the Unified Agenda to identify upcoming rules of interest).

[20] *See infra* Part I.

patent filings,[21] graduate school rankings,[22] and corporate communications.[23]

At the same time, what is currently known about the actual determinants of agency disclosure behavior during this critical pre-proposal phase is still fairly limited.[24] Efforts to shed light on the relevant dynamics have, until now, mostly relied on limited samples from select agencies — hampered by the lack of useable data with which to make more general observations. As others have noted, further research is also needed not only about why agencies would disclose their agendas, but also how they set these agendas in the first place.[25] Agenda-formation is likely to be influenced by a host of factors, including the respective priorities of appointed agency heads;[26] mandatory statutory requirements;[27] as well as the preferences of political monitors and external interest groups.[28]

More broadly, the bulk of existing empirical work in administrative law focuses on how agencies approach the notice-and-comment process — the period *after* the agency promulgates its proposed rule. Recent work, for example, has examined the extent to which agencies shun rulemaking altogether,[29] strategically channel their efforts into other policymaking

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[21] *See, e.g.*, Scott Baker & Claudio Mezzetti, *Disclosure as a Strategy in the Patent Race*, 48 J. L. & Econ. 173 (2005).

[22] Michael Luca & Jonathan Smith, *Strategic Disclosure: The Case of Business School Rankings*,

[23] *See, e.g.*, RICHARD WHITTINGTON AND BASAK YAKIS-DOUGLAS STRATEGIC DISCLOSURE: STRATEGY AS A FORM OF REPUTATION MANAGEMENT (2012); Jeffrey T. Doyle & Matthew J. Magilke, *The Timing of Earnings Announcements: An Examination of the Strategic Disclosure Hypothesis*, 84 THE ACCOUNTING REV. 157 (2009).

[24] *See* COPELAND, *supra* note 11, at 8 (noting unawareness "of any studies examining the extent to which federal agencies' proposed rules were, in fact, preceded by 'proposed rule' entries in the Unified Agenda"); COPELAND, *supra* note 8; Steven J. Groseclose, *Reinventing the Regulatory Agenda: Conclusions from an Empirical Study of EPA's Clean Air Act Rulemaking Progress Projections*, 53 MD. L. REV. 521 (1994) (noting need for more systematic study of question).

[25] *See, e.g.*, Coglianese and Walters, *supra* note 5, at 2 ("R]egulatory agenda-setting merits careful analysis and systemic study."); William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. PUB. ADMIN RED. & THEORY 495, 495 (2013) (noting that "[s]cholars have neglected a critical stage of the administrative process," namely, the agency's "decision
to begin developing a rule").

[26] *See* Coglianese and Walters, *supra* note 5, at 9.

[27] West & Raso, *supra* note 24, at 495 (finding that the "vast majority" of rules in their sample were required by Congress).

[28] *Id.* at at 9-17.

[29] *See* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed*, 1950-1990, 80 GEO. WASH. L. REV. 1414, 1440 (2012) (hypothesizing that since "notice and comment rulemaking has become more costly since the mid-1970s, agencies will fail to utilize notice and comment as much as they should").

forms,[30] use the rulemaking process to engage particular interest groups to their advantage,[31] raise monitoring costs,[32] or manipulate the length of their comment periods.[33] Comparatively lacking are efforts to better understand agency choices before a proposed rule appears to the public.[34]

This Article uses a new dataset obtained from over thirty years of rulemaking and across a wide range of agencies to test empirically whether agencies strategically disclose on the Unified Agenda. Uniquely, the dataset draws directly from the *Federal Register*, which is the government's "official daily publication for rules, proposed rules, and notices of Federal agencies and organizations."[35] Since agencies must publish in its pages for their rules to gain legal effect, the *Federal Register* provides the most comprehensive look possible at agencies' rulemaking behavior.[36] By contrast, most contemporary empirical work on bureaucratic behavior relies on agencies' self-reporting in the Unified Agenda, [37] which our results

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[30] *See* Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257 (1987); Edward H. Stiglitz, Choice of Policymaking Form, Overseer Competence, and Agency Obfuscation (unpublished manuscript) (Jan. 4, 2015) (on file with author).

[31] *See* Mathew McCubbins, Roger Noll, & Barry Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter McNollgast, Structure and Process]; Mathew McCubbins, Roger Noll, & Barry Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) [hereinafter McNollgast, Administrative Procedures as Instruments]; Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

[32] *See* Gersen & O'Connell, *supra* note 17.

[33] *See* Rachel Augustine Potter, *Procedural Politicking: Agency Risk Management in the Federal Rulemaking*
Process, *available at* https://www.lafollette.wisc.edu/images/publications/rule-Potter.pdf

[34] Note that this gap in the literature is matched by a gap in the law: very little of administrative law addresses the phase of a rulemaking process in which agencies in fact make fundamental choices about the contents of rules. *See* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140 (2014) (arguing that "the actual workings of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed.").

[35] See Gov. Printing Off., *About Federal Register*, *available at* http://www.gpo.gov/help/about_federal_register.htm.

[36] *See* 44 U.S.C. § 1507 (2000). *See* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 928 (2008) ("Publication in the Federal Register is the official means of notifying the public of new regulations, and agency activity cannot be hidden if agencies expect anyone to comply with their rules."); Randy S. Springer, Note, *Gatekeeping and the Federal Register: An Analysis of the Publication Requirement of Section 552(a)(1)(D) of the Administrative Procedure Act*, 41 ADMIN. L. REV. 533, 544 (1989) ("Agency documents that fall within the provisions of the publication rule of section 552(a)(1)(D) and are not so published are ineffective against a party without actual notice."). As we will discuss, while agencies face little consequence from omitting entries from the Unified Agenda, they are legally required to publish their proposed and final rules in the *Federal Register* short of providing actual notice to the relevant parties.

[37] *See* O'Connell, supra note 21, at 927 (noting that "[a]lthough they provide a critical perspective on the administrative state, the Unified Agenda are not perfect; they need confirmatory research."). For examples of

suggest is substantially under-inclusive. One hope is that this dataset can help to improve on the current state-of-the-art.

Our empirical results reveal three main findings. First, we find that agencies only report, on average, about 28 percent of their proposed rules. In other words, about roughly 72 percent of proposed rules are *not* contained in the Unified Agenda. Second, our analysis demonstrates that this underreporting is sensitive to the congressional oversight environment, especially for those rules that are likely to be more substantial. In particular, when the President and Congress are from different parties, executive agencies are less likely to publicly report their planned regulatory activities. Notably, this effect does not seem to hold for independent agencies, over which the president has less control. Third, and relatedly, we do not find evidence of strategic disclosure with respect to agency behavior vis-à-vis the President. Our evidence is tentative here, but even when agency heads are expected to have different policy preferences from the President, they do not appear to strategically hide their rules from the Unified Agenda. We suspect this is due in part to the President's superior ability, relative to Congress, to obtain information about regulatory development through more informal means of communications within the executive branch.

Perhaps the most important normative implication of our findings is that Congress currently lacks an effective information-forcing mechanism with which to monitor agencies before they release their proposed rules.

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studies relying on the Unified Agenda database, see, e.g., Steven J. Balla & John R. Wright, *Consensual Rule Making and the Time It Takes to Develop Rules*, in POLITICS, POLICY, AND ORGANIZATIONS, 187-206 (George A. Krause & Kenneth J. Meier eds. 2003); Alex Acs & Charles M. Cameron, *Does White House Regulatory Review Produce a Chilling Effect and 'OIRA Avoidance' in the Agencies*, 43 PRESIDENTIAL STUD. Q. 443 (2013); Steven J. Balla, *Political Control, Bureaucratic Discretion, and Public Commenting on Agency Regulations*, PUB. ADMIN. 1 (2014); Steven J. Balla, *Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking*, 1 I/S: J. L. & POL'Y FOR INFO. SOC'Y 59 (2005) (noting that "the use of the Unified Agenda ensures that the set of rulemakings under study represents as complete a snapshot as possible of [DOT rulemaking activities]"); Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 285 (2013); Gersen & O'Connell, *supra* note 17; Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001-2005*, 38 ENVTL. L. 767 (2008); Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the Midnight Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441 (2005); Note, *OIRA Avoidance*, 124 HARV. L. REV. 994 (2011); O'Connell, *supra* note 36; Michael R. See, *Willful Blindness: Federal Agencies' Failure to Comply with the Regulatory Flexibility Act's Periodic Review Requirement-And Current Proposals to Invigorate the Act*, 33 FORDHAM URB. L.J. 1199 (2006); Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations*, 23 J.L. & POL. 393 (2007); Edward H. Stiglitz, *Unaccountable Midnight Rulemaking? A Normatively Informative Assessment*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 137 (2014); Wagner et al., *supra* note 2; Susan Webb Yackee, *The Politics of Ex Parte Lobbying: Pre-proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RES. THEORY 373 (2012); Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making "Ossified"?*, 20 J. PUB. ADMIN. RES. THEORY 261 (2006).

The existing mechanism becomes even less reliable when it arguably matters the most: when Congress and the executive branch are from different political parties. For the same reason, there is also no dependable means for interest groups to alert resource-constrained legislative committees before the rule is proposed.[38]

The phenomenon also raises the possibility that agencies could skew which interest groups will mobilize in reaction to their proposed rules. They might do so by selectively disclosing those regulations that will benefit its mission-oriented constituents, while hiding those that will rally their detractors. These dynamics, in turn, raise additional concerns about the extent to which less well-resourced groups who lack access to agency decision-making through informal means can meaningfully participate in the regulatory process.[39]

Part I provides background on the Unified Agenda and a motivating theory for the monitoring function that it serves for political overseers and interest groups. Part II, in turn, presents our empirical findings on the extent to which agencies disclose their regulatory activities strategically with respect to congressional oversight. In light of the resulting normative concerns, Part III suggests some ameliorative legislative responses. Specifically, Congress could amend the APA to require agencies to issue judicially enforceable advance notices of proposed rulemaking with a good cause exception, or else narrow the logical outgrowth doctrine. Such reforms could help to restore the ability of political monitors and interest groups to participate more meaningfully in the regulatory development process.

I. MONITORING REGULATORY DEVELOPMENT

Both Congress and the President have issued a number of statutes and executive orders that, together, mandate agencies to disclose their planned regulatory activities for the upcoming year. This Part provides background for these disclosure requirements and grounds them in a well-

[38] *See* McCubbins & Schwartz, *supra* note 5.
[39] *See* Krawiec, *supra* note 5; Wagner et al., *supra* note 2.

known theory regarding the function of administrative procedures — to ensure that political actors can monitor the regulatory development process.

A. Monitoring Function

Presidents and Congress face a common dilemma. They need agencies to carry out important public policies, but agencies have superior information for how to do so. Executive and legislative overseers, in other words, suffer from an information asymmetry. As a result, there is a danger that the agency's preference will prevail over those of democratically-elected representatives. Moreover, the technical nature of many regulations, along with the sheer volume of rules produced, render it challenging for political principals to know what is happening in the bureaucracy, much less to influence or control it.

Under a familiar view developed by three positive political theorists collectively known as "McNollgast,"[40] administrative procedures represent one solution to this information problem. Perhaps most centrally, the APA's notice-and-comment process forces agencies to reveal their contemplated regulations before imposing final versions of them. Congress can thus intervene in a timely manner, whether through hearings, budgetary threats or other forms of influence. Note that Congress itself does not have to actively monitor the agencies. Instead, it can shift these monitoring costs onto motivated third parties. These regulated entities and interest groups, in turn, can then use public notices of proposed rulemakings to alert sympathetic legislative committee members of problematic rules. They may do so through various avenues, for example, through constituent letters, protests, or lobbying.[41]

One wrinkle in this story, however, is the claim that many substantive policy decisions happen before the agency publishes the notice of proposed rulemaking. [42] Although this account is contested,[43] interest

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[40] *See* McNollgast, *Administrative Procedures as Instruments*, *supra* note 31; McNollgast, Structure and Process, *supra* note 31.
[41] McNollgast, *Administrative Procedures as Instruments*, *supra* note 31, at 254.
[42] *See infra* Part I.B.
[43] *See, e.g.*, Cass Sunstein, Keynote Address at the Brookings Institution: The Future of E-rulemaking: Promoting Public Participation and Efficiency. (Nov. 30, 2010) (arguing that "proposed rules are a way of obtaining comments on rules and the comments are taken exceedingly seriously"). Part of the challenge in

groups report regarding proposed rules as a "done deal," noting that there is less "wiggle room" for revisions once the NPRM appears.[44] Similarly, former general counsel of the EPA Don Elliott has likened the comment process to "Kabuki" theater, a "highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues."[45] Notice-and-comment, in this view, is simply a formality used to ratify decisions that have already been made by the agency or negotiated during executive review.[46] The available empirical evidence on the broader issue is mixed. Some small-sample studies find that rules change from proposal to final stage sufficiently enough to conclude that the notice-and-comment process is consequential.[47] Other efforts, also based on small samples, find that the changes are minor — such as semantic changes or revised effective dates — and thus do not implicate central policy choices already made in the proposed rule.[48]

The magnitude of the changes wrought by the notice-and-comment process may still be an open question, but what is important for our purposes are the incentives agencies currently have to release close-to-final proposed rules.[49] Perhaps the most consequential development has been

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assessing these divergent views is that it is not clear the accounts share a common baseline. Sunstein may be right that agencies take the comments seriously, and the reports of interest groups may also be right that most of the substantive decisions occur before the notice. For example, suppose that 80 percent, in some relevant sense, of the eventual rule is "determined" before the notice, and 20 percent is responsive to comments. In this scenario, observing that agencies take comments seriously does not undermine the view that most fundamental policy choices occur prior to notice; and observing that a rule is a "done deal", in a manner, prior to notice does not undermine the view that agencies take the comment process seriously.

[44] Sara Rinfret, Changing the Rules: Interest Groups and Federal Environmental Rulemaking 166 (Aug. 2009) (unpublished Ph.D dissertation, Northern Arizona University) (on file with authors); see also, CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING 195-96 (4th ed. 2011) (reporting results from a survey of interest group participants, showing that they perceive pre-notice contacts to be most effective in influencing rule development).

[45] E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992).

[46] See Simon F. Haeder & Susan Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 AM. POL. SCI. REV. 507 (2015) (finding evidence that lobbying by business groups, but not public interest groups results in changes during OIRA regulatory review).

[47] *See, e.g.*, Steven J. Balla, *Administrative Procedures and the Political Control of the Bureaucracy*, AMER. POL. SCI. REV., 92, 663-673 (1998); Susan W. Yackee, Sweet-talking the fourth branch: Assessing the influence of interest group comments on federal agency rulemaking. Journal of Public Administration Research and Theory, 16, 103-124 (2006).

[48] *See, e.g.*, Marissa M. Golden, *Interest Groups in the Rulemaking Process: Who Participates? Whose Voices Get Heard*? J. OF PUB. ADMIN. RESEARCH & THEORY, 8, 245-270 (1998); West, 2004

[49] *See* Lisa Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1757 (2007) (noting that the APA "no longer serves the informational function contemplated by its drafters; indeed, "[a]lthough the APA reflects a political compromise, the Court has not understood it as restricted to

how courts have determined what constitutes adequate notice under the APA. Specifically, they require final rules to be a "logical outgrowth" of the notice of proposed rulemaking. In essence, this requirement mandates that an agency's final rule must have been reasonably foreseeable by interested parties.[50] A rule will correspondingly be set aside if "interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule."[51] The notice of proposed rulemaking, that is, must be detailed and specific enough to alert potential commentators that their interests are at stake. A number of recent D.C. Circuit cases suggest that the doctrine is still alive and well.[52] At the same time, courts have also required agencies to disclose in their notices the key data and studies they relied upon to formulate their proposals.[53]

Consequently, the function of the proposal has evolved from genuinely providing notice to the public about contemplated regulatory actions to, instead, creating a rulemaking record suitable for judicial review.[54] The purpose of the proposed rule, in other words, is no longer to invite public comments and to gather information on a contemplated rulemaking. Rather, it is the opening salvo in anticipated litigation on what is increasingly likely to amount to the final rule.[55] Resulting from these dynamics is an increased pressure on agencies to shift their actual

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the original bargain — that is, as providing serious constraints only for formal adjudication and not for other forms of agency action.")

[50] *See, e.g.*, Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983); Shell Oil Co. v. EPA, 950 F.2d 741, 759 (D.C. Cir. 1991).

[51] CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1080 (D.C. Cir. 2009) (internal citations omitted).

[52] *See, e.g.*, Envtl. Integrity Project v. EPA, 425 F.3d 992 (D.C. Cir. 2005); CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076 (D.C. Cir. 2009); Ass'n of Private Sector Colleges & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012); Allina Health Servs. v. Sebelius, 746 F.3d 1102 (D.C. Cir. 2014).

[53] *See, e.g.*, United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977) (holding that agency must provide all information material to its proposal in order to facilitate adequate public comment); *see also* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 46-49 (1988) (discussing ways in which courts required agencies to create record to facilitate interest group involvement and eventual review).

[54] *See* E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) ("What was once (perhaps) a means for securing public input into agency decisions has become today primarily a method for compiling a record for judicial review.").

[55] *See* Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856 (2007); Wagner et al., *supra* note 2 at 110 (noting that "if a rule is to survive judicial review, it must essentially be in final form at the proposed rule stage").

information-gathering to before the notice-and-comment period to reduce the litigation risks arising from the rulemaking record.[56]

B. The Unified Agenda

Against this backdrop, it is understandable, then, that political principals would search for alternative means to become informed about what agencies are contemplating before they release their proposed rules. Accordingly, one potential way to understand pre-proposal notification requirements like the Unified Agenda is as a legislative and executive branch substitute for the APA. Because the APA's judicialization has blunted the information-forcing value of the statute, regulatory agendas represent an effort by political overseers to reassert their ability to monitor agency rule development. By granting interest groups early notice about regulations on the radar, such groups can, once again, help political principals to monitor the bureaucracy effectively.

Political principals can benefit from such pre-notice information in several ways. First, pre-notice information facilitates relatively low-cost interventions into the rulemaking process. During the early stages of rule development, overseers may be able to induce agency responsiveness with modest and low-visibility interventions such as informal meetings or staff-level phone calls that are less effective once the agency has published an NPRM. Second, McNollGast points out that if agencies are allowed to present Congress or the President with a "fait accompli," the agency may be able to design the rule to upset legislative coalitions that might otherwise oppose the regulation.[57] Hence, early warning systems are critical for allowing intervention before the agency has developed a rule that can pick off members of such alliances.[58]

President Carter first ordered the publication of a semi-annual regulatory agenda in 1978 to give the public "adequate notice" of "significant" regulations that were "under development or review" at

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[56] Wagner et al., *supra* note 2, at 110-11.
[57] McNollgast, *Structure and Process*, *supra* note 31, at 434-44; Gersen & O'Connell, *supra* note 17 at 1163 (noting that strategic agency behavior "can allow the monitored to choose the monitors").
[58] *Id.*

executive agencies.[59] What counted as "significant" under the order was left to the agency's discretion, but included the consequences and burdens of a rule on individuals, businesses, and state and local governments.[60] For these rules, agencies were not expected to provide precise timetables of predicted rulemakings, but rather enough information to describe the essential substance of a contemplated agency action.[61]

Two years later, Congress passed the Regulatory Flexibility Act (RFA).[62] The Act's legislative history suggests that the statute was intended only to supplement the executive order. Its narrower aim was to require agencies to consider the impact of their regulations on small businesses and to improve public participation accordingly.[63] The statute also extended the agenda requirement to independent regulatory agencies,[64] mandating that all agencies publish an annual regulatory agenda in October and April for rules "likely to have a significant economic impact on a substantial number of small entities."[65] The agendas had to contain an "approximate schedule" for the agency action.[66] Agencies were then called upon to send these agendas to the Small Business Administration (SBA) for comment, as well as to other representatives of small businesses.[67] In this manner, while the executive order granted agencies substantial discretion in terms of when and what to publish, the new statute heightened the substantive and timing requirements for those regulations especially salient to small businesses.[68]

Shortly after the RFA was passed, President Reagan revoked Carter's executive order and issued his own.[69] Among other things, Reagan's order expanded upon the RFA by requiring both independent and executive agencies to submit agenda items for *all* proposed regulations that agencies expected to issue, not only those expected to impact small

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[59] Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978).
[60] *Id.* at § 2(e).
[61] *Id.* ("At a minimum, each published agenda shall describe the regulations being considered by the agency, the need for and the legal basis for the action being taken, and the status of regulations previously listed on the agenda.").
[62] 5 U.S.C. §§ 601-612 (1980).
[63] S. Rep. No. 96-878, 96th Cong., 2d Sess. (1980).
[64] *Id.*
[65] *Id.* at § 601(a)(1).
[66] 5 U.S.C. § 602(c)(2) (1980).
[67] 5 U.SC. § 602(b)(c).
[68] In addition, the RFA also required agencies to submit its Agenda entry to the Chief Counsel of the Small Business Administration as well as to solicit comments from the small business community. *Id.* at § 602(c).
[69] Exec. Order No. 12,291, 3 C.F.R. 127 (1981), reprinted in 5 U.S.C. § 601 (2000).

businesses.[70] These requirements were later reinforced by President Clinton's own executive order, which similarly required all agencies to "prepare an agenda of all regulations under development or review."[71]

In recent years, OIRA has issued calls for data anywhere from three to six months before the Unified Agenda's publication; many agencies, however, begin to prepare their agenda entries beforehand, while others update them after submission, and even publication, deadlines.[72] These agenda entries usually include a short description of the rule, as well as the agency's priority designations — roughly, whether the agency believes the action to be non-significant, significant, or economically significant.[73] After agencies submit their draft agendas, OIRA may then send comments or questions back to the agency regarding the content or anticipated timing of regulations.[74] For the most part, OIRA's review is highly deferential and generally allows agencies to determine the final content.[75]

Notably, neither the congressional enactments nor executive orders create legally enforceable rights. The original RFA explicitly precluded judicial review,[76] while later amendments subject some sections to judicial

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[70] *Id.* at § 5(a).

[71] Exec. Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). Each agenda entry, in turn, is required to contain "a regulation, identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official." *Id.*

[72] COPELAND, *supra* note 8, at 23-24.

[73] More specifically, agencies can prioritize the rule as: (1) "Economically Significant"; (2) "Other Significant" "[t]his category "includes rules that the agency anticipates will be reviewed under Executive Order 12866 or rules that are a priority of the agency head"); (3) "Substantive, Non-significant" "a rulemaking that has substantive impacts but is neither Significant, nor Routine and Frequent, nor Informational/Administrative/Other"); (4) "Routine and Frequent" "a specific case of a multiple recurring application of a regulatory program in the Code of Federal Regulations and that does not alter the body of the regulation"; or (5) "Informational/Administrative/Other" "[a] rulemaking that is primarily informational . . . but that the agency places in the Unified Agenda to inform the public of the activity"). REGULATORY INFO. SERV. CTR., INTRODUCTION TO THE UNIFIED AGENDA OF FEDERAL REGULATORY AND DEREGULATORY ACTIONS (2011), *available at* http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201110/Preamble_8888.html.

[74] *See* COPELAND, *supra* note 8, at 25-26.

[75] *Id*. *See also* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1179 (2012) (observing that while "[t]his planning process affords OIRA several opportunities to identify regulations that might implicate the jurisdiction or interests of other agencies, and to intervene to help ensure that such actions are consistent and coordinated . . . [i]t is not clear, however, whether in practice OIRA spends significant resources on such tasks"); Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 111 (2011) (as a former OIRA administrator, opining that regulatory agenda "process itself has become more of a paper exercise than an analytical tool").

[76] 5 U.S.C. § 611 (Supp. IV 1980) ("Except as otherwise provided in [an inapplicable subsection],any determination by an agency concerning the applicability of any of the provisions of this chapter to any

review but still exclude the provisions pertaining to regulatory agenda requirements.[77] The current statutory regime is clear that agencies are not precluded from "acting on any matter not included" in their agenda, nor are agencies required to consider any listed matters.[78] The Reagan and Clinton executive orders similarly explicitly preclude the creation of any legally enforceable rights.[79] Courts will thus not set aside an agency rule for failing to appear in the Unified Agenda.[80] This observation is important as it grants a substantial degree of freedom into agencies' decisions over whether to report their activity to the Unified Agenda. Doing so does not commit agencies to issue the listed rule; more importantly for our purposes, an agency's failure to report a planned rule to the Agenda does not jeopardize the legal status of the eventual rule.

II. STRATEGIC DISCLOSURE

Given the discretion agencies possess to disclose a contemplated rule, this Part examines what incentives agencies face to disclose during the pre-proposal period. These motivations, in turn, generate hypotheses that we test against a novel dataset drawn from the *Federal Register*.

A. Deciding to Disclose

Once an agency has determined its regulatory agenda, it faces a tradeoff when deciding whether to disclose that agenda. On the one hand, disclosure allows agencies to avoid potential reprisals from political overseers for failing to comply with reporting requirements; these rebukes

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action of the agency shall not be subject to judicial review.") *See* Paul Verkuil, *A Critical Guide to RFA*, 1982 DUKE L. J. 213, 259-62 (1982) (describing the legislative history of the RFA and implications for judicial review).

[77] *See id.*. More specifically, the1996 Amendments made certain provisions of the RFA subject to judicial review, but excluded the relevant regulatory agenda provisions, at 5 U.S.C. § 602 (2000). *See* Small Business Regulatory Enforcement Fairness Act, Pub. L. 104-121 (1996), § 242, codified at 5 U.S.C. § 611 (2000).

[78] 5 U.S.C. §602(d).

[79] Exec. Order 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993)

[80] One possible path might be to appeal to common law reliance interests. *See* Groseclose, *supra* note 24, at 527. However, there are no cases suggesting such a remedy, *id*., and we see dim prospects for the success of any such challenge.

include not only legislative hearings, but also potentially novel and onerous judicially enforceable procedures, along the lines Congress routinely threatens to impose on agencies.[81] So the agency must pick and choose which rules to report and which to not report. Logic suggests that they will therefore use their "budget" for non-compliance on the rules most likely to benefit the agency. As part of these benefits, disclosure allows agencies to appease interest groups with promises — both credible and hollow — of future reforms. After a number of high-profile shooting deaths, for example, the Department of Justice announced in the Unified Agenda its plans to issue a rule that would bar more groups from owning guns — a move celebrated by gun control advocates.[82]

On the other hand, disclosure is also costly to the agency. It can invite greater opposition, as evidenced by the National Rifle Association's reaction to the DOJ disclosure.[83] Opposition can come not only from interest groups, but also the agency's political overseers with divergent preferences. Indeed, agency goals may depart from those of the President or Congress for numerous reasons. Administrators and civil servants may be captured by narrow interest groups, thus resulting in mutually-beneficial special favors.[84] More recent work suggests other possibilities such as regulators' incentives to signal valuable human capital or else expand the market for their post-government services.[85] For any of these reasons, agencies may seek regulatory (or deregulatory) policies that are at odds with congressional or executive desires.

As a result, agencies confront the risk of having their policy decisions opposed by Congress, while executive agencies face this risk with respect to the President as well. Congress, for its part, can always override

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[82] *See, e.g.*, Dave Boyer, Obama intent to toughen gun laws, with or without Congress' help, WASH. TIMES (June 21, 2015) (citing the DOJ's "disclosure . . . in the administration's Unified Agenda, a semiannual publication of proposed rules that the government intends to implement"), http://www.washingtontimes.com/news/2015/jun/21/after-south-carolina-obama-intent-on-gun-restricti/?page=all; Matt Vespa, *Good News: DOJ Says New Gun Regulations Are Coming In November,* TOWNHALL (May 31, 2015), http://townhall.com/tipsheet/mattvespa/2015/05/31/good-news-doj-says-new-gun-regulations-are-coming-in-november-n2006276

e no cases suggesting such a remedy, *id*., and we see dim prospects for the success of any such challenge.

[83] NAT'L RIFLE ASSOC. INSTITUTE FOR LEGISLATIVE ACTION, *Obama's "Unified Agenda" of Regulatory Objectives Causes Fear, Confusion* (June 5, 2015), https://www.nraila.org/articles/20150605/obamas-unified-agenda-of-regulatory-objectives-causes-fear-confusion

[84] *See* Michael E. Levine & Jennifer Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6. J.L. ECON. & ORG. 67 (1990).

[85] For a summary of this literature, see Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265, 1267-70 (2015).

a rule by amending the authorizing statute. Similarly, it can also veto the rule through the Congressional Review Act, which like a statutory amendment, would also require presidential assent.[86] Alternatively, and perhaps more likely, Congress could intervene through a variety of less costly tools: for example, refusing to grant an agency any funds to enforce the rule, or subjecting the agency head to bruising oversight hearings.[87] The President, for his part, also has multiple tools of agency influence. He could, for example, attempt to exercise directive authority over his appointed agency head, or more likely, assert supervisory power through a review process coordinated by the Office of Information Affairs (OIRA).[88] By presidential order, executive agencies must submit to OIRA "significant" regulatory actions for review, defined as those "likely to result in a rule" that meets at least one of several criteria, such as having "an annual effect on the economy of $100 million or more," or raising "novel legal or policy issues."[89] During this review, OIRA could negotiate revisions to the rule, or else potentially send the regulation back to the agency through a return letter or else encourage a withdrawal.[90] For particularly recalcitrant agency heads, the President could threaten removal as well.

Any of these outcomes is costly to the agency. Such interventions can upset months or years of work formulating the regulatory proposal.[91] The effort required to engage with legislative or White House staff is expensive as well. Because administrative agencies

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[86] See 5 U.S.C. §§ 801–808 (2006). That Act, among other things, requires agencies to send a copy of every new final rule and its associated analysis to Congress and the Government Accountability Office. Id. at § 801(a)(1)(A) & (B). Within a sixty-day review period, Congress can use expedited procedures to pass a joint resolution of disapproval overturning the rule. Id. at § 801(a)(3)(B). To date, however, the statute has been used only once in over a decade to invalidate a rule. That rule was the Occupational Safety and Health Administration's ergonomics standard in March 2001, "an action that some believe to be unique to the circumstances of its passage." MORTON ROSENBERG, CONG. RESEARCH SERV., RL 30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE, CONG. RESEARCH SERVICE REPORT OF CONGRESS 6 (2008). At the same time, however, Congress has passed joint resolutions of disapproval in recent years, setting up visible vetoes by the President. *See, e.g.*, Gregory Korte, Obama vetoes attempt to kill clean water rule (Jan. 19, 2015), USA TODAY, http://www.usatoday.com/story/news/politics/2016/01/19/obama-vetoes-attempt-kill-clean-water-rule/79033958/

[87] *See* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006).

[88] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

[89] Exec. Order No. 12,866 § 3(f), 3 C.F.R. at 641-42. For a discussion of how OIRA treats this determination, see Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1849-54 (2012).

[90] *Id.*

[91] *See* West, *supra* note 1.

invest considerable resources in formulating their proposed rules, they have an interest in preserving their major policy decisions in the final rule. They will thus undertake strategies designed to preserve this bureaucratic autonomy by minimizing the probability of having their proposed rules watered down or effectively reversed.

One of these strategies involves the agency's decision whether or not to disclose a rule on its regulatory agenda. Our initial objective below is to determine the extent to which agencies fail to disclose their rulemaking efforts before they formally propose the rule. Such failures deprive the public of the opportunity to get involved in the formulation of the notice of proposed rulemaking, which contains policy choices that are difficult to later reverse without a complete withdrawal. Once the rule has been proposed, however, the public now has notice that the agency is engaged in a rulemaking effort. At the same time, many rules issue without prior notice — for example, rules promulgated pursuant to the APA's "good cause" or other exceptions. Disclosure of these rules would be valuable to explore, as we hope to in future work,[92] but for now, empirical evidence seems to suggest that most of such actions "involve administrative or technical issues with limited applicability."[93]

If it turns out that the magnitude of pre-proposal UA omissions is substantial, then a separate question arises as to what explains this observation. The hypothesis frequently advanced is that such behavior is strategic in nature — that is, manipulated by agencies seeking to avoid the potential costs of having their rules challenged by overseers. Agencies that reveal their contemplated regulatory actions increase the probability that political monitors with divergent views will attempt to revise or otherwise block their rules. Disclosing a rule lowers their monitoring costs, thus making it easier for those with adverse interests to intervene in the agency's proposed rulemaking. A central hypothesis thus emerges: the more an agency expects to have different preferences from its monitors, the more likely the agency is to hide the regulation.

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[92] 5 U.S.C. § 553(a) & (b)(3)(B) (2010).

[93] *See* GAO FEDERAL RULEMAKING: AGENCIES OFTEN PUBLISHED FINAL ACTIONS WITHOUT PROPOSED RULES 2 (1998), http://www.gao.gov/assets/230/226214.pdf. Nevertheless, for those final rules that are more consequential, it would be valuable to also analyze the relevant dynamics for final rules, which we hope to address in future work.

B. Testing Disclosure

To examine this main hypothesis, this study relies on a novel dataset containing over thirty years of proposed rules (1983-2014) published in the Federal Register.[94] Agencies are legally required to publish their proposed rules in the Federal Register, unless providing actual or personal service on potentially affected parties.[95] These data are thus the most complete look possible at the universe of proposed rulemakings. These data also yield a number of background variables, when available: the Federal Register citation, docket number, regulation identifier number (RIN), date of publication, the name of the agency responsible for the regulation,[96] the length of the proposed rule (including the preamble), as well as any cites to the Code of Federal Regulations or the United States Code.

Earlier efforts to study agency activity, by contrast, have relied almost exclusively on Unified Agenda entries to capture rulemaking behavior.[97] However, most users have acknowledged — and various studies (including this one) confirm[98] — that these data are incomplete.[99] Because agenda entries are self-reported, they are susceptible to human error. Agencies and administrations may also omit data for the strategic reasons we suggest. This incompleteness raises questions about the validity of earlier empirical research relying on the Unified Agenda,[100] but also presents new research opportunities. The fact that agencies likely self-report imperfectly to the Unified Agenda allows an examination of the conditions

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[94] This window of analysis corresponds to another dataset created with regard to the Unified Agenda, which also begins in 1983.

[95] 5 U.S.C. § 553(b) (2000) ("General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.").

[96] As explained below, this is a more challenging task than it sounds, and we cannot recover the name of the responsible agency for all rules.

[97] *See* sources cited *supra* note 37.

[98] GAO study; Copeland

[99] *See* Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 L. CONTEMP. PROBS. 185, 198, n.41 (1994) (noting that his investigation into the quality of the Unified Agenda data was "sufficiently disappointing that [he did] not pursue[] the analysis on a more 'scientific' basis"); O'Connell, Political Cycles, *supra* note 36, at n.108 (noting that the "Unified Agenda data are not perfect; they need confirmatory research.").

[100] In fact, only about 31 percent of NPRMs in our dataset appear in the Unified Agenda at *any* stage of the rulemaking process — including completed action reports — before or after the NPRM appears in the Federal Register.

under which an agency opts to expose its regulatory actions to public view, and whether such behavior is strategic or benign.

As an initial overview, the Federal Register data suggest that administrative agencies published a total of 65,833 proposed rules over this 30-year period.[101] Although it was not always possible to match these proposed rules with the identity of the issuing agency, the remaining 86 percent of proposed rules indicate that a disproportionately select number of agencies issue rulemaking proposals. Specifically, the Department of Transportation (DOT) is the most prolific agency by a considerable margin — issuing over 20 percent of all proposed rules in the series. Four other agencies issued over 3,000 proposals over the relevant period: the Environmental Protection Agency (EPA) with just over 9,000 proposed rules; the Federal Communications Commission (FCC) with just over 6,000 proposed rules); and the Departments of Interior and Agriculture with roughly 3,000 and 4,000 proposed rules, respectively. Combined, these five agencies produced a remarkable 58 percent of all proposed rules

1. Agenda Underreporting

The first descriptive question that arises is the extent to which agencies self-report their anticipated proposed rules to the Unified Agenda. A resulting methodological challenge is to construct a measure of agency disclosure. Because the focus here is on the pre-proposal period, the relevant outcome of interest is the extent to which agencies include their pre-proposal regulatory activities on the Agenda—that is, how often do agencies inform the public of notices of proposed rulemaking that they later issue?

To investigate this question, we obtain machine-readable versions of the Agenda from the General Services Administration.[102] We then determine which of the entries in the Agenda relate to rulemaking efforts

[101] As exaplained in the Appendix, we sought to cull from the dataset a variety of Federal Register notices that announce something other than a rulemaking; for instance, notices of public hearings, notices of petitions, notices of inquiry, and so on. The appendix details our extensive efforts in this regard, including our attempts to validate our data.

[102] These data consist of potentially several entries for a single rule, as identified by the Regulatory Identifier Number (RIN). For example, the same rule might have a UA entry at the time it is proposed, the time it is finalized, and then again another entry as a "completed action" following finalization. See the appendix for details on data processing.

that both produce a proposed rule published in the Federal Register and appear in the Agenda beforehand.[103] This task requires the development of a database of proposed rules from the Federal Register, another dataset of Unified Agenda entries, and a method of relating entries between the sources. Appendix A describes these steps in more detail. These efforts, in turn, allow for the identification of proposed rules for which the Agenda put the public on early notice.

The data reveal some stark figures. As an initial matter, between 1983 and 2014, the Unified Agenda reports contained a total of at most 18,303 entries during the pre-proposal stage that eventually resulted in a proposed rule in our data.[104] By comparison, as noted above, there were about 65,833 proposed rules published in the Federal Register. Simply by placing these figures side-by-side, it is clear that agencies dramatically under-report their activity in the Agenda. In particular, agencies appear to

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[103] Specifically, we first develop a comprehensive Agenda dataset that retains the *last* entry available for each RIN; this will often, but not always, be at the "completed action" stage of the rulemaking process. These last-in entries supply the dates, rule abstracts, Federal Register citations, and the like that we use in the analysis below. Then, for each RIN in this Agenda dataset, we determine and record the *earliest* stage at which it appeared in the Unified Agenda (pre-proposal, proposal, and so on). This latter variable informs us of whether the rule appeared on the Agenda at the proposal stage or earlier.

[104] We arrive at this estimate in the following way. First, the Agenda reports a total of 26,806 proposed rules over the series. However, we only find matches for 19,848 of these entries in the Federal Register. That leaves 6,958 "orphan" entries, that is, entries that are reported by agencies as proposed rules but that lack a match in an actual published proposed rule. These entries may be "orphans" for one of two reasons: (1) agencies placed these entries on the Agenda as proposed rules, but they were never actually proposed, whether due to change in priorities or because they never intended to proposed them in the first place; (2) alternatively, our mapping method, detailed in the Appendix A, may be too inaccurate to match the agenda entries to actual proposed rule published in the Final Register, despite their existence. Under these circumstances, we proceed conservatively by assuming that *all* of the "orphan" Agenda entries, almost 7,000 of them, in fact eventually became proposed rules, and that our mapping method simply could not detect them.

Our next task is to identify how many of the rules reported by agencies as proposed rules were published in the Agenda before promulgated in the Federal Register. The issue here is that agencies often self-report a rule as a proposed rule *after* publication has already occurred. By comparing the relevant dates, as detailed in Appendix A, we find that only 11,345 of non-orphan entries in the Agenda entry preceded the date the proposed rule appeared in the Federal Register. We cannot determine whether the 6,958 "orphan" entries were disclosed before publication given that there is no matching Federal Register entry. Therefore, once again, we proceed conservatively by assuming that all of them were indeed published in the Agenda before Federal Register publication.

These calculations result in a fairly generous estimate of 18,303 Agenda entries that were disclosed before Federal Register publication (11,345 known disclosed entries + 6,958 orphaned entries). This estimate is generous in the sense that the conservative assumptions regarding the orphaned entries are very strong. In reality, many of these orphaned entries likely did not lead to an eventual proposed rule, or if they did, were likely not reported to the Unified Agenda before the associated rule was proposed.

report about 28 percent of their proposed rules to the Unified Agenda before they appear in the Federal Register.[105] Put differently, about 72 percent of proposed rules — on the order of 50,000 since 1983 — have been sprung on the public for the first time in the Federal Register. Many of these rules were likely promulgated after considerable periods of development and consultation with regulatory insiders.

While the sheer magnitude of nondisclosure is itself disconcerting, one might nevertheless wonder about the nature of the excluded proposed rules. If the vast majority of these regulations are simply informational, ministerial, or otherwise routine in nature, their absence on the Unified Agenda may not be worrisome. Indeed, many of the proposed rules in our main dataset are arguably relatively minor: for example, airworthiness directives from the Federal Aviation Administration (FAA). Airworthiness directives are legally enforceable regulations issued by the FAA to correct an unsafe condition in a product and thus have limited applicability.[106] Based on the titles of the proposed rules, roughly 9,000 of the 65,000 proposed rules in the dataset — some fourteen percent of the total — represent airworthiness directives.

On the other hand, if some of the missing rules are politically salient or otherwise have substantial effect, then strategic non-disclosure is more problematic. It is clear that at least some of the non-disclosed rules are of public concern. Consider, for example, a proposed rule on country-of-origin-labeling-for-meat-cuts, estimated to impact over 7,000 firms and countless consumers.[107] Country-of-origin labeling has been a contentious issue for years, with supporters arguing that it enables consumer choice, and

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[105] The numerator reflects the number of Unified Agenda entries that we were able to match to our population of proposed rules that had an Agenda publication date prior to the NPRM date. This measure could over-state the degree of under-reporting in a few ways. If the agency fails to record a citation in the Agenda entry for the NPRM, or does so incorrectly, our data would not be able to match the Agenda entry to a proposed rule in the Federal Register (see Appendix A for further details). In addition, if agencies issue multiple NPRMs, this may lead to an overstated rate of under-reporting since only one NPRM is matched to each UA rulemaking entry. However, this issue is mitigated by the Agenda's observation that, based on our calculations, only 1.3 percent of rulemaking efforts with at least one NPRM feature more than one NPRM. As one bound on the combined sources of error, even if one relies solely on the Agenda's self-reported characterizations of rulemaking stage rather than the dates of publications—we find only about 18,000 pre-notice NPRMs listed in the Agenda, implying a reporting rate of roughly 30 percent. The true reporting rate is likely somewhere between these two figures.

[106] *See* https://www.faa.gov/regulations_policies/airworthiness_directives/

[107] Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts 78 Fed. Reg. 15645, 15,647-15,650 (Mar. 12, 2013).

detractors claiming that the labels are costly and misleading barriers to trade. Thus, one would expect the public to be interested in relevant regulatory developments. The Department of Agriculture (USDA), however, did not disclose that it was working on a new proposal before its promulgation.[108] The agency issued the proposed rule after an adverse World Trade Organization (WTO) ruling; the regulation now required labels to "specify the production steps of birth, raising, and slaughter of the animal from which the meat is derived" in each country-of-origin.[109] It also revised coverage definitions, and now prohibited the commingling of certain commodities of different origins.[110]

Importantly, USDA did not materially alter any of these provisions in the final rule,[111] thereby illustrating the importance of the policy choices made at the proposed rule stage. At the same time, many other examples of non-disclosed food labeling regulations abound — pertaining to claims regarding coronary heart disease,[112] gluten-free statements,[113] and "healthy" sodium level assertions.[114] Beyond labeling regulations is a diverse set of other missing proposed rules likely to be of public interest. They include, for example, critical habitat and threatened species determinations,[115] Affordable Care Act regulations relating to small-businesses and health care exchanges,[116] and even the EPA's high-profile greenhouse gas

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[108] The Unified Agenda publication date (Spring 2013) for this rule can be found by searching for its Regulatory Identification Number (RIN), 0581-AD29, at http://www.reginfo.gov/public/do/eAgendaSimpleSearch.
[109] *Id.*
[110] *Id.*
[111] *See* Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 78 Fed. Reg. 31367 (May 24, 2013).
[112] Food Labeling: Health Claims; Soluble Fiber From Certain Foods and Risk of Coronary Heart Disease, 72 Fed. Reg. 5,367 (February 6, 2007) (RIN: 0910-AF94). All of these Unified Agenda entries can be found by searching by RIN at http://www.reginfo.gov/public/do/eAgendaSimpleSearch.
[113] Food Labeling; Gluten-Free Labeling of Foods, 72 Fed. Reg. 2,795 (Jan. 23, 2007) (RIN: 0910-ZA26).
[114] Food Labeling; Nutrient Content Claims, Definition of Sodium Levels for the Term "Healthy," 68 Fed. Reg. 8,163 (Feb. 20, 2003) (RIN: 0910-AC49).
[115] *See, e.g.*, Endangered and Threatened Species; Designation of Critical Habitat for the Arctic Ringed Seal, 79 Fed. Reg. 71,714 (Dec. 3, 2014) (RIN: 0648-BC56).
[116] *See, e.g.*, Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program, 78 Fed. Reg. 15,553 (Mar. 11, 2013) (RIN: 0938-AR76); Patient Protection and Affordable Care Act; Annual Eligibility Redeterminations for Exchange Participation and Insurance Affordability Programs; Health Insurance Issuer Standards Under the Affordable Care Act, Including Standards Related to Exchanges, 79 Fed. Reg. 37,262 (July 1, 2014) (RIN: 0938-AS32); Patient Protection and Affordable Care Act; Annual Eligibility Redeterminations for Exchange Participation and Insurance Affordability Programs; Health Insurance Issuer Standards Under the Affordable Care Act, Including Standards Related to Exchanges, 79 Fed. Reg. 37,262 (July 1, 2014) (RIN: 0938-AS32).

endangerment finding.[117] None of these proposed rules were disclosed on the Unified Agenda before their promulgation.

A more systematic approach to better understanding the character of rules missing from the Agenda involves taking a random sample from the larger dataset and inspecting this random sample by hand. Standard sampling theory suggests that this exercise is informative; just as taking a poll of likely voters helps us understand the thinking of the electorate, so too can sampling observations from our dataset help us understand what it contains. This analysis can also help to motivate further inquiries. We randomly select 200 rules from our dataset in the post-1994 part of the series, after Executive Order 12,866 was issued; thus limited, the focus is on the period for which the "significance" determination exists.[118] We then read the 200 proposed rules to arrive at a sense of what they contain, inspecting also whether they appear in the Unified Agenda.

Most of the proposed rules—113 of the 200—come from the FAA, the EPA, or the FCC. Many of these proposed rules have an adjudicatory feeling to them, along the lines of the FAA's airworthiness directives: technically, these agency actions represent rulemakings, but they are also of fairly limited scope and applicability. Corroborating this assessment, one metric is informative: the average length of proposed rules from these three agencies in our sample is 3,800 words; by comparison, the average length of proposed rules from other agencies is about 8,000 words. Very few of the proposed rules from these three agencies appear in the Agenda; by our count, only 10 of the 113 rules appear on the Agenda before appearing in the Federal Register.

All the same, at least in this sample, it is not only minor proposed rules that do not make it on the Agenda, but OIRA-reviewed "significant" rules as well. Significant rules, recall, are defined by executive order as those regulatory actions "likely to result in a rule" that meets at least one of several criteria, most notably raising "novel legal or policy issues" or having "an annual effect on the economy of $100 million or more."[119] This

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[117] *See* Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. (Apr. 24, 2009) (RIN: 2060-ZA14).

[118] President Clinton issued Executive Order 12,866 on September 30, 1993. *See* Exec. Order No. 12,866 § 3(f), 3 C.F.R. at 641-42.

[119] Exec. Order No. 12,866 § 3(f), 3 C.F.R. at 641-42. For a discussion of how OIRA treats this determination, see Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1849-54 (2012).

latter subset of rules are known as "economically significant" rules.[120] Economically significant and significant rules are therefore those regulations that are of most interest to elected officials like the President or legislators. They are among the most publicly salient.

Of the 165 proposed rules promulgated by executive agencies in this sample, we identify 13 "significant" rules in the OIRA sense of the term. Less than half, six of thirteen, appear on the Agenda prior to publication.[121] Of course, after subsetting on significant rules, the standard error on this estimated reporting rate is large—roughly 14 percentage points; nevertheless, the broader point here is that a non-trivial proportion of even significant proposed rules likely do not appear in the Agenda prior to publication in the Federal Register.

A broader examination of OIRA-designated "significant" rules further confirms that likely-noteworthy regulations are missing from timely agenda reporting. At the same time, it also shows that the most important regulations from executive agencies are more likely to be reported. Because of technical difficulties isolating rule significance directly from the Federal Register,[122] we must instead use here a dataset of significant rules reviewed by OIRA.[123] This approach has two main drawbacks: first, agencies do not always promulgate draft proposed rules reviewed by OIRA; second, when determining whether the proposed rule appeared in the Agenda prior to the Federal Register, it must rely on how agencies report the "stage" of the rulemaking process in the Agenda — rather than comparing the date that the proposed rule appeared in the Federal Register and the date that the rule

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[120] *See* Exec. Order No. 12,866, § 6(a)(3)(C), 3 C.F.R. 638, 645–46 (1993). Circular A-4, in turn, states that "Executive Order 12866 requires agencies to conduct a regulatory analysis for economically significant regulatory actions as defined by Section 3(f)(1)." *See* Office of Mgmt. & Budget, Exec. Office of the President, *Circular A-4, Regulatory Analysis* (2003) (hereinafter Circular A-4), *available at* http://www.whitehouse.gov/omb/circulars_a004_a-4.

[121] Some proposed rules appear in the Agenda, but after they first appeared in the Federal Register. A total of 9 out of 13 appear in the Agenda at some point in the lifecycle of the rule.

[122] We pursued a number of approaches to identifying rule significance based on the text of the proposed rule as it appears in the Federal Register, but none proved highly successful. For example, we isolated and analyzed text around mentions of "12,866", but this recovered only about 50 significant proposed rules per year—roughly a quarter of the figure one would expect based on counts provided by the Regulatory Information Service Center. *See* http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init

[123] In relying on the OIRA review data for the population of significant rules, this analysis adopts the same approach as Curtis Copeland. *See* COPELAND, *supra* note 8.

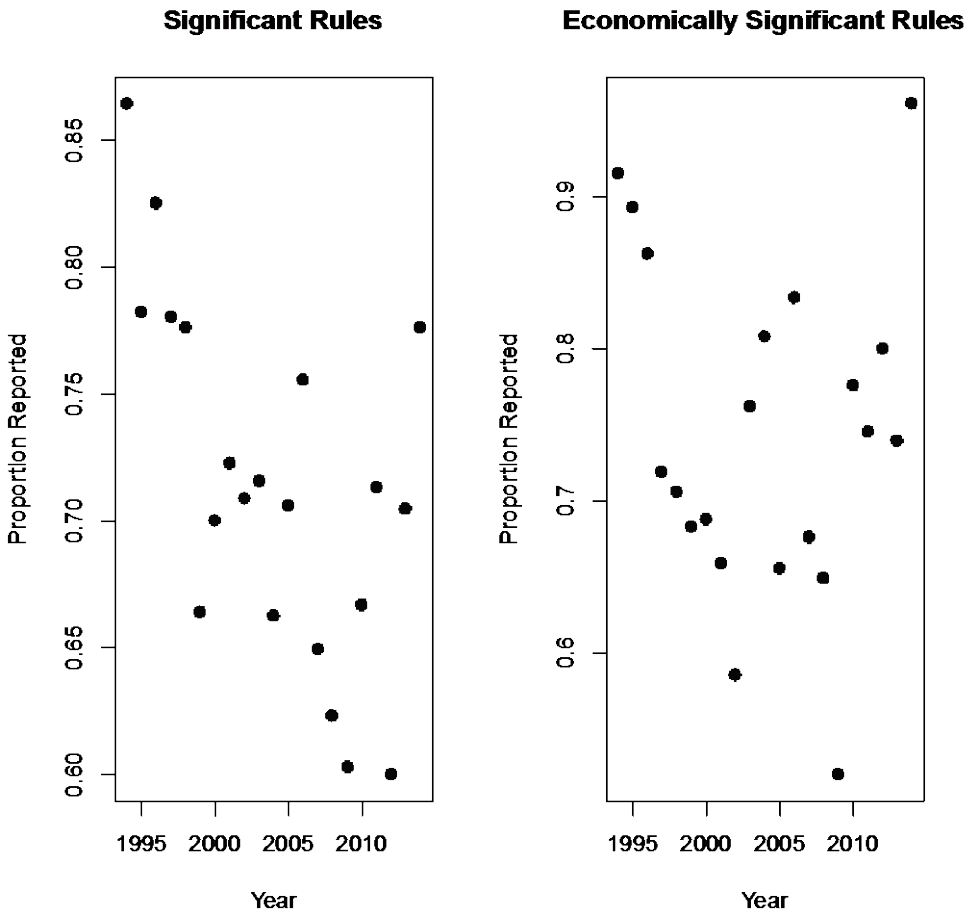
first appeared in the Agenda.[124] Many of these self-reported stages, however, are likely erroneous.

With these caveats in mind, Figure 1 reports the proportion of proposed economically significant and significant rules that appeared in the Unified Agenda before publication. The data shown in the left panel of the figure reveal that, on average, only about 70 percent of significant proposed rules appear in the Agenda at the proposed rule stage or earlier. In other words, about 30 percent of the significant rules proposed in our time period was not disclosed before publication. This exercise largely corroborates the findings in other studies, which indicate that a substantial portion of significant proposed rules appear in the Agenda.[125] Focusing on the economically significant rules—that is, with estimated annual economic impact of $100 million or greater—one sees roughly the same pattern, as shown in the right panel. The reporting rate for these rules is now slightly higher at about 75 percent.

Figure 1: Reporting of Significant Rules

[124] In particular, we code a rule as having appeared in the Agenda in a timely way if it first appears at the proposal stage or earlier, as reported in the Agenda's stage field.

[125] Curtis Copeland's study for the Congressional Research Service, for example, finds that roughly 75 percent of the 231 significant proposed rules published in 2008 had a previous Agenda entry. *See* COPELAND, *supra* note 11, at 9. In a subsequent study for the Administrative Conference of the United States, Copeland finds that, for 88 significant proposed rules published by executive agencies in the first half of 2014, about 94 percent were previously disclosed in the Unified Agenda. *See id.* at 38.



In many ways, it is unsurprising that agencies report more significant rules at higher rates given that political principals are likely to become aware of these rules through other channels, such as fire-alarm oversight by regulatory insiders.[126] So the gains from shielding the development of such regulations are likely minimal, at least as compared to the costs of agenda non-compliance. In addition, agencies are likely to face more public criticism for hiding these regulations. Nevertheless, the still-missing significant rules as well as those rules that are substantial in some sense, but not significant for OIRA-review purposes may still be precisely

[126] McNollgast, *supra* note 31, at 254.

the types of rules where capture and other forms of regulatory misfeasance manifest. Even airworthiness directives, for example, can be the subject of public controversy and affect thousands of registered airplanes and their owners.[127] Such modest rules have a decent chance of sliding through the system undetected by opponents, yet they still may work substantial favors to special interests. Thus, it is important that less connected and well-resourced stakeholders—small businesses and public interest groups—have information about such regulatory developments through the Agenda or similar means.

Finally, it is useful to getter a better sense of where and in which agencies these dynamics may be the most prevalent. Now consulting the main dataset,[128] Figure 2 demonstrates that reporting rates differ widely among the agencies. Specifically, the figure depicts the proportion of proposed rules that each agency reports to the UA: on the x-axis is the proportion of all rules that are reported, and on the y-axis are the agencies. The figure shows that the proportion of rules that appear in the UA prior to finalization ranges from under 10 percent at approximately ten agencies—including the FCC and DHS—to over 70 percent at two agencies—RRB and HUD.

It is not immediately clear what explains this enormous variation in reporting behavior among agencies, but some fine-grained accounts are plausible. Independent agencies appear somewhat less assiduous in their reporting behavior; on average, their reporting rate is about 5 percentage points lower. This finding may be due to the fact that OIRA's review of their agenda entries is likely to be even more deferential than for executive agencies. Situated in the Executive Office of the President, OIRA also possesses less information about their regulatory activities; the office is thus ill-equipped to serve as a check on Agenda completeness. Other differences between agencies likely reflect some combination of agency culture as well as difficult-to-quantify heterogeneity in the content of rules. For this reason, agency-fixed effects are included in some of the specifications above.

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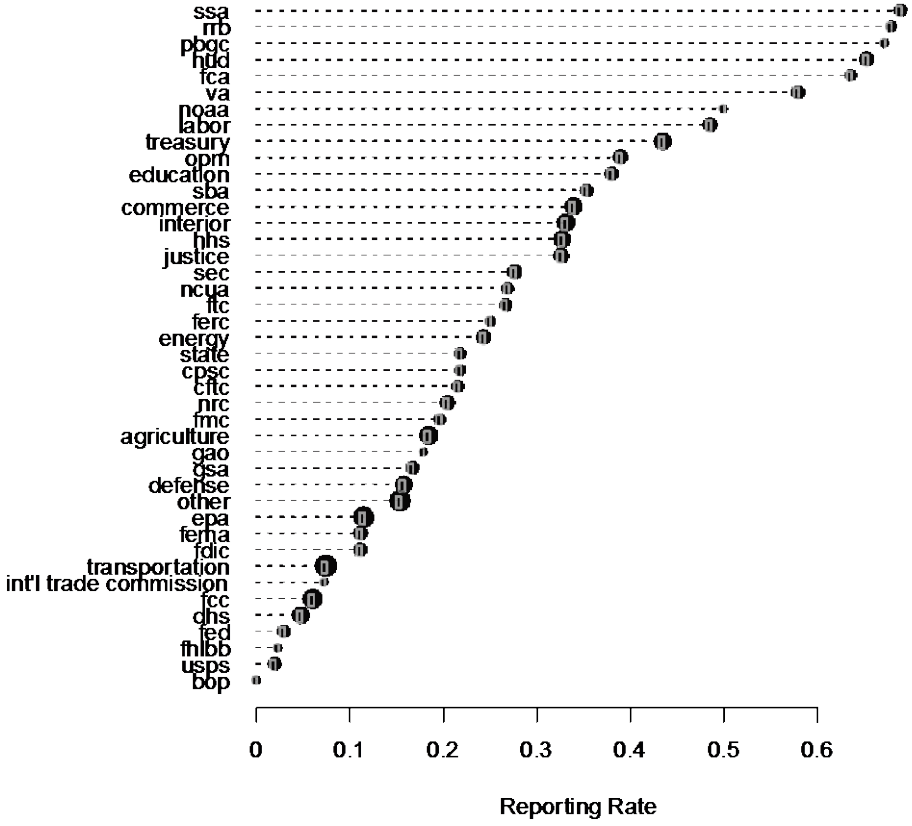
[127] *See, e.g.*, Aircraft Owners and Pilots Association, Regulatory Brief -- FAA Replaces Controversial AD Proposal, Allows Alternative Wing Spar Inspection for Aeronca/Bellanca/Champion Airplanes, http://www.aopa.org/Advocacy/Regulatory-,-a-,-Certification-Policy/Regulatory-Brief-FAA-replaces-controversial-AD-proposal-allows-alternative-wing-spar-inspection-for-Aeronca-Bellanca-Champion (noting that the "proposed [airworthiness directive] would affect approximately 6,500 U.S. registered airplanes").

[128] See the appendix for a description of how we construct the main dataset.

Figure 2: Reporting Rates by Agency[129]



[129] See Appendix B for a key mapping agency abbreviations to their full names.

2. Divided Government

While agencies substantially under-report their rulemaking activity to the Unified Agenda, this section now asks whether this behavior reflects a strategic choice by agencies to evade political oversight. The under-reporting, after all, might simply reflect benign considerations. Unexpected events such as mine explosions or acts of financial malfeasance may suddenly increase the public's demand for regulatory action, thus resulting in last-minute, expedited rulemakings not previously placed on the Agenda. Such unexpected events may also divert internal resources that, in turn, prevent the timely preparation of agenda items. Alternatively, poor management and intra-agency coordination failures may also contribute to what amounts to incompetent, but non-strategic omission of entries. Interviews with agency officials also suggest that the semi-annual nature of the Unified Agenda may prevent officials from providing accurate and updated information.[130] In light of these potential explanations — strategic and benign — the answer cannot be determined solely from theory, but must be empirically uncovered.

To do so, the analysis initially considers the relationship between administrative agencies and Congress. Recall that Congress possesses many tools with which it can attempt to reverse or otherwise influence the agency's rule.[131] When a legislative majority has different preferences than that of the agency, it can require the agency to engage in expensive oversight hearings, threaten or impose budget cuts, and even curtail the agency's authority. It may also eventually attempt to overturn the regulation through the Congressional Review Act, which if successful, will similarly impose costs and thwart the agency's preferences. Strategic agencies will be less likely to disclose their regulatory activities under these circumstances. By hiding their regulatory activity, agencies can shorten the amount of time that interest groups and monitors have to learn about and engage with the proposed rule before it is finalized.[132]

One straightforward method for testing this hypothesis is to examine agency reporting behavior during periods of unified and divided government — that is, when at least one house of Congress and the

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[130] COPELAND, *supra* note 8, 95-97.
[131] *See supra* notes 87-87 and accompanying text
[132] McNollgast, *Structure and Process*, *supra* note 31, at 434-44; Gersen & O'Connell, *supra* note 17, at 1163 (noting that strategic agency behavior "can allow the monitored to choose the monitors").

President are from different political parties. Because agencies are generally part of the executive branch and because their leaders and chairmen are appointed by the President, agencies are generally more likely to align with the party of the President.[133] Thus, when at least one house of Congress is controlled by an opposing political party, it is more likely to be hostile to the preferences of the administrative agency. Under these circumstances, strategic agencies will be less likely to disclose their regulatory activities.

The analysis indeed finds that the probability that a proposed rule appears in the Unified Agenda decreases by roughly 4 percentage points during periods of divided government, as reported in column 1 of the top panel of Table 1 below. This result is statistically significant at any conventional level. Although the magnitude of the decline may sound small, recall that, on average, agencies appear to report only about 28 percent of their NPRMs to the Agenda.

Nevertheless, one might wonder to what extent the observed strategic behavior pertains to the most significant rules. It is possible that this result is driven by small or ministerial rules. As previously discussed, the Federal Register data unfortunately do not allow for the isolation of OIRA-reviewed significant rules.[134] However, is possible to *exclude* the least important rules, such as airworthiness directives, by relying upon rule length as a proxy (alebit an imperfect one) for the rough importance of the rule. The average number of words in an FAA airworthiness directive is about 2,300, with a standard deviation of about 1,600 words[135] Thus, rules above 5,000 words are unlikely to be FAA airworthiness directives and similarly minor rules; indeed, over 98 percent of Airworthiness Directives have fewer than 5,000 words. As shown in the first column of the bottom panel of Table 1, if one zeroes in on longer proposed rules, of 5,000 words or more, the effect of divided government on reporting almost doubles to roughly 7 percentage points.

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[133] *See* Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 460-61 (2008) (finding empirical evidence of notable presidential control over even independent agencies due to increased ideological partisanship).

[134] For relevant discussion, see note 122.

[135] That is, if we use the titles of the proposed rules to determine which ones are Airworthiness Directives, we find that such identified proposed rules have an average of about 2,300 words.

Table 1: Unified Agenda Reporting: Independent and Executive Agencies

	All Proposed Rules		
	All Agencies	Executive Agencies	Independent Agencies
Divided Government	-0.04**	-0.04**	-0.02
	(0.01)	(0.01)	(0.01)
Agency-President Discord	-0.01	-0.01	0
	(0)	(0)	(0.02)
Election Year	0	0.01	0
	(0)	(0)	(0.01)
Time Trend	Y	Y	Y
Time Trend (squared)	Y	Y	Y
Agency Fixed Effects	Y	Y	Y
N	56207	47267	8580
R-squared	0.22	0.22	0.11
	Longer Proposed Rules		
	All Agencies	Executive Agencies	Independent Agencies
Divided Government	-0.07**	-0.08**	-0.01
	(0.01)	(0.01)	(0.03)
Agency-President Discord	-0.01	0	-0.02
	(0.01)	(0.01)	(0.04)
Election Year	0.01	0.01	0
	(0.01)	(0.01)	(0.02)
Time Trend	Y	Y	Y
Time Trend (squared)	Y	Y	Y
Agency Fixed Effects	Y	Y	Y
N	13765	11877	1888
R-squared	0.16	0.16	0.08

Note: ** denotes p <0.01; * denotes p<0.05; ' denotes p<0.1. Standard errors clustered by agency and reported in parentheses. Dependent variable is an indicator for whether appears in UA prior to finalization; other variables as indicated by name in straightforward way. See note 101 and accompanying text for a definition and discussion of agency-president discord. Models in top panel include all observations; models in bottom panel include only proposed rules consisting of 5,000 words or more. All models include controls for rule "complexity", i.e., an indicator for whether the rule refers to more than one part of the CFR, and the length of proposed rule.

This strategic effect, in turn, would be expected to be stronger for agencies controlled to a greater extent by the president. Indeed, some existing evidence suggests that agencies under more presidential control exhibit greater sensitivity to presidential electoral cycles.[136] To test this view, it is thus now useful to now repeat the analysis above, but conduct it separately for independent and executive agencies.[137] Consider first the results relating to executive agencies, over which the president exerts greater control. The second column of Table 1 presents these results: with the top panel, again, reflecting all proposed rules, and the bottom panel relating to longer proposed rules. Here, the reporting rate is about 4 percentage points lower for all rules, and about 8 percentage points lower for longer rules during periods of divided government.

Moreover, as evident from the third column in Table 1, it appears that independent agency reporting rates are relatively insensitive to the conditions of divided or unified government. The magnitude of the coefficient on divided government tends to be smaller relative to the magnitude of the corresponding coefficient for executive agencies;

[136] *See* Stiglitz, *supra* note 29.

[137] The relative independence of an agency from presidential control rests along a continuum rather than as a simple binary distinction between independent and executive agencies. Indicia of independence could include statutory removal protections, a multimember structure, partisan balance requirements, budget and congressional communication authority, litigation authority, as well as adjudication authority. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2012). For the purposes of this Article, Appendix B specifies which agencies we classify as "executive" and "independent." Essentially, we use the statutory definition of "independent regulatory agency" contained in the Paperwork Reduction Act to generate a list of "independent" agencies and categorize the remaining agencies as "executive." 44 U.S.C. 3502(5) (2010).

moreover, the coefficients on divided government are not statistically significant at conventional levels. The results from therefore suggest that much of the strategic behavior we identify derives from the behavior of *executive* agencies. In this sense, this exercise provides even more support for the strategic transparency thesis: it is the agencies more likely to disagree with Congress during periods of divided government—those (more exclusively) controlled by the president—that exhibit the most sensitivity to the partisan composition of Congress. Independent agencies, by comparison, appear somewhat less insensitive to conditions of divided government.

As another check, it is useful to further probe this relationship by examining intervals immediately around a switch in party control of one or more houses of Congress — allowing for a relatively clean assessment of whether reporting behavior is responsive to divided government. By isolating the analysis to these discrete time periods, one can control for the preferences and culture of an administration, as well as for other unobservable factors that vary over time, such as rule composition. It is plausible to suppose that such factors remain stable within an administration, at least locally around the switch in Congress, thus setting up a cleaner test for the strategic disclosure hypothesis.

Although this exercise is clean in one way—in that it is unlikely that agencies dramatically change their agendas in a local period—it is challenging in another. In order to detect an effect, the agency must have discretion over disclosure at the time information about the election is revealed. Because agencies report rules to the Agenda, if at all, before they publish a proposed rule, and the Fall edition of the agenda appears around the same time as the election, this means that it could be difficult to detect changes in reporting rates locally around the election. Many proposed rules that appear in the Federal Register around the time of the election will have been reported—or not—to the Agenda well before the election outcome is known or is foreseeable with reasonable certainty.

Our dataset contains several midterm switches to or from divided government. However, we will only observe a sharp change in behavior if the shift in government comes as a surprise; if the agencies anticipate a shift in divided government, they will smoothly adapt their behavior before the shift occurs. The most natural “surprise” shift in divided government to

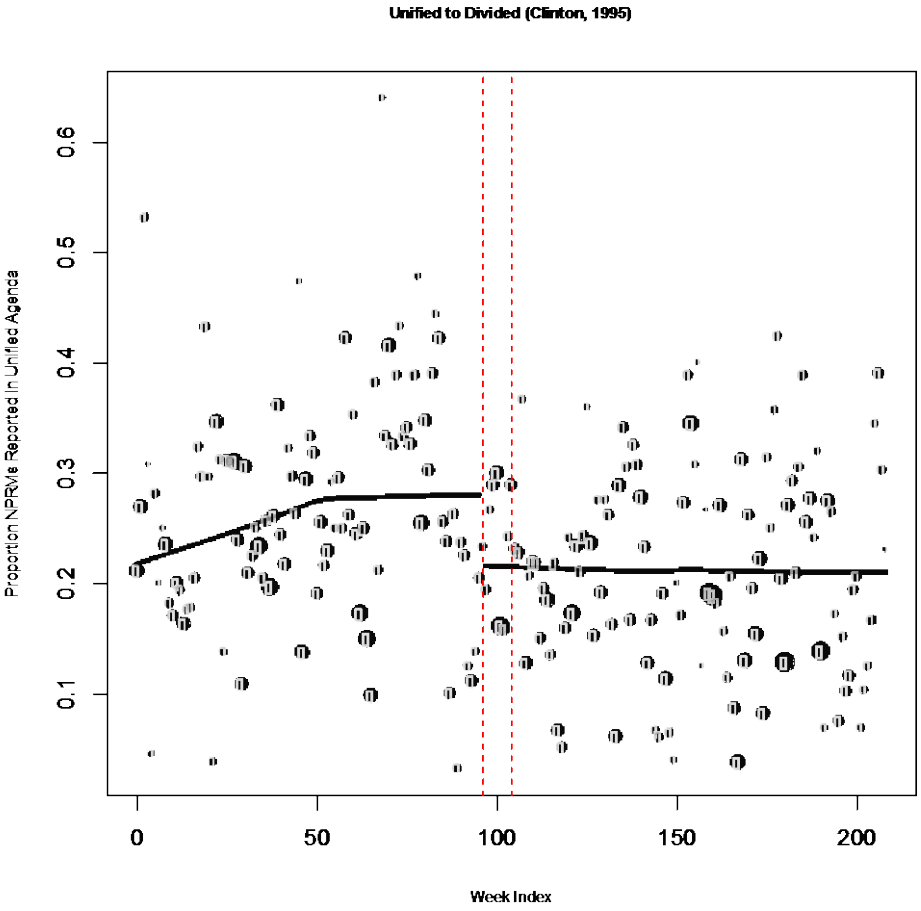
consider is the one following the 1994 election, which the Republicans took control of the House for the first time in almost 50 years.[138] A further advantage of this particular midterm shift is that the Agenda appeared late, on November 14, 1994, somewhat reducing the challenge noted immediately above.

Each dot in Figure 3 represents the proportion of proposed rules that have an entry in the Unified Agenda; the size of the dot is proportional to the number of proposed rules issuing in that week. Thus, we run an index reflecting the week of the administration on the x-axis (i.e., "4" means week four of the administration), and we plot the proportion of proposed rules that week reported to the Unified Agenda on the y-axis. The figure also contains two vertical dashed lines: the left-most of these represents the week of the election, and the right-most represents the week of the congressional transition. Although divided government did not, as a matter of fact, begin until January of 1995, the election resolved any uncertainty regarding this fact several weeks earlier, and one might therefore expect agency behavior to shift around the election date rather than the date of congressional transition. The analysis thus focuses on the interval around the election date, plotting the trends before and after this date in solid grey lines.[139]

Figure 3: A Midterm Shift to Divided Government

[138] See, e.g., David W. Brady et al, The Perils of Presidential Support: How the Republicans Took the House in the 1994 Midterm Elections, 18 Pol. Behavior 345, 362 (1996) (observing that "[t]he Republican takover of the House of Representatives in 1994 caught most observers of elections by surprise"). Another obvious candidate for a surprise shift in divided government involves the 2001 switch in parties by Senator Jeffords. However, that switch occurred so early in the Bush adminstration—just four months in—with appointments still underway, that agency officials had little time to develop their own rules, suggesting many of these rules represent carryover efforts from the previous administration.

[139] The solid grey lines represent locally weighted averages and smooth week-to-week fluctuations to reveal systematic trends.

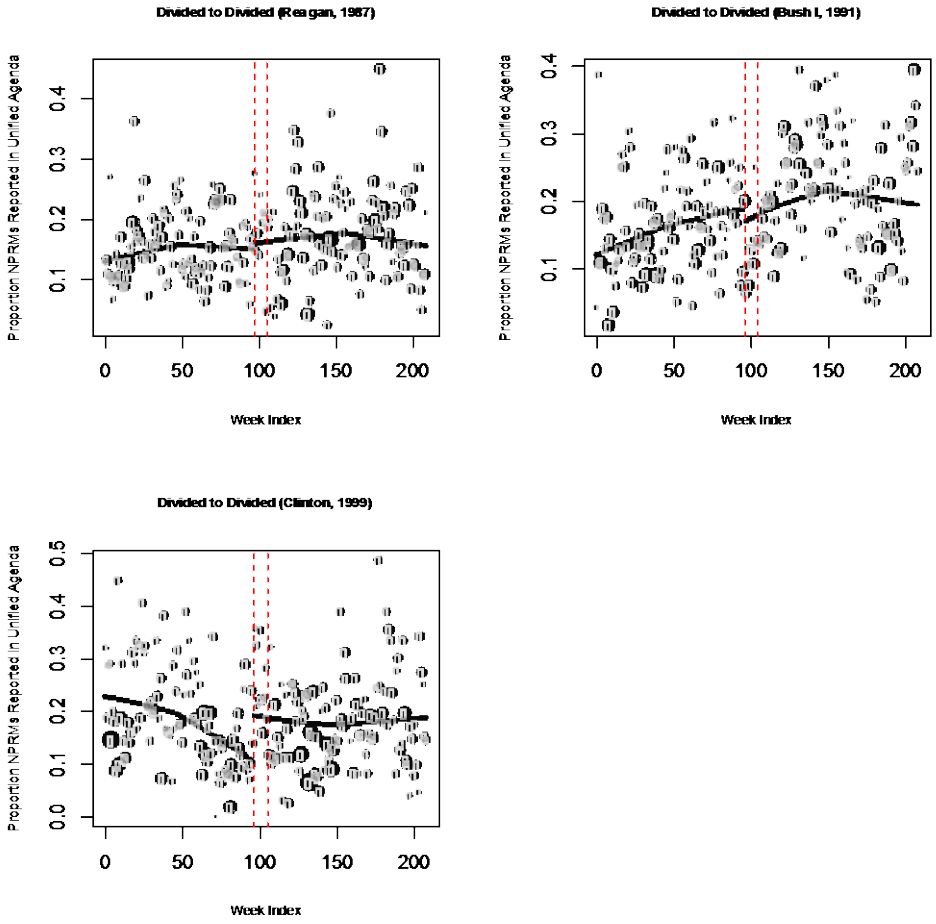


The pattern in this figure is remarkable and consistent with our main results. Immediately prior to the 1994 election, the Clinton administration agencies reported roughly 30 percent of their anticipated proposed rules to the Unified Agenda. By comparison, immediately after the 1994 election, the percentage of anticipated rules appearing in the Federal Register dropped about 7 percentage points, to roughly 20 percent. Most plausibly, this change reflects a change in reporting behavior of agencies in response to divided government. That is, in the face of a newly hostile Congress, agencies took steps to reduce the transparency of their regulatory efforts.

As a further check on this pattern, it is also useful to examine midterm elections that do *not* result in a switch in the control of Congress. Such elections serve, in this context, as a sort of "placebo" test — to the extent strategic disclosure effect is dominant, one should not observe notable changes in reporting behavior around these elections, at least not which replicate the pattern from Figure 3.[140] Figure 4 below plots the corresponding figure for the midterms in the series that do not result in a change in the control of Congress: Reagan following the 1986 elections, H.W. Bush following the 1990 elections, and Clinton following the 1998 elections. The formatting of the plots replicates exactly the formatting of the plots in Figure 3.

[140] By contrast, to the extent the results derive from some factor unrelated to strategic transparency—perhaps, for instance, there is some distinctive feature of mid-terms driving reporting behavior—we will observe transitions in reporting behavior even when Congress does not change hands.

Figure 4: Placebo Midterm Elections



What is notable about these plots is that there are much more modest, if any, changes in reporting behavior around the midterm election. This strongly suggests that the patterns shown in Figure 3 do not reflect generic effects of midterm elections. Instead, the plots in Figure 4 lead to the conclusion that the previous evidence of strategic behavior reflect a pattern

from the change in divided government and, thus, the legislative oversight environment.[141]

3. Intra-Executive Branch

Of course, administrative agencies are subject not only to congressional, but presidential oversight as well. Just as agencies have policy disagreements with Congress, so too with the President. As a result, it is reasonable in the first instance to suppose that agencies would attempt to hide their contemplated regulatory actions from the regulatory agenda when they disagree with the sitting president on policy matters.[142] Such behavior might make it more difficult for the president to monitor agencies directly or indirectly though allied interest groups.

One countervailing consideration is that the President, as discussed,[143] is able to monitor and control executive agencies through many channels not available to Congress. Perhaps most importantly, the President has centralized the review of executive agency rulemaking through OIRA. He also has access to more informal means of influence and information through his presidential appointees and a broader White House apparatus. To the extent this suite of alternative devices of influence and information makes it fruitless for agencies to attempt to hide through non-disclosure on the Agenda, we might expect to see relatively attenuated results in the context of executive branch oversight.

Ideally, one would be able to measure the preference divergence between each agency and the sitting president for each year in our series. Unfortunately, no such measure exists,[144] and so our dataset relies on a popular, but static, measure of agency preferences developed by Professors

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[141] See regression results in appendix.
[142] *See* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013).
[143] *See supra* notes 88-90 and accompanying text.
[144] Professors Bertelli and Grose produce perhaps the closest such measures. *See* Anthony M. Bertelli and Christian R. Grose, *The Lengthened Shadow of Another Institution? Ideal Point Estimates for the Executive Branch and Congress*, AM. J. POL. SCI. (2011) (developing ideal point estimates for cabinet department heads from 1991 to 2004). However, as suggested, this dataset only covers the heads of cabinet departments, and excludes all independent agencies, such as the FCC, as well as the EPA. Moreover, it is not obvious that the *agencies*' preferences best represented by the preferences of their heads, as the heads themselves face a wide range of constraints on their behavior.

Clinton and Lewis.[145] These scores are based on experts' ratings of agency ideologies; that is, Professors Clinton and Lewis survey a set of academics who study the bureaucracy, as well as DC insiders, and record these individuals' senses of agency policy dispositions. Under the Clinton-Lewis scores, a negative value indicates a liberal agency, and a positive value indicates a conservative agency. Our analysis takes these Clinton-Lewis scores, and then adjusts them according to whether the president is a Democrat or Republican. If the latter, the Clinton-Lewis are multiplied scores by negative one, such that higher values indicate more liberal agency preferences, and plausibly more disagreement between president and agency. If the former, the scores are left intact, such that higher values indicate more conservative agency preferences, and plausibly, again, more disagreement between agency and president.

Table 1, above, reports the initial results for this exercise. There, note that—regardless of which set of rules or agencies we consider—the coefficient on this measure for president-agency discord is essentially zero, thus suggesting little relationship between the expected preference divergence and agency reporting behavior.[146] More president-agency disagreement, it seems, is not associated with any change in agency disclosures.

One plausible explanation for this pattern is that agencies face few incentives to "hide" their agendas from the president, who enjoys so many other means to obtain the same information from agencies, notably through political appointees and OIRA review. Through political appointments, he ensures that central decision makers within agencies are unlikely to adopt policies that diverge greatly from his preferred policies. Political appointees also serve as bureaucratic informants who reduce the informational advantages of the agencies. Likewise, through a series of executive orders, the president has effectively set up a parallel system of administrative law, imposing centralized review system on agencies designed to keep abreast of the federal bureaucracy.[147] OIRA itself also reviews entries that agencies submit for the Unified Agenda. These schemes make it less likely that

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[145] Joshua D. Clinton & David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency Preferences*, POL. ANAL. (2008).
[146] This is true whether or not we include agency fixed effects, as in model 2.
[147] Moe & Wilson, *supra* note 40.

agencies could surprise political principals with fully-formed regulations written after secret negotiations with select interests.

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In short, the empirical findings above highlight the magnitude of what, until now, has been limited evidence that agencies are not complying with the requirements of the Unified Agenda. Specifically, our data reveal that agencies only disclose about 28 percent of their proposed rules before they are promulgated. The remaining rules are sprung on the public for the first time in the Federal Register, after which little can substantially change in the final rule unless a "logical outgrowth."[148] It is true that many of the undisclosed rules are minor in nature, but our data show that about 25 percent of OIRA-designated significant rules likely also go unreported. Equally importantly, the data also suggest that such behavior is strategic with respect to congressional, but not presidential, oversight. The findings corroborate other empirical work suggesting that agencies time the release of their decisions for when Congress is out of sessions.[149] Thus, despite congressional and executive efforts to foster greater transparency for regulations in development, agencies are evading legislative supervision. Consequently, the Unified Agenda does not provide the public with the notice necessary to participate fully in actual regulatory development.

At the same time, it is important to acknowledge that our findings cannot rule out some alternative explanations for these results. It is possible, for example, that some of these effects are due not to strategic choices by agencies under divided government, but rather by the President. Because the President appoints agency leaders and can review the Unified Agenda through OIRA, decisions not to disclose may reflect executive attempts to raise the monitoring costs of legislators or interest groups.[150] In this sense, the Unified Agenda may represent a presidential management strategy.

Moreover, it is difficult to disentangle how much our effects are due to strategic behavior as opposed to responsive changes in the substance of the underlying agenda. The focus on the local period around a shift to

[148] *See infra*
[149] *See* Gersen & O'Connell, *supra* note 17, at 1183.
[150] *See* Gersen & O'Connell, *supra* note 17.

divided government represents an effort to address this issue, but it remains the case that when new political realities arise, agencies may shift their agendas to align with those of their political overseers — say, after a change in congressional party control. Because the Unified Agenda is only published twice a year, agencies may be unable to update their regulatory agendas before publishing their proposed rules. Thus, what is actually politically responsive behavior will misleadingly appear to be strategic.

III. IMPLICATIONS

The analysis thus far has been focused on the causes and not the consequences of transparency. The findings can tell us little about important normative goals such as increasing public participation, much less of social welfare. Salient inquiries, perhaps to be tackled in future work, include whether greater rates of Agenda disclosure result in rules with greater net benefits, more public comments, or higher litigation probabilities. Without answers to these empirical questions, the prima facie case for transparency is mixed. On the one hand, transparency is essential to many core democratic values: informing public debate, educating citizens, and facilitating accountability to elected branches of government.[151] Moreover, it could facilitate input and criticism of government activities in ways that might improve their efficiency or effectiveness.[152] Access to government data may further help inform private decision-making by individual consumers or industry actors.[153]

At the same time, however, transparency also has potential costs. It could, for example, facilitate the lopsided participation of well-resourced groups that lobby for special-interest regulations.[154] Or disclosures may harm national security or law enforcement interests, which require confidentiality for diplomatic or investigatory purposes. Additionally, leaked information may increase frivolous legal liabilities or result in unjustified reputational harms.[155] Alternatively, transparency could

[151] Fenster, 895-92
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*

encourage the involvement of ill-informed parties who demand unproductive and resource-intensive meetings. Transparency could also hinder internal agency deliberations, which may chill the candid and free-wheeling discussions necessary when dealing with particularly sensitive or highly uncertain issues. For example, transparency might undermine collegial deliberations by forcing agency officials to publicly posture during negotiations, resulting in breakdowns of the policymaking process.[156]

The story of the Government in the Sunshine Act, for instance, is largely one of unintended consequences.[157] The Act, which required agencies composed of collegial bodies to hold open meetings or public responses when disposing of official business, undermined the ability of agency officials to deliberate in a collegial way by forcing them to adopt a variety of inefficient work-arounds.[158] In this manner, disclosures could also end up further "politicizing" administrative policymaking, harming important domestic policy objectives. As a result, inquiries about whether the disclosures required by the Unified Agenda ultimately increase social welfare or otherwise facilitate accountability remain open empirical questions.

With that caveat in mind, this Part explores what steps could be taken to improve the utility of the Unified Agenda on its own terms. Insofar as the stated objectives of the mechanism are to allow for greater participation and planning, the question addressed here becomes how the Agenda might be reformed to better accomplish these goals.

A. Legislative Reform?

Given our finding that executive branch agencies are less likely to act strategically with respect to the President, the President has less incentive to police agenda requirements. Congressional reforms are thus more likely to be successful than executive branch efforts at improving pre-proposal disclosures. In particular, these findings lend empirical support to

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[156] For a seminal paper making this point, see David Stasavage, *Open Door or Closed Door? Transparency in Domestic and International Bargaining*,58 INT'L ORG. 667 (2004).
[157] William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171 (2009).
[158] *Id.*

recent legislative proposals aimed at requiring earlier public engagement by agencies. Various congressional committees, for example, have approved amendments to the APA that would mandate legally enforceable pre-notice reporting, such as advance notices of proposed rulemakings. The Early Participation in Regulations Act considered in the Senate, for example, would require agencies to publish advance notices of proposed rulemaking for all major rules, defined in part as those expected to have an impact of $100 million or more.[159] The House of Representatives also recently passed the Regulatory Accountability Act, which similarly requires agencies to issue an advance notice of proposed rulemaking for important rules, including basic information that resembles what agencies would include in the Unified Agenda.[160] Unlike the Unified Agenda, however, this early warning procedure would be judicially reviewable to the same extent as the other APA rulemaking procedures.

While partisan wrangling is likely to prevent these bills from passing,[161] its plausible viability spurred 84 law professors to pen a letter urging the House to vote against the bill.[162] With respect to the advance notice requirement, the letter argued that there was "no justification" for the requirement, since the existing requirement for agencies to submit regulatory agendas containing much the same information. However, our empirical findings show that this assumption is questionable — and, moreover, that agencies are acting strategically with respect to congressional oversight. Such findings could thus bolster the wisdom of statutory advance notice requirements.

That said, a judicially reviewable requirement to issue a pre-proposal notice raises several countervailing concerns. An obvious worry is that an agency may face a pressing public policy problem that cannot

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[159] S.1820 - Early Participation in Regulations Act of 2015, https://www.congress.gov/bill/114th-congress/senate-bill/1820/text

[160] *See* Final Vote Results for Roll Call 28, H.R. 185 (Jan. 13, 2015), *available at* http://clerk.house.gov/evs/2015/roll028.xml.

[161] Of the 250 votes in favor, all but 8 came from Republicans; all 175 nays came from Democrats. *See id.* Indeed, since the 112th Congress (2011-2013), we count numerous congressional efforts to revise the APA or otherwise create new procedures for agencies to follow. See, e.g., Regulations from the Executive in Need of Scrutiny Act of 2011 (REINS Act), H.R.10, 112th Cong. (2011); Regulatory Accountability and Economic Freedom Act of 2012, H.R.4116, 112th Cong. (2012); Closing Regulatory Loopholes Act of 2011, S.1530, 112th Cong. (2011); Financial Regulatory Responsibility Act of 2011, S.1615, 112th Cong. (2011); Regulatory Accountability Act of 2011, H.R.3010, S.1606, 112th Cong. (2011); Sound Regulation Act of 2014, S.2099, 113th Cong. (2014); Achieving Less Excess in Regulation and Requiring Transparency (ALERRT Act), H.R.2804, 113th Cong. (2014).

[162] The Regulatory Accountability Act of 2015, H.R. 185, 114th Cong. (2015).

reasonably be signaled in advance of the proposed rule. One solution to this problem, however, is to provide for a "good cause" exemption from the requirement to issue a pre-notice notice, with the exemption itself subject to judicial review. Another concern is that additional rulemaking requirements would unduly ossify the regulatory process.[163] Empirical efforts to examine this hypothesis, so far at least, have suggested that such worries may be more speculative than real.[164]

Congress could also reassert its ability to monitor regulatory development through statutory amendment in other ways. For instance, it could pare back the common law gloss applied by courts requiring a "logical outgrowth" between the proposed and final rules, and thus help to reassert the notice-giving function of the proposed rule. Doing so would ease the pressure on the Unified Agenda to serve the same purpose. To be sure, courts have been using the logical outgrowth doctrine to police a significant concern — the worry that final rules will be imposed in ways that could not be anticipated by would-be commenters. The concern is that agencies could keep their intended rules under wraps while proposing something only tenuously related to what they plan to release as the final rule.[165]

At the same time, however, overly-aggressive attempts to enforce this connection will discourage agencies from learning from public comments and responding accordingly. As it stands, some have rightly pointed out that the logical outgrowth requirement is in tension with the Supreme Court's decision in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council*.[166] There, the Court held that procedural requirements must come from the constitution, from a statute, or from the agency itself.[167] *Vermont Yankee* thus prohibits courts from

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[163] *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

[164] *See* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1415 (2012) (concluding that "evidence that ossification generally is either a serious or widespread problem is mixed at best, and appears relatively weak overall"); Jason Webb Yackee & Susan Webb Yackee, Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making "Ossified"?, 20 J. PUB. ADMIN. RES. & THEORY 261, 261–62, 268–80 (2010) (finding little evidence of ossification using dataset ranging from 1983 to 2006).

[165] *See* Beerman & Lawson, *supra* note 55, at 895.

[166] 435 U.S. 519 (1978) (2000). *See* Beerman & Lawson, *supra* note 55.

[167] *Id.*

inventing and imposing their own novel procedural requirements — a proscription that has been recently reaffirmed by the Supreme Court.[168]

Applying *Vermont Yankee* to the logical outgrowth doctrine highlights the doctrine's tenuous foundations against the backdrop of the APA.[169] By requiring agencies to provide what amounts to the actual terms or substance of the rule, as well as supporting evidence justifying them, courts have arguably expanded rulemaking requirements beyond the text of the APA itself. Instead, Congress could clarify that agencies should only be required to provide a description of the regulatory issues under consideration, rather than the precise text of the regulation or the substance of every regulatory detail at the proposal stage. Otherwise, the prevailing reading of Section 553 effectively reads out the "subjects and issues" alternative that Congress made available to agencies. Reestablishing this more minimal notice requirement would restore the function of the notice and comment process as a forum for genuine regulatory development with the broader public. Doing so could ameliorate the problems of political oversight that our empirical results identify.

B. Persisting Puzzles

While some of the reforms above could help Congress reestablish a tool for earlier legislative and public regulatory involvement, two related puzzles — raised, but not resolved here — remain. The first puzzle is why Congress has yet to pass any of the many bills requiring some kind of

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[168] *See* Perez v. Mortgage Bankers, Assoc., No. 13–1041, slip op. at 6-7 (U.S. March 29, 2015), *available at* http://www.supremecourt.gov/opinions/14pdf/13-1041_0861.pdf (overruling doctrine on the grounds that it was "contrary to the clear text of the APA's rulemaking provisions, and it improperly imposes on agencies an obligation beyond the 'maximum procedural requirements' specified in the APA") (quoting Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U. S. 519, 524 (1978)).

[169] Consider the sparse text of the APA: to promulgate rules, agencies must publish in the *Federal Register* a "general notice of proposed rulemaking" that includes (1) "a statement of the time, place, and nature of public rule making proceedings"; (2) "reference to the legal authority under which the rule is proposed"; and (3) "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Agencies must then give the public an opportunity to publicly comment on the proposal, after which they must publish a "concise general statement of . . . basis and purpose" with the final rule. In this manner, the APA's text imposes minimal requirements on the agency's notice of proposed rulemaking. That notice must only contain either the "terms or substance" of the rule or else a mere "description of the subjects and issues involved." 5 U.S.C. 553.

reviewable pre-proposal notification. The second is why Congress passed the Regulatory Flexibility Act requiring regulatory agendas for small business interests without making the mandate judicially enforceable. The two inquiries are related in that they raise the broader question of whether Congress possesses the incentive and institutional capacity, going forward, to impose legal costs for agency failures to disclose.

One potential explanation for the persisting lack of a legally enforceable agenda requirement is simply that of legislative naiveté. Perhaps statutory drafters assumed that agencies would comply with the statute given the potential political costs of avoidance. Alternatively, perhaps they believed that the Small Business Administration would be able to vigorously enforce the requirements, even without the threat of judicial review.[170] Our results suggest that both of these assumptions have proven misplaced. Similarly, Congress may have also expected the mandates to be enforced by the executive branch more broadly, given that it had issued executive orders on the subject. However, this expectation preceded the rise of the apparatus of presidential review — and the many other avenues Presidents have to gain information about regulatory development. Because the White House and OIRA can now retain this information informally, the President no longer needs to enforce the Unified Agenda requirements to meet his informational needs.

Another possible account for why agenda requirements remain under-enforced relates to technological limitations. Recall that the Unified Agenda is currently required to be published semi-annually, likely due in part to the costs of executive branch coordination, as well as those associated with printing and publication. As a result, the original drafters of these requirements may have considered a legally enforceable disclosure requirement to be impractical given the realities of rulemaking. Some regulations must be formulated and issued in less than six months due to exigent circumstances.[171] Thus, it would unduly tie the hands of regulators to require pre-proposal notice a half year in advance.

Considered dynamically, however, it is still curious why this state of affairs has persisted, that is, why has Congress not acted in the face of

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[170] *See, e.g.*, 5 U.S.C. § 602(b) ("Each regulatory flexibility agenda shall be transmitted to the Chief Counsel for Advocacy of the Small Business Administration for comment, if any.").

[171] *Id.* at §602(c) ("Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.").

agency non-compliance to reassert the public's ability to monitor regulatory development? The empirical results here suggest that perhaps Congress already has some of the regulatory information it desires: about three-quarters of the most significant regulations from executive branch agencies are disclosed. But this still leaves a quarter of significant regulations as well as an indeterminate number of important rules from independent agencies off the legislative radar.

It is also possible that — for the swathe of rules not reported in the Agenda — Congress is basically content to conduct oversight after the agency has promulgated the notice. However, this view ignores the hardening of the notice of proposed rules under the logical outgrowth and other doctrines, so that it is difficult for agencies to revise proposed rules once published. Of course, agencies might withdraw a proposed rule, revise it, and re-propose it. But all of this is costly relative to simply influencing the agency to revise the rule prior to the time it is proposed, when the agency might be more susceptible to congressional prodding. Thus, as stressed by McNollGast,[172] for legislators to be successful, it is important that they intervene early in the rulemaking process, before coalitions have mobilized in support of the agency's rule.

Accordingly, another hypothesis worth considering — the simplest, and perhaps most correct — is that revision to administrative procedures is effectively precluded by legislative gridlock. Under prevailing legislative conditions, a substantial majority of members might prefer to enact revisions to the APA, only to have their wishes frustrated by any one of the many veto points in the legislative process. Indeed, one substantial veto point is the President himself, who is unlikely to accede to revisions that curtail his authority or discretion. This is particularly true as the President can now avail himself of modern tools of executive control and review, many of which did not exist when Congress originally drafted and subsequently revised the APA.

Insofar as partisan gridlock is likely to persist — likely, in our view — then perhaps other institutions like the Administrative Conference of the United States (ACUS) are better-positioned to nudge reforms on behalf of

[172] McNollgast, *Administrative Procedures as Instruments*, *supra* note 31, at 258 (stressing that procedures "ensure that agencies cannot secretly conspire against elected officials by presenting them with a fait accompli, that is, a new policy with already mobilized supporters"); McNollgast, *Structure and Process*, *supra* note 31, at 441 (noting that "when an agency presents politicians with a fait accompli, politicians may find it difficult, if not impossible, to respond").

the public more generally. Indeed, ACUS has recently proposed a number of sound recommendations regarding the Unified Agenda, including suggestions that agencies engage in more automatic, real-time reporting on their websites as well as other digital media.[173] Such reforms would help to ameliorate the ability of agencies to cite publication delays as a pretext for non-disclosure. Because of its unique role in "bridging" internal agency actors with external parties, ACUS may help to facilitate changes from within agencies, should legislative or executive efforts fall short.[174]

CONCLUSION

Some of the most critical regulatory decision-making occurs before the agency issues its proposed rule. Yet scholars and the public alike know little about agency behavior during this period of the rulemaking process. This Article has examined the largely voluntary pre-notice disclosures contained in the Unified Agenda and found significant evidence of potentially strategic behavior. Agencies, and executive agencies in particular, notably decrease their reporting rates in periods of divided government — periods in which they likely face a hostile congressional oversight environment. Agencies indeed appear to play "hide and seek" with the most important pre-notice disclosure regime currently available. The results are noteworthy because they suggest that Congress is currently hobbled in its ability to monitor and influence agencies' regulatory development. The findings are also meaningful given that common law amendments to the APA have constrained the ability of agencies to revise proposed rules once they appear in the Federal Register.

This Article has thus identified some ways to help restore the function of public comment as a genuine opportunity for transparent regulatory development. Specifically, Congress could amend the APA to create legally binding pre-notice disclosure requirements. These provisions

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[173] *See* Admin. Conf. of U.S., Promoting Accuracy and Transparency in the Unified Agenda: Administrative Conference Recommendation 2015-1, https://www.acus.gov/sites/default/files/documents/Unified%20Agenda%20Recommendation%20FINAL_0.pdf.

[174] *See* Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. at 1517, 1536 (2015).

could, for example, require agencies to report impending rules to the Unified Agenda or issue advance notice of proposed rulemakings subject to judicial review. Alternatively, statutory reforms could pare back the logical outgrowth requirement or refine it in ways that reduce the incentive for agencies to issue near-final rules as proposed rules. Ultimately, however, we acknowledge that the theoretical normative case for transparency is ultimately a mixed one. There is thus a need for further empirical work regarding the extent to which disclosure affects various regulatory outcomes.

Additional research questions remain. Future work, for example, could extend the insights developed here to agency behavior with respect to final rules: what factors explain an agency's decision to disclose its plans to finalize a rule and how do these dynamics differ from the pre-proposal context given that the proposed rule has already been published? In a similar spirit, what consequences flow from being included or excluded from the Agenda, either at the proposal or final stage? Do excluded rules have different fates in congressional hearings, or in post-finalization litigation? Does the content of the rules themselves depend on whether they are included in the Agenda? Other important inquiries are the extent to which independent agency reporting may differ from that of executive agencies, particularly with respect to its most important regulations. Finally, it may also be interesting to consider how agencies engage substitute mechanisms of disclosure such as their own websites, published requests for information, or announcements at public meetings or conferences.

How agencies disclose their regulatory activities has important implications for a number of administrative law's animating concerns: who gets access to the rulemaking process, how agencies are held accountable, and which institutions are best situated to police regulatory behavior. With a new dataset, this Article has undertaken an empirical examination of how agencies report their rulemaking plans and found evidence suggesting that such behavior may be strategic. The results suggest a form of bureaucratic autonomy meriting closer examination by scholars and political overseers alike.

APPENDICES

Appendix A

This appendix describes our data collection efforts. In essence, the basic exercise involves (a) developing a universe of proposed rules culled from the Federal Register; (b) creating a database of entries in the Unified Agenda; and (c) finding a way to map between the two datasets.

After collecting machine-readable Federal Register entries from a variety of sources, we first searched the action headings to remove "false" proposed rules, that is, entries with variations of "proposed" in the title but that had virtually no regulatory effect. These false positives included, for example, notices of proposed hearings or public meetings, technical corrections of proposed rules, and the like. To corroborate this effort, we also tasked research assistants with reviewing two hundred randomly selected entries by hand. This exercise suggested that the vast majority of the entries in our dataset in fact represented proposed rules. Of the two hundred entries, the research assistants coded only five as being something other than a proposed rule. Based on these numbers, we estimate that 97.5 percent of the entries in our Federal Register dataset capture proposed rules, with a standard error on this estimate of 1.1 percentage points (implying a 95 percent confidence interval of 95.3 percent to 99.6 percent). Without further attempting to find proposed rules erroneously excluded from our dataset, this suggests that our estimates understate the reporting rate in the Agenda, conservatively at the lower bound of the interval, by 4.9 percent (i.e., 1/.953). For example, if our estimated reporting proportion is 0.25, we can conservatively bound the true reporting proportion at 0.26.

For the Unified Agenda database, we rely on XML files provided by the Regulatory Information Service Center (RISC) within the General Services Administration. A single rule might have numerous entries in the Agenda, for example, one for the proposed rule, one for the final rule, and one as a completed action report. For most of identifying information, we retain the last available entry for each rule, where the rule is traced through its Regulation Identification Number (RIN). According to RISC, a "RIN consists of a 4-digit agency code plus a 4-character alphanumeric code, assigned sequentially when a rulemaking is first entered into the database,

which identifies the individual regulation under development."[175] The last available entry in the Unified Agenda is likely to contain the most information about the rule's Federal Register citations, up-to-date abstracts of the rule, and the like.

Creating a mapping between these two datasets — the Federal Register dataset of proposed rules and the set of Unified Agenda entries — posed considerable challenges. The most obvious candidate for a mapping between them is through the RIN, which should in theory be a unique identifier that would allow us to trace the lifecycle of a rulemaking. However, while the UA fairly consistently contains RINs, most entries in the Federal Register do not report them. Instead, Federal Register entries tend to include docket numbers, if they include any identifier. But these docket numbers may change over the life course of a rule. Moreover the UA only lists docket numbers in a highly inconsistent and incomplete fashion. Thus, while we use RINs to match entries where agencies report them, we also needed to develop an alternative mapping strategy.

The most attractive alternative is based on Federal Register citations. Part of the information reported in the UA is a citation to the Federal Register entry for each reported action, though many UA entries were missing these citations. When available, we use the Federal Register citation listed for the NPRM in the UA to match the UA to the population of NPRMs. The combination of RIN-based matching and this approach produce a match for approximately 20,000 UA entries in our population of roughly 27,000 UA entries that list a NPRM. As a result, after this first approach to matching, we have some 7,000 "orphan" UA entries, which we know list a NPRM as an action for the rule, but for which we have no corresponding match in the Federal Register dataset. Generally, this lack of a match seems to result from incomplete data: not infrequently, as mentioned, the UA does not list a Federal Register cite at all. Other times, the Federal Register cite is erroneous (e.g., it lists a "7" instead of a "1" for a page number).

We have examined a number of approaches to dealing with these orphan entries, but they all involve considerable error. As such, the main results we report in the main body exclude the orphan entries. That said, we now describe the most successful approach we have found, and we will make results that incorporate these matches available on request;

[175] http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA_HowTo.jsp

qualitatively, they resemble the results reported above. The most promising approach we found involves relying on the descriptions of the rules contained in the UA and Federal Register. First, we extract the "abstract" (Unified Agenda) or "summary" (Federal Register) information from the two datasets. These short descriptions generally consist of roughly 100-300 words that state the essence of what the agency is accomplishing in the rule. We also considered using the rule titles, but in practice found them often not sufficiently informative.

Second, we tokenize, stem, and vectorize the text in these fields in the standard fashion. Third, we calculate the cosine similarity, a standard metric of the distance between two vectors, between each orphaned UA entry and every entry in the Federal Register dataset that (a) was issued in the same month as the UA action report indicates the NPRM was issued, (b) does not already have a UA match based on citations. We then retain the top 10 matches for further investigation. The cosine similarity between two vectors is given by $\frac{A \cdot B}{\|A\| \|B\|}$, and ranges in this context between 0 and 1, with higher values indicating more similarity between the two vectors. We then match each orphaned UA entry to the to the Federal Register entry for which it has the highest similarity; if two UA entries both match to the same Federal Register entry, the winner is the UA entry with the higher similarity score, and we then rely on the second-highest score for the loser; and so on. We discard any match with a similarity score of less than some threshold. If the threshold is set at 0.1, for example, this approach produces roughly another 5,000 matches, so that after including these additional matches, we find a pairing for roughly 25,000 of the 27,000 entries in the UA that list a NPRM as a relevant action.

Finally, after creating a mapping between the two datasets, we must then determine whether the Agenda entry precedes the appearance of the proposed rule in the Federal Register. We do so by comparing the date of the Unified Agenda in which the rule made its first appearance, to the date the agency published the proposed rule in the Federal Register. More specifically, we identify the first time that the rule appeared in the Agenda using the RIN to trace the rule, and we associate that Agenda publication with the date it appeared in the Federal Register.

Appendix B

Table A1: Key for Agency Codes

Abbreviation	Full Name
Agriculture	Department of Agriculture
BOP	Bureau of Prisons
CFTC	Commodity Futures Trading Commission*
Commerce	Department of Commerce
CPSC	Consumer Product Safety Commission*
Defense	Department of Defense
DHS	Department of Homeland Security
Education	Department of Education
Energy	Department of Energy
EPA	Environmental Protection Agency
FCA	Farm Credit Administration
FCC	Federal Communications Commission*
FDIC	Federal Deposit Insurance Corporation*
FED	Federal Reserve*
FEMA	Federal Emergency Management Agency
FERC	Federal Energy Regulatory Commission*
FHLBB	Federal Home Loan Bank Board
FMC	Federal Maritime Commission*
FTC	Federal Trade Commission*
GAO	Government Accountability Office
GSA	General Services Administration
HHS	Department of Health and Human Services
Int'l Trade Commission	International Trade Commission -
Interior	Department of Interior
Justice	Department of Justice
Labor	Department of Labor

NOAA	National Oceanic and Atmospheric Administration
NRC	Nuclear Regulatory Commission*
NUCA	National Credit Union Administration
OPM	Office of Personnel Management
Other	Residual category
PBGC	Pension Benefit Guaranty Corporation
RRB	Railroad Retirement Board
SBA	Small Business Administration
SEC	Securities and Exchange Commission*
SSA	Social Security Administration
State	Department of state
Transportation	Department of Transportation
Treasury	Department of Treasury
USPS	United States Postal Service
VA	Veterans Administration

* Denotes an “independent” agency, as classified in the Paperwork Reduction Act, 44 U.S.C. § 3502(5).