**Dynamic Rulemaking**

Wendy Wagner,[[1]](#footnote-1)\* William West,[[2]](#footnote-2)\*\* Thomas McGarity,[[3]](#footnote-3)\*\*\* and Lisa Peters[[4]](#footnote-4)\*\*\*\*

Working Draft - Feb. 20, 2016

Abstract

*In administrative law it is generally assumed that once an agency promulgates a final rule, its work on that project -- provided the rule is not litigated -- has come to an end. In order to ensure that these static rules adjust to the times, therefore, both Congress and the White House have imposed a growing number of formal requirements on agencies to “look back” at their rules and revise or repeal ones that are ineffective.*

*Our empirical study of the rulemaking process in three agencies (N=462 revised rules to 183 parent rules) reveals that -- contrary to conventional wisdom -- agencies face a variety of incentives to revise and update their rules outside of such formal requirements. Not the least of these is pressure from those groups that are affected by their regulations. There is in fact a vibrant world of informal rule revision that occurs voluntarily and through a variety of techniques. We label this phenomenon “dynamic rulemaking.” In this paper we share our empirical findings, provide a conceptual map of this unexplored world of rule revisions, and offer some preliminary thoughts about the normative implications of dynamic rulemaking for regulatory reform.*

Table of Contents

[I. The Need for Dynamic Regulation 7](#_Toc443720885)

[A. The Rulemaking Revolution 7](#_Toc443720886)

[B. An Increasingly Complex Environment for Rulemaking 9](#_Toc443720887)

[II. An Empirical Investigation of Dynamic Rulemaking 13](#_Toc443720888)

[A. Methods 13](#_Toc443720889)

[B. Findings 16](#_Toc443720890)

[*1.* *Do Agencies Revise their Rules?* 16](#_Toc443720891)

[*2.* *What Kind of Revisions Are the Agencies Making?* 18](#_Toc443720892)

[*3.* *Potential Differences across Regulatory Programs* 32](#_Toc443720893)

[III. Dynamic Rulemaking: The Phenomenon and a Typology 34](#_Toc443720894)

[A. The Phenomenon of Dynamic Rulemaking 35](#_Toc443720895)

[B. A Typology of Regulatory Dynamism 36](#_Toc443720896)

[*1.* *Error Correction.* 36](#_Toc443720897)

[*2.* *Incremental Policy Development* 38](#_Toc443720898)

[*3.* *Policy Clarification and Change.* 40](#_Toc443720899)

[*4.* *Adaptation to Environmental Changes.* 44](#_Toc443720900)

[IV. Future Considerations for Dynamic Rulemakings 47](#_Toc443720901)

[A. The Virtues of Dynamic Rulemaking. 48](#_Toc443720902)

[B. Cautionary Notes. 49](#_Toc443720903)

[*1.* *Instability and Uncertainty.* 49](#_Toc443720904)

[*2.* *Fidelity to Statutory Goals.* 50](#_Toc443720905)

[*3.* *Administrative Efficiency* 50](#_Toc443720906)

[*4.* *Delay.* 51](#_Toc443720907)

[*5.* *Inconsistency with Comprehensive Analytical Rationality.* 51](#_Toc443720908)

[*6.* *Transparency.* 53](#_Toc443720909)

[*7.* *Balanced Access.* 54](#_Toc443720910)

[*8.* *Avoiding Centralized Review.* 54](#_Toc443720911)

[C. Disciplining Dynamism 55](#_Toc443720912)

[D. Possible Reforms 58](#_Toc443720913)

[*1.* *Discouraging Unaccountable Dynamism* 58](#_Toc443720914)

[*2.* *Encouraging Virtuous Dynamism* 59](#_Toc443720915)

[*3. Formalizing Dynamism* 60](#_Toc443720916)

[V. Conclusions 61](#_Toc443720917)

An agency’s publication of a final rule, conventionally understood, marks the completion of an arduous and sometimes tumultuous life cycle.[[5]](#footnote-5) In preparing just the proposed rule, the agency typically engages in an information gathering and analytical process that can consume many years. Add a few more years for the agency to solicit, collate, digest, and respond to a barrage of comments and convince the White House to pass the rule through to the Federal Register. And then, after publication of the final rule and compilation of a supporting record, one or more interest groups may file motions for reconsideration and ultimately challenge the regulation in court. Once the agency clears these hurdles, the administrative law literature gives the impression that its work is effectively concluded and its staff may move on to other pressing matters.

This static view of the rulemaking process has been the source of considerable consternation to regulatory reformers who complain that agencies that have gone to the effort of developing a regulation have little incentive to re-examine it in light of subsequent technological developments, changed policies, and experience with its application in the field.[[6]](#footnote-6) Largely at the urging of regulated industries, every president since Jimmy Carter has required executive branch agencies to re-examine existing regulations in light of specified criteria (usually some form of cost-benefit analysis) on either a one-time or a continuing basis. These “look-back” requirements have sometimes mandated agency review of all rules meeting a certain threshold of significance and sometimes required agencies to respond to suggestions from the regulated industries to re-examine particular rules.[[7]](#footnote-7) Similarly, the Regulatory Flexibility Act has since 1980 required all agencies to review on a ten-year cycle existing regulations that have a significant impact on a substantial number of small businesses or small governmental entities with an eye toward repealing or revising rules in light of five factors specified in the statute.[[8]](#footnote-8) Moreover, Congress is currently considering legislation that would establish an independent commission to review existing regulations and recommend a set of rules for Congress to repeal by joint resolution on an all-or-nothing basis.[[9]](#footnote-9) All of these prescriptions for retrospective review reflect the assumption that agencies are not already actively engaged in revising their regulations in light of real-world implementation experience and changes in the physical, economic, and political environments.

This static view of the rulemaking process also dominates the academic literature, in which many authorities have urged policymakers to devote more resources to formal, proactive and systematic review of existing regulations. Curiously, however, few scholars have examined the extent to which agencies are already modifying their rules in response to changed circumstances.[[10]](#footnote-10) Beyond citing the Administrative Procedure Act’s (APA) requirement that agencies give interested parties “the right to petition for the issuance, amendment, or repeal of a rule,”[[11]](#footnote-11) the leading treatises scarcely mention the informal, reactive processes of revising regulations that agencies employ, much less provide a framework for understanding them. Scholars have mined classic cases involving rule revisions, such as *State Farm* and *Chevron*, for insights into the standards of review the courts apply in deciding whether to set aside changes in rules based on procedural or substantive considerations, but they have not probed those cases for insights into rulemaking as a dynamic process.

Yet there are sound reasons for believing that the rulemaking process might be a much more dynamic process than commonly understood. To begin with, mistakes are inevitable in coping with the complex and uncertain technical and policy environments in which many rulemaking initiatives play themselves out. Second, scientific, technical, and economic knowledge relevant to rulemaking initiatives can change over time as more and better information becomes available, models improve, and cause-effect relationships become more or less apparent. Finally, a regulatory agency’s well-being depends on its regulations remaining current with changing public attitudes and the political preferences of those in a position to influence its actions. Affected parties are generally not shy about calling outdated or erroneous features of existing rules to an agency’s attention. Without some degree of dynamism in these respects, regulators risk becoming ineffective and losing the legitimacy upon which they depend for their survival.

A 1996 article by Neil Eisner and Judith Kaleta may be the only study that explicitly recognizes this need for dynamism. Although the authors’ principal concern is with formal requirements imposed by statute or executive order that agencies review their regulations and modify them as appropriate, they also note that “as part of its daily operation, a well-run agency is constantly ‘informally’ reviewing its regulations.”[[12]](#footnote-12) From their vantage point as attorneys for the Department of Transportation (easily the most prolific rulemaking agency in the federal government), they observe that “during the general operations of the agency, problems with existing rules are identified that may warrant further action. Investigators and others who work with the regulated parties may note a continuing problem in implementing the rules; attorneys may note problems in enforcing, interpreting, or litigating over rules; and accidents, congressional interest, media interest, and other events may result in discussions within an agency that may, in turn, result in a decision to change rules.”[[13]](#footnote-13)

 Eisner and Kaleta distinguish the “informal” reviews that take place during the day-to-day operations of rulemaking agencies from “formal” reviews required by statute or executive order. In formal or retrospective review, the agency is obliged to revisit important regulations in accordance with specified criteria with an eye toward identifying those rules it should repeal or modify. This must take place regardless of whether the rules have given rise to any problems for the agency or the regulated community. The vast bulk of relevant legal scholarship, including the Eisner and Kaleta article, focuses on the appropriateness and structure of such formal reviews.

 In contrast, this article undertakes an empirical exploration of the little-acknowledged extent to which agencies voluntarily engage in the revision and modification of their rules outside of these more formal look-back commands. Data drawn from four programs located in two executive branch agencies—the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA)—and one independent agency—the Federal Communications Commission (FCC)-- reveal that agencies engage in a great deal of informal review and modification of existing rules, often beginning before their effective dates. Most of the rules in our sample (N=182) were revised at least once and many were revised multiple times over decades (N=462 revised rules). The result is a phenomenon we call “dynamic rulemaking.”

The primary purpose of the article is to cast light on this blind spot in administrative law scholarship and begin a conversation about both the positive and normative implications of a dynamic regulatory state. In the first instance, we develop a conceptual framework for understanding this phenomenon that focuses on the various factors that motivate agencies to revisit final rules without the stimulus of a statutory directive or executive order. In the second instance, we consider the possible advantages and disadvantages of informal, dynamic rulemaking as an alternative to formal requirements that agencies proactively review their regulations in a systematic way. Much as “fire-alarm oversight”[[14]](#footnote-14) and “problemistic search”[[15]](#footnote-15) can serve the respective interests of Congress and organizational executives, a reactive approach to rule revision may promote administrative efficiency by allowing agencies to allocate limited resources to problems that arise while precluding the need to devote scarce resources to evaluating regulations that are not “broken.” To the extent that it is driven by input from external stakeholders, however, dynamic rulemaking may also overlook important issues and reinforce familiar biases in favor of well-organized groups at the expense of more diffuse public interests.

This paper proceeds in four parts. The first discusses the seeming inevitability of rule revisions in the contemporary regulatory state as agency survival tactics. The second part sets off on an empirical investigation of whether and how agencies revise rules by examining several complete sets of regulations promulgated by the FCC, EPA, and OSHA. These findings then provide the grist for a suggested typology of revisions in the third part of the article. Given the absence of information on dynamic rulemaking, this conceptual mapping offers a preliminary structure for understanding the breadth and depth of the phenomenon. The final section takes the findings and analysis from the prior two sections to offer preliminary suggestions for nurturing rule revisions, while also ensuring that agencies revise rules in a transparent and accountable fashion. Although this normative work is necessarily tentative, we hope that it will begin a larger conversation about dynamic processes in administrative law.

# The Need for Dynamic Regulation

An attorney who had spent twenty years developing rules for the Food and Drug Administration (FDA) described her job as a “matter of figuring out what will work and what will fly.”[[16]](#footnote-16) What she meant in the first instance is that rulemaking requires an agency to resolve empirical issues that are instrumentally related to its program’s goals—what might be termed objective policy analysis. What she meant in the second instance is that rulemaking is also a process of defining those goals by accommodating competing interests and fashioning decisions that are politically viable.

 Although these interrelated but often competing demands have always been inherent in bureaucratic policy making, the task of crafting sound rules has become more daunting in recent decades as the result of institutional developments that have added to the technical and political challenges agencies face. Attributable in large part to the expanded use of rulemaking in the modern regulatory state, these developments have made it more likely that agencies will want to (or have to) revisit prior decisions. The regulatory challenges agencies face are further magnified by the fact that they operate within fluid environments. New technologies, products, and business practices, as well as changing political conditions, can require bureaucrats to modify their policies over time, sometimes incrementally and sometimes rather abruptly.

This section considers the challenges that agencies face in developing rules that remain up-to-date and effective in a swiftly changing world, and it sets these challenges against scholars’ neglect of such issues. Despite the importance of factors that create a need for regulatory change, with the exception of periodic interest in the effects of presidential turnover,[[17]](#footnote-17) the administrative law literature has been almost silent on both the practice and theory of rule revisions. Yet the pressures on agencies make it evident that some rule revisions will become inevitable if not imperative.

## The Rulemaking Revolution

There was once a near consensus that rulemaking was severely underutilized. Often with the qualification that policy development through *ad hoc* adjudication could be preferable in certain contexts,[[18]](#footnote-18) administrative law scholars and some judges argued that agencies should employ rulemaking much more frequently because of its fairness to affected interests,[[19]](#footnote-19) its ability to bring a broader range of technical information and analysis to bear on regulatory problems, and its forcefulness and effectiveness in achieving programmatic objectives. [[20]](#footnote-20) Yet if rulemaking was a more holistic approach to implementation, it was precisely this characteristic that had discouraged its use.

Efforts to deal with problems in a comprehensive way are often impeded by the constraints associated with the concept of bounded rationality—by limited information and by the limited capacity of human beings to process information that is available.[[21]](#footnote-21) Rulemaking often involves disputed or complexly interrelated or otherwise unpredictable technical or economic considerations that make it difficult for an agency to define the problems being addressed, to assess the probable effects of proposed solutions to those problems, and to plan for future contingencies.[[22]](#footnote-22) Accordingly, attempts to resolve such issues in a comprehensive way run the risk of making big mistakes.[[23]](#footnote-23)

Moreover, rulemaking often takes place in an environment where statutory goals are ambiguous and consensus is lacking, and where agencies must anticipate pressure from the political principals who write their authorizing legislation, control their budgets, and appoint and (in the case of executive branch agencies) remove their leaders. The risk of making “political mistakes” under such circumstances is directly proportional to the breadth and precipitousness of the agency’s actions. Responding to the puzzlement some had expressed over agencies’ preference for case-by-case adjudication, a prominent D.C. Circuit judge suggested that they avoided rulemaking as an impolitic commitment.[[24]](#footnote-24)

 Few would contend that rulemaking is underutilized today. The so-called rulemaking revolution of the late 1960s and 1970s was in part voluntary as agencies responded to widespread criticisms of their reliance on case-by-case adjudication and to heightened pressures to achieve regulatory results. It was also partly mandatory as new legislation prescribed the use of informal rulemaking to address many issues. In fact, some statutes in the expanding areas of health, safety, environmental, and consumer-protection regulation required agencies to promulgate rules addressing certain issues by explicit statutory deadlines.[[25]](#footnote-25) These “action-forcing provisions were intended to ensure that agencies “would make use of their broad rulemaking powers to engage in creative policy making in the public interest.”[[26]](#footnote-26)

If it was advocated as a fairer and more forceful way of achieving statutory goals, however, the expanded use of rulemaking also led to complaints from the business community and it political allies about the excessive burdens imposed by federal regulations. This backlash in turn resulted in various procedural constraints and oversight requirements designed to restrain an allegedly overzealous bureaucracy. These included institutional developments such as centralized regulatory oversight by the White House, requirements that agencies justify their rules on the basis of cost-benefit analysis, and statutory provisions in some areas that subjected rulemaking to a level of due process that went well beyond the terms of the APA. They have also included calls for retrospective review of regulations.

## An Increasingly Complex Environment for Rulemaking

 This brief overview speaks to a tension that lies at the heart of modern rulemaking. If agencies have adopted rulemaking in recent decades as a more rational and forceful form of administration, it still remains subject to the informational and political constraints on comprehensive policy development that once discouraged its use.[[27]](#footnote-27) Large, complicated rules are apt to contain errors and to be based on information and assumptions that can change over time. To be durable, regulatory policies must be able to correct those errors and be adaptable to a changing environment.

Certainly the primary target of most regulation – industry – undergoes continuous and sometimes dramatic change with the acceleration of technological innovations and the resultant development of new products, new services, and new ways of doing business. Rules that constrain industry operations must be sensitive to these advances and shifts. Whereas television broadcasting once involved the transmission of signals from local towers to home antennae and was dominated by three networks, for example, today it includes satellite TV, cable TV, and a multitude of networks and channels.

The need for adaptive rulemakings is amplified further by the analytical and political developments over the last few decades that were intended to make the process more responsive to affected interests, more objective and comprehensive in their assessment of policy effects, and more accountable to each of the constitutional branches of government. For their part, interest groups have proliferated and are often vigorous participants that can engage all institutions – the courts, Congress, and the President – simultaneously to advance their goals in the rulemaking process.

Congress obviously plays a critical role in rulemaking through its delegation of authority to agencies and through its imposition of various procedural constraints that determine how agencies must exercise that authority.[[28]](#footnote-28) The legislature also influences rulemaking informally through committee-based oversight.

The president’s role in administrative policy making has also expanded in several ways over the last few decades. The White House exercises significant indirect influence over what agencies do through the appointment of roughly seven hundred political executives who manage the line bureaucracy on the president’s behalf, and this process has only become more centralized under recent administrations.[[29]](#footnote-29) Although available evidence suggests that requests by the Executive Office for agencies to issue specific rules are highly selective,[[30]](#footnote-30) the direct and anticipatory effects of reactive oversight by the President in discouraging or altering agency initiatives appears to be much more substantial.[[31]](#footnote-31)

The environment of rulemaking has also become more complex and subject to swift changes as bureaucratic policymaking space with the Executive Branch itself has become more crowded. It is now more likely that decisions in one area will impinge on other areas of administration, and modifications and adjustments may also be needed to address these conflicts.[[32]](#footnote-32) This pressure is reflected in part in the Office of Information and Regulatory Affairs’ (OIRA) important role as a “convenor” of interested bureaucratic actors to ensure that the positions taken in one agency’s proposed or final rule are in accord with the preferences and positions of the other federal agencies.[[33]](#footnote-33)

These cumulative changes in information, technology, and industry practices over time, coupled with the growing number of parties involved in the process, would seem inevitably to lead to heightened demands for adjustments to existing regulations. Indeed, in many settings it is not difficult to imagine an agency facing considerable pressure to revise a rule from a number of different sources, including companies that remain opposed to the regulation, companies that find themselves covered by a regulation they never thought would apply to them, companies that find compliance difficult or impossible and therefore demand exceptions, beneficiaries who discover that the regulation does not perform as effectively as the agency predicted, newly empowered political actors motivated by disgruntled stakeholders after a power-shifting election, and others who consider themselves adversely affected by the regulation. In addition, some agencies operate in such rapidly changing technological environments that one would expect them to be adjusting their rules periodically to prevent entire programs from becoming obsolete.

Presented with a regulation that appears out of step with newly acquired scientific and technical understandings or with the external policymaking environment, an agency must rescind the rule and promulgate a new one from scratch, revise the existing rule in one or more regards, or do nothing and deal with the consequences of an obsolete or irrelevant policy.[[34]](#footnote-34) An agency exercising the first option will encounter all of the above-described analytical and political challenges and institutional constraints, which some scholars have associated with the “ossification” of the rulemaking process.[[35]](#footnote-35) One might conclude that the second option would invoke precisely the same constraints, because it is well settled as a legal matter that revising a rule requires the same notice and comment procedures as are required for promulgating the rule in the first instance.

 The Administrative Procedure Act, however, does provide a means for agencies to make some adjustments to existing rules without invoking the elaborate requirements of notice and comment, making the second option – revising rules – often the most attractive option among alternatives. Under the APA’s “good cause” exception, agencies may promulgate (or revise) rules without notice and comment if the changes are minor and non-controversial or if delaying a rule to solicit comments would be contrary to the public interest.[[36]](#footnote-36) The limited case law and lack of conceptual guidelines for utilizing this good cause exception make it a particularly attractive way for agencies to adapt rules to changing times expeditiously and without draining their scarce resources.

Thus, revising rules may be a relatively straightforward option when stakeholders, political officials, or the agency itself determine that changes need to be made to a rule correct errors, to address unanticipated effects, or to keep up with the times. To adjust the rule, agencies can engage in notice and comment rulemaking to make necessary revisions. Alternatively, in some cases agencies can revise rules without undertaking lengthy analyses and data gathering, without undergoing OMB and interagency review, and without any serious threat of judicial review.

While the pressures and incentives discussed above lead us to expect that agencies are likely to engage in at least some revision of previously promulgated rules, they tell us very little about how agencies actually respond in practice. It is that more grounded world of revised rules to which we now turn.

# An Empirical Investigation of Dynamic Rulemaking

Assuming that agencies often encounter pressures to change rules in light of the increased fluidity and complexity of the regulatory environment, how do they respond to these pressures? Is there a world of dynamic rulemaking or does the formalized nature of notice and comment discourage agencies from adjusting rules? And if agencies are in fact revising their rules, how do these revisions comport with the values of transparency, balanced responsiveness, and reasoned and factually informed decision making that are central to administrative law?

To gain purchase on these practical questions, we conducted an empirical investigation of rule revision activity in three different agencies over four complete rulemaking programs. While the findings for these discrete programs raise more questions than answers, the findings do unequivocally answer at least the initial question of whether agencies revise rules. They do. All three of the agencies revised the majority of their rules in our sample, often several times. Yet the answer to the second question – regarding the accountability and procedural integrity of these revisions -- is less clear. Our more specific findings are detailed below.

## Methods

Rather than sampling revised rules randomly across the Federal Register, the basic design of our study examines all of the revised rules in four discrete regulatory programs. This approach does limit the representational features of our findings; on the other hand, it provides more detail in attempting to make sense of variations in agency practice.

 The three agencies selected for study – the Environmental Protection Agency (EPA), Federal Communications Commission (FCC), and Occupational Safety and Health Administrative (OSHA) – were identified in part because they are expected to operate differently, but not so differently as to make comparisons difficult. See Figure 1. Specifically, in OSHA, we examined two complete groups of worker safety regulations– one governing standards for exposure to toxics and a second involving more acute harms from machinery and workplace conditions.[[37]](#footnote-37) The FCC regulatory program selected for study consisted of a set of relatively technical broadcast rules.[[38]](#footnote-38) The EPA program consisted of the highly technical test rules promulgated under the Toxic Substances Control Act (TSCA), which requires added testing of individual chemicals or chemical families.[[39]](#footnote-39) We also included more limited EPA data, collected primarily from a previous study, on revisions to technology-based standards promulgated for air toxics under the Clean Air Act.[[40]](#footnote-40)

EPA TSCA Test Rules (N = 52 revised rules)

General technical complexity of sets of rules (increasing)

Expected Engagement by diverse interest groups (increasing)

FCC Broadcast Rules (N = 87 revised rules)

OSHA Health and Safety Standards (N= 90 revised rules)

EPA Air Toxic Standards (N = 344 revised rules)

FIGURE 1: A conceptual map of differences in the sets of rules in this study

The mix of agencies and programs selected for study covers a range of functions and policy-making environments, as defined by the political forces with which they must contend and the technical complexity of their policy decisions. For example, whereas OSHA and FCC rulemaking often involves conflict between well-organized and well-represented interests, the revision of EPA toxicity testing rules and hazardous air pollutant rules is more apt to occur in a unidimensional environment that is dominated by industry groups without much input from diffuse beneficiaries of regulation. The EPA rules selected for study also tend to be more technically complex than FCC and OSHA safety rules.

After selecting the discrete regulatory programs, we identified all of the Federal Register rules underlying the Code of Federal Regulations (CFR) sections and traced their lineage, using both Westlaw and the CFR, to find all of the subsequent “revisions.” (See Appendix for a more detailed explanation of the methods.) For purposes of this study, a “revised rule” is a final, published rule that modifies, adds to, or retracts some feature of an originating or “parent” rule in our database.[[41]](#footnote-41) Once located, trained research assistants extracted information on each revised rule concerning its nature, its impetus, its length and significance, and its provisions for input by affected interests. We also conducted three in-depth case studies of small, medium, and large revised rules in each agency program.[[42]](#footnote-42) The case studies are relatively long and can be accessed through links in the footnotes. These analyses supplement the aggregate quantitative data in important ways that become more evident in the section that follows.

## Findings

Our investigation begins with an inquiry into the extent to which rules are revised. We then gather additional basic information about the nature of the revisions to understand more about agency practice.

### *Do Agencies Revise their Rules?*

 Our first question was simply “**Do agencies revise their rules despite the various impediments to rulemaking discussed in Part I?**” The aggregate data in our study unequivocally answer this question in the affirmative.[[43]](#footnote-43) Seventy-three percent of the 183 rules in the regulatory programs we examined were revised by the agency at least once and typically multiple times. Although the percentages for EPA’s two programs were significantly higher than those for OSHA and FCC, all three agencies revised a majority of their parent regulations in our sample. See Figure 1 below.

 Since the initial rules in our sample dated only to the mid-1970’s, some of those designated as “parents” for purposes of the study were themselves rule revisions. Although this did not apply to EPA rules, nearly half of the parents in the OSHA and FCC datasets were revisions of earlier regulations.[[44]](#footnote-44) This observation suggests that the overall rate of 73 percent may significantly understate the actual frequency with which the rules in our study were revised.

The extent of revision activity is even more striking when viewed in relation to all of the published “final” (including final revised) rules in our database. Although many were minor adjustments, the revised rules outnumber the original parent rules by a factor of 2.5 to 1 if each published final rule is counted as equal. (All of these rules are in final form; none are proposed rules.) Thus, there were 462 revised final rules in our database that originated from an initial list of 183 parent rules.[[45]](#footnote-45)

In addition to the extensive revision activity in all three agencies, our data reveal considerable variation across agencies. In EPA’s case, we found a high probability of some type of revision to every final rule. All of EPA’s TSCA parent test rules were revised at least once, and only fourteen out of 102 parent rules in the air toxic program were not revised. This yields an overall revision rate of nearly 90% for EPA’s parent rules in this study. By contrast, OSHA revised only a little more than half of its parent rules. Yet although a thorough examination of the issue would require a more systematic qualitative analysis, one should note that OSHA’s revisions could be quite significant once it opened the door to change. In several cases these revisions went far beyond the scope and size of the parent. In one, for example, OSHA dedicated 361 total pages to the published revisions of the original rule, making 189 total changes over time. See Figure 2.

FCC also revised its rules slightly more than half the time. The extent and significance of its revisions were not as great as OSHA’s as measured by number of changes or pages of revisions. (These reached a maximum of 34 changes over the course of the revised rules and totaled 63 pages.) In the case studies of revised rules, however, the changes FCC made appeared to be quite significant.[[46]](#footnote-46) Furthermore, the difference in revision rates between FCC and EPA is mitigated by the aforementioned fact that our data only extend back to the mid-1970s. Unlike EPA, a significant number of FCC rules categorized as parents in our study were revisions themselves.

### *What Kind of Revisions Are the Agencies Making?*

 The observation that revisions are extremely common if not the norm suggests a second level of inquiry into what this activity entails in substantive and procedural terms. “**What kinds of revisions are the agencies making and are the revisions major? If so, do they engage the public?**” To understand more about their character in these regards, each revision was coded with respect to whether it involved some form of notice and comment or other publicized notice and to how the agency characterized its significance.

#### Types of Revisions

Agencies label their revisions differently and perhaps inconsistently, but overall they range from simple corrections to technical amendments to more radical overhauls of central features of the original rule.[[47]](#footnote-47) Figure 3 displays the types and relative frequency of revision activity as characterized by the agencies in our study.

The largest set of revisions was characterized as “final rules.” As discussed below, most of these were relatively significant additions, modifications, or other changes to the prior rule and provided for notice and comment. Indeed, perhaps because they were often substantial undertakings, the titles of these “final rules” sometimes offered no signal that the agency was in fact revising an existing rule. As Figure 3 indicates, the agencies varied in the extent to which they deployed these revisions. Very few of EPA’s TSCA revisions were promulgated as significant revisions; on the other hand, nearly half of the FCC’s revisions were promulgated as “final rules.”

The second most significant set of revisions consisted of those that were entitled “corrections.” All of the agencies appeared to use “corrections” at roughly the same rate to make seemingly minor adjustments to the parent rule. In the course of investigating some of these corrections in our case studies, we discovered that many were truly minor. In one such example, OSHA made a single correction to a typographical error, changing an “of” to an “or” in a table.[[48]](#footnote-48) Revisions that were classified as corrections were not always so trivial, however. In another, OSHA changed a “should” to a “shall” for its safety requirements governing certain concrete operations. Although the agency characterized this change as a response to a “technical error,” it apparently had the legal effect of transforming a voluntary standard (or guideline) into a mandatory requirement for lift-slab operations.[[49]](#footnote-49) Another substantive change that was labeled as a technical correction involved an asbestos standard in which OSHA initially indicated it would allow disposable respirators but then removed that option.[[50]](#footnote-50) There were also cumulative corrections that together might constitute more significant changes in some of EPA’s corrections to air toxic standards. In a Secondary Aluminum “corrections” rule, for example, EPA made thirty separate changes to address problems or ambiguities that had arisen with the standard in operation.[[51]](#footnote-51)

Beyond the corrections category, we observed differences between the types of revisions that the agencies made. As compared with the other agencies, OSHA made more liberal use of “administrative stays” (22%) and “extensions” (10%) within its revisions. Another unique approach was EPA’s use of “technical amendments/consent orders” to revise its rules (73%). This category was unique to TSCA and was based on negotiations with manufacturers that had been memorialized in letters, usually well before the changes were published in the Federal Register in an annual reporting of “technical amendment/consent orders.”[[52]](#footnote-52) In most cases, the agencies neither articulated nor referenced the underlying conceptual and/or legal framework for placing a revised rule in one category, rather than another.

#### Role of Public Comment and Other forms of Participation

Variation in the types of revisions leads to even more legally-pressing questions about the extent to which the revised rules were subjected to public participation. One might hypothesize that the agency’s decision about whether and how to include public comment signals its view of the significance of the revision, at least in a crude way. The graphic below depicts an idealized version of the options the agency could consider with respect to the need for notice and comment as determined by the expected significance of the change.



Declining public significance of the revision

 It is important to note that each of the categories to the right of “formal notice and comment” box would require some “good cause” justification by the agency under the terms of the APA.[[53]](#footnote-53) Absent an emergency or other circumstances rendering public comment “impracticable,” this would generally encompass a showing that the formal participation is “unnecessary” (encompassing a trivial or minor amendment) or “contrary to the public interest.”[[54]](#footnote-54) Both exceptions apply to rules in which the public presumably has little interest, but they leave some room for agencies that are so motivated to avoid notice and comment by framing their rules in highly technical and complicated ways that make them inaccessible to lay participants.[[55]](#footnote-55)

One should also note that judicial review of the agencies’ use of the APA good cause exceptions[[56]](#footnote-56) is rather limited.[[57]](#footnote-57) Although courts purport to view those exceptions quite narrowly,[[58]](#footnote-58) the case law reveals considerable variation in the scrutiny provided to alleged abuses.[[59]](#footnote-59) Technical and minor corrections typically do satisfy the unnecessary exception.[[60]](#footnote-60) On the other hand, courts vary with regard to whether substantive but still modest revisions to rules require notice and comment.[[61]](#footnote-61) For example, some courts might credit an agency’s solicitation of post-promulgation participation or note the limited scope of the rule in undertaking an assessment of whether notice and comment was required; other courts might not consider these alternative avenues for engagement.[[62]](#footnote-62) Similarly, some courts have required that an agency’s indefinite extension of effective dates be subject to notice and comment rulemaking, whereas others do not require public comment for incremental delays in effective dates.[[63]](#footnote-63)

**How, then, do agencies sort their rules among the various options identified above?**  In our sample of rules, only one-third of the revisions across all agencies involved formal notice and comment. For another 25 percent, the agencies provided opportunities for public engagement after the fact through direct final rules, through petitions, or informally in a variety of different ways.

As compared to the “background rate” for the use of notice and comment for all rules (and not just revised rules), the proportion of revised rules subjected to notice and comment in this study appears somewhat lower. Several studies on the use of notice and comment for promulgating final rules across all agencies report that it is employed 50% or more of the time.[[64]](#footnote-64) While we are not able to assess the statistical significance of these differences since these studies do not differentiate between initial and revised rules, it seems clear that at least in some rulemaking settings – e.g., TSCA – agencies employ notice and comment procedures substantially less often than is the case for other agencies.

A lower rate in agency use of notice and comment for revisions may be easy enough to explain in both practical and legal terms because revisions are more likely than new rules to involve minor issues of little importance to stakeholders. Yet agency avoidance of notice and comment may not always be so easily justified. Although our data do not demonstrate that this is the case, they do suggest that agencies have the capacity to effect significant cumulative changes in policy through a series of minor revisions that do not involve public participation because public comment on each change is deemed “unnecessary” under the good cause exemption. Such an incremental strategy would presumably lower the risk of litigation against the agency for procedural violations, which may increase its willingness to engage in “notice-and comment avoidance.”[[65]](#footnote-65)

|  |  |
| --- | --- |
|  |  |

As Figure 4 reveals, there was also considerable variation across agencies in eliciting public input on their revisions. EPA’s TSCA test rules rarely involved notice and comment. Input solicited by the agency generally consisted of negotiations with regulated parties (counted in this study as “input solicited other ways”) that were later memorialized as revisions to the original final rule.

In the air toxic revisions, EPA deployed direct final rules for over twenty percent of its revisions. These are rules that take effect several months after their promulgation unless the agency receives an adverse comment.[[66]](#footnote-66) In some cases EPA also published a notice of proposed rule rulemaking (NPRM) simultaneously with publication of the direct final rule in order to prevent one adverse comment from completely derailing a revision.[[67]](#footnote-67) If adverse comments were received, EPA could then shift the rule into the formal notice and comment process without starting over.

Only 38% of the FCC revisions involved informal notice and comment, but nearly 25% of the remaining rules were still subject to some form of informal engagement by affected parties – primarily as a result of petitions that triggered the revision. For these petitioned revisions that did not involve notice and comment, nearly 2/3 were prompted by multiple petitions filed by diverse groups that appeared to take different positions on the issues. Thus, FCC was confronted with some diverse input from stakeholders on the record for 63% of its rule revisions.

OSHA’s revisions were primarily made outside of the formal notice and comment process – for every revised rule that was subjected to notice and comment there were two that went without. OSHA also received petitions for slightly more than 10% of the revisions, although the petitions were generally filed by only one group.

#### Legality of Revisions

These different practices naturally lead to the more legally relevant question of “**whether significant revisions were consistently subject to notice and comment?**” Put another way, are some of the revisions that lack formal notice and comment promulgated in violation of the APA?While the data cannot answer this question with any kind of precision, there is evidence that some substantive revisions were not subjected to notice and comment yet arguably should have been.[[68]](#footnote-68) The best-fitting legal exception available to the agency to justify forgoing notice and comment for the revisions in our sample (there did not appear to be emergencies) is the “unnecessary” exemption typically reserved for minor, technical changes;[[69]](#footnote-69) yet some of the revisions promulgated without notice and comment seemed to be both substantive and important to the public. As mentioned in the prior section, our case studies provide several examples of apparently substantive changes that were designated as corrections that did not involve public comment.[[70]](#footnote-70)

Beyond the materiality changes characterized as corrections, the case studies revealed other examples of substantive revisions where the absence of formal notice and comment might in hindsight appear to be legally problematic. In one revision of an air toxics standard for halogenated cleaning solvents, for example, EPA exempted an entire group of industries without notice and comment.[[71]](#footnote-71) The case studies also exposed the phenomenon of cumulative revisions. In at least one rule from our case studies – an EPA rule requiring testing of fluoroalkenes – the parent regulation was subjected to five revisions without notice and comment over a period of six years. While each round of changes appeared relatively minor, the cumulative effect of those changes appears significant.[[72]](#footnote-72)

 The examples in our case studies of substantive changes that were not subject to notice and comment obviously do not speak directly to the other rules in our study. Yet the likelihood that some of those rules involved material changes that should have been subjected to greater public oversight is reinforced by the agencies’ own summaries of the nature of the changes made in rules not involving notice and comment. These revisions included: changes in reporting requirements; effectuating stays and extensions; changing the effective date of a rule; deleting a standard; clarifying compliance requirements; and changing the methods or parameters of a mandated test. The variation in the general use of public comment within similar types of revisions, such as amendments, also raises questions about the decision processes the agencies employed for determining whether to elicit comments. See Table 1.

Table 1: Comparisons of Select Types of Revisions According to Whether Agency Followed Formal Notice and Comment on the Change

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | Final Rule |  Amendment |  Stay |  Extension |  Correction |  Technical Amendment and Consent Order |
| FCC Comment | 27 | 3 | 0 | 1 | 0 | 0 |
| FCC No Comment  | 22 | 3 | 1 | 0 | 17 | 0 |
| OSHA Comment | 19 | 0 | 2 | 0 | 1 | 0 |
| OSHA No Comment | 8 | 4 | 18 | 1 | 20 | 0 |
| EPA TSCA Comment | 1 | 1 | 0 | 0 | 0 | 0 |
| EPA TSCA No Comment | 2 | 0 | 0 | 0 | 7 | 33 |
| EPA Air toxics Comment | 145 | 46 | 1 | 4 | 2 | 0 |
| EPA Air toxics No Comment | 2 | 15 | 5 | 1  | 62 | 0 |

 |

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
|  | Final Rule | Amendment | Stay | Extension | Correction | Technical Amendment and Consent Order |  |
| FCC Comment | 27 | 3 | 0 | 1 | 0 | 0 |  |  |
| FCC No Comment  | 22 | 3 | 1 | 0 | 17 | 0 |  |  |
| OSHA Comment | 19 | 0 | 2 | 0 | 1 | 0 |  |  |
| OSHA No Comment | 8 | 4 | 18 | 1 | 20 | 0 |  |  |
| EPA TSCA Comment | 1 | 1 | 0 | 0 | 0 | 0 |  |  |
| EPA TSCA No Comment | 2 | 0 | 0 | 0 | 7 | 33 |  |  |
| EPA Air toxics Comment | 145 | 46 | 1 | 4 | 2 | 0 |  |  |
| EPA Air toxics No Comment | 2 | 15 | 5 | 1  | 62 | 0 |  |  |

 |  |  |  |
|  |  |  |  |  |

#### Who Impel Agencies to Revise Rules?

Because we were also interested in why agencies decide to revise rules, we sought to determine whether we could trace the instigator for revision through a careful read of the document itself. Specifically, our questions here were: “**What is the impetus for the revision? Is it a presidential command? Interest group pressure? Efforts to avoid an embarrassment due to error? Experience with enforcement? Or some other factor?”**

To gain at least some purchase on the trigger for rule revisions, we extracted the agency’s explanation for what triggered the change from the preamble of each revised rule. At a general level, these various motives are aptly summarized by the statements of agency officials in Eisner and Kaleta’s 1990’s study that “[t]he agency will generally only review [of revise] a rule when it thinks something is wrong”.[[73]](#footnote-73) Also consistent with Eisner and Kaleta’s study is the fact that more than 99% of revised rules in our dataset appear to have resulted from “informal” agency revision activity rather than the result of formal retrospective review directed by the President or Congress.[[74]](#footnote-74) Indeed, given the existence of both the Regulatory Flexibility Act’s directive coupled with Executive Orders requiring some type of look-back beginning with the Carter Administration,[[75]](#footnote-75) the absence of this more formal trigger for the 400-plus revisions in our study is noteworthy. The rich revision activity reveals a vibrant “culture” of dynamic rulemaking that occurs without formal commands or directives, even in settings where those formal requirements are in place.

In most cases the agency itself decided that a revision was needed without any apparent formal prompting from outside parties. For example, OSHA revised a rule governing workplace safety in concrete and masonry construction based on a series of tragedies that highlighted the need for revised workplace rules.[[76]](#footnote-76) More challenging, of course, is determining what may have triggered the agency’s own interest in promulgating a revision when the agency is silent on the matter. Thus, while we distinguish between revisions triggered by the agency and those triggered by interest groups based on the agency’s explanation, in practice we suspect that there is a large gray area in which the agency makes revisions based on interest group input or congressional or executive branch inquiries stimulated by interest groups that run the gamut from a helpful suggestion to a demand backed by the threat of litigation or other sanctions.

The second and third most prevalent triggers for revisions were interest group pressure – either through informal avenues (e.g., letters) or through formal petitions.[[77]](#footnote-77) As mentioned, in most of EPA’s TSCA test rules, requests for revisions were made exclusively, or nearly so, by the regulated community, and these requests were generally informal – interest groups contacted EPA by letter, fax, or perhaps telephone without filing motions of reconsideration or petitions. By contrast, the interest groups typically used more formal methods of communication by filing petitions with the FCC and to a lesser extent OSHA.[[78]](#footnote-78)

The courts also played an important role in triggering revisions. While their direct role was not a dominant trigger in our study (see Figure 5), our in-depth cases reveal that courts were nevertheless an important force behind some of the more significant changes.[[79]](#footnote-79) In four of the six FCC and OSHA case studies, for example, courts were the catalyst for at least some of the revisions, although they often entered the scene after a series of revisions had already been made to the parent rule. The agency revised its rule in response to a judicial remand in three of these cases. In the fourth case, the agency’s revision was triggered not by a remand but by a judicial suggestion that some type of adjustment might be necessary.[[80]](#footnote-80) In the air toxic EPA rules, the courts’ influence was less direct; some of the revisions were based on the EPA’s “agreements” and “settlements” with regulated parties. Presumably the impetus for the agency to sign these agreements was the threat of credible litigation by regulated parties.[[81]](#footnote-81)

Both Congress and the President also triggered some revisions, although their influence from the written record appeared to be slim or nonexistent in the vast majority of cases. The case studies provide several concrete examples of the legislature’s role in sparking some of the more important revisions. In the FCC’s regulation of low-power FM for example, Congress intervened midway through the agency’s drawn-out rulemaking process by passing a law advancing the interests of full-power broadcasters. FCC’s subsequent rule revisions were required or otherwise influenced by this new legislation.[[82]](#footnote-82) Two of the OSHA revisions in the larger dataset were attributed to an internal agency review triggered by the Paperwork Reduction Act and another OSHA revision was triggered by the Regulatory Flexibility Act. In the air toxics program, Congress required EPA to review its technology-based standards at regular intervals and also to consider the possibility of revising the standards if unacceptable risks to the public health remained after installing the required technology.[[83]](#footnote-83) Some of the revisions in the air toxics set of rules – though certainly a minority – were the result of this congressionally triggered review activity that took place about once a decade.[[84]](#footnote-84) And the agency took credit for instigating the legislation that in turn triggered the revision in at least one FCC and one OSHA rule.[[85]](#footnote-85)

The President’s formal influence – through express commands or requirements for retrospective rule reviews[[86]](#footnote-86) -- was rarely cited as a trigger for a revision.[[87]](#footnote-87) We suspect that if the stimulus for the modification was a formal regulatory lookback requirement, the agency would have mentioned that fact to earn credit with those in the White House who were responsible for the requirement. Virtually all of the revisions appeared instead to be the result of informal processes rather than a formal edict requiring retrospective review.[[88]](#footnote-88) Presidential influence may nevertheless have served as an implicit inducement for revisions, but identifying this potentially more substantial presidential role in a direct way is nearly impossible given the nontransparent nature of discussions between agencies and the White House.[[89]](#footnote-89) In a rather crude effort to assess the possible effects of presidential influence, we focused on OSHA, which promulgated rules that were more likely to attract national attention (FCC did as well, but it is an independent agency), and searched for spikes in revisions following a new Administration. See Figure 6. No observable increase in revision activity appeared in the two years after a change in Administration, though the absence of a spike in revision activity does not mean that changes in political management were not important. A spike in revision activity in 1986 was probably caused by the appointment of a new OSHA Administrator who was particularly interested in toxic exposures in the workplace.[[90]](#footnote-90) These findings do suggest, however, that at least for the rules we studied, turnover in the White House is not the primary or even necessarily an important explanatory factor for most revision activity.

### *Potential Differences across Regulatory Programs*

Even though the aggregate level of revisions was relatively constant from agency program to agency program (on average about 2-3 revisions per parent rule), the case studies and data reveal potentially significant differences in the nature of and initial justification for rule revisions. One difference between the sets of rules might be due to differences in the nature of the “parent” rule itself; in both sets of EPA rules (TSCA test rules and MACT rules), the agency was subjected to judicially enforceable deadlines for promulgating the parent regulation.[[91]](#footnote-91) By contrast, there did not appear to be deadlines for most and perhaps all of the FCC and OSHA rules. One might hypothesize that the agency would be more rushed and make more errors in developing deadline-driven regulations, and that this would result in more frequent revisions -- particularly shortly after the rule’s promulgation.[[92]](#footnote-92) Our data provide some support for this possibility for at least EPA’s TSCA test rules, which involved some uniquely intensive revision activity. For example, EPA’s TSCA test rules involved a 100% revision rate; every parent was revised at least once.[[93]](#footnote-93) Additionally, EPA revised the vast majority of its parent rules through consent agreements reached with the manufacturers, an approach that also signals some urgency with respect to finalizing the revisions.[[94]](#footnote-94)

 Although we did not have a reason to expect this, an initial review of our data also revealed dramatic differences in the clarity of the agency’s explanation with respect to both the motivation for and implications of its revisions. In light of this, we had students code the accessibility of the reasons for and significance of revisions based on three categories – clear, unclear, and in-between.[[95]](#footnote-95) These data revealed striking differences between EPA on the one hand and FCC and OSHA on the other. In the case of EPA’s revisions of chemical test rules, in fact, the agency not only failed to explain why it was revising the rule or the implications of the revision; it did not even identify the text of the rule existing prior to the revision. In many cases, it merely printed those words that changed in the course of the revision. As just one example, EPA volunteered that in its revision it had, “ … approved use of nitrogen as the negative control and diluting gas, a 10 L/min flow rate, and an 18- to 19-hour treatment time for the non-activated portion of the test.”[[96]](#footnote-96) There was no mention of the prior requirements, why the changes were made, or what their implications were for the regulated parties or public health research. By contrast, both FCC and OSHA provided relatively accessible explanations for their revisions. See Figure 8.

Several other differences among the agencies also emerged from the case studies and aggregate data. As compared with FCC and OSHA, EPA’s revisions to its TSCA test rules appeared to have been dominated by the concerns of regulated parties. Its changes were also more frequent and their implications were more difficult to understand.

OSHA’s revisions tended to be the most substantial – involving nearly triple the number of revisions per rule as compared to the other two agencies. In contrast to EPA’s revisions, moreover, OSHA’s changes were often supported by relatively accessible explanations and, in some cases, notice and comment to ensure that affected parties were aware of the changes and had an opportunity to respond to them. The case studies indicate more diverse engagement by interest groups in OSHA revisions as compared to EPA. Labor groups sought judicial review of two of the three rules detailed in the case studies that led to further revisions.

FCC revisions – particularly as revealed in the case studies – included more significant changes that went through notice and comment or resulted from a barrage of petitions lodged by diverse affected groups.[[97]](#footnote-97) Many of its revisions also generated considerable interest and comment from a wide range of interests.[[98]](#footnote-98) Much like OSHA -- but unlike EPA-- FCC was also clear about the nature of the changes it was proposing. One might speculate that these factors are interrelated. Where well-organized and competing groups are attentive to rule revisions, there is more pressure on the agency to be transparent.

In both OSHA and FCC, the need for a revision was often triggered by external events at points in the revision process. Revisions were triggered by a series of workplace tragedies in one of the OSHA case studies, for example, and revisions involved court remands in two of the three FCC cases. Both OSHA and FCC sometimes strategically bracketed controversial issues, moving sequentially through revised rules to tackle a larger set of significant issues over time.[[99]](#footnote-99)

# Dynamic Rulemaking: The Phenomenon and a Typology

The preceding section indicates that dynamic rulemaking is both prevalent and multi-dimensional. This section attempts to draw some larger lessons from the data. The first set of lessons considers the phenomenon of dynamic rulemaking on its own terms. The second offers a preliminary framework to help us think about this largely unexplored, yet potentially important phenomenon.

## The Phenomenon of Dynamic Rulemaking

Although the literature often implies that once an agency promulgates a “final rule” its life cycle has come to an end, the data in this study reveal considerable agency activity dedicated to adjusting and revising regulations after they are published. Our data also suggest that, in terms of the applicable legal considerations, agencies often promulgate revised rules somewhat differently from the initial parent rules. As the lower rate of notice and comment makes clear, many revisions are smaller and more incremental in nature. Accordingly, revised rules tend more often to fly under the radar of those who might otherwise oppose them (and might even be timed and framed by the agency to maximize this possibility in some settings); the promulgation of an initial rule, by contrast, might garner more news and attention, bringing with it more forms of oversight and monitoring. Revised rules are also less likely to be significant in an economic sense, since they merely adjust existing regulations, and they therefore face greater odds of escaping OIRA oversight and other procedural checks such as small business review. Finally, since they are mostly undertaken voluntarily by the agencies, revisions seem more likely than parent rules to involve changes that follow the path of least resistance. If a revision is likely to be litigated, politicized, or the subject of oversight hearings, it seems less likely that the agency will take it on. That there were 2.5 revisions for every parent rule in our study is consistent with the speculation that revisions are generally easier to promulgate than the parent rules.

The findings also provide an informative backdrop for considering reforms of rulemaking, particularly the current drive for more formalized retrospective review. Although these actual and proposed requirements are based on an assumption that rulemaking is a static activity, the 400-plus revisions in this study tell a very different story. Virtually all of the revisions were made outside of existing formal requirements or requests for regulatory lookbacks. Agencies instead made the adjustments in response to a variety of other stimuli. TSCA adjustments, for example, were made repeatedly as the result of relatively continuous negotiations between industry and the agency. Indeed, if there is cause for concern in the dynamism we observed in agencies like EPA, it is that there may be a bit too much revision activity occurring outside of the spotlight provided by notice and comment.

Our findings also reveal that regulated industries were among the most important motivators for adjusting rules, urging revisions through petitions, informal overtures, and even threats of litigation. This steady pressure for revisions is not surprising; since regulated industries are most directly affected, they would have strong incentives to keep agency rules operating properly. At the same time, the prevalence of agency adjustments in response to industry pressure may render the need for retrospective review less pressing, at least to the extent that retrospective review is premised on the need to reduce burdens on regulatory parties.[[100]](#footnote-100)

## A Typology of Regulatory Dynamism

Having identified dynamic rulemaking as an empirical matter, the next challenge is to develop a conceptual framework for thinking about it in functional terms. The substantial gap that exists between what we might expect to occur and what our data demonstrate, on the one hand, and what is discussed in the literature, on the other, is an important lacuna in our understanding of the administrative process. With the notable exception of a 1996 article by Neil Eisner and Judith Kaleta[[101]](#footnote-101) and several recent analyses of formal regulatory lookback requirements,[[102]](#footnote-102) conventional descriptions of rulemaking in the law-review, political science, and public administration literatures reinforce the general impression that it is a static process. Beyond its purely academic implications, information on whether, why, and how agencies revise their regulations is relevant to how lawyers, judges, and other policy makers might think about rulemaking in applied and prescriptive terms. A conceptual framework is a necessary precondition for troubleshooting problems that might be associated with dynamic rulemaking and imaging the kinds of reforms that might improve it.

 As supplemented by other examples, our quantitative data and in-depth case studies suggest a preliminary typology describing the incentives for dynamic rulemaking and the purposes it can serve. It may be a vehicle for avoiding mistakes through incremental policy development, as well as a vehicle for correcting policy mistakes that do occur. It may also be a vehicle for responding to technical as well as political changes in the regulatory environment. This section explores these varied functions dynamic rulemaking can perform.

### *Error Correction.*

 Agencies frequently issue revised rules to correct typographical and other inadvertent errors contained in parent rules. Such mistakes are an understandable consequence of the length and complexity of many regulations, coupled with the competing demands on agency staff. In our study, the second greatest set of revisions involved these types of error corrections. Although they are seldom controversial and are usually made without notice and comment, they can occasionally have significant substantive implications, as illustrated by OSHA’s replacement of the word “should” with “shall” in its Concrete and Masonry rule. We have also hypothesized that corrections may be even more common when the agency must promulgate the initial parent rule under a tight, judicially enforceable deadline.

 On occasion, an agency realizes that a parent rule may need corrections after it has become final, but before judicial review has run its course. This realization may come in response to the briefs that challengers have filed in litigation. For example, when EPA published a final rule in 1998 tightening the standards of performance for emissions of nitrogen oxides from new power plants and major modifications of existing power plants, it expressed the standard for new plants in different units than the standard for modified existing sources. [[103]](#footnote-103) While the challenge to its regulation was pending, EPA asked the court to remand the standard that governed modifications of existing plants to provide a better explanation for its decision.[[104]](#footnote-104) The court set aside that aspect of the standards and remanded it to the agency for further consideration, but it continued to consider the standard for new sources.[[105]](#footnote-105)

 Finally, an agency may discover after a regulation has been in effect for a suitable period of time that the assumptions upon which it based critical decisions in the prior rulemaking were erroneous. This could come about as the positive and negative impacts of the rule become clearer over time and the entities subject to the regulation or its beneficiaries bring erroneous assumptions to the agency’s attention through a complaint, a petition, or some other means of capturing the agency’s attention.[[106]](#footnote-106) It could also result from a formal “lookback” exercise in which the agency tests the assumptions underlying a previous regulatory impact analysis against real-world performance.[[107]](#footnote-107)

### *Incremental Policy Development*

Incrementalism has fallen out of favor as a prescriptive model for policy making in recent decades. This has been manifested not only in the greater emphasis on rulemaking described above, but also in requirements that agencies employ cost-benefit analysis and related analytical techniques[[108]](#footnote-108) and engage in comprehensive planning as a way of rationalizing their exercises of governmental power.[[109]](#footnote-109) An incremental approach to policy making may nevertheless be advantageous under conditions of limited knowledge and political conflict. First, it is a form of bounded rationality that can allow decision makers to address issues as they ripen or to deal with some aspects of problems and defer others pending the collection of additional information.[[110]](#footnote-110) This can be especially appealing when agencies address issues that are new or complex. Second, incremental policy development can be preferable as a strategy for limiting the scope of conflict. It can facilitate negotiation and compromise in this regard by focusing on relatively small issues sequentially. As already noted, a preference for incrementalism may explain federal agencies’ former preference for case-by-case adjudication.

 Although rulemaking is, by definition, a relatively comprehensive approach to policy development, its dynamic character may still reflect the advantages of proceeding incrementally. One way in which this can occur is through an agency’s codification of precedent. Some parent rules contain “back end” provisions that allow officials to modify or grant exemptions, variances or waivers from their requirements on a case-by-case basis in the interest of fairness and flexibility.[[111]](#footnote-111) As the agency gains knowledge in the course of dealing with such issues, it may promulgate subsequent rules that confine its own discretion in determining the types of individuals or activities that are subject to regulation or that are eligible for waivers or exemptions.

 Provisions within rules that allow for *ad hoc* discretion are meant to be temporary solutions in some cases. For example, one of the most contentious issues that arose in the FCC’s 2008 Low-Power FM (LPFM) rulemaking was whether the Commission should allow improvements to full-power stations that might interfere with existing low-power broadcasters. Another was whether new LPFM stations could be established within a certain minimum distance of existing full-power stations that were operating at second-adjacent broadcast frequencies.[[112]](#footnote-112) In dealing with each of these issues, the Commission stated that the primacy generally afforded to full-power FM could be waived based on a case-by-case assessment of community needs. At the same time, it characterized these as “interim measures” that would be reevaluated in future proceedings and that might be replaced by general criteria as the agency gained experience.[[113]](#footnote-113)

Illustrations of this type of dynamic rulemaking are plentiful throughout the bureaucracy more generally. In 2007, the Treasury Department’s Alcohol and Tobacco Tax and Trade Bureau issued a rule that codified a series of case-by-case decisions made pursuant to an earlier regulation that allowed it to approve requests for the use of new materials in “clarifying, stabilizing, preserving, fermenting, and otherwise correcting wine and juice.”[[114]](#footnote-114) In 2002, the Mine Safety and Health Administration issued a rule that proscribed the use of high-voltage continuous mining machines but that allowed operators to request exceptions to this prohibition. After reviewing fifty-two Petitions for Modification, it promulgated a rule in 2010 that modified the parent rule by establishing criteria for the use of such machines.[[115]](#footnote-115)

 Incremental policy development can also involve the agency’s resolution of relatively straightforward and non-controversial issues as it defers less tractable ones. An agency may decide that a partial solution to a problem is better than none as it is developing an NPRM. Alternatively, it may drop or postpone consideration of part of a proposal when it becomes apparent that the provision is more controversial than anticipated or is not adequately supported by evidence in the record. Indeed, these are often the most significant changes that are made to proposed rules.[[116]](#footnote-116) For example, when OSHA dropped “lift-slab operations” from proposed revisions to its concrete and masonry standards in the wake of new evidence that became available after the close of the comment period, it did so with the intent of revisiting the issue in a later proceeding.[[117]](#footnote-117) As another illustration, the National Highway Traffic Safety Administration in the 1990s dropped a fuel economy provision from a rule on tire quality in response to opposition from industry and members of Congress.[[118]](#footnote-118) Years later, it revisited the issue in a regulation that required tire manufacturers to disclose such information to consumers.[[119]](#footnote-119)

 The FCC’s efforts to regulate LPFM illustrate these dynamics through a procedural approach that may be somewhat distinctive to that agency. It began with an NPRM that did not offer specific recommendations with regard to several of the key questions it posed. The agency followed with a series of rules combined with further notices that resolved some policy issues and refined and deferred others pending the collection of more information and (one suspects) more consensus building. In one of these subsequent rules, for example, the Commission chose not to resolve the issue of whether applications for LPFM stations should be given priority over translator stations. Rather, it sought additional information bearing on factual issues, such as the amount of spectrum that remained available in certain markets, and on political/normative issues concerning the relative contributions of LPFM and translator stations to community needs. [[120]](#footnote-120)

### *Policy Clarification and Change.*

 The limits on comprehensive policymaking that can be conducive to incremental policy development also create pressures to change rules after they have been promulgated. Because policy decisions are often based on incomplete information, they impose costs on certain groups or otherwise have implications for the allocation of scarce resources.[[121]](#footnote-121) And since agencies are subject to feedback from their environments, the most common function of dynamic rulemaking is to address issues that arise during implementation and enforcement.[[122]](#footnote-122) In a sense the inverse of incremental policy development, policy clarification and change can take a variety of forms.

 Many rule revisions define terms or criteria for application that were ambiguous or unintended in the parent regulations. The need for clarification often reflects the difficulty of articulating generally applicable standards, even within what may appear to be narrow policy domains.[[123]](#footnote-123) Once a rule is in effect, agency inspectors may discover that the vagueness of its terms hinders effective enforcement, or agency officials in the field may receive complaints from regulatees or regulatory beneficiaries that the rule as currently worded is not achieving its intended effect.[[124]](#footnote-124) Likewise, a large number of requests for interpretations or exemptions may indicate that the rule is not functioning as intended, and the agency can respond by clarifying or modifying the rule to bring it into line with the agency’s original expectations.[[125]](#footnote-125)

Our aggregate coding does not provide the fine-grained information to identify the frequency of this type of activity, but revisions for the purpose of policy clarification were starkly evident in our case studies. As one example, EPA issued a rule, the primary purpose of which was to clarify the intent of an earlier regulation concerning the production of hydrochloric acid (HCl). Included among its provisions was a more precise definition of “equipment” and clarifications of several reporting and maintenance requirements that had been confusing to the industry. The agency also removed language from its earlier rule that was meant to avoid duplicative requirements (under other EPA rules) but that had inadvertently exempted HCL leaks in storage tanks, transfer operations, and various kinds of equipment from any federal regulation.[[126]](#footnote-126) These changes were made pursuant to an NPRM in which the EPA offered to hold public hearings if requested. The proposal elicited only two written comments, both of which were from the regulated industry.[[127]](#footnote-127)

One can draw a conceptual distinction (if not always a practical one) between dynamic rulemaking that clarifies policy intent and dynamic rulemaking that effectively changes policy. The latter takes a variety of forms but typically results from feedback concerning unanticipated consequences of requirements that affected groups bring to agencies’ attention or that are identified by officials in the field who are responsible for enforcing regulations. Perhaps the most common example of dynamic rulemaking of the latter sort is the administrative stay that extends a requirement’s effective date in light of complaints that compliance by the specified date will be very difficult or impossible. Although time extensions were contained in some of the revisions issued by each of our agencies, they were especially prevalent in the EPA’s TSCA revised test rules. (See Table 2). Fully seventy-five percent of the TSCA rules involved some type of extension of time for regulated parties to come into compliance.[[128]](#footnote-128) Notice and comment was also generally not solicited when an agency labeled a final rule as a “stay” (although OSHA did solicit notice and comment for about 5% of its final stays).

Table 2: Revisions (percent) for each set of rule that involves time

|  |  |  |  |
| --- | --- | --- | --- |
|  | EPA TSCA | OSHA | FCC |
| No time involved in revision | 24 | 67 | 82 |
| Administrative stay (AS) | 0 | 26 | 0 |
| Extension (often not in the title) | 75 | 5 | 6 |
| Other  | 1 | 2 | 12 |

Our qualitative case studies revealed an interesting practice by both OSHA and EPA (but not FCC)[[129]](#footnote-129) of using administrative stays to break off a portion of a final rule that is hotly contested after promulgation and deferring compliance requirements pending further study and possible revision. In the OSHA revision of its formaldehyde standard, for example, the agency encountered some disagreements with OIRA over the extent to which its hazard communication requirements were consistent with constraints imposed by the Paperwork Reduction Act (which OIRA enforces). To give itself time to work through these issues, OSHA stayed this portion of the rule eight separate times over a period of three years.[[130]](#footnote-130) OSHA also stayed a portion of its asbestos standard as it applied to a certain type of asbestos-related material for six years pending further research. EPA followed a similar pattern in two of the three air toxics case studies, staying the applicability of the requirements to certain facilities pending further research.[[131]](#footnote-131) These more specific examples come from our select case studies, but the likelihood of finding similar creative uses of stays and extensions in the aggregate data seems high.

Perhaps the most significant policy changes accomplished through rule revisions are modifications in the coverage of parent rules. For example, the EPA modified its regulations on Halogenated Cleaning Solvents with regard to certain kinds of cleaning machines because the original rule was based on a misunderstanding of how those machines operated. In the same series of revisions, the agency exempted another type of machine from regulation because the discretionary authority the states had been given to offer such exemptions did not extend to businesses operating on Indian reservations. The effect of leaving the regulation in place would have been to maintain an uneven economic playing field to the disadvantage of Native Americans.[[132]](#footnote-132) Similarly, when OSHA recognized that it might have made a mistake in including non-asbestiform tremolite, anthophyllite and actinolite in its parent asbestos rule, it addressed this situation by staying the effective date of the rule several times with respect to those substances to permit further notice and comment. This corrective revision was precipitated by a number of letters and petitions for rulemaking from some entities that had participated in the asbestos rulemaking and others that had not. As the parent rule went into effect for the asbestiform versions of those minerals, OSHA promulgated the stays through direct final rules that did not afford an opportunity for public comment.

 Our case studies suggest that post-promulgation policy changes such as these are common and perhaps even the norm for important rules. Reviewing courts sometimes play a role in the process by requiring agencies to revisit decisions when they have overlooked important evidence. This accounted for some of the changes in two of the three OSHA cases we examined, one of the three FCC cases, and one of the three EPA Air Toxic cases. On rare occasions, Congress plays a role in policy change by enacting legislation in response to the parent rule. In response to lobbying by full-power broadcasters and translators against FCC’s initial LPFM rule, for example, Congress passed a law less than a year later requiring the Commission to revise the regulation in ways that favored those interests (at the expense of low-power broadcasters).[[133]](#footnote-133)

Post-promulgation changes to parent rules are in part attributable to the previously discussed informational and political challenges that comprehensive policy development frequently encounters. The frequency of such policy changes also speaks to the limitations of notice-and-comment procedures in providing information to agencies about the prospective effects of their decisions. Post-promulgation changes often address problems that could have been identified in advance by affected interests who were sufficiently attentive. Because monitoring and participating in the rulemaking process is costly, however, some stakeholders may remain unaware of agency rulemaking initiatives until the rules take effect. Given that agencies make many adjustments without notice and comment, however, another possibility is that agencies sometimes find it strategically advantageous to wait until a rule has been promulgated before attempting to secure changes, a possibility we return to in Section IV.

### *Adaptation to Environmental Changes.*

No matter how well-crafted regulations might be when they are issued, dynamic rulemaking may also occur in response to changes in the physical, technical or institutional environments.[[134]](#footnote-134) These often consist of objective changes in the conditions that programs were designed to address. For example, many of the Federal Aviation Administration’s revisions to regulations are issued in response to technological developments ranging from better ways of reducing fuel-tank flammability in transport airplanes[[135]](#footnote-135) to the construction of cell phone towers that restrict navigable airspace.[[136]](#footnote-136) Evolving commercial practices, such as new advertising claims or the invention of new financial instruments, may also provide the impetus for policy adaptation through dynamic rulemaking.

Policy adaptation often takes place as a reaction to environmental changes as they occur, but agencies may also take the initiative periodically to review their rules in a more proactive fashion in areas where policy-relevant conditions are assumed to be in constant flux. This is true of the Nuclear Regulatory Commission, for example, which periodically revisits its fee recovery schedules and its list of approved fuel storage casks.[[137]](#footnote-137) In addition, Congress often structures regulatory programs with an iterative form of dynamic rulemaking in mind. The door is not just open for change; the agency is required by its enabling legislation to revisit its regulations on a regular basis. For example, the Clean Air Act instructs EPA to revisit the national ambient air quality standards every five years with the goal of revising them in light of scientific information that has accumulated since the previous rulemaking.[[138]](#footnote-138) It is not at all uncommon for EPA to initiate another iteration of the standard-setting process before the judicial challenges to the product of the previous iteration have run their course.[[139]](#footnote-139) Similarly, section 112 of the Clean Air Act requires that EPA revisit the air toxic emission standards after eight years in light of changes in emissions reduction technologies.[[140]](#footnote-140) Dynamic rulemaking can therefore be a cyclical process in which new rules are necessitated in part by the effects of existing regulations. Based on input from a legislatively constituted advisory panel, for example, NOAA significantly relaxed its restrictions on the harvesting of swordfish in one of its regions because its regulations had successfully led to an increase in the population of that species.[[141]](#footnote-141)

 Changes in the environment can also result from the actions of other agencies. This is often the case in policy areas such as environmental protection and financial regulation, where administrative authority is highly fragmented and overlapping. At the urging of industry representatives and the Commodity Futures Trading Commission, for example, the Securities and Exchange Commission proposed an amendment to its net capital rule so that it would be consistent with recent changes in the Commodity Trading Futures Commission’s net capital rule.[[142]](#footnote-142) With continued economic globalization, agencies ranging from FDA, to FAA, to USDA, to the Patent and Trademark Office have also felt increased pressure to harmonize their policies with regulatory initiatives by foreign governments and other international entities. In a joint rulemaking, the Federal Reserve, the Federal Deposit Insurance Corporation, and the Treasury Department’s Offices of the Controller of the Currency and Thrift Supervision revised their regulations on risk-based capital standards largely in response to policy changes by the International Association of Bank Regulators.[[143]](#footnote-143) And OSHA has used a notice-and-comment rulemaking process to change its longstanding Hazard Communications regulations to harmonize them with the Globally Harmonized System of Classification and Labeling of Chemicals.[[144]](#footnote-144)

 Dynamic rulemaking can also reflect changes in the political environment such as shifts in public opinion or media attention, or turnover in the presidency or on legislative oversight committees.[[145]](#footnote-145) For example, the regulation at issue in *State Farm* was an adjustment to an existing rule that was precipitated by the incoming Reagan Administration’s anti-interventionist regulatory philosophy.[[146]](#footnote-146) The rule that precipitated the landmark *Chevron[[147]](#footnote-147)* decision provides an example of how both political change and different prescriptive models of policy making can cause agencies to revise their regulations. Issued in October of 1981 under the newly elected Reagan administration,[[148]](#footnote-148) an EPA rule modified a regulation that had been issued at the urging of environmentalists at the end of the Carter administration. It did so by substituting the more industry-friendly bubble concept as a regulatory criterion in place of restrictions on point-source emissions in regions of the country that did not meet national ambient air quality standards.[[149]](#footnote-149)

 Another example of dynamic rulemaking as adaptation to changes in the political environment is the frequent attempt by new administrations to review and revise “midnight” regulations finalized by previous administrations governed by a different party.[[150]](#footnote-150) Typically, the president or a high-level White House official issues a memorandum to all executive branch agencies ordering them to withdraw all proposed and final regulations from the Office of the Federal Register and to issue public notices postponing the effective dates of final regulations that had been published but were not yet effective for a limited time to permit the agency to re-examine those rules in light of the new administration’s policies.[[151]](#footnote-151)

 Admittedly, there is not always a clear dividing line between policy change in response to political reaction and adaptation in response to a changed political environment. As a conceptual distinction, however, the former addresses a political miscalculation while the latter occurs in response to a significant reconfiguration of the environment as new coalitions emerge, issues are redefined, new presidential administrations assume office, or legislative attention shifts as the result of constituent pressures or electoral turnover. Adaptation in response to disruptions of existing institutional relationships and new ways of thinking about problems are relatively rare in comparison to other forms of dynamic rulemaking, but it can also produce the most noteworthy policy changes.

 Changes in the political and intellectual environment can be intertwined with changes in technology and business practices. This was the case with the attenuation and eventual elimination of the FCC’s 1970 regulation that restricted the major networks’ ownership and control over syndicated television shows. Controversial from the outset, the argument that the rule was needed in order to reduce the concentration of economic power and promote diversity in the broadcast industry became more suspect with the rise of satellite and cable TV, the emergence of additional networks, and other changes that led to more competition and a greater variety of programming. Economic arguments based on changes in the structure of the industry were no doubt reinforced by the growing influence of “Chicago School” thinking, which took a relatively sanguine view of market concentration. These practical and intellectual changes affected the balance of influence between the various groups that benefited from the regulations and the groups and other agencies that opposed them. Although the FCC issued a rule in June of 1991 and a slightly amended revision in December of that year[[152]](#footnote-152) that sought to strike a compromise between these coalitions, the regulation was overturned by the Seventh Circuit in 1992.[[153]](#footnote-153) A subsequent rule issued in 1993 all but eliminated restrictions on syndication ownership.[[154]](#footnote-154)

# Future Considerations for Dynamic Rulemakings

Our exploratory study reveals that rule revisions are ubiquitous, that they perform various functions, and that they come about through various procedural mechanisms. How this dynamism intersects with the goals of retrospective review remains an open question, but as a preliminary matter the data reveal that rules are not static and that agencies are in fact constantly revisiting the majority of their rules without formal requirements or oversight. Our results also suggest that much of this dynamism occurs in response to changes in information – often provided formally or informally – by affected interests. This observation should mitigate some of the concerns of regulatory reformers and academic observers that formal retrospective review is needed to protect regulated parties from outdated and unnecessary regulations.

Yet quite apart from the implications of these findings for retrospective review, dynamic rulemaking raises basic administrative process questions. How should we think about rule revisions in normative terms, particularly since they vary so greatly among sets of rules and agencies, and with respect to their purpose and form? While it seems apparent that dynamic rulemaking is both necessary and inevitable in a complex and fluid policy environment, the findings from our study also reveal that at least some of this revision activity has the potential to undermine important process values if not properly structured. How can agencies repair and revise rules expeditiously in pursuit of their statutory missions without creating dangerous loopholes that undermine the deliberative processes prescribed by the APA?

This final part of the article begins by summarizing the virtues of dynamic rulemaking in a world that is constantly changing. It then explores how dynamic rulemaking can lead to outcomes that are inconsistent with agency statutes, can undercut administrative process values, and can bypass analytical and centralized review requirements of various executive orders. After exploring these various dangers, the section then provides a preliminary model for how we might distinguish good from bad procedures for rule revisions and concludes with preliminary suggests for reform.

## The Virtues of Dynamic Rulemaking.

Dynamic rulemaking has many desirable characteristics. Most would agree that it is desirable for agencies to correct errors in previously promulgated rules. Dynamic rulemaking allows agencies to address difficult issues in rapidly changing policy environments incrementally in ways that allow them to accomplish some progress toward fulfilling statutory goals without having to muster the informational, analytical and political resources necessary to bring about comprehensive changes. Dynamic rulemaking also permits agencies to clarify and make slight adjustments in the stringency or coverage of rules in light of feedback the agency receives as it is implementing and enforcing them. Relying on dynamic rulemaking, agencies can defer compliance on hotly contested aspects of a regulation for more prolonged consideration while proceeding ahead with less controversial aspects of the rule. Perhaps most important, an agency may employ dynamic rulemaking to adapt to changes in the physical, technological or policy environments in which it operates. An agency that is willing to make rapid adjustments to rules in the future can be less concerned about promulgating a stringent rule at the outset because it can depend on regulated entities to alert it to the need for change as they attempt to comply with its terms.[[155]](#footnote-155) All of these are desirable characteristics of a regulatory system that operates in an uncertain and changing world. Indeed, one careful observer has suggested that the agency’s ability to change a rule in light of changed circumstances has a positive value and that regulatory impact analyses for rules should incorporate that value into their estimates of the costs and benefits of rules.[[156]](#footnote-156)

The informal process of dynamic rulemaking that takes place as a matter of course as agencies react to feedback from a variety of sources also has important advantages over formal requirements that agencies review all or some significant portion of their regulations in a proactive way. In so far as such requirements are taken seriously, they impose a very substantial burden on agency staff who are already stretched so thin that important issues must often wait years to be placed on the rulemaking agenda and more years to be addressed through final regulations. Assuming that it is driven by full and balanced information from the agency’s physical and policy environments, dynamic rulemaking can be a more efficient way to allocate limited organizational resources than efforts at systematic, proactive review. As a primarily reactive process, it can allow agencies to allocate their limited resources to rules that that are problematic while ignoring those that are not. This leaves open the question whether formal requirements for proactive review are a desirable supplement to dynamic rulemaking, given their costs.

## B. Cautionary Notes.

Despite its virtues, there are also reasons to temper one’s enthusiasm for dynamic rulemaking. Precisely because of its reactive nature, it may work to the advantage of some groups over others. In particular, it may favor well-organized, intensely affected interests (typically regulatees) that have the resources to sustain their influence in the administrative process over time at the expense of the generally more diffuse interests of the beneficiaries of regulatory programs. Moreover, even the most valuable revisions to existing rules may lack legitimacy if they are promulgated in ways that lack procedural accountability. Our study reveals that some revision techniques are rigorous and transparent, but that others lack transparency and fail to provide opportunities for all relevant interests to weigh in on technical issues and policy changes. As such, they may facilitate the kinds of subterranean decision-making long associated with agency capture. This section tallies up some of the administrative process dangers that emerge from our data and case studies.

### *Instability and Uncertainty.*

 The most obvious downside to dynamic rulemaking is its tendency to render agency policy unstable; neither the regulatees nor the beneficiaries of a rulemaking exercise can be confident that the result will remain in effect for a definite period of time. The uncertainty that arises when an agency is constantly changing the rules of the game can defeat settled expectations and befuddle long-range planning. The owner of a power plant, for example, needs to be confident that the requirements of a recently promulgated environmental regulation will not change over the time that it takes to install an expensive technology or comply with a 10-year low-sulfur coal contract. Having gone through the excruciating process of preparing state implementation plans to attain a recently promulgated national ambient air quality standard, state environmental protection agencies do not relish the prospect of having to repeat the process in another five years when EPA revises the NAAQS. People who thought they would be protected by a parent rule when it was promulgated may be unpleasantly surprised to discover that the agency amended it not long after its publication to provide multiple exemptions (as EPA did in the secondary aluminum smelter rulemaking) or to cut back on its scope or stringency. Few members of the general public are avid readers of the Federal Register, and most revisions and exceptions are unlikely to receive media attention. The parent may have given the illusion of protection that subsequent revisions have whittled away unbeknownst to its beneficiaries.

### *Fidelity to Statutory Goals.*

 In much the same vein, dynamic rulemaking has the potential to undermine legislative goals in ways that are consistent with conventional accounts of regulatory capture. An agency is exercising power vested by a statute to further legislative intent when it promulgates a substantive rule. Yet when the agency employs dynamic rulemaking to accomplish substantive changes to those regulations at the behest of rent seeking interest groups, it may achieve a result that is inconsistent with the statute’s purpose. One or two brief extensions of the deadline for complying with a requirement are not likely to undermine that purpose, but a continuing procession of extensions and other changes to a rule can run contrary to legislative intent. This can be especially pernicious when the statute empowers the agency to address serious risks to the public. The decade-long sequence of deadline extensions and outright exemptions that characterized EPA’s halogentated solvents rulemaking shows that dynamic rulemaking can be a vehicle through which agencies effectuate policy erosion as regulatees nibble away at statutory protections.[[157]](#footnote-157)

### *Administrative Efficiency*

 If it is theoretically more efficient than formally prescribed efforts at comprehensive review, dynamic rulemaking can still prevent an agency from employing its limited resources in the most productive way. Having completed a burdensome rulemaking exercise, it is not necessarily a wise use of the agency’s resources to reinvent the wheel in another proceeding devoted to the same regulatory issue. The tendency for this to occur may be reinforced by the APA’s failure to distinguish between recently promulgated and long-standing rules when it provides that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”[[158]](#footnote-158) A stakeholder who is dissatisfied with the outcome of a rulemaking exercise may petition the agency to amend or repeal it the day after it becomes final. Prior to that, stakeholders can petition the agency to extend the effective date, and prior to publication in the Federal Register stakeholders can, at least in some agencies, file motions for reconsideration. Responding to such petitions takes time and resources that the agency could be employing more productively. Enabling statutes that require agencies to revisit their rules on a periodic basis can also be a source of inefficiency. Having just completed the grueling exercise of revising the national ambient air quality standards for ozone in early 2008, for example, EPA Administrator Stephen Johnson complained about having to initiate the same resource-intensive process every five years and urged Congress (unsuccessfully) to relieve the agency of that obligation.[[159]](#footnote-159)

### *Delay.*

 While an agency can use dynamic rulemaking to put off aspects of a rulemaking exercise for which it lacks adequate information, it can also use it to avoid deciding controversial questions for which it has sufficient information but lacks the political support (or the political will) to resolve the conflict. Dynamic rulemaking can allow agencies to address issues that are tractable while deferring those that are not, but it can also be abused if employed liberally in the interest of comfort and simple expediency, rather than sparingly as a matter of political necessity. It can delay the accomplishment of critical statutory goals, a prospect that is especially troublesome in the case of statutes intended to protect potential victims from risks to their health or safety. For example, EPA’s repeated deferral of deadlines for complying with the permit requirement of its halogenated solvents rule over the course of a decade was arguably inconsistent with the Clean Air Act’s goal of subjecting major emitters of hazardous air pollutants to the statute’s operating permit program.[[160]](#footnote-160) Similarly, OSHA’s multiple stays of the hazard communication provisions of its formaldehyde standard arguably left employees in workplaces exposed to that carcinogenic chemical without critical information on their health risks that the statute meant for them to have.[[161]](#footnote-161)

### *Inconsistency with Comprehensive Analytical Rationality.*

 By permitting agencies to proceed incrementally, dynamic rulemaking can discourage policy makers from paying sufficient attention to how a rule will affect stakeholders and overall economic well-being. When an agency decides to drop a portion of a rule, as when OSHA dropped the lift-slab portion of its concrete and masonry standard, there is little loss of the value that comprehensive analytical rationality can lend to decisionmaking.[[162]](#footnote-162) This is because the agency will most likely examine the economic and/or environmental impacts of the dropped provision in the subsequent proceeding that revisits the issue. When an agency adopts an incremental strategy through which it modifies existing rules incrementally, however, it may head down an irreversible path toward a destination that a more comprehensive examination of the problem would have avoided. Rather than making modest modifications to the existing rule in response to episodic changes, it may in some cases be more rational for the agency to step back, re-examine the basic assumptions and analyses underlying the original rule, and consider the possibilities of comprehensively revising the rule, replacing it with a new one, or even repealing the rule altogether. Incremental reactions to episodic pressures will rarely result in such comprehensive changes; nor are they likely to result in changes to “entrenched” rules that are “imbedded in industry practice.”[[163]](#footnote-163)

Advocates of formal retrospective review argue that it is a good idea for agencies to re-examine the costs and benefits of previously issued rules from time-to-time with an eye toward revising or repealing rules that no longer comport with statutory mandates and that impose costly burdens on industry.[[164]](#footnote-164) Some argue that agencies too often promulgate regulations hurriedly in response to crises and therefore devote insufficient attention to the accuracy of their predictions and the possibility that they are over-reacting to the events that gave rise to the crises.[[165]](#footnote-165) Technology or markets may evolve in ways that render previous regulatory interventions undesirable.[[166]](#footnote-166) Over time, “the cumulative burden of decades of regulations issued by numerous federal agencies can both complicate agencies’ enforcement efforts and impose a substantial burden on regulated entities.”[[167]](#footnote-167) Assuming that agencies have the resources to comply with them, formal retrospective review requirements provide an opportunity to purge the Code of Federal Regulations of outdated and unnecessarily burdensome regulations.[[168]](#footnote-168) Professors Joseph Aldy and Cary Coglianese believe that such “regulatory lookback” is such a good idea that agencies should create plans for post-promulgation review of major regulations at the time that they promulgate the final rules.[[169]](#footnote-169)

With respect to concerns about imposing undue burdens on regulated parties, our research indicates that agencies are in fact addressing both serious and trivial problems in existing rules as they become aware of their existence. Whether they are addressing the same problems that synoptic, retrospective review would reveal is an open question. It does appear that while dynamic rulemaking may not fully address all of the concerns that motivate advocates of retrospective review of rules, it should at least ensure that agencies are addressing quite a few pressing problems relevant to affected parties that arise after rules are promulgated.[[170]](#footnote-170) As Eisner and Kaleta note, agencies are likely to hear about serious problems with rules during their routine implementation and enforcement activities,[[171]](#footnote-171) and our research suggest that they are addressing at least some of them.

On the other hand, our findings do provide preliminary support for at least some retrospective review in settings where the diffuse beneficiaries’ needs might be ignored as a result of these informal, “squeaky wheel” processes. Agencies appear to be at least somewhat responsive to petitions, informal lobbying, lawsuits, and political pressure, and they make revisions accordingly. But these triggers may be largely inapplicable where changes in information or technology suggest that the agencies should increase the stringency of existing rules, but where beneficiary constituencies are insufficiently well-organized to take advantage of them. In these settings where diffuse interests are underrepresented, a more comprehensive retrospective review process may indeed be warranted.

### *Transparency.*

 Agencies can affect a substantive policy change in a non-transparent way by characterizing it as correcting an “error” or “inadvertent mistake.” When EPA corrected a punctuation “error” to reduce the reach of its secondary aluminum rule and when OSHA changed “should” to “shall” in the concrete and masonry construction safety rulemaking and added a respirator option for employers in the formaldehyde rulemaking, the agencies arguably accomplished important changes in direct final rules for which they did not invite public comment. Since corrections of “technical errors” are not likely to be reported by even the trade press, these were essentially invisible to the general public. Careful readers of the indexes to the *Federal Register* might have discovered the changes, but they might well have concluded that they were of little consequence given the agencies’ failure to invite comment.[[172]](#footnote-172) Similarly, extensions of effective dates often take the form of interim rules or direct final rules that may attract little public attention, but may put off compliance with important protections for years.

 Perhaps the most troubling employment of dynamic rulemaking in a nontransparent way that we identified in our case studies was EPA’s use of annual “interim rules” to publish vague after-the-fact descriptions of changes to TSCA test rules.[[173]](#footnote-173) These changes were made with little or no explanation and were published long after they had been implemented by the manufacturers who were subject to the original rules. It may be true that most members of the public are not interested in arcane changes to the protocols of test rules, but that need not always be the case. Test rules for some high profile chemicals might very well attract the interest of environmental groups or advocates of those who are exposed to them in the workplace. It may well be that EPA is in a hurry to make the changes because many involve ongoing testing regimes, but that should not allow it to make a mockery of the APA-prescribed rulemaking process.

### *Balanced Access.*

 In a similar fashion, dynamic rulemaking can be inconsistent with balanced access to the administrative process. When accomplished in response to a motion to reconsider or in a direct final rule, a “clarification” that is in reality a change in the scope of applicability of the parent regulation (perhaps in response to pressures to change the substance of the rule) avoids the public participation requirements of the Administrative Procedure Act. Likewise, extensions of effective dates, which invariably favor regulatees, are inconsistent with balanced access to the decisionmaking process when they are accomplished through direct final rules. When a revision is accomplished as part of an “interim rule” that is published long after the change was in fact implemented, the public has no role to play at all, and the process becomes heavily weighted in favor of the entity (invariably the regulatee in the case of TSCA testing rules) that instigates the change. In all of these instances, the agency need not pay as much attention to providing reasons for the changes, and the decisionmaking process becomes less accountable.

### *Avoiding Centralized Review.*

 Presidents since Richard Nixon have issued executive orders requiring executive branch agencies to send rules to the Office of Management and Budget for review. Although the nature and propriety of such centralized review is a controversial subject, dynamic rulemaking can undermine the salutary coordinative role it can play. When an agency accomplishes a significant change in the substance of a regulation in response to a motion to reconsider or reopens the rulemaking to promulgate a “supplemental rule,” as OSHA did in the asbestos rulemaking, the action may not undergo interagency vetting because the change by itself is unlikely to cross the threshold of significance that prompts review under relevant executive orders. Likewise, when an agency proceeds incrementally by resolving some policy issues and deferring others pending the collection of further information, it may be able to avoid OIRA review of one or more of the deferred issues to the extent that they do not constitute major rulemakings.

## Disciplining Dynamism

 While it can serve important functional needs, dynamic rulemaking is only as good as the processes the agencies employ in accomplishing it. Even the best intentions will not lead to desirable revisions if agencies make decisions in ways that sidestep important administrative law values or, even worse, are patently illegal. Yet this acknowledgement still begs the central question of how one identifies a procedurally “good” revision from one that is “bad” or even “ugly.”

One might attempt to sort good from bad by coding the substance of each change in a revised rule, but an effort to measure the quality of revisions would pose slippery methodological issues and may ultimately prove futile. For example, attempting to sort the good from the bad revisions based on whether the revised rule decreased or increased the stringency of regulatory requirements might suggest that industry had a heavy hand in encouraging a revision. On the other hand, such an assessment would reveal little about whether the change was nevertheless justified based on important new information that became available to the agency after the rule went into effect. One might also attempt to evaluate the substantive quality of revisions by tracing whether commenters who lost arguments during the original notice and comment process persisted and convinced the agency to promulgate their preferred approach as a revised rule. Yet again, the fact that a rejected comment was ultimately accepted in a revised rule may simply indicate that experience proved the commenter right, not that the revised rule was flawed.

Since administrative law defines the quality of rulemaking by the accountability of the underlying process, a consideration of the procedures agencies employ for revising rules may provide the best practical litmus test for assessing the quality of those revisions. In an effort to begin a conversation about this, we offer a very simple model for assessing the procedural integrity of rule revisions that pivots on whether the agency institutes adequate accountability mechanisms in the process. If the agency approaches revisions in an ad hoc fashion, with no structure for ensuring adequate public scrutiny of the changes, the revision begins to take on many of the negative characteristics described in Section IV.B. Conversely, revisions are “good” when they not only perform the substantive functions described in Section III, but also provide opportunities for rigorous scrutiny by all interested parties in a balanced fashion, even though this scrutiny may not always entail formal notice and comment. Because it subjects the agency’s changes to the light of deliberation and inter-institutional oversight, such scrutiny can go a long way toward avoiding the downsides of dynamic rulemaking.

The graphic below situates these three categories of revised rules on a spectrum. 

This framework does not require every revision to undergo full notice and comment. An agency should be able to correct simple typographical errors without fanfare if there is a process in place for a skeptical agency official to review the change to ensure that it is inconsequential as a substantive matter. In addition, agencies may properly subject more substantive changes to some sort of revision protocol short of full notice and comment in some cases. An agency could, for example, create a small interdisciplinary team of agency staff, including an attorney from the agency’s Office of General Counsel, to review changes that the initiating office believed to be inconsequential. If the team determined that the changes were potentially consequential, the revision would then move to a higher level of public oversight. Intermediate levels – those that perhaps engage stakeholders informally or approach the revision as a direct final rule – would nevertheless need to include some assurances that the agency would actively solicit participation by all relevant stakeholders, perhaps even with a small subsidy. The key point is that substantive revisions that have not been subjected to balanced public oversight are problematic exercises of dynamic rulemaking from the perspective of agency accountability. Process-related concerns become still more pressing when the impetus for a revision comes from external stakeholders, rather than from environmental developments such as shifts in technology, political change (e.g., a change in agency leadership), or court opinions that alter the legal landscape.

Our data do not provide sufficient information to sort each of our revised rules into these three categories, but in the course of our analysis – particularly the case studies – we saw individual examples of good, bad, and ugly rules. Perhaps an even more interesting, if tentative observation is that the four sets of agency rules in our study appear to clump within the good, the bad, and the ugly categories. FCC, for example, appeared to engage in the revision process openly and many of its revisions were subjected to diverse public scrutiny. The FCC also used notice and comment more frequently than the other agencies, and the bulk of its remaining revisions were triggered by petitions from diverse parties. In more than one instance, moreover, FCC revisions were triggered by some development that was either external to the agency – such as technological change – or was explicitly bracketed as a contentious issue requiring further analysis and discussion. Why FCC was particularly exemplary in this regard is an important question that is beyond the limits of this study, although one might speculate that it is because the agency operates in a contentious environment where the key stakeholders on different sides are often well-organized and attentive to what it does. We will continue to explore the policy environment and stakeholder dynamics that may lead FCC to operate in more accountable ways in future work.

The revisions to OSHA’s health and safety standards and EPA’s air toxic rules, based both on the case studies and preliminary clues from aggregate data, appear to contain a larger portion of “bad” rules than FCC revisions. Certainly some of the revisions examined in the case studies that neither employed notice and comment nor engaged the full range of affected parties fit the characteristics of “bad” revisions. Because these revisions sometimes lacked any accessible discussion of the agency’s rationale for forgoing notice and comment, or any discussion of how the agency considered the interests of unrepresented stakeholders, they left the impression of ad hoc, unaccountable rulemaking. Moreover, at least some of the changes were apparently not triggered by new discoveries, but were based on information that should have been available in the parent rulemaking.[[174]](#footnote-174)

And at least some of EPA’s revised rules under TSCA appear to fall into the “ugly” category. Unlike the “bad” examples, which might have involved the failure of agencies to actively solicit skeptical review, these “ugly” revisions – emerging in both the aggregate data and the case studies -- consisted of agreements with regulated parties that were struck without any significant public oversight.[[175]](#footnote-175) The revisions were published in the *Federal Register* a year or more after the parties had reached agreement and the agreements had taken effect. The agency’s failure to explain the nature of the changes in the *Federal Register* made the after-the-fact notices all but useless. Although it is possible that none of the dozens of changes were consequential, the process the agency employed to revise its final rules provides no basis for comfort in that regard.

These preliminary efforts at categorizing rule revisions should not overshadow our more important conclusion that it is difficult, if not impossible, to assess either the procedural or substantive integrity of most of the rule revisions in this study based on the information the agencies provided. At the very least, onlookers should be able to assess the procedures the agency followed and the justifications it provided for the level of stakeholder input it solicited for any particular revision. Moreover, simple recordkeeping – that tracks revisions for rules – should be standard practice so that the changes do not drop out of sight. These conclusions provide the underpinnings for the procedural recommendations to which we now turn.

## Possible Reforms

Based on this preliminary glimpse at what may be an even more complex and elaborate world of dynamic rulemaking, we offer several preliminary suggestions for reform. Because there is so much to learn, we offer these suggestions as a conversation-starter about possible “good ideas”[[176]](#footnote-176) rather than as a playbook that calls for immediate action. In initiating this discussion, we also focus on processes that operate without active judicial oversight since we share Connor Raso’s skepticism that the courts will be able to play a meaningful role in overseeing this particular area of activity under the current construction of the APA. The varied considerations, circumstances, and justifications that motivate agency revisions make the development of predictable rules for review – particularly through the judiciary – a perilous exercise.[[177]](#footnote-177)

### *1. Discouraging Unaccountable Dynamism*

First, and at the risk of repetition, agencies should afford meaningful opportunities for all potentially affected entities to scrutinize substantive revisions. When the implications of a revision appear potentially important, the agency should vet the revision widely among the diverse stakeholder community in ways that are well-documented and rigorous. This type of review need not require full notice and comment in all cases. It should, however, entail some form of active solicitation and notification of possible stakeholders and clear explanations of the nature of changes.[[178]](#footnote-178) The agency should place all of these communications in an accessible rulemaking docket that it makes available on its website.

 On the other hand, when an agency uses dynamic rulemaking as a vehicle for adapting to changes in the political or ideological environment, procedural shortcuts are inappropriate. The agency should initiate a new round of notice and comment by publishing a notice of proposed rulemaking in the *Federal Register* as a matter of course. The new head of an agency at the outset of a presidential administration may be tempted to reverse his or her predecessor’s rulemaking initiatives quickly and quietly, but the APA requires notice and comment for substantive amendments to regulations that have been published in the *Federal Register*, even if they have not yet gone into effect. Similarly, agencies should not change the substance of a rule in potentially significant ways in response to a motion to reconsider without giving the public an opportunity to comment on the changes identified in the motion. Agencies should reserve direct final rules for typographical errors and other clear mistakes, and they should not employ direct final rules to clarify misunderstandings or to reflect changes in factual or technical settings, shifts in the political environment, or developments in other agencies.[[179]](#footnote-179)

### *2. Encouraging Virtuous Dynamism*

 Dynamic rulemaking reflects the open-ended aspect of rulemaking as envisioned by the authors of the Administrative Procedure Act. Yet it is by no means clear that federal agencies are taking full advantage of the above-discussed virtues of dynamic rulemaking. While the process for revising rules should be disciplined, agencies should not be reluctant to revise regulations in response to changes in facts, in industry practices, or in the policy environment to ensure that they achieve statutory goals efficiently and effectively. They should be attentive to feedback from agency officials in the field concerning how regulated entities are adapting to their rules in the real world. And they should design reporting requirements in rules to ensure that they yield accurate information on the impacts of those rules on regulated entities and intended beneficiaries.[[180]](#footnote-180)

Congress should provide additional resources and incentives to encourage agencies to undertake these types of dynamic assessments of their rules seamlessly, without the necessity of formal, resource-intensive review processes for all regulations. The need to encourage agencies to engage in these revisions seems particularly acute when changes in technology and information warrant revisions benefiting more diffuse interests that are less likely to raise such issues. Our data suggest, at least preliminarily, that a considerable amount of the revision activity occurring in agencies is triggered by pressure from groups that are intensely affected and have sufficient resources to bring their concerns to the agency’s attention. Without requiring them to revisit all regulations, Congress should encourage agencies to proactively assess the need for revisions in selected areas where the beneficiaries of regulation are apt to be poorly represented. In short, agencies should be mindful of the possibility of tightening the scope or stringency of existing rules that are not yielding anticipated benefits as well as the possibility of reducing the scope or stringency of rules that are imposing unanticipated burdens on regulated entities.

### *3. Formalizing Dynamism*

As mentioned above in Section IV.B.5, the active, yet informal world of dynamic rulemaking calls into question the need for more formalized processes for retrospective regulatory review. To the extent that the interests of regulated parties are already being advanced expeditiously through various informal revision processes, the implementation of more formal and cumbersome retrospective review may actually be a net detriment to ensuring regulations are responsive to change. Formal retrospective review also tends to be costly, and without additional congressional appropriations, agencies may shift their current resources dedicated to informal rule revisions to the mandated, formal process for regulatory review.[[181]](#footnote-181) Alternatively, agencies might divert funds from addressing new problems and mandates to satisfy the congressional demand for formalized retrospective review. Both approaches to reallocating agency resources involve worrisome tradeoffs that are not easily justified.[[182]](#footnote-182)

It is, of course, possible that in revising rules, agencies are overlooking larger systematic problems, particularly those that lack high stakes advocates. Yet, without targeted resources dedicated to retrospective review, agency officials are likely to be reluctant to conduct rigorous retrospective reviews, making them little more than a time-consuming and costly paper tiger.[[183]](#footnote-183) If the president or Congress is serious about implementing formal comprehensive retrospective review of regulations, they should see to it that the agencies receive adequate resources to accomplish that task.

On the other hand, more limited efforts to formalize dynamic rulemaking may be in order. In our study, the ad hoc nature of many revisions indicates that agencies could do a better job of developing explicit processes that govern revisions to their rules. First and foremost, for example, an agency should simply explain in the preamble to the Federal Register notice for a rule revision the process it employed for securing skeptical review of the changes it made. For corrections that consist of addressing obvious typographical errors and the like, this might consist of a sentence or even a phrase in the preamble to the one paragraph correction. For more substantive revisions, the agency’s explanation for how it ensured rigorous review by the full range of affected interests should be more extensive. Not all revisions that have substantive implications require notice and comment review. For example, when an agency makes a revision that has public implications that appear to be noncontroversial and the agency has solicited skeptical input from the full range of stakeholders and received no adverse comment, direct final rulemaking is a good way to conserve agency resources. However, when the agency is not confident of the noncontroversial nature of its change and believes it would benefit from added input obtained through notice and comment, it is well advised to publish a notice of proposed rulemaking in lieu of a direct final rule.

# V. Conclusions

Our study indicates that an agency’s promulgation of a final regulation is hardly the end of the rulemaking process. Although it is based on an examination of only four programs implemented by three agencies, the technical, political, and institutional characteristics of those programs differ along what are arguably the most important dimensions of variation in the general environment of federal regulation. Although further analysis will undoubtedly add to our understanding of the richness and complexity of dynamic rulemaking, we would be quite surprised to discover that it is not a ubiquitous phenomenon given the critical practical functions it performs.

If our observations may not be surprising to most practitioners and some scholars, the informal process of rule revision and its implications have been all-but-ignored in the academic literature. The realization that rulemaking is an on-going, dynamic process is also at odds with the assumptions that underlie existing and proposed requirements that agencies proactively review all or a large share of their regulations with an eye toward identifying and revising or eliminating those that are outdated or otherwise undesirable. In fact, agencies are not rigid and insulated from their environments as portrayed by regulatory reformers and by more general stereotypes of bureaucracy; the agencies included in our study were generally quite responsive to changing conditions and to the input of those who were most directly affected by their rules. In this regard, the largely reactive process of dynamic rulemaking is arguably a more efficient and reliable mechanism for identifying “unnecessary regulatory burdens” than resource-intensive look-back requirements. Perhaps a more legitimate concern is that dynamic rulemaking may sometimes be driven by intensely interested regulatees at the expense of more diffuse public interests, and that this may take place through mechanisms that lack transparency. This possibility together with its procedural remedies is a fertile area for further inquiry.

**Appendix: Methods for Locating and Coding Revised Rules**

Selection of Sets of Rules for Study

In order to avoid sub-sampling, we identified sets of rules from three separate, relatively different agency programs:

* testing rules with relatively high technical complexity promulgated by EPA under the Toxic Substances Control Act (40 CFR Part 799, Subpart B);
* two different sets of worker protection rules promulgated by OSHA under the Occupational Safety and Health Act (nearly all of the “General Industry” and “Construction” rules promulgated at 29 CFR 1910 and 1926; these two sets include simple protection rules, e.g., for scaffold and fire, and complex rules for hazardous substance exposures), and
* two sets of rules of medium-complexity promulgated by the Federal Communications Commission (47 CFR Part 73, Subparts E (television broadcast stations) and G (low power FM broadcast stations)).

The total rules for study (N) = 138.

An initial list of rules was generated by collecting the Federal Register citations provided at the end of each of the Code of Federal Regulations sections included in our study. See illustration in box below. These Federal Register citations provided the “seed” population of rules that we used to search for revised rules, as described in more detail below.



 *Example of the Federal Register history found at the end of a CFR Section*

Because we had already collected limited data on revised rules in an earlier study of EPA’s technology based (MACT) standards promulgated for hazardous air pollutants under the Clean Air Act, we also included that data in our study. Rather than use the CFR to identify the rules, we relied on EPA’s own online database of all of the EPA MACT rules at <http://www3.epa.gov/airtoxics/mactfnlalph.html>.

Finding Revisions of Rules in the Database

*FCC and OSHA*

The initial database of rules contained the seed rules (seed rules consisted of a mix of parents and revised rules) that we used to track down revisions. We used the citation of each seed rule as the search term and searched each of the seed rules in Westlaw’s Federal Register database. We screened each hit based on whether a rule was explicitly linked to an earlier seed (parent) rule and promulgated as some type of modification (including amendments, corrections, deletions, additions, stays, extensions, etc.) to that rule in the perambulatory discussion. This method produced more than 94% of the revised rules in our database.

A second, much smaller source of revised rules (1% for FCC; 11% for OSHA) were not picked up in the Westlaw searches. Instead, they showed up in our original set of rules, but occurred after an earlier initial rule in the history for a CFR section and appeared to modify that rule. We counted a rule from the CFR history as a revised rule when it met three conditions: it was cited in CFR history as a subsequent rule; there was no notice and comment on the final rule; and substantively the rule provided a modification to an original rule.

 *EPA TSCA Test Rules*

We obtained the full docket index for each test rule in our sample. In these docket indices, EPA lists all revisions to the initial parent rule. We thus relied exclusively on the EPA’s own record of rule revisions. If EPA’s records are incomplete, it will lead our study to understate revision activity.

 *EPA MACT Rules*

EPA maintains an online site for each MACT rule that lists all of the revisions and changes to each of the parent rules at <http://www3.epa.gov/airtoxics/mactfnlalph.html> . We carefully screened each listed revision for each parent rule (by clicking the CFR subpart on the webpage), since they were not all connected to the first, originating rule (e.g., there are different types of MACT rules for the same industry, as well as residual risk rules). Again, we assumed EPA’s records provided the complete list of revised rules.

*Conventions on Inclusion/Exclusion*

We adopted several conventions to identify rules in the dataset. As long as the subsequent rule identified one of the parent rules in our database as the predecessor (a feature that the agency typically discussed explicitly in the preamble), we considered the linked final rule to be a revision for purposes of our study. The revised rule generally altered part of the text and/or requirements of the parent, but as long as it conformed to our methods (e.g., subsequent to and linked to a parent) it was counted as a “revision” even if it wholly replaced the revised rule or led to the creation of a new subpart of the CFR that fell outside of our initial study. Moreover, if a revised rule altered more than one parent rule, we counted it as a single revision and linked it to what we considered the dominant parent rule. No revised rule was counted more than once in our dataset.

Extracting Information from Each Revised Rule

Each revised rule was recorded in a separate row in an Excel sheet and additional information was collected by law student coders on that rule for further analysis. The information collected included the date of the revised rule, the identification of triggers for the revision mentioned in the preamble, the agency’s own characterization of the type of revision (e.g., amendment, correction), the number of pages of the revised rule in the Federal Register, the nature of the agency’s engagement of the public as mentioned in the preamble (e.g., notice and comment, petition), the number of issues revised in each rule, etc. The original, more detailed coding instructions are available on request.

1. \* Joe A. Worsham Centennial Professor, University of Texas School of Law. Contact: WWagner@law.utexas.edu. This study was supported by NSF GRANT SES-1023571 and a University of Texas Special Research Grant. We are grateful to Neil Eisner, Dick Pierce, Connor Raso, Sid Shapiro, Glen Staszewski, Peter Strauss, David Vladeck, Chris Williams, and to the participants at the “Empirical Research on Administrative Law Conference” hosted by Susan and Jason Yackee at Wisconsin Law School in 2015, and the participants in the University of Texas School of Law Faculty Colloquium in February 2016 for helpful comments on an earlier version of this article. We are particularly grateful to our able research assistants, Emil Mikkelsen and Jeff Guidry, for their invaluable help in collecting the data for this study. [↑](#footnote-ref-1)
2. #### \*\* Professor and Sara Lindsey Chair, The Bush School of Government & Public Service, Texas A&M University

 [↑](#footnote-ref-2)
3. \*\*\* Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law, University of Texas School of Law [↑](#footnote-ref-3)
4. \*\*\*\* Reference and Scholarly Communications Librarian, Case Western Reserve University School of Law [↑](#footnote-ref-4)
5. *See, e.g*., Congressional Research Service, The Federal Rulemaking Process: An Overview at 3 (June 2013), *available at* <http://fas.org/sgp/crs/misc/RL32240.pdf> (diagramming the rule making life cycle, which ends with the final promulgated rule); [Maeve P. Carey, Cong. Research Serv., The Federal Rulemaking Process: An Overview 2 (2013)](http://fas.org/sgp/crs/misc/RL32240.pdf) (diagram on page 2 purporting to sketch out entire rulemaking process fails to mention process of rule revision); *see also*, Jeffrey S. Lubbers, Am. Bar Ass'n, A Guide to Federal Agency Rulemaking (4th ed. 2006) (providing comprehensive discussion of stages of informal rulemaking, but not discussing the revision of final rules except for a short chapter, chapter 8, on political initiatives that encourage agencies to revisit existing rules for reasons of efficiency); Richard J. Pierce, Administrative Law Treatise (4th ed. 2002) (providing little to no mention of rule reconsideration or revised rules despite offering comprehensive overview of rulemaking process); William Funk, Sidney A. Shapiro, Russell L. Weaver, **Administrative Procedure and Practice: Problems and Cases (4th ed. 2010) (discussing at length the rulemaking process but providing little mention of revised rules and the vehicles for revisions such as petitions for reconsideration.)** [↑](#footnote-ref-5)
6. *See* Reeve T. Bull, *Building a Framework for Governance: Retrospective Review & Rulemaking Petitions*, 67 Admin. L. Rev. 265, 280-282 (2015) (agency officials are invested in existing rules, they are often hamstrung by resource limitations, and may be unaware of the inter-articulation between their rules and those of other agencies); Michael Mandel & Diana G. Carew, “Progressive Policy Institute Policy Memo, Regulatory Improvement Commission: A Politically Viable Approach to U.S. Regulatory Reform,” May 2013, at 3, available at <http://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-Carew_Regulatory-Improvement-Commission_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf>; Administrative Conference of the United States, Administrative Conference Recommendation 2014-5, Retrospective Review of Agency Rules, December 4, 2014, at 3-4, available at <https://www.acus.gov/sites/default/files/documents/95-3.pdf> (citing criticisms of retrospective review of rules that relies upon individual agencies to reassess their own regulations because it “provides few incentives for ensuring robust analysis of existing rules”) [↑](#footnote-ref-6)
7. *See, e.g.,* Neil R. Eisner & Judith S. Kaleta, *Federal Agency Reviews of Existing Regulations*, 48 Admin. L. Rev. 139, 141-43 (1996) (describing the various congressional and executive mandates that have been made to administrative agencies to take part in a rule review process); Joseph E. Aldy, “Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy, Report to the Administrative Conference of the United States,” November 17, 2014, at 27-34, available at <https://www.acus.gov/sites/default/files/documents/Aldy%2520Retro%2520Review%2520Draft%252011-17-2014.pdf> . [↑](#footnote-ref-7)
8. 5 U.S.C. §§ 601-612. [↑](#footnote-ref-8)
9. S. 1683, 114th Cong., 1st Sess. (2015). *See* Hearings on “A Review of Regulatory Reform Proposals,” Before the Senate Homeland Security and Governmental Affairs Committee, 114th Cong., 1st Sess. 3 (September 16, 2015) (Testimony of Susan E. Dudley); Aldy, *supra* note 3, at 39-40. [↑](#footnote-ref-9)
10. *See* Bull, *supra* note 2; Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 Yale J. Reg. 57 (2013); Cass R. Sunstein, *The Regulatory Lookback*, 94 B.U. L. Rev. 579 (2014). *But see* Lawrence E. McCray, Kenneth A. Oye & Arthur C. Petersen, *Planned Adaptation in Risk Regulation: An Initial Survey of US Environmental Health, and Safety Regulation*, 77 Tech. Forecasting & Social Change 951 (2010) (exploring how agencies reacted to changed conditions in five case studies). [↑](#footnote-ref-10)
11. 5 U.S.C. § 553(e). [↑](#footnote-ref-11)
12. Eisner & Kaleta, *supra* note 3, at 146. [↑](#footnote-ref-12)
13. *Id.* at 147. [↑](#footnote-ref-13)
14. Matthew D. McCubbins and Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 Am. J. of Pol. Sci. 28 (1984). [↑](#footnote-ref-14)
15. Richard Cyert and James March, A Behavioral Theory of the Firm (1992). [↑](#footnote-ref-15)
16. Interview conducted for William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 Administration and Society 576 (2009). [↑](#footnote-ref-16)
17. *See, e.g*., Jack M. Beerman, *Combating Midnight Regulation*, 103 Nw. U. L. Rev. 352 (2009) (analyzing the “flurry of regulatory activity” that happens in the final days of an outgoing presidential administration); B.J. Sanford, *Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking*, 78 N.Y.U. L. Rev. 782 (2003) (analyzing the legality of executive delays on the effective dates for agency regulations promulgated in the final days of an outgoing administration); Curtis W. Copeland, “Midnight Rulemaking: Considerations for Congress and a New Administration,” Congressional Research Service (2008), available at <https://www.fas.org/sgp/crs/misc/RL34747.pdf> (analyzing legislative proposals to change the “midnight rule” making process). [↑](#footnote-ref-17)
18. These included decisions that affected the rights of only a few or narrow class of individuals in a substantial way. Some argued that the more rigorous due process afforded by adjudication might be preferable in such cases. [↑](#footnote-ref-18)
19. For a discussion of this literature and of the advantages claimed for rulemaking see, for example, Ruel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 Admin. L. Rev*.* 1139, 1140 (2001) (arguing that rulemaking was a sleeker, more efficient and fairer method to developing policy than using the judiciary); *see also* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. of Chi. L. Rev. 1383, 1391 (2004) (evaluating the effectiveness of the various policymaking tools administrative agencies have available to them—adopting rules, bringing or deciding a case, or announcing its interpretation of a statute); Jeffrey W. Lubbers, A Guide to Federal Agency Rulemaking (5th ed. 2012). The use of rulemaking to clarify the meaning of vague statutes was advocated as an antidote to arbitrariness and capriciousness in the application of policy to individuals. In some regulatory contexts, for example, an adjudicatory approach might single out one of many businesses that were engaged in the same practice. Rulemaking could also provide certainty that would allow businesses to plan and could preclude retroactive punishment for practices that businesses might not reasonably have been expected to know were illegal. Although rulemaking had many advocates during the 1950s and 1960s, the most influential was Kenneth Culp Davis. His book, *Discretionary Justice* had an impact that went well beyond the legal community (1969). For a critical discussion of arguments on behalf of rulemaking see David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev*.* 921-72 (1965). [↑](#footnote-ref-19)
20. As one author described the frustrated efforts to regulate cigarette advertising through adjudication that eventually led the FTC to adopt a rulemaking strategy, “[t]he Commission found itself putting out brush fires of deception while the inferno raged on.” A. Lee Fritschler, Smoking and Politics 75 (1969). [↑](#footnote-ref-20)
21. Herbert A. Simon, Administrative Behavior: A Study of Decision-Making Processes in Administrative Organizations (1947). [↑](#footnote-ref-21)
22. Obviously depending on the rule, these range from the collection and evaluation of various kinds of scientific or technical evidence to the consideration of how policy decisions are likely to affect economic and other kinds of human behavior. [↑](#footnote-ref-22)
23. Warren Baker, *Policy by Rule or Ad Hoc Approach—Which should it Be?*, 22 L. and Contemp. Probs*.* 658, 659 (1957) (“[T]he agency may not have had sufficient experience with [the industry] to warrant rigidifying its tentative judgment into a hard and fast rule.”). [↑](#footnote-ref-23)
24. J. Skelly Wright, *Beyond Discretionary Justice*, 81 Yale L. J. 575 (1972). [↑](#footnote-ref-24)
25. *See, e.g*., Schiller, *supra* note 15. [↑](#footnote-ref-25)
26. Bruce Ackerman and William Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 Yale L. J*.* 1466, 1474 (1980). [↑](#footnote-ref-26)
27. Ernest Gellhorn & Ronald M. Levin, Administrative Law and Process 310 (1997). [↑](#footnote-ref-27)
28. Although the role Congress plays in rulemaking through legislation and oversight sometimes reflects legislators’ own policy views, it also frequently reflects the influence of groups with a direct stake in the process. Given the legislature’s decentralized structure coupled with the weakening of the seniority system, the diversity of the constituents it represents, and the increased polarization of political dialogue, it is also not surprising that its influence can add to the complexity of the of the rulemaking environment. Agencies must adapt rapidly to the widely fluctuating political pressures from a Congress that remains deeply divided ideologically between advocates and critics of federal regulation. The oversight process is especially apt to be a free-for-all in areas of administration that are politically salient, sometimes involving multiple committees and subcommittees in both chambers. In a 1991 study, Richard J. Lazarus identified more than eighty committees and subcommittees in the House and Senate that had held oversight hearings for EPA. Richard Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*” 54 L. and Contemp. Probs. 205 (1991); Cindy Williams observes a similar fragmentation with regard to oversight of the Department of Homeland Security. Cindy Williams, Strengthening Homeland Security: Reforming Planning and Resource Allocation(2008). [↑](#footnote-ref-28)
29. *See, e.g.,* David E. Lewis, *The Personnel Process in the Modern Presidency*, 42 Presidential Studies Quarterly 577 (2012). [↑](#footnote-ref-29)
30. William F. West and Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J. of Pub. Admin. Res. and Theory 496, 504 (2013) (quantitative report analyzing selectivity of executive office requests for agencies to issue specific rules); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 Mich. L. Rev*.* 47 (2006) (discussing the "presidential control" model of agency decision-making, suggesting that it paints too superficial a picture). [↑](#footnote-ref-30)
31. Insiders cite this anticipatory effect as the primary explanation for the fact that the rules returned or withdrawn pursuant to regulatory review increased dramatically in the first year of the George W. Bush administration and then reverted to Clinton-era numbers.

The Office of Management and Budget’s (OMB) reliance on cost-benefit analysis as a criterion for regulatory review adds to the empirical burden agencies face, and the well-documented responsiveness of OMB to input from interest groups and other agencies adds to the complexity of the rulemaking environment. George C. Eads & Michael Fix, Relief or Reform: Reagan’s Regulatory Dilemma 4 (1984) (“[U]ndisclosed industry lobbying of OMB in some cases appears to influence OMB’s position on EPA’s rules under review.”). The familiar depiction of the president as a “unitary actor” notwithstanding, *see, e.g*., Elana Kagan, *Presidential Administration*, 114 Harv. L. Rev*.* 2246 (2011), reactive oversight often subjects agencies to multiple and conflicting viewpoints from within the Executive Office of the President (EOP), the Office of Advocacy in the Small Business Administration, and other departments. *See, e.g.,* Bressman & Vandenbergh, *supra* note 26. [↑](#footnote-ref-31)
32. Hugh Heclo recognized this early on in arguing that broader, more eclectic, and more fluid “issue networks” had supplanted “iron triangles” as a descriptive model for bureaucratic policy making. Hugh Heclo, *Issue Networks and the Executive Establishment, in* The New American Political System (Anthony King ed. 1978). [↑](#footnote-ref-32)
33. *See, e.g*., Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838, 1872 (2013), [↑](#footnote-ref-33)
34. An agency will have difficulty adjusting the substance of an existing rule with new guidances or targeted enforcement actions premised on focused enforcement positions; instead the change will need to be made to the text of the rule itself. [↑](#footnote-ref-34)
35. *See* Richard J. Pierce, *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59 (1995); Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 Duke. L. J. 1385 (1992); *but 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. 144 (2012). [↑](#footnote-ref-35)
36. 5 U.S.C. § 553(b)(B). [↑](#footnote-ref-36)
37. 29 CFR 1910 & 1929 (most sections, but not complete) [↑](#footnote-ref-37)
38. 47 C.F.R. 73 Subparts E and G [↑](#footnote-ref-38)
39. 40 CFR 799 Subpart B (providing a list of chemicals). [↑](#footnote-ref-39)
40. 40 CFR 63. [↑](#footnote-ref-40)
41. As a result of these methodological choices, the study is limited in coverage and scope to final rules promulgated after the mid-1970’s. Notices of proposed rulemakings and withdrawals of proposed rules fall outside of the methods, as do other forms of agency decision-making (e.g., guidance documents, policy statements, and adjudications).

Indeed, these choices and other methodological choices that arose in the course of the study (see conventions in the Appendix, for example) serve to spotlight the fact that even simple administrative concepts, including the definition of a rule, can be both complicated and ambiguous. *See also* GAO, Agencies Could Take Additional Steps to Respond to Public Comments 14 (2012), available at <http://www.gao.gov/assets/660/651052.pdf> (noticing similarly that “[a]cross the rules in our sample without an NPRM, agencies used 109 distinct terms, many of which had only slight wording variations within a broad category, to identify the rulemaking action”). These factors would also seem likely to complicate retrospective review to the extent that retrospective reviews assumes that rules are both discrete and static. [↑](#footnote-ref-41)
42. The case studies are posted here: <https://utexas.box.com/s/ntrinpdiwb5dhyyo1lqd>. They were selected by selecting – essentially blindly – a rule that fell in the bottom third of parent rules with revision activity (usually one revision that did not involve comment), a rule that fell in the middle of the stack based on the same criteria, and one near the top in terms of the extent of revision activity. McGarity, West, and Wagner each wrote up several of the case studies by reading through all of the Federal Register publications and at times consulting extraneous material. [↑](#footnote-ref-42)
43. This is a ratio of the total number of revisions for all 4 sets of rules relative to the total number of parent rules (including those that were not revised). [↑](#footnote-ref-43)
44. For FCC, 42% of the parent rules that were revised were themselves revisions of early rules. For OSHA, nearly all of the parent rules that were revised were themselves revisions of initial consensus standards, which, however, were promulgated in a single proceeding in a hurried fashion under a tight statutory deadline and did not represent the agency’s independent judgment. For that reason, the initial revisions were in reality the agency’s initial attempt to address the subject matters of those rules. *See, e.g.,* Thomas O. McGarity & Sidney A. Shapiro, Workers at Risk 17 (1993) [↑](#footnote-ref-44)
45. If a revised rule altered more than one parent rule (for example a method for testing mice that applied to multiple test rules under TSCA), it was counted as a single revision. Since one of the hypothesis being tested was that “agencies do not revise rules often,” we erred on the side of undercounting revision activity. [↑](#footnote-ref-45)
46. The case studies are posted here: <https://utexas.box.com/s/ntrinpdiwb5dhyyo1lqd>. [↑](#footnote-ref-46)
47. The Federal Register Handbook lists twelve and fourteen examples of “typical captions” that agencies use to describe proposed and final rules, respectively, but it does not provide definitions of those actions. It also notes that “others are possible.” Federal Register Document Drafting Handbook: October 1998 Revision 1-7, 2-7 (1998). [↑](#footnote-ref-47)
48. 54 Fed. Reg. 31765. [↑](#footnote-ref-48)
49. *See* OSHA, Concrete and Masonry Construction Safety Standards, at 2, available at <https://utexas.box.com/s/zlv8wt93awecam6nn7am> [↑](#footnote-ref-49)
50. Case Studies, supra, available at <https://utexas.box.com/s/ntrinpdiwb5dhyyo1lqd>. [↑](#footnote-ref-50)
51. Secondary Aluminum case study at 7-8, available at <https://utexas.box.com/s/bsq7rs1z7wcjp3dpwvv9>. [↑](#footnote-ref-51)
52. The general public thus typically learned of the agreements after the deal had been struck and often after the terms of the revised requirement had been met, thereby mooting any substantive disagreements on test protocols. See TSCA case studies, available at [https://utexas.box.com/s/1v1ok2u2up3h829zzy4d](https://utexas.box.com/s/ntrinpdiwb5dhyyo1lqd). [↑](#footnote-ref-52)
53. 5 U.S.C. § 553(b)(B) (providing an exception to notice and comment under the APA “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”). [↑](#footnote-ref-53)
54. *Id.* [↑](#footnote-ref-54)
55. This possibility runs through debates on identifying normative guides for the courts’ application of the “good cause” exception. See Lars Noah, *Doubts about Direct Final Rulemaking*, 51 Admin. L. Rev. 401 (1999) (raising questions about concluding a rule is “minor” simply because the public acquiesces); Ronald M. Levin, *More on Direct Final Rulemaking: Streamlining, Not Corner-Cutting*, 51 Admin. L. Rev. 757 (1999) (defending this position, codified in an ACUS recommendation). For a more general discussion of how agencies can frame their rules in ways that affects who can monitor them, see Jacob E. Gersen & Anne O’Connell, *Hiding in Plain Sight? Timing and Transparency in the Administrative State*, 76 U. Chi. L. Rev. 1157 (2009). [↑](#footnote-ref-55)
56. The GAO reports that 44% of the rules involve the “good cause” exception. *See* GAO, *supra* note 37. Ron Levin also reports on an empirical study by Prof. Lavilla that revealed relatively frequent use of the good cause exemption – 25% of the rules published in the Federal Register during a 6 month period made use of the “unnecessary” exemption to avoid notice and comment. Ronald Levin, *Direct Final Rulemaking*, 64 Geo. Wash. Law Rev. 14 (1995). [↑](#footnote-ref-56)
57. In 1995, Ron Levin reports that “[t]here has never been a legal challenge to a direct final rule” at EPA. *Id.* At 10. [↑](#footnote-ref-57)
58. *See, e.g., id.* at 13 (citing the case law for this established gloss on judicial review of the “good cause” exception). [↑](#footnote-ref-58)
59. Ellen Jordan quotes from the legislative history, which offers further insights about the meanings of these terms. “Unnecessary” was intended to exempt “minor” or “technical amendments” in which the public is typically not interested and “contrary to the public interest” occurs when the procedures might get in the way of the agency and yet the general public is not terribly interested. Ellen Jordan, *The Administrative Procedure Act’s “Good Cause” Exemption*, 36 Admin. L. Rev. 113, 118-19 (1984); *see also* Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 Admin L. Rev. 101, 123-26 (2015). [↑](#footnote-ref-59)
60. See, e.g., Raso, *supra* note 55, at 123-26. [↑](#footnote-ref-60)
61. *See, e.g., id*. [↑](#footnote-ref-61)
62. *See, e.g., id.* At 123-25 (2015); Jordan, *supra* note 55, at 133. [↑](#footnote-ref-62)
63. Compare, for example, Natural Resources Defense Council, Inc. v. Abraham, 355 F.3d 179, 204-06 (2d Cir. 2004) (holding that DOE’s indefinite suspension of the effective date of prior rule violated APA notice and comment requirements) with Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. Rev. 947, 994 (2003) (discussing how at least brief delays in effective dates do not require notice and comment). [↑](#footnote-ref-63)
64. GAO found that about 65% of major rules and 56% of nonmajor rules promulgated from 2003 to 2010 were preceded by a NPRM and involved a comment period. GAO, *supra* note 37, at 8. Raso found that 48% of the rules issued from 1995 to 2012 involved a notice and comment period. Raso, *supra* note 55, at 108. [↑](#footnote-ref-64)
65. *See, e.g.,* Raso, *supra* note 55, at 143. [↑](#footnote-ref-65)
66. In the case studies, we discovered that when there was at least one adverse comment the revised rule was withdrawn, available at <https://utexas.box.com/s/ntrinpdiwb5dhyyo1lqd>; *See* 64 Fed. Reg. 56173 (1999) (Halogenating Cleaning Solvents Rule). [↑](#footnote-ref-66)
67. *See* [Secondary Aluminum case study](https://utexas.box.com/s/bsq7rs1z7wcjp3dpwvv9) at 3, available at <https://utexas.box.com/s/bsq7rs1z7wcjp3dpwvv9>. [↑](#footnote-ref-67)
68. See case studies for medium and large rules in each of the four agency programs examined in this study, available at <https://utexas.box.com/s/ntrinpdiwb5dhyyo1lqd>. [↑](#footnote-ref-68)
69. *See supra* note 50 and accompanying text. [↑](#footnote-ref-69)
70. *See supra* notes 45-47 and accompany text. [↑](#footnote-ref-70)
71. *See, e.g*., 64 Fed. Reg. 37683 (exempting nonmajor batch cold solvent machines from federal permit program); see generally Halogenated Cleaning Solvents case study, available at <https://utexas.box.com/s/y959j936erpkyvzbenqc> [↑](#footnote-ref-71)
72. The track copy – of the cumulative revisions – is available at <https://utexas.box.com/s/20avwul6wyxyavi6jsly>. [↑](#footnote-ref-72)
73. Eisner & Kaleta, *supra* note 3, at 148-49 (quoting unidentified agency official’s for this observation) . [↑](#footnote-ref-73)
74. OSHA maintains a list of rules it has subjected to the “lookback” provisions of Section 5 of Executive Order 12866 and Section 610 of the Regulatory Flexibility Act. <https://www.osha.gov/dea/lookback.html#Completed>. Only one of the rules – a direct final rule revising the cotton dust standard – is included in the 88 revised rules promulgated by OSHA for the rules in our dataset. FCC instituted retrospective review in 2011; thus none of the revisions of FCC rules in our dataset occurred as a result of a more formal process. (The FCC revised rules in our dataset span 1982 through 2010). Finally, none of EPA’s revisions of TSCA test rules and only one revision to its MACT standards appeared to be triggered by formal retrospective review. [↑](#footnote-ref-74)
75. See Aldy, *supra* note 3, at Table 1 of Appendix, available at <https://www.acus.gov/sites/default/files/documents/Retro%2520Review%2520Draft%2520Tables%2520140922%2520%25282%2529.pdf> [↑](#footnote-ref-75)
76. OSHA Concrete and Masonry Construction Safety Standards case study at 2, available at <https://utexas.box.com/s/zlv8wt93awecam6nn7am> . [↑](#footnote-ref-76)
77. While the line between judicial influence and interest group pressure is also a fine one, many of the revisions that we consider “interest group-induced” did not involve negotiated settlements with interest groups, at least from what could be gleaned from the Federal Register descriptions. [↑](#footnote-ref-77)
78. This is noted in all three of the FCC case studies and less frequently in the OSHA case studies. *See* FCC case studies at 3-7, available at: <https://utexas.box.com/s/bner5nzn7f6juimc9c3z> ; *see also* OSHA case studies at 8, 10, available at <https://utexas.box.com/s/zlv8wt93awecam6nn7am> [↑](#footnote-ref-78)
79. *Cf*. West & Raso, *supra* note 26, at 504 (see chart showing that courts rarely initiated rulemakings, but when the courts did, 50% of those rules were economically significant). [↑](#footnote-ref-79)
80. Case study examples – See FCC Subscription Television Rules in case studies at 1 (where FCC revised its classification of subscription television rules as broadcasting in response to a D.C. Circuit court reversal of FCC’s related classification of direct broadcast satellite services), available at <https://utexas.box.com/s/bner5nzn7f6juimc9c3z> ; *see also* FCC Financial Interest and Syndication Rules case study at 4 (where FCC issued a Second Further Notice of Proposed Rulemaking regarding the Fin-Syn rules because the Seventh Circuit vacated the FCC's finalized 1991 Fin-Syn rules as arbitrary and capricious), available at <https://utexas.box.com/s/bner5nzn7f6juimc9c3z> ; OSHA Formaldehyde Health Standard case study at 4 (where OSHA extended the startup date of the hazard communication requirements to allow for judicial consideration of a motion filed by the Formaldehyde Institute), available at <https://utexas.box.com/s/zlv8wt93awecam6nn7am> . [↑](#footnote-ref-80)
81. Secondary Aluminum case study at 2, available at <https://utexas.box.com/s/bsq7rs1z7wcjp3dpwvv9> . [↑](#footnote-ref-81)
82. FCC Low Power FM Rules case study at 7, available at <https://utexas.box.com/s/bner5nzn7f6juimc9c3z>. [↑](#footnote-ref-82)
83. 42 U.S.C. § 7412 (2012). [↑](#footnote-ref-83)
84. In the three case studies, this statutorily directed revision activity showed up only in the secondary aluminum case study. *See* Secondary Aluminum case study at 5, available at <https://utexas.box.com/s/bsq7rs1z7wcjp3dpwvv9> ; *See* 42 U.S.C. § 7412(d)(6) (2012) (requiring review of emission standards at least every 8 years). [↑](#footnote-ref-84)
85. *See, e.g*., FCC, 62 Fed. Reg. 51052-01. ("The rule and procedure changes adopted in the Report and Order in MM Docket 96-58 were enabled by Congress' change, at the Commission's request, of Section 403(m) in the Communications Act in its Telecommunications Act of 1996. Subsequently, in the Notice of Proposed Rulemaking, the Commission proposed to eliminate the requirement for a construction permit in certain instances of modifications to broadcast facilities . . . .”); OSHA, 65 Fed. Reg. 46798-01 (noting how the Agency asked Congress to grant the agency authority to collect fees so it can better fund a specific agency program. Congress did grant this authority). [↑](#footnote-ref-85)
86. *See* Aldy, *supra* note 3, Appendix 1 listing the Executive Orders requiring retrospective review. [↑](#footnote-ref-86)
87. ###  *See, e.g*., EPA, Recordkeeping and Reporting Burden Reduction, 64 FR 7458-01

(1999) (revision to generic recordkeeping requirements, including for MACT rules, as a result of a presidential directive). [↑](#footnote-ref-87)
88. None of the revisions in this study occurred as a result of prompt letters, for example. *See* OIRA website at <http://www.reginfo.gov/public/jsp/EO/promptLetters.jsp> [↑](#footnote-ref-88)
89. Although it was initially a common law creation, the deliberative process privilege is most commonly invoked as an exemption to FOIA, which allows an agency to withhold “inter-agency or intra-agency memorandums or letter which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). It is also used as an exemption to the requirement that agencies place communications on the record after the publication of an NPRM. *See, e.g*., Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1980). S*ee generally* Shilpa Narayan, *Proper Assertion of the Deliberative Process Privilege: The Agency Head Requirement*, 77 Fordham L. Rev. 1183 (2009) (describing the history and developing of the deliberative process privilege over time). *See also* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2280 (2000-2001). [↑](#footnote-ref-89)
90. John Pendergrass became the Administrator of OSHA in 1986 and, as a former industrial hygienist, made toxics standard setting one of his top priorities. *See, e.g.,* <https://www.osha.gov/history/OSHA_HISTORY_3360s.pdf> at 19; McGarity & Shapiro, *supra* note 40, at 122. *See also* Peter Perl, *Players; John A. Pendergrass: Hands on Experience in Workplace Health*, The Washington Post, August 25, 1986, at A13. [↑](#footnote-ref-90)
91. See 42 U.S.C. § 7412(e) (setting judicially enforceable deadlines for EPA’s promulgation of MACT rules); 15 U.S.C. § 2603(e)(1)(B) (requiring EPA under TSCA to either initiate a test rule or public a reason for not initiate a test rule within 12 months after the interagency Testing Committee recommends that chemical for priority consideration); Natural Resources Defense Council v. EPA, 595 F. Supp. 1255 (S.D. NY 1984) (interpreting and partly enforcing deadlines on the EPA for test rules). [↑](#footnote-ref-91)
92. This is consistent with Gersen & O’Connell’s finding of an increased proportion of direct final rules in cases where agencies are promulgating rules under judicially enforced deadlines. See Jacob E. Gersen & Anne O’Connell, *Bureaucracy at the Boundary*, 156 Pa. L. Rev. 923, 970-71 (2008). [↑](#footnote-ref-92)
93. *See* Figure 1. [↑](#footnote-ref-93)
94. *See* Figure 4. [↑](#footnote-ref-94)
95. While coding of the clarity of the agencies’ explanations is subjective and may be subject to errors for inter-coder reliability, the differences between the agencies on the clarity of the revision is so divergent that the pattern is likely to be robust. [↑](#footnote-ref-95)
96. TSCA Fluoroalkenes case study at 5, available at <https://utexas.box.com/s/1v1ok2u2up3h829zzy4d> . [↑](#footnote-ref-96)
97. *See, e.g*., FCC Low Power FM Rules case study at 6 (where FCC published a Memorandum Opinion and Order on Reconsideration in response to petitions for reconsideration that were not published as a Notice of Proposed Rulemaking), available at <https://utexas.box.com/s/bner5nzn7f6juimc9c3z> [↑](#footnote-ref-97)
98. See all case studies, available at <https://utexas.box.com/s/ntrinpdiwb5dhyyo1lqd> . [↑](#footnote-ref-98)
99. See OSHA, Concrete and Masonry Construction Safety Standards in Case Studies at 1-2, available at <https://utexas.box.com/s/zlv8wt93awecam6nn7am> ; See FCC Low Power FM Rules case study at 6-9, available at <https://utexas.box.com/s/bner5nzn7f6juimc9c3z> . [↑](#footnote-ref-99)
100. President Obama’s 2012 Executive Order makes this deregulatory slant explicit. <https://www.whitehouse.gov/the-press-office/2012/05/10/executive-order-identifying-and-reducing-regulatory-burdens> (May 10, 2012). For an insightful critique of this slant on retrospective review, see Michael Livermore & Jason Schwartz, *Unbalanced Retrospective Regulatory Review*, Penn RegBlog (July 12, 2012), available at http://www.regblog.org/2012/07/12/12-livermore-schwartz-review/. [↑](#footnote-ref-100)
101. Eisner & Kaleta, *supra* note 3. [↑](#footnote-ref-101)
102. *See, e.g*., Coglianese, *supra* note 6. [↑](#footnote-ref-102)
103. Lignite Energy Council v. EPA, 198 F.3d 930, 932 (D.C. Cir. 1999); Final Rule Sets Fuel Neutral NOx Standard For New or Rebuilt Utility, Industrial Boilers, 29 ER 957 (09/18/1998) [↑](#footnote-ref-103)
104. Industry Wants New Source Standards For NOx Vacated; Agency Seeks Remand, 30 ER 745 (08/13/1999) [↑](#footnote-ref-104)
105. Federal Appeals Court Strikes Down Performance Standard for Modified Boilers, 30 ER 1013 (10/01/1999). EPA later withdrew the standard altogether, thereby leaving major modifications of existing power plants subject to the existing 1979 NSPS for NOx. Responding To 1999 Ruling, EPA Withdraws NOx Emissions Standard For Modified Boilers, 32 Env't Rep. Cur. Dev. (BNA) 1616 (August 17, 2001) [↑](#footnote-ref-105)
106. *See, e.g*., Eisner & Kaleta, supra note 3, at 145 (“Agencies may receive complaints or suggestions about rules they have issued. They may also receive formal petitions to revise or revoke an existing rule. (Some agencies treat a written complaint or a suggestion as an APA petition, regardless of how it was submitted.) The legitimacy of the concerns raised, or simply the number of the complaints, suggestions, or petitions, may justify a review.”). [↑](#footnote-ref-106)
107. *See, e.g., id.* (“After a rule has been in effect for some time, the agency may learn that the costs or benefits predicted for the rule are quite different from the actual numbers. Costs may be greater or benefits may be lower. As a result, changes may be warranted.”)*.* [↑](#footnote-ref-107)
108. *See, e.g*., Thomas O. McGarity, Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy (1991). [↑](#footnote-ref-108)
109. Beryl A. Radin, Challenging the Performance Movement: Accountability, Complexity, and Democratic Values (2006); William F. West, Program Budgeting and the Performance Movement: The Elusive Quest for Efficiency in Government (2011). [↑](#footnote-ref-109)
110. *See, e.g.,* Simon, *supra* note 17; Charles E. Lindblom, *The Science of Muddling Through*, 19 Public Administration Review 79 (1959) (explaining that the “need for information on values or objectives” in an incremental approach “is drastically reduced,” and “capacity for grasping, comprehending, and relating values to one another is not strained beyond the breaking point.”); Aaron Wildavsky, The Politics of the Budgetary Process (1974). [↑](#footnote-ref-110)
111. *See* Robert L. Glicksman & Sidney A. Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. Kan. L. Rev. 1179 (2004) (arguing that back end rule making is more pragmatic and effective than front end rule making). [↑](#footnote-ref-111)
112. The second-adjacent frequencies for FM 98.6 would be FM 98.4 and FM 98.8. [↑](#footnote-ref-112)
113. 73 Fed. Reg. 3202 (2008). [↑](#footnote-ref-113)
114. 72 Fed. Reg. 51707 (2007). [↑](#footnote-ref-114)
115. 79 Fed. Reg. 17529 (2014) [↑](#footnote-ref-115)
116. They are relatively easy to make procedurally because they do not tend to create standing in the same way as provisions that extend the reach of government. [↑](#footnote-ref-116)
117. 53 Fed. Reg. 22612 (1988); 53 Fed. Reg. 35972 (1988); 55 Fed. Reg. 42306 (1990). [↑](#footnote-ref-117)
118. William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 Public Administration Review 66, 71 (2004) (The “National Highway TrafficSafety Administration regulation on rear-impact protections” was “substantially influenced by the introduction of new empirical information through public comment.”). [↑](#footnote-ref-118)
119. 74 Fed. Reg. 29542 (2009). [↑](#footnote-ref-119)
120. 73 Fed. Reg. 3209 (2008). [↑](#footnote-ref-120)
121. As is the case with much FCC regulation, for example. [↑](#footnote-ref-121)
122. *See, e.g.,* Eisner & Kaleta, *supra* note 3, at 144-45 (“As inspectors work with the people subject to the regulations, as investigators examine accidents, and as attorneys try to prove violations of regulations in enforcement cases or in litigation, they and others involved in the day-to-day implementation of the regulations will identify problems.”). [↑](#footnote-ref-122)
123. *Id*. at 145 (“A rule thought to be clear on its face may be confusing to many. A rule thought to solve a problem may not be achieving its intended results. A rule thought to be easy to implement may turn out to be quite difficult to comply with in the real world. Finally, a court may find that a rule means something other than the agency thought. When an agency learns of these types of things, it may decide that it is necessary to review the regulation.”). [↑](#footnote-ref-123)
124. *Id.* [↑](#footnote-ref-124)
125. *Id.* at 145 [↑](#footnote-ref-125)
126. 71 Fed. Reg. 17738 (2006). [↑](#footnote-ref-126)
127. 70 Fed. Reg. 49530 (2005). [↑](#footnote-ref-127)
128. The extensions were only about a year in duration, although in some cases cumulative extensions led to a delay in compliance of as much as five or six years. See TSCA Cumene case study at 1; See also TSCA Anthraquinone case study at 3-5. Both available at [https://utexas.box.com/s/1v1ok2u2up3h829zzy4d](https://utexas.box.com/s/ntrinpdiwb5dhyyo1lqd). [↑](#footnote-ref-128)
129. FCC did not use stays to hold back portions of the rule but instead explicitly bracketed the more difficult or controversial issues identified during the comment period for further discussion and study without resolving them in the final rule and taking them on sequentially in later rulemaking initiatives. This could be attributable to many factors, but at least one difference could be that FCC was not operating under statutory deadlines as was the case with EPA’s air toxic rules. In addition, FCC was not promulgating protective standards, which by their nature suggest the need for action that is stayed rather than action that is deferred without a default standard in place. [↑](#footnote-ref-129)
130. OSHA Formaldehyde Health Standard case study at 4, available at <https://utexas.box.com/s/zlv8wt93awecam6nn7am> . [↑](#footnote-ref-130)
131. Halogenated Cleaning Solvents case study at 3-4 (noting this approach being used twice for two different issues arising over time – one in 1998 and another in 1999), available at <https://utexas.box.com/s/y959j936erpkyvzbenqc> ; Secondary Aluminum case study at 2 (breaking off – under a settlement – the aluminum foundries and aluminum die casting facilities for separate treatment), available at <https://utexas.box.com/s/bsq7rs1z7wcjp3dpwvv9> . [↑](#footnote-ref-131)
132. 64 Fed. Reg. 37683 (1999), 64 Fed. Reg. 67793 (1999), 64 Fed. Reg. 69637 (1999) [↑](#footnote-ref-132)
133. [↑](#footnote-ref-133)
134. Eisner & Kaleta, *supra* note 3, at 144. [↑](#footnote-ref-134)
135. 71 Fed. Reg. 14122 (2006). [↑](#footnote-ref-135)
136. 75 Fed. Reg. 42296 (2010). [↑](#footnote-ref-136)
137. This process has resulted in many revisions of the NRC’s list. *See, e.g.,* <https://www.nrc.gov/reading-rm/doc-collections/cfr/part072-0214.html> [↑](#footnote-ref-137)
138. 42 U.S.C. § 7409(d). [↑](#footnote-ref-138)
139. For example, EPA was well on the way toward revising the national ambient air quality standards for ozone in the Obama Administration when the D.C. Circuit affirmed the ozone standard that the George W. Bush Administration had promulgated in 2007. Mississippi v. EPA, 723 F.3d 1334 (D.C. Cir. 2013). [↑](#footnote-ref-139)
140. 42 U.S.C. § 7412 [↑](#footnote-ref-140)
141. 72 Fed. Reg. 96 (2007). [↑](#footnote-ref-141)
142. 71 Fed. Reg. 60636 (2006). [↑](#footnote-ref-142)
143. 72 Fed. Reg. 69288 (2007). [↑](#footnote-ref-143)
144. Occupational Safety and Health Administration, Hazard Communication: Final Rule, 77 Fed. Reg. 17, 574 (2012) [↑](#footnote-ref-144)
145. Eisner & Kaleta, *supra* note 3, at 144 (“When [a] rule was originally issued, certain requirements may not have been imposed because the technology to implement them may not have existed. Alternatively, technology may have improved so much that the original rule may be hindering a regulated industry's ability to use the most effective approach…. Similarly, the economic situation may have changed.”). [↑](#footnote-ref-145)
146. *Motor Vehicles Manufacturers Association v. State Farm*, 463 U.S. 29, 38 (1983) (In 1981, the Reagan administration rescinded the administrative regulation requiring seatbelts in motor vehicles).  [↑](#footnote-ref-146)
147. *Chevron U.S.A, Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837, 844 (1984) (“Considerable weight should be accorded by courts to an executive department's construction of a statutory scheme it is entrusted to administer.”). [↑](#footnote-ref-147)
148. 46 Fed. Reg. 50766 (1981). [↑](#footnote-ref-148)
149. 45 Fed. Reg. 52676 (1980). [↑](#footnote-ref-149)
150. *See supra* note 13 and accompanying text. [↑](#footnote-ref-150)
151. *See, e.g.,* Memorandum for the Heads and Acting Heads of Executive Departments and Agencies from Andrew H. Card, Jr., dated January 20, 2001, 66 Fed. Reg. 7702 (2001) (example of a White House memorandum directing executive branch agencies to withdraw all proposed and final regulations from the Office of the Federal Register and to issue public notices postponing the effective dates of final regulations). [↑](#footnote-ref-151)
152. 56 Fed. Reg. 24642 (1991) and 56 Fed. Reg. 64207 (1991). [↑](#footnote-ref-152)
153. Schurz Communications v. FCC, 982 F.2d 1043, 1055 (7th Cir. 1992) (overruling FCC regulation). [↑](#footnote-ref-153)
154. 58 Fed. Reg. 28927 (1993) [↑](#footnote-ref-154)
155. See Hearings on “A Review of Regulatory Reform Proposals,” Before the Senate Homeland Security and Governmental Affairs Committee, 114th Cong., 1st Sess. (September 16, 2015) (Testimony of Sidney A. Shapiro) [↑](#footnote-ref-155)
156. *See, e.g.,* Joe Vladeck, *Valuing Regulatory Flexibility: A Real Options Approach to Cost-Benefit Analysis*, 103 Geo. L. J. 797, 798 (2015). [↑](#footnote-ref-156)
157. *See, e.g*., Halogenated Cleaning Solvents case study, available at <https://utexas.box.com/s/y959j936erpkyvzbenqc> [↑](#footnote-ref-157)
158. 5 U.S.C. § 553(e) [↑](#footnote-ref-158)
159. *See, e.g*., Steven D. Cook, *EPA Sets Stricter Standards for Ozone, But at Level Weaker than Advisers Sought*, 39 Env't Rep. Cur. Dev. (BNA) 493 (March 14, 2008). [↑](#footnote-ref-159)
160. Halogenated Cleaning Solvents case study, available at <https://utexas.box.com/s/y959j936erpkyvzbenqc> [↑](#footnote-ref-160)
161. See, e.g., OSHA Formaldehyde Health Standard case study, available at <https://utexas.box.com/s/zlv8wt93awecam6nn7am> . [↑](#footnote-ref-161)
162. OSHA, Concrete and Masonry Construction Safety Standards, at 2, available at <https://utexas.box.com/s/zlv8wt93awecam6nn7am> [↑](#footnote-ref-162)
163. *See, e.g*., Eisner & Kaleta, *supra* note 3, at153. [↑](#footnote-ref-163)
164. *See* Sunstein, *supra* note 6, at 590. [↑](#footnote-ref-164)
165. *See, e.g.,* Bull, *supra* note 2, at 7-10 [↑](#footnote-ref-165)
166. See, e.g., Sunstein, *supra* note 6, at 590. [↑](#footnote-ref-166)
167. Administrative Conference of the United States, Administrative Conference Recommendation 2014-5, Retrospective Review of Agency Rules at 1 (December 4, 2014). *See also* Sunstein, *supra* note 6, at 590. [↑](#footnote-ref-167)
168. Administrative Conference of the United States, Administrative Conference Recommendation 2014-5, Retrospective Review of Agency Rules, December 4, 2014, at 1-2 [↑](#footnote-ref-168)
169. *See, e.g*., Aldy, *supra* note 3, at 66-67; Coglianese, *supra* note 6, at 62-63. [↑](#footnote-ref-169)
170. *See* Aldy, *supra* note 3, at 48 (suggesting that some of the rules promulgated as a result of formal retrospective reviews under the executive orders “may have been already in progress”); *id.*, at 51 (concluding that agencies have identified rule modifications that were already in the pipeline as revised rules under the executive orders). [↑](#footnote-ref-170)
171. *See, e.g.,* Eisner & Kaleta, *supra* note 3, at 148-49. [↑](#footnote-ref-171)
172. Some agencies, such as DOT, may also include such changes in updated status reports that remain available to the public for some time after the publication of a final rule. EPA has instituted an online rule tracker that allows the public to follow the development and revision of rules that can be searched in various formats to learn about ongoing developments. *See* <http://yosemite.epa.gov/opei/RuleGate.nsf/>. [↑](#footnote-ref-172)
173. *See* TSCA case studies, available at [https://utexas.box.com/s/1v1ok2u2up3h829zzy4d](https://utexas.box.com/s/ntrinpdiwb5dhyyo1lqd). [↑](#footnote-ref-173)
174. *See, e.g*., EPA Secondary Aluminum case study at 7-8, available at <https://utexas.box.com/s/bsq7rs1z7wcjp3dpwvv9>; OSHA, Concrete and Masonry Construction Safety Standards, at 2, available at <https://utexas.box.com/s/zlv8wt93awecam6nn7am>. [↑](#footnote-ref-174)
175. *See* TSCA case studies, available at [https://utexas.box.com/s/1v1ok2u2up3h829zzy4d](https://utexas.box.com/s/ntrinpdiwb5dhyyo1lqd). [↑](#footnote-ref-175)
176. *See* Eisner & Kaleta, *supra* note 3, at 155 (concluding that given the significant differences in agency rulemaking environments, it is more appropriate to provide “a list of good ideas from which agencies can choose” rather than offer specific prescriptive proposals for agency action). [↑](#footnote-ref-176)
177. *See, e.g*., Raso, *supra* note 55, at 147, 152. [↑](#footnote-ref-177)
178. *See* Aldy, *supra* note 3, at 70 (urging agencies to engage in active outreach to stakeholders and the public when they engage in formal retrospective review of existing regulations). [↑](#footnote-ref-178)
179. *See* Eisner & Kaleta, *supra* note 3, at 167-68. [↑](#footnote-ref-179)
180. *See* Coglianese, *supra* note 6, at 62-63 (recommending that regulatory impact analyses for major rules include a plan for evaluating the costs and benefits of the underlying rule in light of experience with its application). [↑](#footnote-ref-180)
181. *See* Aldy, *supra* note 3, at 53 (“agencies do not have the time or personnel to undertake detailed analysis of every rule”); Bull, *supra* note 2, at 18. [↑](#footnote-ref-181)
182. *See, e.g*., Eisner & Kaleta, *supra* note 3, at 148. One suspects that this may be a hidden motivation of some regulatory reformers calling for mandatory retrospective review of all significant agency rules. [↑](#footnote-ref-182)
183. *Id.* at 148-49. [↑](#footnote-ref-183)