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## ARTICLES

# STRATEGIC RULEMAKING DISCLOSURE

JENNIFER NOU AND EDWARD H. STIGLITZ\*

### ABSTRACT

*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 reveal that agencies substantially underreport their rulemaking activities—about 70 percent of their proposed rules do not appear on the*

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\* Neubauer Family Assistant Professor, University of Chicago Law School, and Assistant Professor of Law and Jia Jonathan Zhu and Ruyin Ruby Yu Sesquicentennial Fellow, Cornell Law School, respectively. For helpful comments and discussions, many thanks to Nicholas Almendares, Steven Balla, Josh Chafetz, Tom Clark, Curtis Copeland, Cynthia Farina, William Hubbard, Kim Krawiec, Saul Levmore, Michael Livermore, Jonathan Masur, Tom McGarity, Anne Joseph O'Connell, Eric Posner, Jeff Rachlinksy, Connor Raso, Stuart Shapiro, Wendy Wagner, and William West, as well as to workshop participants at Cornell Law School, University of Chicago Law School, the Conference of Empirical Legal Studies, and the NYU Conference on Political Economy and Public Law. Thanks also to Emmanuel Arnaud, Ariel Atlas, Caitlin Lucey, Paul Rogerson, and Michael Zhu for outstanding research assistance.

*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.<sup>1</sup> Agency staff must draft regulatory text along with legal justifications and cost-benefit analyses.<sup>2</sup> To

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) [hereinafter West, *Formal Procedures*] (finding that the average length of the proposal development period for the study's 42 rules was more than 4 years).

2. See CORNELIUS M. KERWIN & SCOTT R. FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND POLICY* 81, 246–47 (4th ed. 2011).

do so, they must gather the requisite data to make informed decisions. For this purpose, agencies often solicit input from potentially affected interest groups and regulated entities.<sup>3</sup> These interactions, however, are often “informal and idiosyncratic.”<sup>4</sup> They can range from meetings with stakeholders to casual phone calls with individual contacts.<sup>5</sup> These communications are rarely public and often occur behind the scenes.<sup>6</sup>

Yet this stage of the rulemaking process—when agencies formulate their policy proposals—is one of the most critical.<sup>7</sup> Determining which regulatory options are on-screen 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 about rules in the pipeline. In particular, these statutes and executive orders instruct rulemaking agencies to publish their regulatory agendas every fall and spring.<sup>8</sup> Generally speaking, these agenda entries should disclose planned regulatory actions for the upcoming year, though agencies can include more long-term efforts as well.<sup>9</sup> The Regulatory Information Service Center (“RISC”) then compiles these individual agendas into what

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3. See *id.* at 75–82; Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 281–85 (2004); 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) [hereinafter West, *Black Box*]; West, *Formal Procedures*, *supra* note 1.

4. West, *Black Box*, *supra* note 3.

5. See *id.* at 591.

6. See Kimberly D. Krawiec, *Don’t “Screw Joe the Plumber”: The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 71 (2013) (“[R]esearch on the pre-proposal 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.”).

7. Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 67 ADMIN. L. REV. (forthcoming 2016) (manuscript at 2) (on file with authors) (observing that the 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].”).

8. See Regulatory Flexibility Act, 5 U.S.C. § 602(a) (2012) (“During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory flexibility agenda . . .”).

9. See OFFICE OF MGMT. & BUDGET, *About the Unified Agenda*, REGINFO, [http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA\\_About.jsp](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA_About.jsp) (last visited Apr. 5, 2016) (“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 twelve 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 twelve months after publication of the agenda.”).

is known as the Unified Agenda of Regulatory and Deregulatory Actions (“Unified Agenda”).<sup>10</sup>

Agencies have recently come under fire, however, for conspicuous omissions and irregularities.<sup>11</sup> Under President George W. Bush, Democratic legislators questioned the Occupational Safety and Health Administration’s failure to include a regulation regarding risk assessments in the Agenda as “highly unusual.”<sup>12</sup> The Government Accountability Office found numerous errors in samples prepared by prominent agencies, including entries that should have appeared in previous editions of the Unified Agenda, entries that reported the wrong date of regulatory action, or entries that otherwise incorrectly reported the status of rules.<sup>13</sup> Similarly, the Congressional Research Service and the Administrative Conference of the United States (“ACUS”), in work spearheaded by Curtis Copeland, revealed that a substantial fraction of “significant” proposed rules was not preceded by an Agenda entry.<sup>14</sup> Copeland’s most recent work also finds that many “significant” final rules were published in the first half of 2014 without notice in the Unified Agenda.<sup>15</sup>

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10. OFFICE OF MGMT. & BUDGET, *Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions*, REGINFO, <http://www.reginfo.gov/public/do/eAgendaMain> (last visited Apr. 10, 2016).

11. See CURTIS W. COPELAND, *THE UNIFIED AGENDA: PROPOSALS FOR REFORM 11–14* (April 13, 2015) [https://www.acus.gov/sites/default/files/documents/Unified%20Agenda%20Draft%20Report%20041315%20FINAL\\_0.pdf](https://www.acus.gov/sites/default/files/documents/Unified%20Agenda%20Draft%20Report%20041315%20FINAL_0.pdf) [hereinafter COPELAND, UNIFIED AGENDA PROPOSALS] (compiling examples of agencies’ omissions and irregularities in their reporting).

12. *Key Lawmakers Question OSHA’s Secrecy in Drafting Risk Assessment Rule*, INSIDEOSHAONLINE (Inside Wash. Publishers, Arlington, Va.), July 21, 2008, at 1.

13. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-01-1024R, *ACCURACY OF INFORMATION IN THE UNIFIED AGENDA* (2001). More specifically, the United States Government Accountability Office study analyzed a sample of agendas prepared by the Departments of Commerce and Health and Human Services, the Federal Communications Commission (“FCC”), and the Securities and Exchange Commission for April and October of 1999 and 2000, as well as for April 2001. *Id.*

14. See CURTIS W. COPELAND, CONG. RESEARCH SERV., R40713, *THE UNIFIED AGENDA: IMPLICATIONS FOR RULEMAKING TRANSPARENCY AND PARTICIPATION 9* (2009) [hereinafter COPELAND, UNIFIED AGENDA TRANSPARENCY] (from a sample of 231 significant proposed rules in 2008, there were no Unified Agenda entries for “about one-quarter of the proposed rules . . . before they were published in the Federal Register”); COPELAND, UNIFIED AGENDA PROPOSALS, *supra* note 11, at 43–44 (from a sample of 88 significant proposed rules from the first half of 2014, 94 percent “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, “[o]nly 7 (32%) of the 22 proposed rules examined had any . . . prior agenda entry . . .” *Id.* at 47.

15. COPELAND, UNIFIED AGENDA PROPOSALS, *supra* note 11, at 50 (finding that from a sample of 55 “significant” final rules from the first half of 2014, 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 seven (35%) had ‘final rule stage’ entries in the preceding Unified Agenda.” *Id.* at 53.

Republican committee members and other observers have also criticized President Obama's administration for not publishing separate spring and fall Unified Agendas in 2012—a reelection year. Instead, the Unified Agenda was released as an unprecedented single edition just days before Christmas.<sup>16</sup> The spring Agenda the following year was not published until the summer.<sup>17</sup> Interest groups and legislators accordingly charged agencies with playing regulatory hide and seek.<sup>18</sup> 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.<sup>19</sup> Another claim was that agencies were acting strategically to keep regulations off the radar for as long as possible.<sup>20</sup> The longer an agency could shield its internal machinations, the less time those opposed to the rule would have to mobilize against it. Indeed, Jacob Gersen and Anne O'Connell posit that agencies often raise the monitoring costs for their opponents in just this manner—a strategy particularly effective for less-monitored agency actions such as rule withdrawals.<sup>21</sup>

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 the agency publishes its notice of proposed rulemaking (“NPRM”).<sup>22</sup> If an agency can

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16. See Wayne Crews & Ryan Young, *Missing: Regulatory Transparency*, DAILY CALLER (Oct. 11, 2012, 3:52 PM), <http://dailycaller.com/2012/10/11/missing-regulatory-transparency/>; Hester Peirce, *More Sensible Regulations Require Predictable Disclosure*, REAL CLEAR MKTS. (Jan. 3, 2013), [http://www.realclearmarkets.com/articles/2013/01/03/more\\_sensible\\_regulations\\_require\\_predictable\\_disclosure\\_100067.html](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.”); *Press Release, Committee Leaders Request Information on Agencies' Missing Regulatory Agendas*, EDUC. & WORKFORCE COMMITTEE (May 24, 2013), <http://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=335456>.

17. *Unified Agenda: 3,503 Federal Regulations, 739 Affecting Small Businesses*, SENSIBLE REGS. (Jul. 7, 2013, 3:52 PM), <http://www.sensibleregulations.org/2013/07/unified-agenda-3503-federal-regulations-739-affecting-small-businesses/>.

18. *Press Release, Committee Leaders Request Information on Agencies' Missing Regulatory Agendas*, *supra* note 16.

19. See, e.g., Clyde Wayne Crews Jr., *Big Sexy Holiday Fun with the Unified Agenda of Federal Regulations*, FORBES (Dec. 2, 2013, 11:04 AM), <http://www.forbes.com/sites/waynecrews/2013/12/02/big-sexy-holiday-fun-with-the-unified-agenda-of-federal-regulations/>.

20. See Press Release, Cong. Docs. & Pubs., Vitter: Administrative Evading Regulation Transparency Obligation (Jan. 23, 2013) (claiming that one possibility for missing Agenda was that the “administration [was] intentionally hiding its regulatory agenda” as part of “a coordinated effort across agencies to keep the American people in the dark”).

21. 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 (2009).

22. See Letter from James W. Conrad, Jr., Chair of Section of Admin. Law & Regulatory Practice, ABA, to Boris Bershteyn, Acting Adm'r, Office of Info. & Regulatory Affairs (Nov. 30,

selectively hide regulations from public view, then interested parties may not be able to bring their informed perspectives to bear. This worry is heightened given that the most significant policy decisions are often made during this pre-proposal stage of regulatory development.<sup>23</sup> Such concerns mirror those in other contexts of potentially strategic disclosure such as in patent filings,<sup>24</sup> graduate school rankings,<sup>25</sup> and corporate communications.<sup>26</sup> The underlying fear in these settings is that legal actors can reveal information in ways that are privately beneficial, but at the expense of social welfare or other values. Indeed, many interest groups and trade associations rely on the Agenda to monitor rules of concern. Curtis Copeland reports, for example, that the Associated General Contractors of America, various financial industry publications, and consulting firms regularly use the Unified Agenda to identify upcoming rules of interest.<sup>27</sup> Other consumers also include members of Congress, the Congressional Research Service, and the Office of the Federal Register.<sup>28</sup>

At the same time, what is currently known about the actual determinants of agency disclosure behavior during this critical pre-proposal phase is still limited.<sup>29</sup> Most efforts to shed light on the relevant dynamics

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2012), [http://www.americanbar.org/content/dam/aba/administrative/administrative\\_law/unified\\_regulatory\\_agendas\\_letter.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/administrative_law/unified_regulatory_agendas_letter.authcheckdam.pdf) (“[T]he 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.”) (quoting ABA Section of Admin. Law & Regulatory Practice, *Twenty-First Century Governance: Improving the Federal Administrative Process*, 52 ADMIN. L. REV. 1099, 1104–05 (2000)); *infra* Part I.

23. See *infra* Part I.

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

25. See, e.g., Michael Luca & Jonathan Smith, *Strategic Disclosure: The Case of Business School Rankings*, 112 J. ECON. BEHAV. & ORG. 17 (2015).

26. See, e.g., Richard Whittington & Basak Yakis-Douglas, *Strategic Disclosure: Strategy as a Form of Reputation Management*, in THE OXFORD HANDBOOK OF CORPORATE REPUTATION 402 (Michael L. Barnett & Timothy G. Pollock eds., 2012); Jeffrey T. Doyle & Matthew J. Magilke, *The Timing of Earnings Announcements: An Examination of the Strategic Disclosure Hypothesis*, 84 ACCT. REV. 157 (2009).

27. COPELAND, UNIFIED AGENDA PROPOSALS, *supra* note 11, at 10.

28. *Id.* at 9–10.

29. See COPELAND, UNIFIED AGENDA TRANSPARENCY, *supra* note 14, 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”) (quoting Letter from Victor S. Rezendez, Managing Dir., Strategic Issues, to Ronald C. Kelly, Exec. Dir., Regulatory Info. Serv. Ctr. (July 27, 2001), in U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-01-1024R, ACCURACY OF INFORMATION IN THE UNIFIED

have, until now, 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 needed not only about why agencies would disclose their agendas, but also how they set these agendas in the first place.<sup>30</sup> Agenda-formation is likely to be influenced by a host of factors, including the respective priorities of appointed agency heads;<sup>31</sup> mandatory statutory requirements;<sup>32</sup> as well as the preferences of political monitors and external interest groups.<sup>33</sup>

More broadly, the bulk of existing empirical research in administrative law focuses on how agencies approach the notice-and-comment process—the period *after* the agency promulgates its proposed rule. Extant work, for example, has examined the extent to which agencies shun rulemaking altogether,<sup>34</sup> strategically channel their efforts into other policymaking forms,<sup>35</sup> use the rulemaking process to engage particular interest groups to their advantage,<sup>36</sup> or manipulate the length of their comment periods.<sup>37</sup>

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AGENDA (2001)); 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, 545 (1994) (noting the need for a more systematic study of question).

30. See Coglianesi & Walters, *supra* note 7 (“[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. RES. & THEORY 495, 495 (2012) (“Scholars have neglected a critical stage of the administrative process”; namely, the agency’s “decision to begin developing a rule. . .”).

31. See Coglianesi & Walters, *supra* note 7, at 9.

32. See West & Raso, *supra* note 30 (finding that the “vast majority” of rules in their sample were required by Congress).

33. See Coglianesi & Walters, *supra* note 7, at 9–17.

34. 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) [hereinafter Yackee & Yackee, *Testing Ossification*] (“[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.”).

35. See generally 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, *Expertise and Agencies Choices over Policymaking Form: The Strategic Substitution Effect* (Oct. 30, 2011) (unpublished manuscript) (on file with authors).

36. See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 264–71 (1987) [hereinafter McNollgast, *Administrative Procedures as Instruments*]; Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984); Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 444 (1989) [hereinafter McNollgast, *Structure and Process*].

37. Rachel Augustine Potter, *Procedural Politicking: Agency Risk Management in the Federal Rulemaking Process* (Feb. 20, 2015) (working paper at 2), <https://www.lafollette.wisc.edu/images/publications/rule-Potter.pdf>

Comparatively lacking are efforts to better understand agency choices before a proposed rule appears to the public for comment.<sup>38</sup>

This Article uses a new dataset obtained from over 30 years of rulemaking across a wide range of agencies to test empirically whether agencies strategically disclose in 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."<sup>39</sup> Since agencies must publish in its pages for their rules to gain legal effect, the Federal Register provides the most comprehensive look possible at agency rulemaking behavior.<sup>40</sup> By contrast, virtually all contemporary empirical work on agency behavior relies on agency self-reporting in the Unified Agenda,<sup>41</sup> which our results suggest is

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38. Note that this gap in the literature is matched by a gap in the law: very little of administrative law addresses the phase of the 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) ("[T]he actual workings of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed.").

39. *About Federal Register*, U.S. GOV'T PUB. OFF., [http://www.gpo.gov/help/about\\_federal\\_register.htm](http://www.gpo.gov/help/about_federal_register.htm) (last visited Mar. 30, 2016).

40. See 44 U.S.C. § 1507 (2012). See also 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 for 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. See *infra* Part I.

41. See O'Connell, *supra* note 40, at 927 n.108 ("Although they provide a critical perspective on the administrative state, the Unified Agenda are not perfect; they need confirmatory research."). For examples of studies relying on the Unified Agenda database, see 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, 443 (2013); 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, 70 (2005) ("[U]se of the Unified Agenda ensures that the set of rulemakings under study represents as complete a snapshot as possible of [Department of Transportation rulemaking activities] . . ."); 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); Steven J. Balla, *Political Control, Bureaucratic Discretion, and Public Commenting on Agency Regulations*, 93 PUB. ADMIN. 524, 536 n.12 (2014); Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENVTL. & ADMIN. L. 285, 319 (2013); Gersen & O'Connell, *supra* note 21, at 1177; Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENVTL. L. 767, 780–81 (2008); Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the Midnight Regulations Passed by the Two Previous Outgoing Administrations*, 40



substantially underinclusive. One hope is that this dataset improves the current state of the art.

Our empirical results reveal three main findings. First, agencies only report, on average, about 28 percent of their proposed rules. In other words, roughly 72 percent of proposed rules are *not* contained in the Unified Agenda. Second, 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, there is little evidence of strategic disclosure with respect to 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. The existing mechanism becomes even less reliable when it arguably matters the most: when Congress and the president are from different political parties. For the same reason, there are also no dependable means for interest groups to alert resource-constrained legislative committees before the rule is proposed.<sup>42</sup> The phenomenon also raises the possibility that agencies could skew which interest groups will mobilize in reaction to their proposed rules. Agencies might do this by selectively disclosing those

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WAKE FOREST L. REV. 1441, 1454–55 (2005); 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, 1217–19 (2006); Stuart Shapiro, *Presidents and Process: A Comparison of the Regulatory Process Under the Clinton and Bush (43) Administrations*, 23 J.L. & POL. 393, 400–01 (2007); Edward H. Stiglitz, *Unaccountable Midnight Rulemaking? A Normatively Informative Assessment*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 137, 156 (2014); Wagner et al., *supra* note 3, at 123–36; Jason Webb Yackee & Susan Webb Yackee, *Administrative Procedures and Bureaucratic Performance: Is Federal Rule-making "Ossified"?*, 20 J. PUB. ADMIN. RES. & THEORY 261, 267–68 (2006) [hereinafter Yackee & Yackee, *Ossified*]; 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, 379 (2012); Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 1007–08 (2011).

42. See McCubbins & Schwartz, *supra* note 36, at 175–76.

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 that lack access to agency decisionmaking through informal means can meaningfully participate in the regulatory process.<sup>43</sup>

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 Administrative Procedure Act (“APA”) to require that agencies issue judicially enforceable advance notices of proposed rulemaking with a good cause exception, or narrow the logical outgrowth doctrine.<sup>44</sup> 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-known theory regarding the function of administrative procedures—ensuring 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.

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43. See Krawiec, *supra* note 6, at 77–78; Wagner et al., *supra* note 3, at 106–09.

44. See *infra* notes 59–62 and accompanying text.

Under a familiar view developed by a team of positive political theorists, collectively known as “McNollgast,”<sup>45</sup> administrative procedures represent one solution to this information problem. Paradigmatically, the APA’s notice-and-comment process forces agencies to reveal their contemplated regulations before imposing final versions of them. As its name suggests, notice-and-comment rulemaking requires agencies to give notice of a proposed rule in the Federal Register and then provide parties with an opportunity to submit comments. The agency must base the rulemaking upon consideration of those comments and include a statement of basis and purpose in the final rule adopted. Final rules adopted according to this procedure operate with the force of law.<sup>46</sup>

Given this comment period, McNollgast argues, Congress can intervene in the regulatory process in a timely manner, whether through hearings, budgetary threats, or other forms of influence.<sup>47</sup> Note that Congress itself does not have to actively monitor the agencies. Instead, it can shift these monitoring costs onto motivated third parties.<sup>48</sup> These regulated entities and interest groups, in turn, can use public notices of proposed rulemakings to alert sympathetic legislative committee members of problematic rules.<sup>49</sup> They may do so through various avenues, such as constituent letters, protests, or lobbying.<sup>50</sup>

One wrinkle to this story, however, is that, in practice, many substantive policy decisions happen before the agency publishes the notice of proposed rulemaking.<sup>51</sup> Although this account is contested,<sup>52</sup> interest

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45. See McNollgast, *Administrative Procedures as Instruments*, *supra* note 36, at 244; McNollgast, *Structure and Process*, *supra* note 36, at 442.

46. 5 U.S.C. §§ 553(b)(c) (2000).

47. See Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84–90 (2006).

48. See Gersen & O’Connell, *supra* note 21, at 1170 (“The average agency is monitored by a diverse mix of public actors and private interest groups.”).

49. See *id.* at 1172.

50. McNollgast, *Administrative Procedures as Instruments*, *supra* note 36, at 254.

51. See *infra* Part I.B.

52. See, e.g., Cass Sunstein, Keynote Address at the Brookings Institute: The Future of E-rulemaking: Promoting Public Participation and Efficiency (Nov. 30, 2010) (“Proposed rules are a way of obtaining comments on rules and the comments are taken exceedingly seriously.”). Part of the challenge in assessing these divergent views is that it is not clear that 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 that 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. Conversely, observing that a rule is essentially a “done deal” prior to notice does not undermine the view that agencies take the comment process seriously.

groups report regarding proposed rules as a “done deal,” noting that there is less “wobble room” for revisions once the NPRM appears.<sup>53</sup> Similarly, Don Elliott, the former general counsel of the Environmental Protection Agency (“EPA”), 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.”<sup>54</sup> 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.<sup>55</sup> The available empirical evidence on the 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.<sup>56</sup> 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.<sup>57</sup>

The magnitude of the changes wrought by the notice-and-comment process is still an open question, but important for our purposes are the incentives agencies currently have to release close-to-final proposed rules.<sup>58</sup> Most relevant is the judicial determination of what constitutes adequate notice under the APA. Specifically, courts require final rules to be a “logical outgrowth” of the notice of proposed rulemaking.<sup>59</sup> In essence,

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53. Sara Rinfret, *Changing the Rules: Interest Groups and Federal Environmental Rulemaking* 166 (Aug. 13, 2009) (unpublished Ph.D. dissertation, Northern Arizona University) (on file with authors). See also KERWIN, *supra* note 2, at 195–96 (reporting results from a survey of interest group participants, showing that they perceive pre-notice contacts to be most effective in influencing rule development).

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

55. See Simon F. Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 AM. POL. SCI. REV. 507, 518 (2015) (finding evidence that lobbying by business groups, but not public interest groups, results in changes during OIRA regulatory review).

56. See, e.g., Steven J. Balla, *Administrative Procedures and the Political Control of the Bureaucracy*, 92 AMER. POL. SCI. REV. 663, 663–673 (1998); Susan Webb Yackee, *Sweet-Talking the Fourth Branch: Assessing the Influence of Interest Group Comments on Federal Agency Rulemaking*, 16 J. PUB. ADMIN. RES. & THEORY 103, 103–124 (2006).

57. See, e.g., Marissa Martino Golden, *Interest Groups in the Rulemaking Process: Who Participates? Whose Voices Get Heard?* 8 J. PUB. ADMIN. RES. & THEORY 245, 245–70 (1998); West, *Formal Procedures*, *supra* note 1, at 68.

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

59. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983); *Sierra Club v. Costle*, 657 F.2d 298, 352 (D.C. Cir. 1981).

this requirement mandates that an agency's final rule must have been reasonably foreseeable by interested parties.<sup>60</sup> 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."<sup>61</sup> 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.<sup>62</sup>

At the same time, courts have required agencies to disclose in their notices the key data and studies they relied upon to formulate their proposals.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> Resulting from these dynamics is an increased pressure on agencies to shift their actual information gathering to before the notice-and-comment period to reduce the litigation risks arising from the rulemaking record.<sup>66</sup> Some empirical evidence supports this view. Beyond the notices of proposed rules analyzed below,<sup>67</sup> we also collected the final rules promulgated by agencies. As a

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60. See, e.g., *Shell Oil Co. v. EPA*, 950 F.2d 741, 759 (D.C. Cir. 1991); *Small Refiner*, 705 F.2d at 547.

61. *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (alteration in original) (quoting *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259–1260 (D.C. Cir. 2005)).

62. See, e.g., *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014); *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 435 (D.C. Cir. 2012); *CSX*, 584 F.3d at 1083; *Env'tl. Integrity Project v. EPA*, 425 F.3d 992, 993 (D.C. Cir. 2005).

63. See, e.g., *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (holding that an 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 a record to facilitate interest group involvement and eventual review).

64. See Elliott, *supra* note 54 ("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.").

65. See Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 899 (2007); Wagner et al., *supra* note 3, at 110 ("[I]f a rule is to survive judicial review, it must essentially be in final form at the proposed rule stage.").

66. Wagner et al., *supra* note 3, at 110–11.

67. See Appendix B for details.

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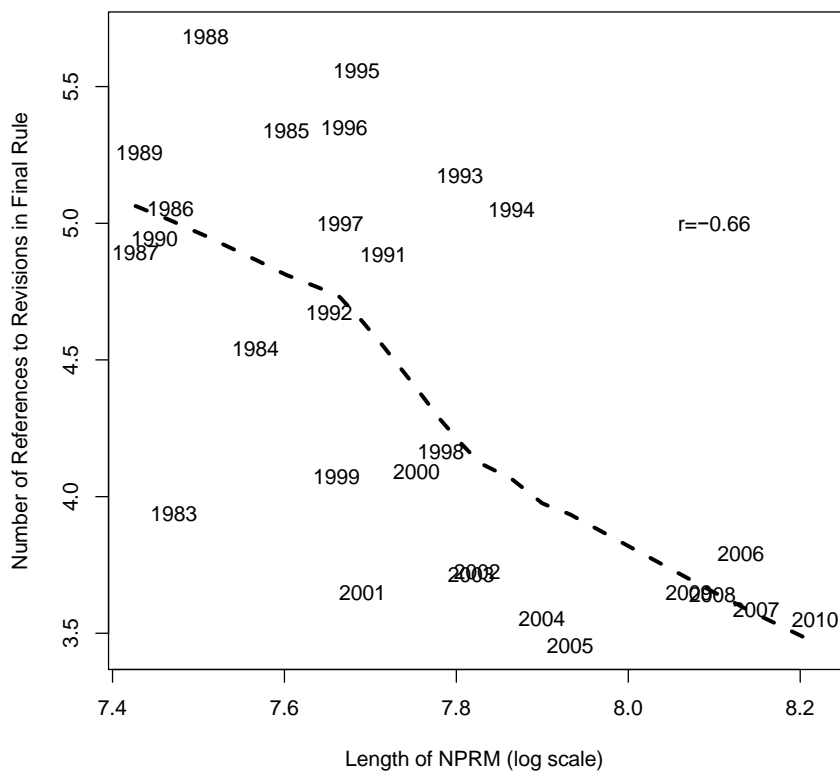
result, we can then compare features of proposed rules over time with those of final rules over time. Figure 1 shows those characteristics relevant to changing proposed and final rule drafting practices. On the x-axis runs the average number of words of NPRMs in a given year (on the log scale); on the y-axis runs the average number of references to revisions in the final rule for that year.<sup>68</sup> What is remarkable about this figure is that there is a strong negative relationship between the length of the proposed rule and the number of revisions noted in the final rule.<sup>69</sup> One possible implication is that more substantial rules are revisited less often after the comment period, thus heightening the importance of the regulatory development period. Moreover, the general trend over time appears to be for agencies to issue longer proposed rules and to revise final rules less as well. Though this relationship might owe to other aspects of the legal, regulatory, or political environment that have changed between 1983 and 2010, the figure is at least suggestive that the dynamics scholars associate with the logical outgrowth doctrine—above all, creating the incentive for agencies to issue near-final proposals—are, in fact, a reality.

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68. In particular, we count the number of times that the final rule mentions that it was “revised” or “amended.” Obviously, agencies might express revisions in other language, and we might likewise have some false positive counts, but we feel that to a first approximation, this count is informative of the quantity of revisions between proposed and final rule.

69. The correlation between the 2 variables at the year level is -0.66, statistically significant at any conventional level.

FIGURE 1. Changing Rulemaking Practices



### B. THE UNIFIED AGENDA

Against this backdrop, political principals have understandably sought alternative means to become informed about what agencies are contemplating before they release their proposed rules. Indeed, one 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.

Political principals benefit from prenotice information in several ways. First, such information facilitates relatively low-cost interventions into the rulemaking process. During the early stages of regulatory development, overseers can 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, agencies may be able to design the rule to upset legislative coalitions that might otherwise oppose the regulation.<sup>70</sup> Hence, early warning systems are critical for allowing intervention before the agency has developed a rule that can pick off members of such alliances.<sup>71</sup>

President Jimmy Carter first ordered the publication of a semiannual regulatory agenda in 1978 to give the public “adequate notice” of “significant” regulations that were “under development or review” at executive agencies.<sup>72</sup> What counted as “significant” under the executive order was left to agency discretion but included the consequences and burdens of a rule on individuals, businesses, and state and local governments.<sup>73</sup> 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.<sup>74</sup>

Two years later, Congress passed the Regulatory Flexibility Act (“RFA”).<sup>75</sup> 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.<sup>76</sup> The statute also extended the agenda requirement to independent regulatory agencies,<sup>77</sup> mandating that all agencies publish an annual regulatory agenda in October and April for rules “likely to have a significant economic impact on a

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70. Gersen & O’Connell, *supra* note 21, at 1163 (Strategic agency behavior “can allow the monitored to choose the monitors”); McNollgast, *Structure and Process*, *supra* note 36, at 434–44.

71. See McNollgast, *Structure and Process*, *supra* note 36, at 434–44.

72. Exec. Order No. 12,044, 43 Fed. Reg. 12,661, 12,661 (Mar. 24, 1978).

73. *Id.*

74. *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.”).

75. Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C §§ 601–612 (2012)).

76. S. REP. NO. 96-878, at 1–2 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 2788, 2788–89.

77. *Id.* at 2.



substantial number of small entities.”<sup>78</sup> The agendas had to contain an “approximate schedule” for the agency action.<sup>79</sup> 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.<sup>80</sup> 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 salient to small businesses.

Shortly after the RFA’s enactment, President Ronald Reagan revoked Carter’s executive order and issued his own.<sup>81</sup> Among other things, Reagan’s order expanded the RFA by requiring both independent and executive agencies to submit agenda items for *all* proposed regulations that agencies expected to issue, not just those expected to impact small businesses.<sup>82</sup> These requirements were later reinforced by President William J. Clinton’s own executive order, which similarly required all agencies to “prepare an agenda of all regulations under development or review.”<sup>83</sup> The order further charged the Office of Information and Regulatory Affairs (“OIRA”) with specifying the “time and manner” in which the Unified Agenda was compiled.<sup>84</sup> In recent years, OIRA has issued calls for Agenda entries anywhere from 3 to 6 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.<sup>85</sup>

These Agenda entries usually include the agency’s name, a short description of the rule along with its title, as well as the agency’s priority designations—roughly, whether the agency believes the action to be nonsignificant, significant, or economically significant.<sup>86</sup> The entries also

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78. 5 U.S.C. § 602(a)(1).

79. *Id.* § 602(c)(2).

80. *Id.* § 602(b)–(c).

81. Exec. Order No. 12,291, 3 C.F.R. § 127 (1982), *reprinted in* 5 U.S.C. § 601 (1982), *revoked by* Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2012).

82. *See* 5 U.S.C. § 5(a).

83. Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2000). 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.*

84. *Id.*

85. COPELAND, UNIFIED AGENDA PROPOSALS, *supra* note 11, at 23–24.

86. More specifically, agencies can prioritize the rule as: 1) “Economically Significant”; 2) “Other Significant”: “This 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,

provide the legal basis for the rule, an agency contact, an estimated schedule for the rulemaking, and whether the rule is expected to affect various interests such as states, small businesses, or other countries. Finally, upon its first appearance in the Unified Agenda, each rule is also assigned a Regulation Identifier Number (“RIN”), which is designed to allow the public to track the entry through the various stages of the rulemaking process.<sup>87</sup> A sample Unified Agenda entry can be found in Appendix A. 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.<sup>88</sup> For the most part, OIRA’s review is highly deferential and generally allows agencies to determine the final content.<sup>89</sup>

Notably, neither the congressional enactments nor executive orders create legally enforceable rights. The original RFA explicitly precluded judicial review,<sup>90</sup> while later amendments subject some sections to judicial review, but still exclude the provisions pertaining to regulatory agenda requirements.<sup>91</sup> The current statutory regime is clear that agencies are not

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Nonsignificant”: “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), <https://www.gpo.gov/fdsys/pkg/FR-2014-12-22/pdf/2014-28927.pdf>.

87. OFFICE OF MGMT. & BUDGET, *How to Use the Unified Agenda*, REGINFO, [http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA\\_HowTo.jsp](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA_HowTo.jsp) (last visited Mar. 31, 2016).

88. See COPELAND, UNIFIED AGENDA PROPOSALS, *supra* note 11, at 25–26.

89. See *id.* at 25. See also Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1179 (2012) (“This 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. It 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 the regulatory agenda “process itself has become more of a paper exercise than an analytical tool”).

90. Regulatory Flexibility Act, Pub. L. No. 96-354, § 3(a), 94 Stat. 1164, 1169–70 (1980) (codified as amended at 5 U.S.C. § 611 (2012)) (“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 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).

91. More specifically, the 1996 Amendments made certain provisions of the RFA subject to judicial review, but excluded the relevant regulatory agenda provisions at 5 U.S.C. § 602 (2012). See Small Business Regulatory Enforcement Fairness Act, Pub. L. 104-121, § 242, 110 Stat. 865 (1996)

precluded from “acting on any matter not included” in their agenda, nor are agencies required to consider any listed matters.<sup>92</sup> The Reagan and Clinton executive orders similarly explicitly preclude the creation of any legally enforceable rights.<sup>93</sup> Courts will thus not set aside an agency rule for failing to appear in the Unified Agenda.<sup>94</sup> 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 include not only legislative hearings, but also potentially novel and onerous judicially enforceable procedures, along the lines Congress routinely threatens to impose on agencies.<sup>95</sup> So the agency must pick and choose which rules to report and which not to report. An agency will therefore use its “budget” for noncompliance on the rules most likely to benefit the agency. Indeed, sometimes compliance itself benefits agencies, as they use disclosure 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 (“DOJ”) announced in the Unified

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(codified as amended at 5 U.S.C. § 611 (2012)).

92. 5 U.S.C. § 602(d) (2012).

93. Exec. Order No. 12,291, 3 C.F.R. §§ 133–134 (1982), *reprinted in* 5 U.S.C. § 601 (1982), *revoked by* Exec. Order No. 12,866, 3 C.F.R. § 649 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2012).

94. One possible path might be to appeal to common law reliance interests. *See* Groseclose, *supra* note 29, at 527. To our knowledge, however, there are no cases suggesting such a remedy, and we see dim prospects for the success of any such challenge. *Id.*

95. *See infra* Part III.

Agenda its plans to issue a rule that would bar more groups from owning guns—a move celebrated by gun control advocates.<sup>96</sup>

But often disclosure is costly to the agency. It can invite greater opposition, as evidenced by the National Rifle Association's heated reaction to the DOJ disclosure.<sup>97</sup> 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.<sup>98</sup> More recent work also identifies regulators' incentives to signal valuable human capital or else expand the market for their postgovernment services.<sup>99</sup> 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 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.<sup>100</sup> Alternatively, and perhaps more

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96. See, e.g., Dave Boyer, *Obama Intent to Toughen Gun Laws, With or Without Congress' Help*, WASH. TIMES (June 21, 2015), <http://www.washingtontimes.com/news/2015/jun/21/after-south-carolina-obama-intent-on-gun-restricti/> (citing the DOJ's "disclosure . . . in the administration's Unified Agenda, a semiannual publication of proposed rules that the government intends to implement"); 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>.

97. *Obama's "Unified Agenda" of Regulatory Objectives Causes Fear, Confusion*, NAT'L RIFLE ASS'N INS. FOR LEGIS. ACTION (June 5, 2015), <https://www.nraila.org/articles/20150605/obamas-unified-agenda-of-regulatory-objectives-causes-fear-confusion>.

98. See Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. (SPECIAL ISSUE) 167, 169 (1990) (discussing the "special interest . . . theory of regulatory behavior, which describes actors in the regulatory process as having narrow, self-interested goals—principally job retention or the pursuit of reelection, self-gratification from the exercise of power, or perhaps postofficeholding personal wealth").

99. For a summary of this literature, see Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265, 1267–69 (2015).

100. See 5 U.S.C. §§ 801–808 (2012). 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. § 801(a)(1)(A)–(B). Within a 60 day review period, Congress can use expedited procedures to pass a joint resolution of disapproval overturning the rule. § 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., RL30116,

likely, Congress could intervene through a variety of less costly tools: for example, refusing to grant an agency any funds to enforce the rule,<sup>101</sup> or subjecting the agency head to bruising oversight hearings.<sup>102</sup> 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 OIRA.<sup>103</sup> 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.”<sup>104</sup> During this review, OIRA could negotiate revisions to the rule, send the regulation back to the agency through a return letter or else encourage a withdrawal.<sup>105</sup> 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.<sup>106</sup> The effort required to engage with legislative or White House staff is expensive as well. Because administrative agencies 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 of whether or not to disclose a rule in its regulatory agenda. Of course, all agencies eventually have to disclose their proposed rules upon publication in the Federal Register. At that point, they will also be subject to many of the aforementioned dynamics, including fear of reprisal from interest groups

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CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE 6 (2008). At the same time, however, Congress has passed joint resolutions of disapproval during President Obama’s second term, setting up visible vetoes by the president. See, e.g., Gregory Korte, *Obama Vetoes Attempt to Kill Clean Water Rule*, USA TODAY (Jan. 19, 2015, 8:48 PM), <http://usat.ly/1V73Q55>.

101. See Beermann, *supra* note 47, at 84–90.

102. See *id.* at 124–27.

103. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–78 (2001).

104. Exec. Order No. 12,866, 3 C.F.R. §§ 641–642 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2012). 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, 1850–54 (2012).

105. Sunstein, *supra* note 104, at 1846–47.

106. See West, *Formal Procedures*, *supra* note 1, at 416.

and political overseers. What is distinctive about early disclosure in the Agenda, however, is the greater ability of agencies to bargain over and still revise their regulatory policy choices at this stage. By contrast, an agency's later disclosure as a published proposed rule subjects the agency to the constraints of the logical outgrowth doctrine.<sup>107</sup> As a result—unless the agency withdraws the rule entirely and further delays the rulemaking—the agency can claim that its hands are now tied with respect to the central policy choices. Agencies thus have greater incentive to shield their proposals at the agenda stage when their policy choices are more vulnerable. Relatedly, agencies also have an interest in avoiding early disclosure since presenting near-final proposals to the public for the first time allows agencies to divide and otherwise upend coalitions that would form in opposition.<sup>108</sup> Broad disclosure arms opponents with more time to coordinate their attack. Selective early disclosure, by contrast, allows agencies to give more notice to expected supporters of the rule.

Our initial objective below, therefore, 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.<sup>109</sup> Disclosure of these rules would be valuable to explore, as we hope to in future work, but for now, empirical evidence seems to suggest that most of such actions "involve administrative or technical issues with limited applicability."<sup>110</sup>

If it turns out that the magnitude of pre-proposal Unified Agenda omissions is substantial, then a separate question arises about what explains this observation. One possibility 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

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107. See *supra* notes 59–62 and accompanying text.

108. See McNollgast, *Structure and Process*, *supra* note 36, at 434–44.

109. 5 U.S.C. § 553(a), (b)(3)(B) (2012).

110. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-98-126, FEDERAL RULEMAKING: AGENCIES OFTEN PUBLISHED FINAL ACTIONS WITHOUT PROPOSED RULES 2 (1998). 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.

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.

#### B. TESTING DISCLOSURE

To examine this hypothesis, this study relies on a novel dataset containing over 30 years of proposed rules (1983–2014) published in the Federal Register.<sup>111</sup> Agencies are legally required to publish their proposed rules in the Federal Register, unless providing actual or personal service on potentially affected parties.<sup>112</sup> 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, RIN, date of publication, the name of the agency responsible for the regulation,<sup>113</sup> 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.<sup>114</sup> However, most users have acknowledged—and various studies (including this one) confirm—that these data are incomplete.<sup>115</sup> Because Agenda

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

112. 5 U.S.C. § 553(b) (“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.”).

113. Extracting the names is a more challenging task than it sounds as agencies do not always report their names in a standard fashion. For example, the National Park Service sometimes lists itself as the agency, and other times also reports its parent agency, the Department of Interior. We isolate the text where agencies typically report their name and contact information, and from this text attempt to identify the agency name. However, these areas of text do not always allow us to recover the name of the responsible agency. If we cannot recover the name of the agency, or if the agency is a minor issuer of rules, we designate the agency as “other”. 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.

114. See *supra* sources cited note 41.

115. See *supra* text accompanying notes 11–15. See also Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 L. CONTEMP. PROBS. 185, 198 n.41 (Spring 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, *supra* note 40, at 927 n.108 (“[The] Unified Agenda data are not perfect;

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,<sup>116</sup> but also presents new research opportunities. The fact that agencies likely self-report imperfectly to the Unified Agenda allows an examination of the conditions 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.<sup>117</sup> 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 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 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 5 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 in the Unified Agenda—that is, how often do agencies inform the public of notices of proposed rulemaking that they later issue?

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they need confirmatory research.”).

116. 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.

117. As explained 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.



To investigate this question, we obtained machine-readable versions of the Unified Agenda from the General Services Administration.<sup>118</sup> We then determined which of the entries in the Agenda related to rulemaking efforts that both produced a proposed rule published in the Federal Register and appeared in the Agenda beforehand.<sup>119</sup> To do so, we used a variety of automated text-based efforts to associate and link the proposed rules. These efforts were then checked against a random sample of 200 entries coded by research assistants. This task required 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 B describes these approaches in further detail. These efforts allowed 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.<sup>120</sup> By comparison, as noted above, there were about 65,833

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118. These data consist of potentially several entries for a single rule, as identified by the RIN. For example, the same rule might have a Unified Agenda entry at the time it is proposed, the time it is finalized, and then again another entry as a “completed action” following finalization. See Appendix for details on data processing.

119. 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.

120. 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 a change in priorities or because they never intended to propose them in the first place; 2) alternatively, our mapping method, detailed in Appendix B, may be too inaccurate to match the agenda entries to actual proposed rules published in the Federal 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 nonorphan 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

proposed rules published in the Federal Register. Simply placing these figures side-by-side reveals that agencies dramatically underreport their activity in the Agenda. In particular, agencies appear to report about 28 percent of their proposed rules to the Unified Agenda before they appear in the Federal Register.<sup>121</sup> 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 may be disconcerting, one might nevertheless wonder about the nature of the undisclosed proposed rules. If the vast majority 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 minor including, for example, Airworthiness Directives from the Federal Aviation Administration (“FAA”).<sup>122</sup> Airworthiness Directives are legally enforceable regulations issued by the FAA to correct an unsafe condition in a product and thus have limited scope.<sup>123</sup> Based on the titles of the proposed rules, roughly 9,000 of the 65,000 proposed rules in the dataset—some 14 percent of the total—are Airworthiness Directives.<sup>124</sup>

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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 plus 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. *See infra* Appendix B.

121. 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 overstate the degree of underreporting 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 (providing further details). In addition, if agencies issue multiple NPRMs, this may lead to an overstated rate of underreporting since only one NPRM is matched to each Unified Agenda 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 prenotice NPRMs listed in the Agenda, implying a reporting rate of roughly 30 percent. The true reporting rate is likely somewhere between these two figures. *See id.*

122. *See Airworthiness Directives (ADs) – Current Only*, FED. AVIATION ADMIN. (June 22, 2015), [https://www.faa.gov/regulations\\_policies/airworthiness\\_directives/](https://www.faa.gov/regulations_policies/airworthiness_directives/).

123. *Id.*

124. This assessment is based on calculations performed on the dataset developed in this paper.

On the other hand, if some of the missing rules are politically salient or otherwise have substantial effect, then strategic nondisclosure is more troubling. It is clear that at least some of the nondisclosed rules fall into these categories of concern. Consider, for example, a proposed rule on country-of-origin labeling for meat cuts, estimated to impact over 7,000 firms and numerous consumers.<sup>125</sup> Country-of-origin labeling has been a contentious issue for years, with supporters arguing that it enables consumer choice, and detractors claiming that the labels are costly and misleading barriers to trade.<sup>126</sup> 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.<sup>127</sup> To the contrary, the agency issued the proposed rule shortly after an adverse World Trade Organization ruling,<sup>128</sup> and the new regulation 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.<sup>129</sup> It also revised coverage definitions and prohibited the commingling of certain commodities of different origins.<sup>130</sup> Importantly, when USDA issued the final rule, the agency did not materially alter any of these provisions,<sup>131</sup> thereby illustrating the importance of the policy choices made at the proposed rule stage.

At the same time, many other examples of nondisclosed food labeling

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125. 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, 15645–52 (proposed Mar. 12, 2013) (to be codified at 7 C.F.R. pts. 60, 65).

126. See Dan Mitchell, *Study: Country-of-Origin Labels Don't Hurt Beef Trade*, FORTUNE (Feb. 2, 2015), <http://fortune.com/2015/02/02/country-of-origin-labels-beef/>.

127. See *Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Macadamia Nuts, Ginseng, etc.*, REGINFO, <http://www.reginfo.gov/public/do/eAgendaSimpleSearch> (enter RIN “0581-AD29” and hit “Search”) (last visited Apr. 14, 2016). To see this, note that the Spring 2013 Unified Agenda was published on July 23, 2013, well after the March 12, 2013 publication date of the NPRM, and indeed after the May 24, 2013 publication date of the final rule. See Spring 2013 Unified Agenda, 78 Fed. Reg. 44200 (2013).

128. *Id.*

129. 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, 15646 (2013).

130. *Id.* at 15645–46.

131. Compare 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) (to be codified 7 C.F.R. pts. 60, 65), with 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, 15645–52.

regulations abound—pertaining to claims, for instance, regarding coronary heart disease<sup>132</sup> and “healthy” sodium level assertions.<sup>133</sup> 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,<sup>134</sup> Affordable Care Act regulations relating to small businesses and health care exchanges,<sup>135</sup> and even the EPA’s high-profile greenhouse gas endangerment finding.<sup>136</sup> None of these proposed rules were disclosed in the Unified Agenda before their promulgation.<sup>137</sup>

A more systematic approach to understanding the character of rules missing from the Agenda involves taking a random sample from the larger dataset and manually inspecting this random sample. Standard sampling theory suggests that this exercise is informative.<sup>138</sup> Accordingly, we randomly selected 200 rules from our dataset in the post-1994 part of the series, after Executive Order 12,866 was issued; the focus is therefore on the period for which the “significance” determination exists.<sup>139</sup> 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.

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132. Food Labeling: Health Claims; Soluble Fiber from Certain Foods and Risk of Coronary Heart Disease, 72 Fed. Reg. 5367 (proposed Feb. 6, 2007) (to be codified at 21 C.F.R. pt. 101).

133. Food Labeling; Nutrient Content Claims, Definition of Sodium Levels for the Term “Healthy,” 70 Fed. Reg. 56828 (proposed Sept. 29, 2005) (to be codified at 21 C.F.R. pt. 101).

134. See, e.g., Designation of Critical Habitat for the Beringia Distinct Population Segment of the Bearded Seal (RIN: 0648-BC55); Designation of Critical Habitat for the Arctic Ringed Seal (RIN: 0648-BC56); Listing *Gouania hillebrandii* as an Endangered Plant and Determining Its Critical Habitat (RIN: 1018-YB20); Endangered and Threatened Wildlife and Plants, Proposed Endangered Status and Critical Habitat for the Amargosa Vole (RIN: 1018-YB32); Determine *Eriogonum pelinophilum* to Be an Endangered Species and to Designate Its Critical Habitat (RIN: 1018-YB74). To access these proposed rules, search the corresponding RIN number on *Search of Agenda/Regulatory Plan*, REGINFO, <http://www.reginfo.gov/public/do/eAgendaSimpleSearch>.

135. See, e.g., Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program (SHOP) (RIN: 0938-AR76); Patient Protection and Affordable Care Act; Establishment of the Multi-State Plan Program for the Affordable Insurance Exchanges (RIN: 3206-AN12); Annual Eligibility Determinations for Exchange Participation and Insurance Affordability Programs; Health Insurance Issuer Standards Under the Affordable Care Act (RIN: 0938-AS32). To access these proposed rules, search the corresponding RIN number on *Search of Agenda/Regulatory Plan*, REGINFO, <http://www.reginfo.gov/public/do/eAgendaSimpleSearch>.

136. See Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Apr. 24, 2009).

137. That is, our search of the relevant databases did not reveal that they were disclosed before publication in the Federal Register.

138. Just as taking a poll of likely voters helps gauge 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.

139. President Clinton issued Executive Order 12,866 on September 30, 1993. See Exec. Order No. 12,866, 3 C.F.R. § 638 (1994), reprinted as amended in 5 U.S.C. § 601 (2012).

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 are rulemakings, but they are of limited applicability. Corroborating this assessment, one informative, though imperfect, metric of regulatory scope is that the average length of proposed rules from these 3 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 3 agencies, only about 10 out of 113, appear in the Agenda.

Many OIRA-reviewed “significant” rules also do not make it into the Unified Agenda. 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.”<sup>140</sup> This latter subset of rules is commonly characterized as “economically significant.”<sup>141</sup> Economically significant and significant rules are essentially 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, 13 were significant. Less than half—6 of 13—appeared in the Unified Agenda prior to publication.<sup>142</sup> That said, note that the standard error on this estimated reporting rate is large for this subset of significant rules: roughly 14 percentage points. Nevertheless, the broader point here is that a nontrivial proportion of significant proposed rules likely do not appear in the Unified Agenda prior to publication in the Federal Register.

A broader examination of significant rules—now using a more comprehensive, but unfortunately still-imperfect, dataset of OIRA-revised significant rules—further confirms that likely-noteworthy regulations are not reported.<sup>143</sup> Figure 2 reports the proportion of proposed economically

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140. *Id.* See also 3 C.F.R. §§ 641–642. For a discussion of how OIRA treats this determination, see Sunstein, *supra* note 104.

141. See Exec. Order No. 12,866, 3 C.F.R. §§ 645–646 (1994). 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).” OFFICE OF MGMT. & BUDGET, *Circular A-4: To The Heads of Executive Agencies and Establishments, Regulatory Analysis*, WHITE HOUSE (Sept. 17, 2003), [http://www.whitehouse.gov/omb/circulars\\_a004\\_a-4](http://www.whitehouse.gov/omb/circulars_a004_a-4).

142. 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.

143. In order to identify the complete set of significant rules, we initially attempted to isolate and analyze text around mentions of “12,866” in the proposed rules’ preambles, but were only able to

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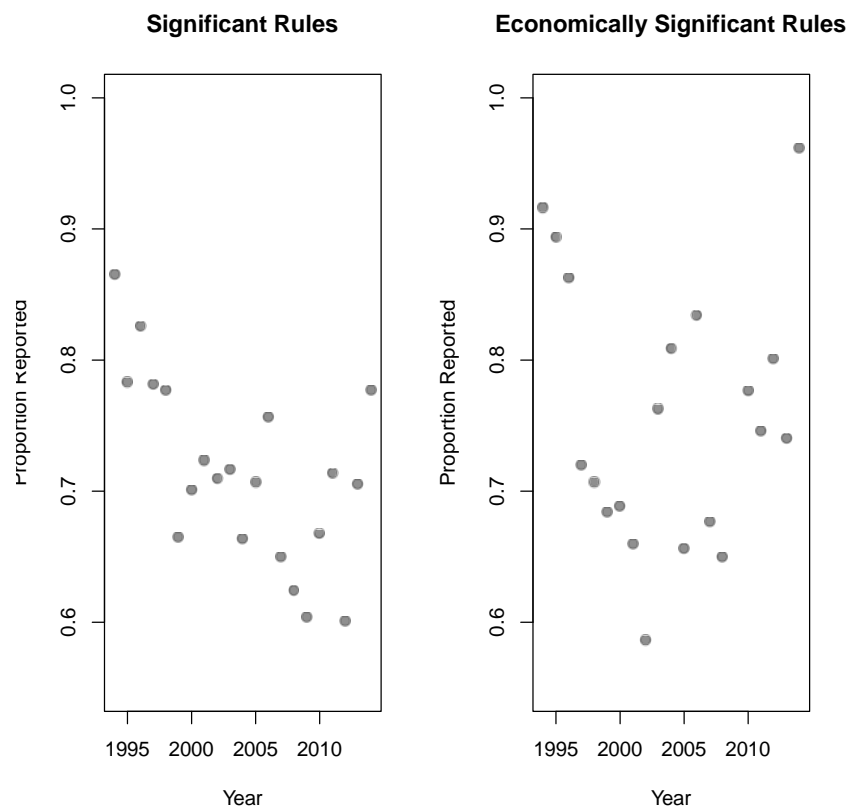
significant and significant rules that appeared in the Unified Agenda before publication. The data shown in the figure's left panel reveal that, on average, only about 70 percent of significant proposed rules appear in the Unified Agenda at the proposed rule stage or earlier. In other words, about 30 percent of the significant rules proposed in our time period were 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 Unified Agenda.<sup>144</sup> Focusing on the economically significant rules—that is, those rules with estimated annual economic impact of \$100 million or greater—one sees roughly the same pattern, as shown in the right panel of Figure 2. The reporting rate for these rules is now slightly higher at about 75 percent.

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recover about 50 significant proposed rules per year. This figure is roughly a quarter of the amount one would expect based on counts provided by the RISC. *See Review Counts*, REGINFO, <http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init> (using this database, the normal year shows roughly 200 “significant” proposed rules reviewed by OIRA). As a result, we instead turned to a separate dataset of significant rules reviewed by OIRA. In relying on the OIRA review data for the population of significant rules, this analysis adopts the same approach as Curtis Copeland. *See COPELAND, UNIFIED AGENDA PROPOSALS*, *supra* note 11, at 17–19. This approach unfortunately 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, we 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 first appeared in the Agenda. Many of these self-reported stages, however, may be erroneous.

144. 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, UNIFIED AGENDA TRANSPARENCY*, *supra* note 14, at 9. In a subsequent study for the ACUS, 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.

FIGURE 2. Agency Reporting of Significant Rules



Taking a step back, 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.<sup>145</sup> So the gains to an agency from shielding the development of such regulations are likely minimal, at least as compared to the political costs of agenda noncompliance. At the same time, the fact that agencies fail to report at least a quarter of their most significant regulations is troubling. While it is possible that some of these missing rules can be explained by agencies that may issue multiple proposed rules for a single Agenda entry, this dynamic would still dilute the initial notice's specificity and effectiveness. Selective disclosure may also enable agencies to distract monitors from particular rules.

145. McNollgast, *Administrative Procedures as Instruments*, *supra* note 36, at 250.

Even those hidden rules that are not OIRA-significant may also be precisely the type where capture and other forms of regulatory misfeasance are most likely. While these rules have a decent chance of sliding through the system undetected by opponents, they may work substantial favors to narrow special interests. The FAA's Airworthiness Directives, for example, can still be the subject of public controversy and affect thousands of registered airplanes and their owners.<sup>146</sup> Thus, it is important that less connected and well-resourced stakeholders such as small businesses and public interest groups have information about such regulatory developments through the Unified Agenda or similar means.

To this end, it will now be useful to gain a better sense of where and in which agencies these dynamics may be the most prevalent. Consulting the main dataset once again,<sup>147</sup> Figure 3 shows that reporting rates differ widely among the agencies. The figure depicts the proportion of proposed rules that each agency reports to the Unified Agenda: 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 Agenda prior to finalization ranges from under 10 percent at approximately 10 agencies—including the FCC and Department of Homeland Security—to over 70 percent at two agencies—the Railroad Retirement Board and the Department of Housing and Urban Development.

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.

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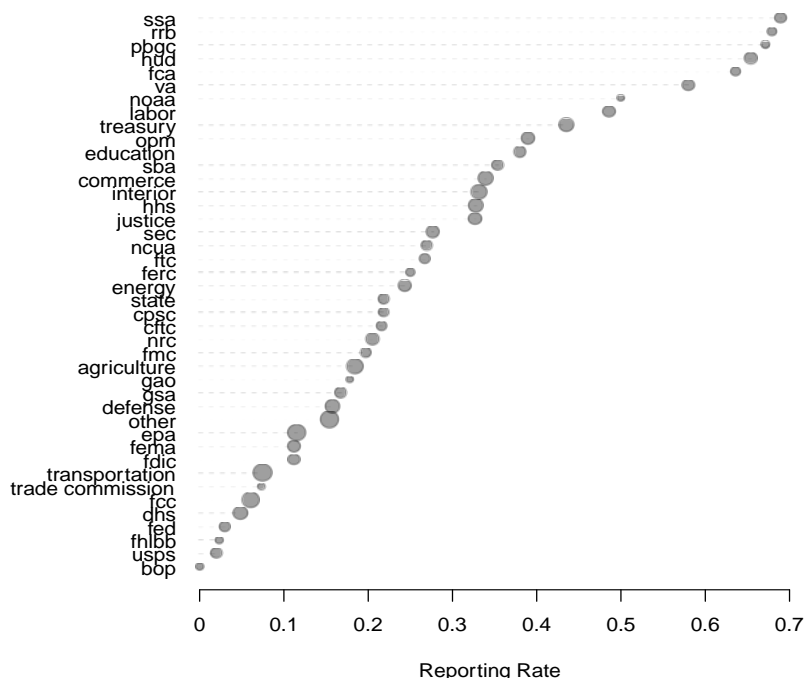
146. See, e.g., *Regulatory Brief—FAA Replaces Controversial AD Proposal, Allows Alternative Wing Spar Inspection for Aeronca/Bellanca/Champion Airplanes*, AIRCRAFT OWNERS & PILOTS ASS'N, <http://www.aopa.org/Advocacy/Regulatory-,-a-,-Certification-Policy/Regulatory-Brief-FAA-replaces-controversial-AD-proposal-allows-alternative-wing-spar-inspection-for-Aeronca-Bellanca-Champion> (last visited Apr. 4, 2016) (“The proposed [airworthiness directive] would affect approximately 6,500 U.S. registered airplanes.”).

147. See Appendix B for a description of how we construct the main dataset.



For this reason, agency fixed effects are included in some of the specifications below.

FIGURE 3. Reporting Rates by Agency<sup>148</sup>



## 2. Divided Government

While agencies substantially underreport 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 underreporting, 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 Unified 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

148. See Appendix C for a key mapping agency abbreviations to their full names.

nonstrategic omission of entries. Furthermore, agency officials suggest that the semiannual nature of the Unified Agenda also prevents them from providing accurate and updated information.<sup>149</sup> In light of these potential explanations—strategic and benign—the answer cannot be determined solely from theory, but must be empirically uncovered.

Recall that Congress possesses many tools with which it can attempt to reverse or otherwise influence an agency's rule.<sup>150</sup> 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.<sup>151</sup> 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.<sup>152</sup> 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.<sup>153</sup>

One straightforward method for testing this hypothesis is to examine agency reporting behavior during periods of unified and divided government—that is, when the president and at least one house of Congress 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 more likely to align with the party of the president.<sup>154</sup> 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 the first column of the left panel of Table 1 below. In other words, when the president and

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149. COPELAND, UNIFIED AGENDA PROPOSALS, *supra* note 11, 95–98.

150. See Beermann, *supra* note 101 and accompanying text.

151. For a classic work on congressional oversight, see generally JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (2001).

152. See Congressional Review Act, 5 U.S.C. §§ 801–808 (2012).

153. McNollgast, *Structure and Process*, *supra* note 36, at 434–44; Gersen & O'Connell, *supra* note 21, at 1163 (Strategic agency behavior “can allow the monitored to choose the monitors”).

154. 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).

Congress are from different political parties, an agency's reporting rate drops by about 4 percentage points. 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 Unified Agenda.

TABLE 1. Unified Agenda Reporting: Executive and Independent Agencies

	All Proposed Rules			Longer Proposed Rules		
	All Agencies	Executive Agencies	Independent Agencies	All Agencies	Executive Agencies	Independent Agencies
Divided Government	-0.04** (0.01)	-0.04** (0.01)	-0.02 (0.01)	-0.07** (0.01)	-0.08** (0.01)	-0.01 (0.03)
Agency-President Discord	-0.01 (0)	-0.01 (0)	0 (0.02)	-0.01 (0.01)	0 (0.01)	-0.02 (0.04)
Election Year	0 (0)	0.01 (0)	0 (0.01)	0.01 (0.01)	0.01 (0.01)	0 (0.02)
Complex Proposed Rule	0.06* (0.03)	0.07* (0.03)	0.03 (0.03)	0.04* (0.02)	0.04* (0.02)	0.01 (0.04)
Length of Proposed Rule (log)	0.08** (0.01)	0.09** (0.01)	0.05** (0.01)	0.09** (0.03)	0.09** (0.03)	0.07** (0.02)
Time Trend	Y	Y	Y	Y	Y	Y
Time Trend (squared)	Y	Y	Y	Y	Y	Y
Agency Fixed Effects	Y	Y	Y	Y	Y	Y
N	56207	47267	8580	13765	11877	1888
R-squared	0.22	0.22	0.11	0.16	0.16	0.08

Note: \*\* denotes  $p < 0.01$ ; \* denotes  $p < 0.05$ ; ' denotes  $p < 0.1$ . Standard errors are clustered by agency and reported in parentheses. The dependent variable is an indicator for whether the proposed rule appears in the Unified Agenda prior to finalization. See *infra* notes 170-71 and accompanying text for a definition and discussion of Agency-President Discord. Other variables are indicated by name in a straightforward way. Models in the left panel include all observations ("All Proposed Rules"); models in the right panel include only proposed rules consisting of 5,000 words or more ("Longer Proposed Rules"). All models include controls for rule "complexity," i.e., an indicator for whether the rule refers to more than one part of the Code of Federal Regulations, and the length of the proposed rule.

Nevertheless, one might wonder to what extent the observed strategic behavior pertains to the most significant rules. It is again possible, after all, that this result is mainly driven by small or ministerial rules. While previously discussed data limitations unfortunately do not permit a precise answer,<sup>155</sup> one can attempt to examine this question by using a rough proxy of significance like rule length. More specifically, consider a set of nonsignificant rules with limited impact like the FAA Airworthiness Directives. The average number of words in an FAA Airworthiness Directive is about 2,300, with a standard deviation of about 1,600 words.<sup>156</sup> Thus, rules above 5,000 words are unlikely to be FAA Airworthiness Directives or similarly minor rules; indeed, over 98 percent of Airworthiness Directives have fewer than 5,000 words. If one zeroes in on longer proposed rules of 5,000 words or more—as shown in the first column of Table 1’s right panel—the effect of divided government on reporting almost doubles to roughly 7 percentage points.

This strategic effect would be expected to be even 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.<sup>157</sup> To test this view, it is useful to now repeat the analyses above, but conduct them separately for independent and executive agencies.<sup>158</sup> Consider first the results relating to executive agencies, over which the president exerts greater control, as shown in the second column of Table 1: the left panel again reflects all proposed rules, while the right panel reflects 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

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155. See *supra* text accompanying note 143.

156. 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.

157. See Stiglitz, *supra* note 35.

158. The relative independence of an agency from presidential control rests along a continuum rather than as a simple binary distinction between independent agencies 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, 772–73 (2013). For the purposes of this Article, Appendix C specifies which agencies we classify as “executive” and which agencies we classify as “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.” See Paperwork Reduction Act, 44 U.S.C. § 3502(5) (2012).

independent agency reporting rates are relatively insensitive to the conditions of divided government 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; the coefficients on divided government are also not statistically significant at conventional levels. The results from Table 1 therefore suggest that much of the strategic behavior we identify derives from the behavior of *executive* agencies. In other words, the agencies most controlled by the president and likely to disagree with Congress during periods of divided government are those that exhibit the most sensitivity to Congress's partisan composition. Independent agencies, by comparison, are less sensitive to conditions of divided government.

Notice also that these regressions control for a number of factors one might think relevant to reporting behavior. Notably, the regressions control for the (log) length of the proposed rule, as well as for its "complexity," that is, whether the notice of proposed rulemaking refers to more than one part of the Code of Federal Regulations. Agencies may have an incentive to hide longer and more complex rules or, alternatively, may decide that the benefits of doing so are minimal given that such rules are more likely to come to the public's attention through other means. As evident from Table 1, in almost all specifications, these variables return with large, statistically significant, and positive coefficients, suggesting that agencies are actually more likely to disclose longer and more complex rules.<sup>159</sup> Insofar as these characteristics reflect the more substantial nature of the rule, this pattern is consistent with the discussion above. The regressions also control for election years, but these all return with near-zero, not statistically significant coefficients.

As another check on these results, 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. By isolating the analysis to these discrete time periods, one can better control for the preferences and culture of an administration, as well as for other unobservable factors that vary over time, such as rule composition. Because such factors remain relatively stable within an administration, at least locally around the switch in Congress, this alternative approach allows for a relatively cleaner assessment of whether reporting behavior is responsive to divided

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159. For example, the coefficients on "complexity" suggest that an agency is 4-7 percentage points more likely to report a proposed rule if it refers to more than one part of the Code of Federal Regulations.

government.

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, because if the agencies anticipate a shift in divided government, they can smoothly adapt their behavior before the shift occurs. The most natural “surprise” shift in divided government to consider is the one following the November 8, 1994 election, in which the Republicans took control of the House for the first time in almost 50 years.<sup>160</sup> A further advantage of this particular midterm shift is that the Unified Agenda appeared late, on November 14, 1994, thus creating the opportunity for agencies to react to the unexpected political outcome.<sup>161</sup>

Each dot in Figure 4 represents the proportion of proposed rules that have an entry in the Unified Agenda in a given week; 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 4 of the administration), and we plot the proportion of proposed rules reported to the Unified Agenda that were on the y-axis. The figure also contains two vertical dashed lines: the left line represents the week of the election, and the right line represents the week of the congressional transition. Although divided government did not actually begin until January of 1995, the election resolved any uncertainty regarding this fact several weeks earlier. 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 gray lines.<sup>162</sup>

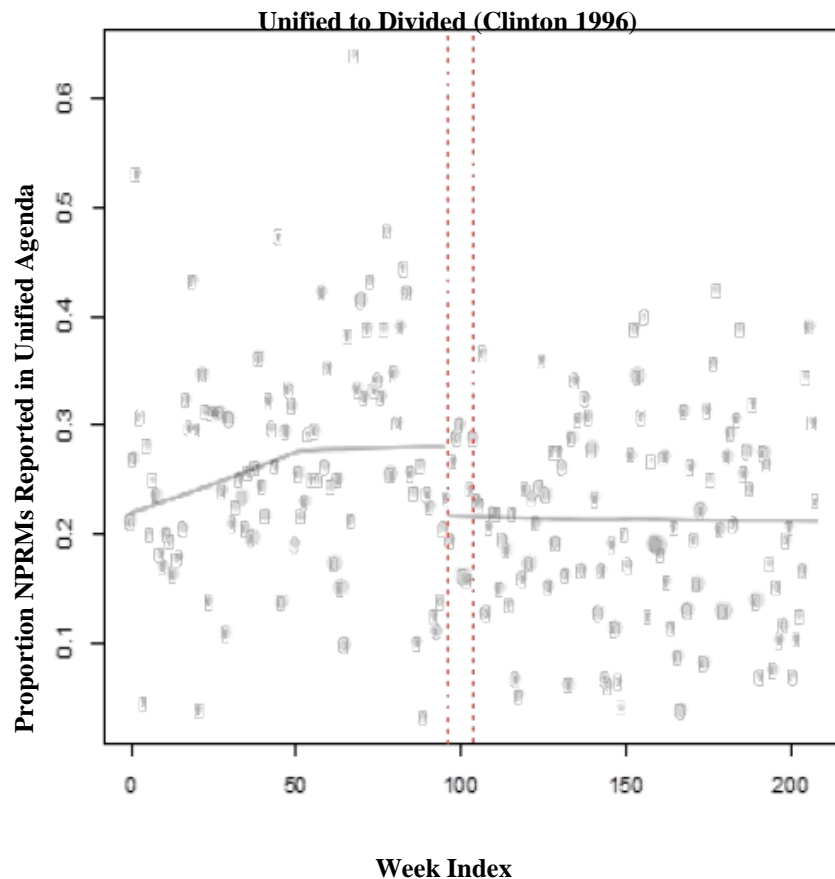
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160. E.g., David W. Brady et al., *The Perils of Presidential Support: How the Republicans Took the House in the 1994 Midterm Elections*, 18 POL. BEHAV. 345, 362 (1996) (“The Republican takeover of the House of Representatives in 1994 caught most observers of elections by surprise.”). Another obvious candidate for a surprise shift in divided government involves the 2001 switch in parties by Senator Jim Jeffords. See Alison Mitchell, *G.O.P. Senator Plans Shift, Giving Democrats Control in Setback for White House*, NY TIMES (May 24, 2001), <http://www.nytimes.com/2001/05/24/politics/24JEFF.html>. However, that switch occurred so early in the Bush administration—just 4 months in—with appointments still underway, that agency officials had little time to develop their own rules, suggesting that many of these rules represent carryover efforts from the previous administration.

161. *Additional Government Publications: The Regulatory Plan and Unified Agenda of Federal Regulations*, U.S. GOV'T PUBL'G OFF. (Nov. 14, 1994) <https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=GPO&browsePath=Unified+Agenda%2F1994&searchPath=Unified+Agenda%2F1994&leafLevelBrowse=false&isCollapsed=false&isOpen=true&ancestors=root&packageid=GPO-UA-1994-11-14&ycord=429> [hereinafter *Regulatory Plan*].

162. The solid gray lines represent locally weighted averages and smooth week-to-week fluctuations to reveal systematic trends.

FIGURE 4. A Midterm Shift to Divided Government



The pattern in this figure is consistent with our main results. Immediately before the 1994 election, the Clinton administration's agencies had reported roughly 30 percent of their proposed rules to a previous edition of the Unified Agenda. In other words, prior to November 8, about 30 percent of agencies' proposed rules had been previously reported in some edition of the Unified Agenda up to that year's spring edition, which was published on April 25.<sup>163</sup> By comparison, immediately after the 1994 election, the percentage of anticipated rules appearing in the Unified Agenda dropped by about 7 percentage points. Importantly, the fall edition of the Unified Agenda that year was not issued in October as usual,

163. *Introduction to the Unified Agenda of Federal Regulations*, 59 Fed. Reg. 20002 (1994).



but rather on November 14—6 days after the election.<sup>164</sup> Thus, the immediate shift in reporting rates that followed after the election was more likely due to behavioral changes with respect to the recent fall edition of the Unified Agenda.

Another potential interpretation of this figure is that the change instead reflects the fact that agencies adapted their proposed rules to appease the Republican majority. Thus, the drop in the reporting rate comes not from a lack of transparency, but rather from an increase in the number of new proposed rules now designed to satisfy different congressional overseers. These new proposed rules, the argument continues, could not have been reported the previous spring nor in the fall due to a lag in Agenda preparation. In this view, agencies are acting responsively, not strategically.

While our data cannot definitively reject this alternative theory, we believe the scenario is highly unlikely for two reasons. First, agencies are generally unable to promulgate new proposed rules so quickly as to produce a notable effect immediately after the election.<sup>165</sup> Second, as previously mentioned, the publication of the fall edition of the Unified Agenda that year was nearly contemporaneous with the election. Because agencies can revise Agenda items until the date of publication,<sup>166</sup> they had the ability to reduce the transparency of their regulatory efforts almost immediately following the election. Put differently, though constrained by Agenda entries they had submitted for previous Unified Agenda data calls, agencies could choose not to disclose their continuing stream of proposed rules on that year's fall Agenda.<sup>167</sup>

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164. See *Regulatory Plan*, *supra* note 162.

165. One challenge is that it is difficult to observe the date at which agencies “start” a rulemaking. Nevertheless, one estimate for a sample of rules suggests that the regulatory development period, at least for some rules, could be as long as 4 years. See West, *Formal Procedures*, *supra* note 1. While there are surely shorter development periods for many rules, such efforts likely take longer than 6 days. To further get a sense of magnitude, consider that the estimated duration between NPRM and final action is a little more than a year. See Anne Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 513 (2011) (finding that, between the fall 1983 and the spring 2010, the average rulemaking took 462.79 days to complete, from NPRM to finalization).

166. As Copeland reports, agencies may revise their Unified Agenda entries, potentially until shortly before the Agenda is published. COPELAND, UNIFIED AGENDA PROPOSALS, *supra* note 11, at 25–26.

167. As a sort of “placebo” test, we also examined midterm elections that did not result in a shift in congressional control; here, we do not observe the same pattern of a postelection drop in reporting rate.

### 3. Intra-Executive Branch

Of course, administrative agencies are subject not only to congressional, but also to presidential, oversight as well. Just as agencies have policy disagreements with Congress, so too do they have them with the president. As a result, it is reasonable 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.<sup>168</sup> Such behavior might make it more difficult for the president to monitor agencies directly or indirectly through allied interest groups.

One countervailing consideration is that the president, as discussed,<sup>169</sup> is able to oversee 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 that these alternative devices of influence and information make it fruitless for agencies to attempt to hide through nondisclosure on the Unified Agenda, one might expect to see relatively attenuated results in the context of executive branch oversight.

To test these competing hypotheses, it would be ideal to have a measure of the preference divergence between each agency and the sitting president for each year in our series. Unfortunately, no such measure exists for the entire time period of our analysis.<sup>170</sup> So our dataset relies on a popular, but static, measure of agency preferences developed by Joshua Clinton and David Lewis.<sup>171</sup> These scores are based on experts' ratings of

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168. See Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1803–04, 1809 (2013).

169. See *supra* notes 103–105 and accompanying text.

170. Professors Bertelli and Grose produce perhaps the closest such measures. See generally Anthony M. Bertelli & Christian R. Grose, *The Lengthened Shadow of Another Institution? Ideal Point Estimates for the Executive Branch and Congress*, 55 AM. J. POL. SCI. 767 (2011) (developing ideal point estimates for cabinet department heads from 1991 to 2004). However, Bertelli and Grose's dataset only covers the heads of cabinet departments and excludes all independent agencies, as well as the EPA. Other time-variant measures of agency and presidential preferences are also available, but currently yield estimates that similarly cover periods that are only a fraction of our 30-year dataset. See, e.g., Alex Acs, *Presidents and Their Regulatory Agencies: Pulling Back the Curtain on Policy Disagreement* (April 1, 2016) (unpublished manuscript) (on file with authors); Adam Bonica, Jowei Chen & Tim Johnson, *Senate Gate-Keeping, Presidential Staffing of "Inferior Offices," and the Ideological Composition of Appointments to the Public Bureaucracy*, 10 Q.J. POL. SCI. 5 (2015); Jowei Chen & Tim Johnson, *Federal Employee Unionization and Presidential Control of the Bureaucracy: Estimating Ideological Change in Executive Agencies*, 101 J. THEORETICAL POL. 657 (2014).

171. Joshua D. Clinton & David E. Lewis, *Expert Opinion, Agency Characteristics, and Agency*

agency ideologies. Specifically, Clinton and Lewis survey a set of academics who study the bureaucracy, as well as Washington D.C.-based insiders, and record these individuals' assessments of agency policy dispositions. Under the Clinton-Lewis scores, a negative value indicates a liberal agency, and a positive value indicates a conservative one. Our analysis takes these Clinton-Lewis scores and then adjusts them according to whether the president is a Democrat or Republican. If the president is a Republican, the Clinton-Lewis scores are multiplied by negative 1, such that higher values indicate more liberal agency preferences, and thus more likely disagreement between agency and president. If the president is a Democrat, the scores are left intact, such that higher values indicate more conservative agency preferences, and again, more likely disagreement between agency and president.

Table 1 above reports the results for this exercise. There, note that—regardless of which set of rules or agencies we consider—the coefficient on this measure for agency-president discord is essentially 0. This is true whether or not agency fixed effects are included. These findings suggest that there is little relationship between expected preference divergence and agency reporting behavior. Greater agency-president disagreement, it seems, is not associated with any change in agency disclosure. 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.<sup>172</sup> Through political appointments, presidents can ensure that central decisionmakers within agencies are unlikely to adopt policies that diverge greatly from their preferred policies. Political appointees also serve as bureaucratic informants who reduce the informational advantages of the agencies. Likewise, through a series of executive orders, presidents have effectively set up a parallel system of administrative law, imposing a centralized review system on agencies designed to keep abreast of the federal bureaucracy.<sup>173</sup> OIRA itself also reviews entries that agencies submit for the Unified Agenda.<sup>174</sup> These schemes make it less likely that agencies could surprise presidents with

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*Preferences*, 16 POL. ANALYSIS 3, 4–5 (2008).

172. Exec. Order No. 12,866, 3 C.F.R. § 641 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2012).

173. Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 37–39 (1944).

174. OFFICE OF MGMT. & BUDGET, *About OIRA*, WHITE HOUSE, <https://www.whitehouse.gov/omb/oira/about> (last visited Apr. 14, 2016).

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 it is a “logical outgrowth” of the original proposals.<sup>175</sup> 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 are also likely to go unreported. Equally importantly, the data also suggest that such behavior is strategic with respect to congressional, but not presidential, oversight. These findings corroborate other empirical work suggesting that agencies time the release of their decisions for when Congress is out of session.<sup>176</sup> Thus, despite congressional and executive efforts to foster greater transparency for regulatory development, agencies are evading legislative supervision. Consequently, the Unified Agenda does not provide the public with the notice necessary to participate fully in the rulemaking process.

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 at least some of these effects are due not to strategic choices by agencies under divided government, but rather to strategic choices 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.<sup>177</sup> In this sense, the Unified Agenda may reflect a presidential management strategy.

Moreover, it is also difficult to disentangle precisely just how much our results are due to strategic behavior as opposed to responsive changes in the substance of the underlying proposed rules. Our focus on the local period around a shift to divided government represents an effort to address this issue, but it remains true that when new political realities arise, agencies may eventually shift their rulemaking behavior to align with those

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175. See Beerman & Lawson, *supra* note 65, at 894.

176. See Gersen & O’Connell, *supra* note 21, at 1183.

177. See *id.* at 1163, 1169–72, 1174–75.

of their political overseers. 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, some of what is actually politically responsive behavior may 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 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 Unified Agenda disclosure result in regulations with greater net benefits, more public comments, or higher litigation probabilities. Without answers to these questions, the theoretical 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 within elected branches of government.<sup>178</sup> Moreover, transparency facilitates input about and criticism of government activities that can improve their efficiency or effectiveness.<sup>179</sup> Access to government data may also help inform private decisionmaking by individual consumers or industry actors.<sup>180</sup>

At the same time, however, transparency also has potential costs. Transparency could, for example, facilitate the disproportionate participation of well-resourced groups that lobby for special interest regulations.<sup>181</sup> Disclosures can also harm national security or law enforcement interests, both of which require confidentiality for diplomatic or investigatory purposes.<sup>182</sup> Additionally, leaked information may increase frivolous legal liabilities or result in unjustified reputational harms.<sup>183</sup> Alternatively, the information could encourage involvement from ill-informed parties who demand unproductive and resource-intensive meetings.<sup>184</sup> Transparency could also hinder internal agency deliberations, which may chill the candid discussions that are necessary when dealing with particularly sensitive or highly uncertain issues.<sup>185</sup> For example,

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178. See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 896–99 (2006).

179. *Id.* at 900.

180. *Id.*

181. See *id.* at 918–19.

182. *Id.* at 906–07.

183. *Id.* at 937.

184. See *id.* at 942.

185. *Id.* at 908. The story of the government in the Sunshine Act, for instance, is largely one of unintended consequences. The Act, which required agencies composed of collegial bodies to hold open

transparency might undermine collegial deliberations by forcing agency officials to publicly posture during negotiations, resulting in breakdowns of the policymaking process.<sup>186</sup> In this manner, disclosures could 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. Insofar as the stated objectives of the mechanism are to allow for greater participation and planning, the question addressed here is how the Unified Agenda might be reformed to better accomplish these goals.

#### A. LEGISLATIVE REFORM?

Given our findings that executive branch agencies are less likely to act strategically with respect to the president, the president has less incentive to police Unified Agenda requirements. Congressional reforms are thus more likely to be successful than executive branch efforts at improving pre-proposal disclosure. In particular, these findings lend empirical support to recent legislative proposals aimed at requiring earlier public engagement from agencies. Various congressional committees, for example, have approved amendments to the APA that would mandate legally enforceable prenotice 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.<sup>187</sup> In 2015, the House of Representatives 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.<sup>188</sup> Unlike the Unified Agenda, however, this

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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 workarounds. See William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 187–91 (2009).

186. For a seminal paper making this point, see generally David Stasavage, *Open-Door or Closed-Door? Transparency in Domestic and International Bargaining*, 58 INT'L ORG. 667 (2004).

187. Early Participation in Regulations Act of 2015, S. 1820, 114th Cong. (2015).

188. See Regulatory Accountability Act of 2015, H.R. 185, 114th Cong. (2015); Final Vote

early warning procedure would be judicially reviewable to the same extent as the other APA rulemaking procedures.

While partisan wrangling is likely to prevent the bill from passing,<sup>189</sup> its plausible viability spurred 84 law professors to pen a letter urging the House to vote against the bill.<sup>190</sup> 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 contained much of the same information.<sup>191</sup> However, our findings suggest that this assumption is questionable, and 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. For instance, an obvious worry is that an agency that faces a pressing public policy problem may not be able to both respond to the problem in a timely way and signal its regulatory intent 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 prenotice notice, with the exemption itself subject to judicial review. Another concern is that additional rulemaking requirements would unduly ossify the regulatory process.<sup>192</sup> Though rigorously studying the hypothesis is difficult,<sup>193</sup> existing efforts to examine this hypothesis have at least suggested that rulemaking continues at a good rate despite the

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Results for Roll Call 28, H.R. 185, 114th Cong. (2015) [hereinafter Final Vote Results].

189. Of the 250 votes in favor, all but 8 came from Republicans; all 175 nays came from Democrats. See Final Vote Results, *supra* note 189. Indeed, since the 112th Congress (2011–2013), there have been numerous congressional efforts to revise the APA or otherwise create new procedures for agencies to follow. See, e.g., Achieving Less Excess in Regulation and Requiring Transparency Act of 2014 (ALERRT Act of 2014), H.R. 2804, 113th Cong. (2014); Sound Regulation Act of 2014, S. 2099, 113th Cong. (2014); Regulatory Accountability and Economic Freedom Act of 2012, H.R. 4116, 112th Cong. (2012); Regulations From the Executive in Need of Scrutiny Act of 2011, H.R. 10, 112th Cong. (2011); Regulatory Accountability Act of 2011, H.R. 3010, 112th Cong. (2011); Financial Regulatory Responsibility Act of 2011, S. 1615, 112th Cong. (2011); Closing Regulatory Loopholes Act of 2011, S. 1530, 112th Cong. (2011).

190. Regulatory Accountability Act of 2015, H.R. 185, 114th Cong. (2015).

191. Letter from Alfred C. Aman, Professor of Law, Ind. Univ., to the Honorable Bob Goodlatte, Chairman, Comm. on the Judiciary, U.S. House of Representatives (Jan. 12, 2015) (on file with authors).

192. See Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385–86 (1992).

193. The clear difficulty is that it is not obvious how to think about the counterfactual baseline. That is, we observe agencies produce X number of rules, but we have no credible way to determine how many rules would have been produced absent the relevant rulemaking requirements.

imposition of such procedural requirements.<sup>194</sup>

Congress could also reassert its ability to monitor regulatory development through statutory amendment in other ways. For instance, Congress 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. 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.<sup>195</sup> 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.<sup>196</sup>

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*.<sup>197</sup> There, the Court held that procedural requirements must come from the Constitution, from a statute, or from the agency itself.<sup>198</sup> *Vermont Yankee* thus prohibits courts from inventing and imposing their own novel procedural requirements—a proscription that was reaffirmed by the Supreme Court in 2015.<sup>199</sup>

Applying *Vermont Yankee* to the logical outgrowth doctrine highlights the doctrine’s tenuous foundations against the backdrop of the APA.<sup>200</sup> By

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194. See Yackee & Yackee, *Testing Ossification*, *supra* note 34, at 1415 (“[E]vidence that ossification generally is either a serious or widespread problem is mixed at best, and appears relatively weak overall.”); Yackee & Yackee, *Ossified*, *supra* note 41, at 261–62, 268–80 (finding little evidence of ossification using dataset ranging from 1983 to 2006).

195. See Beermann & Lawson, *supra* note 65, at 895.

196. See *id.*

197. See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519 (1978); Beerman & Lawson, *supra* note 65, at 898–99.

198. *Vt. Yankee*, 435 U.S. at 518–19, 524.

199. See *Perez v. Mort. Bankers Ass’n.*, 135 S. Ct. 1199, 1207 (2015) (overruling the paralyzed veteran 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 *Vt. Yankee*, 435 U.S. at 524).

200. 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



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.<sup>201</sup> 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 above reforms could help Congress reestablish a tool for earlier legislative and public regulatory involvement, two related puzzles—raised, but not resolved here—remain. The first is why Congress has yet to pass any of the many bills requiring some kind of reviewable pre-proposal notification. The second is why Congress passed the RFA requiring regulatory agendas for small business interests without making the mandate judicially enforceable.<sup>202</sup> 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 SBA would be able to vigorously enforce the

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subjects and issues involved.” 5 U.S.C. § 553(b)(1)–(3) (2012). 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. *Id.* § 553(c). 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.” *Id.* § 553(b)(3).

201. *Id.* § 553(b)(3).

202. Regulatory Flexibility Act, Pub. L. No. 96-3545, 94 Stat. 1164 (1980) (codified as amended at U.S.C. § 611(a)(1) (2012)) (“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 action of the agency shall not be subject to judicial review.”).

requirements, even without the threat of judicial review.<sup>203</sup> 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 underenforced relates to technological limitations. Recall that the Unified Agenda is currently required to be published semiannually, 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 6 months due to exigent circumstances.<sup>204</sup> 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 agency noncompliance 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.

One possibility is that—for the swath of rules not reported in the Agenda—Congress is 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

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203. See 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.”).

204. *Id.* § 602(d) (“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.”).

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,<sup>205</sup> 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. Nevertheless, individual congressional committees may have diverging priorities or face other collective action problems that result in a status quo bias. Despite the value of earlier intervention to specific committees, individuals on these committees may not be able to influence the legislative agenda of Congress as a whole.

Another possible explanation for why Congress has not amended the ineffective Unified Agenda regime is that legislators are captured by the very regulatory insiders that benefit from excluding outsiders from the rulemaking process. In other words, because early disclosure grants interest groups more time to influence agency policymaking, those groups that can influence agencies through more informal channels lobby congressional staff not to revisit regulatory agenda requirements.

Yet 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.<sup>206</sup>

Insofar as partisan gridlock is likely to persist—likely, in our view—then perhaps other institutions like the ACUS are better positioned to nudge reforms on behalf of the public more generally. Indeed, the ACUS has recently proposed a number of sound recommendations regarding the Unified Agenda, including suggestions that agencies engage in more

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205. See McNollgast, *Administrative Procedures as Instruments*, *supra* note 36, at 258 (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 36, at 441 (“[W]hen an agency presents politicians with a *fait accompli*, politicians may find it difficult, if not impossible, to respond.”).

206. See *supra* notes 103–05 and accompanying text.

automatic, realtime reporting on their websites as well as other digital media.<sup>207</sup> Such reforms would help to ameliorate the ability of agencies to cite publication delays as a pretext for nondisclosure. Because of its unique role in “bridging” internal agency actors with external parties, the ACUS may help to facilitate changes from within agencies, should legislative or executive efforts fall short.<sup>208</sup>

### CONCLUSION

Some of the most critical decisions during the regulatory process are made before the agency issues its proposed rule. Yet scholars and the public alike know relatively little about this period. This Article has examined the largely voluntary prenotice disclosures contained in the Unified Agenda and found evidence of politically 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 prenotice 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 prenotice disclosure requirements. These provisions could, for example, require agencies to report impending rules to the Unified Agenda or issue advance notices of proposed rulemaking 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.

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207. See ADMIN. CONF. OF THE U.S., ADMINISTRATIVE CONFERENCE RECOMMENDATION 2015-1: PROMOTING ACCURACY AND TRANSPARENCY IN THE UNIFIED AGENDA (2015).

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

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 postfinalization litigation? Does the content of the rules themselves depend on whether they are included in the Agenda? 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. Selective disclosure is thus a form of bureaucratic autonomy meriting closer examination by scholars and political overseers alike.

APPENDICES

APPENDIX A: SAMPLE UNIFIED AGENDA ENTRY

**View Rule**

[View EO 12866 Meetings](#)     [Printer-Friendly Version](#)     [Download RIN Data in XML](#)

**HHS/FDA**     **RIN:** 0910-AG09     **Publication ID:** Fall 2015

**Title:** Updated Standards for Labeling of Pet Food

**Abstract:**  
 FDA is proposing updated standards for the labeling of pet food that include nutritional and ingredient information, as well as style and formatting standards. FDA is taking this action to provide pet owners and animal health professionals more complete and consistent information about the nutrient content and ingredient composition of pet food products.

**Agency:** Department of Health and Human Services(HHS)  
**RIN Status:** Previously published in the Unified Agenda  
**Major:** Yes     **Priority:** Economically Significant  
**CFR Citation:** [21 CFR 501.201](#), [21 CFR 501.221](#)     **Agenda Stage of Rulemaking:** Proposed Rule Stage  
**Legal Authority:** [21 U.S.C. 343](#), [21 U.S.C. 371](#), [Pub. L. 110-85, sec. 1002\(a\)\(3\)](#)     **Unfunded Mandates:** Private Sector

Final	Action	Source	Description	Date
		Statutory		09/27/2009
Timetable:				
NPRM	Action	06/00/2016		FR Cite

**Regulatory Flexibility Analysis Required:** Yes     **Government Levels Affected:** State  
**Small Entities Affected:** Businesses     **Federalism:** Yes  
**Included in the Regulatory Plan:** No  
**International Impacts:** This regulatory action will be likely to have international trade and investment effects, or otherwise be of international interest.  
**RIN Data Printed in the FR:** Yes  
**Agency Contact:**  
 William Burkholder  
 Veterinary Medical Officer  
 Department of Health and Human Services  
 Food and Drug Administration  
 Center for Veterinary Medicine, MPN-4, Room 2642, HFV-228, 7519 Standish Place,  
 Rockville, MD 20855  
 Phone 240 402-5900  
 Email: [william.burkholder@fda.hhs.gov](mailto:william.burkholder@fda.hhs.gov)

Source: OFFICE OF MGMT. & BUDGET, *Updated Standards for Labeling of Pet Food*, REGINFO, <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=0910-AG09> (last visited Apr. 11, 2016).

## APPENDIX B: DATA COLLECTION

This appendix describes our data collection efforts. In essence, the basic exercise involves (1) developing a universe of proposed rules culled from the Federal Register; (2) creating a database of entries in the Unified Agenda; and (3) 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 200 randomly selected entries from our dataset by hand. This exercise suggested that the vast majority of the entries in our dataset in fact represented proposed rules. Of the 200 entries, the research assistants coded only 5 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). In addition, without attempting to find proposed rules erroneously *excluded* from our dataset based on action headings, this suggests that our dataset erroneously *includes* some 4.7 percent of its entries; that is, some 4.7 percent of the entries in our dataset are not proposed rules for which we should expect to find a Unified Agenda entry. These false inclusions will generally lead us to underestimate the reporting rate. However, the magnitude of this bias is not large. Conservatively using the lower bound of the confidence interval above, this exercise suggests that we underestimate the reporting rate by 4.9 percent (i.e.,  $1 - 1/.953$ ). That is, for example, if our estimated reporting proportion is 0.25, we can conservatively bound the true reporting proportion at 0.26 (i.e.,  $0.25 * 1.049$ ).

For the Unified Agenda database, we rely on XML files provided by the 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 the identifying information, we retain the last available entry for each rule, where the rule is traced through its RIN. According to RISC, a RIN consists of a four-digit agency code plus a four-character alphanumeric code, assigned sequentially when a rulemaking is first entered into the

database, which identifies the individual regulation under development.”<sup>209</sup> 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 Unified Agenda 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 lifetime of a rule. Moreover, the Unified Agenda 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 Unified Agenda is a citation to the Federal Register entry for each reported action, though many Unified Agenda entries were missing these citations. When available, we use the Federal Register citation listed for the NPRM in the Unified Agenda to match the Unified Agenda 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 Unified Agenda entries that list a NPRM. As a result, after this first approach to matching, we have some 7000 “orphan” Unified Agenda entries, which the Unified Agenda lists 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 Unified Agenda 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). Still other times, the entry may be more phantom than orphan: for example, the agency may not end up in fact issuing a NPRM.

We have examined a number of approaches to dealing with these orphan entries, but they all involve considerable error. As such, the main

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209. OFFICE OF MGMT. & BUDGET, *How to Use the Unified Agenda*, REGINFO, [http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA\\_HowTo.jsp](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA_HowTo.jsp) (last visited Apr. 10, 2016).



results we report in the main body exclude the orphan entries. That said, the most promising approach we did find involves relying on the descriptions of the rules contained in the Unified Agenda 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. Tokenization involves taking a string of text and separating it into a set of words. Stemming involves taking the words, or tokens, and grouping them into lexemes, or more basic lexical units. For example, the words “sit,” “sits,” and “sitting” all belong to the same basic lexical unit. Finally, vectorization involves representing the stemmed tokens for a given string as a numeric vector, where each position in the vector encodes a specific stemmed token, and all stemmed tokens in the more general body of the text (here, rule abstracts and summaries) have a designated position in the vector. For example, if the string in question contained the word “sit,” the vector would take “1” in the position for that word; if the string in question did not have the word “sit,” the vector for that string would take a “0” in the same position.<sup>210</sup>

Third, we calculate the cosine similarity, a standard metric of the distance between two vectors, between each orphaned Unified Agenda entry and every entry in the Federal Register dataset that (1) was issued in the same month as the Unified Agenda action report indicates the NPRM was issued and (2) does not already have a Unified Agenda match based on citations. We then retain the top 10 matches for further investigation. The cosine similarity between two vectors is given by  $(A \cdot B) / (||A|| ||B||)$ , and ranges in this context between 0 and 1, with higher values indicating more similarity between the two vectors. We then match each orphaned Unified Agenda entry to the to the Federal Register entry for which it has the highest similarity; if two Unified Agenda entries both match to the same Federal Register entry, the winner is the Unified Agenda 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 5000 matches, so that after including these

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210. For more on the statistical processing of text, see generally CHRISTOPHER D. MANNING & HINRICH SCHUTZE, *FOUNDATIONS OF STATISTICAL NATURAL LANGUAGE PROCESSING* (1999).

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additional matches, we find a pairing for roughly 25,000 of the 27,000 entries in the Unified Agenda that list a NPRM as a relevant action.

While this approach was better than other alternatives, we ultimately did not feel confident in the matches generated. Thus, our main results exclude matches generated through this procedure, though we offer it here mainly as a possible step towards a future refinement of the dataset. Regardless, we will make the results that incorporate these matches available upon request. Qualitatively, they resemble the results reported above.

Finally, after creating a mapping between the two datasets, we must then determine whether the Unified 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 then associate that Agenda publication with the date it appeared in the Federal Register.

APPENDIX C: AGENCY CODES  
TABLE A1. Key for Agency Codes

<i>Abbreviation</i>	<i>Full Name</i>
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
HUD	Department of Housing and Urban Development
Int'l Trade Commission	International Trade Commission
Interior	Department of Interior
Justice	Department of Justice

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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

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Note: An asterisk (\*) denotes an “independent” agency, as classified in the Paperwork Reduction Act, 44 U.S.C. § 3502(5) (2012). “Other” agencies include those agencies with names reported in a non-standard fashion. These agencies often engaged in little rulemaking. See *supra* note 113 for further explanation.

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\* Denotes an “independent” agency, as classified in the Paperwork Reduction Act, 44 U.S.C. § 3502(5) (2012).