

***We've only Just Begun:***  
***The Not-so-final "Final Rule" and its Implications for Administrative Process***

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Working Draft 2/9/2015

*[Note to workshop participants: We apologize for the early stage of this project. This draft is not yet a coherent "paper" but instead is more of a collection of our preliminary observations and thoughts. We very much appreciate any comments and suggestions you have on the project.]*

In administrative law, an agency's publication of a final rule is conventionally understood as marking the end of an often tumultuous rulemaking life cycle. In preparing just the proposed rule, the agency typically engages in an information gathering and analytical process that can drag on for years. Add a few more years for the agency to solicit, collate, and respond to a barrage of comments and convince the White House to pass the rule through to the Federal Register. When the rule is significant, the final rule package also includes a handful of lengthy, supplemental regulatory analyses that assess the implications of the rule with respect to its impact on small business, its net cost-benefit, and other features. Even after publication of the final rule and its supporting record, one or more interest groups may file motions for reconsideration and ultimately challenge the rule in court. But for final rules that are not challenged, which constitute the vast majority,<sup>2</sup> the final rule is assumed to take effect and the rulemaking life cycle comes to an end.

In this paper we suggest a different ending for the traditional rulemaking story. For the majority of rules, the first final rule marks only the beginning or at least the middle of the rulemaking process. The initial final rule – or parent as we call it -- spawns progeny of revised rules that can populate the Federal Register for decades. Dozens of revisions, adjustments, settlements, stays, and related changes, often instigated by the agency itself, can occur during the middle-aged years of a rule's life cycle. In the majority of revisions, moreover, much of this activity is done outside of litigation, even though the courts' influence is sometimes a contributing cause of the revision activity. And while some of the revised rules may be little more than under-the-radar- capitulations to vocal interest groups, in more balanced regulatory

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<sup>1</sup> This work was supported by NSF GRANT SES-1023571.

<sup>2</sup> See Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Administrative Law*, 1990 DUKE L.J. 984, 998 (1990); Christopher H. Schroeder & Robert L. Glicksman, *Chevron, State Farm and the EPA in the Courts of Appeals during the 1990s*, 31 ENVTL. L. REP. NEWS & ANALYSIS 10371, 10372 (2001).

settings, the larger process of rule revision appears on balance to be a positive one consistent with the larger regulatory environment in which it is developed.

[fill out with an overview of analysis/findings]

This paper explores the hidden world of open-ended rulemaking. While our own investigation is by no means comprehensive, we hope that by examining open-ended rules in different rulemaking areas we can gain some appreciation for the range of approaches that agencies take in making adjustments to final rules and their larger implications. After providing a summary of our methods and findings, the paper offers a preliminary typology for conceptualizing this revision activity. The paper closes with an assessment of the preliminary implications of the open-ended rulemaking phenomenon and offers suggestions for the future.

## I. THE STUDY.

In the administrative law literature, the phenomenon of open-ended or revised rules is rarely noted, much less investigated.<sup>3</sup> Instead, the “rulemaking life cycle” is portrayed as ending once a rule is finalized, except in cases where a rule is ultimately challenged in court.<sup>4</sup>

As teachers and researchers in administrative law, we have perpetuated this blind spot in our own work and writing until the data from our larger empirical study forced us to confront revision reality. The findings from our study reveal a significant level of rulemaking energy dedicated to revising rules. Indeed, the majority of final rules in our dataset are supplemented by, on average, another 2.5 final rules that revise the original rules in some way. In this section we share our methods and findings on open-ended rulemakings.

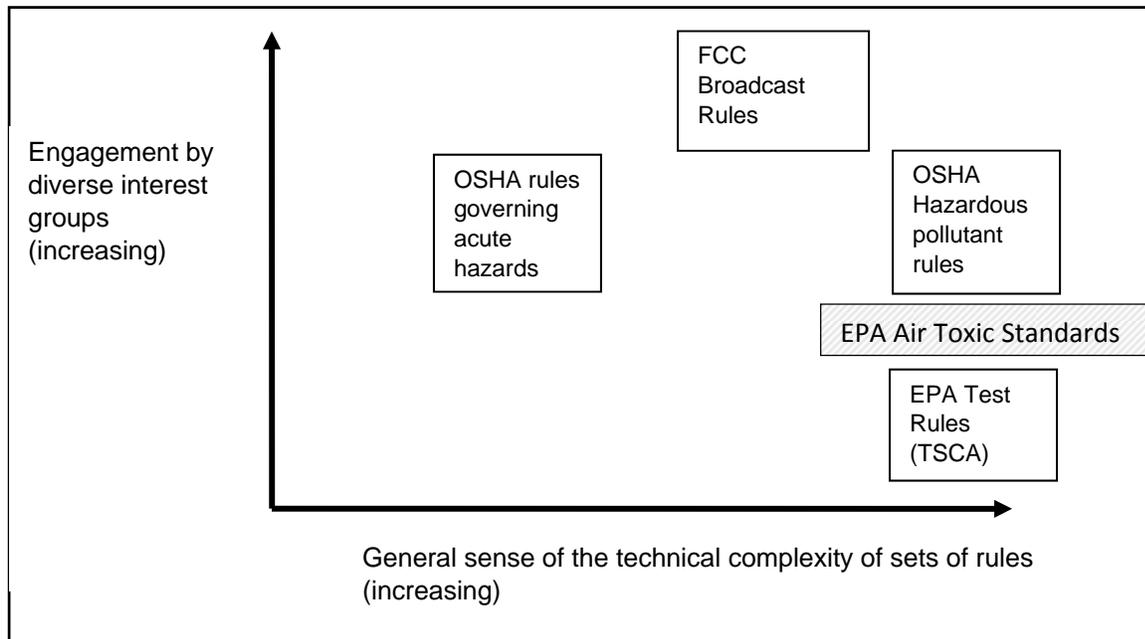
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<sup>3</sup> See, e.g., Emily S. Bremer, *A Primer on the Informal Rulemaking Process*, THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, (JAN. 25, 2015), <http://www.acus.gov/newsroom/administrative-fix-blog/primer-informal-rulemaking-process>; See also, MAEVE P. CAREY, CONG. RESEARCH SERV., THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 2 (2013) (where 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); See also 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); See also 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.)

<sup>4</sup> See, e.g., Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1738-43 (2011) (providing illuminating discussion of agency responses to remands); see also ROBERT J. HUME, HOW COURTS IMPACT FEDERAL ADMINISTRATIVE BEHAVIOR (2009).

## A. Methods

This paper is the first in a series of papers drawn from a larger empirical project that involves tabulating participation and other features of informal rulemakings in three different agencies.<sup>5</sup> In order to ensure we obtain snapshots of the rulemaking process from different angles, in this larger project we select three very different regulatory programs. One set of rules represents highly complex and technical decisions that are likely to generate interest primarily from regulated parties --- the Environmental Protection Agency's (EPA's) promulgation of test rules under the Toxic Substances Control Act (TSCA), which requires manufacturers of specified chemicals to conduct mandated toxicity and related tests on those chemicals. The remaining regulatory programs vary in complexity, but appear more likely to attract a broader range of participants. The first set of rules consists of two groups of worker safety rules at the Occupational Safety and Health Administration (OSHA) – one governing standards for exposure to toxics and a second involving more acute harms from machinery and workplace conditions. The second set of rules consists of moderately technical broadcast rules promulgated by the Federal Communications Commission (FCC).



For each rule within this larger set, we examined the docket index and final rule published in the Federal Register. It was at this point that we discovered that the majority of the rules were not original rules, but revisions. The average ratio of total revised rules to new

<sup>5</sup> The project was funded by NSF GRANT SES-1023571.

rules was about 2 to 1, but in cases in which rules were revised, they were typically revised multiple times.<sup>6</sup>

To learn more about this revision activity we collected additional data on the revised rules. After ensuring we had located all of the revised rules associated with the parent rules in our study,<sup>7</sup> we extracted information from the published Federal Register revised rules on various criteria, such as the use of a notice and comment process, the number of changes made in a revised rule, the nature of each change, etc. Since we had some data on rule revisions of EPA's air toxic technology-based standards from an earlier study, we included that data in this study as well to provide an even richer database from which to investigate open-ended rulemaking. See shaded box in the table above. Because this set of rules was added, however, we do not have data on each of the criteria of interest, although we have data on most of them.

We also conducted in-depth case studies of three small, medium, and large revised rules in each agency program.<sup>8</sup> These lengthy case studies supplement the aggregate quantitative data in important ways.

## **B. Findings**

The aggregate data, combined with the case studies, provides a coarse-grained picture of the world of revised rules. We share the findings here and offer our analysis in the final two sections of this paper.

### *1. Extent of Revisions*

As mentioned, most of the rules (73%) in our regulated programs (N=183) were revised by the agency at least once. Relative to OSHA and FCC, EPA tended to revise more of its parent

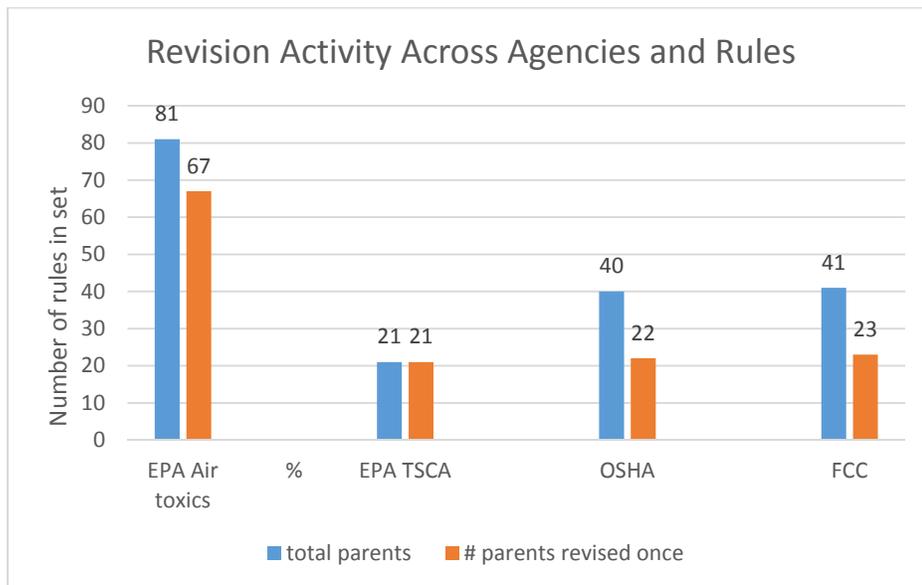
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<sup>6</sup> This is a ratio of the total number of revisions for all 4 sets of rules relative to the total number of parent rules (including those that were not revised).

<sup>7</sup> We collected all of the rules cited in the Code of Federal Register. The "parent" was the original, earliest rule cited at the bottom of each regulation of the CFR. We then tracked the revisions – based initially on this italicized list of Federal Register cites in the CFR. We then supplemented the list of revised rules by running searches in the Federal Register using the Federal Register citation as the search term. This second search yielded still more rules that were revisions of the parent. (We are unsure of why our supplemental list were not referenced in the Code of Federal Regulations since some were more than corrections; we leave that mystery to others).

<sup>8</sup> The case studies are posted here: <https://utexas.box.com/s/ntrinpdwib5dhyyo1lqd>. 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.

rules; in the case of TSCA, every final rule was revised at least once. See Bar Chart below.



Since our initial rules dated only to the mid-1970's, the rules that we designated as the original "parent" for purposes of the study were occasionally the product of a rule revision themselves. Both sets of EPA rules involved "parents" that were first generation; they were rules that had not been promulgated before. But in the case of both OSHA and FCC, nearly half of the "parent" OSHA and FCC rules were actually revised rules themselves.<sup>9</sup> The 73% revision rate is thus an underestimate of the extent that rules in our study were revised over time.

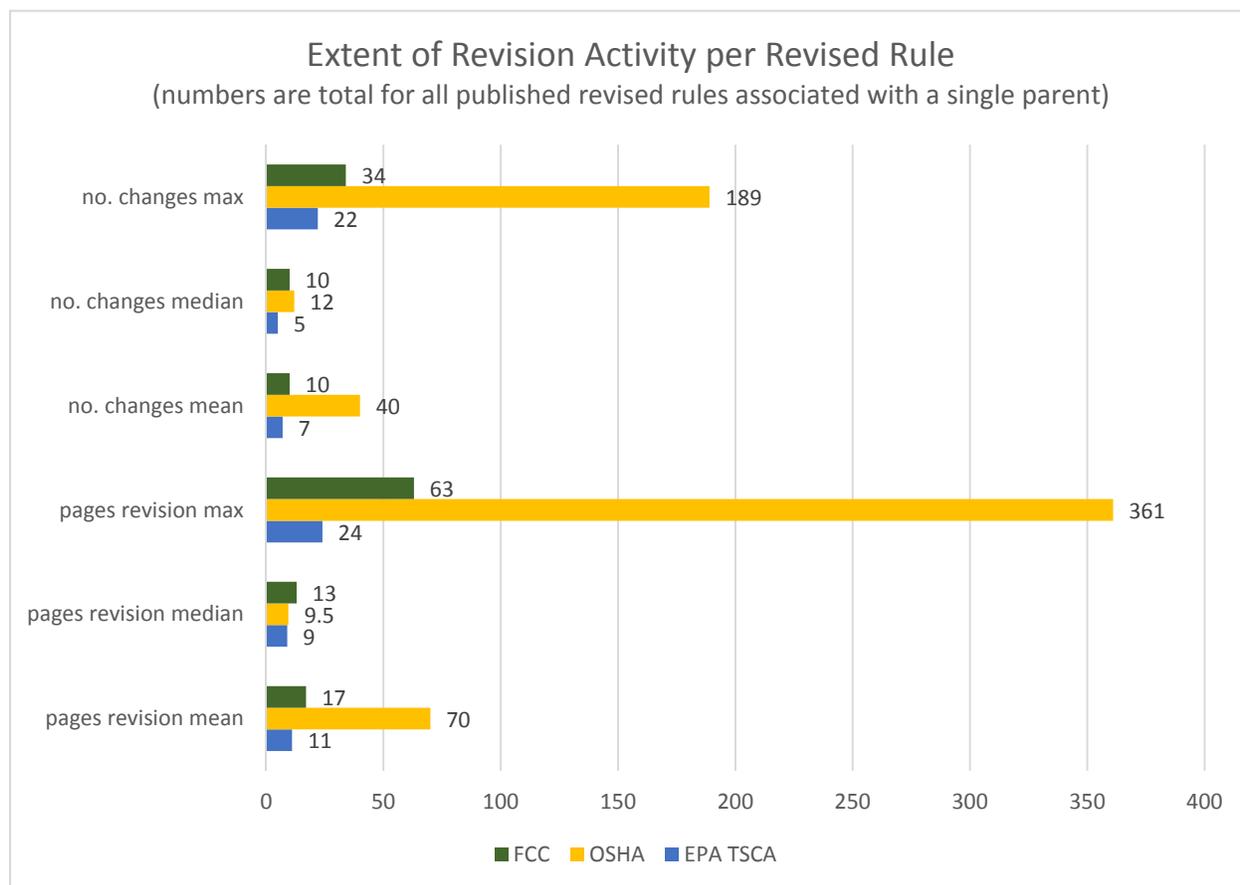
The extent of revision activity is even more striking when viewed from the standpoint of a simple count of all of the published "final" (including final revised) rules in our database. Although many of the revised final rules were minor, if each published final rule is counted as equal, the revised rules outnumber the original parent rules by a factor of 2.5 to 1. There were 462 revised final rules in our database that originated from an initial list of 183 parent rules.

Despite the considerable revision activity, the agencies varied in whether revisions were made uniformly across all the rules or instead involved changes to only a subset of rules.<sup>10</sup> In

<sup>9</sup> 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.

<sup>10</sup> *The frequency of revisions also varied between the agencies. Perhaps because the test rules were discrete requirements that can be satisfied relatively promptly, the revisions to these test rules were made much more frequently – on average about once every nine. In OSHA and FCC, revisions were more spread out, occurring about every two or three years. [This is based on eyeballing the data – I'm not sure how to pull this info out of the spreadsheet and am not sure it is worth the trouble. Thoughts?]*

EPA’s case, there was a high probability of some type of revision to every final rule. As mentioned, all of EPA’s TSCA parent test rules were revised at least once. In the air toxics program, out of 102 parent rules, only fourteen were not revised. This yields an overall revision rate of nearly 90% for all of EPA’s promulgated rules in this study. By contrast, OSHA revised only a little more than half of its parent rules, but once it opened the door to revision activity, this revision activity could be quite significant – in several cases far beyond the scope and size of the original parent rule. In one rule, for example, OSHA dedicated 361 total pages to the published revisions of the original rule, making 189 total changes over time. See bar chart below.



FCC also revised its rules slightly more than half the time. The extent and significance of its revisions was not as large as OSHA’s in the number of changes or pages of revisions – reaching a maximum of 34 changes over the course of the revised rules and totaling 63 pages -- but at least in the case studies of revised rules, the changes FCC made appeared to be quite significant.<sup>11</sup>

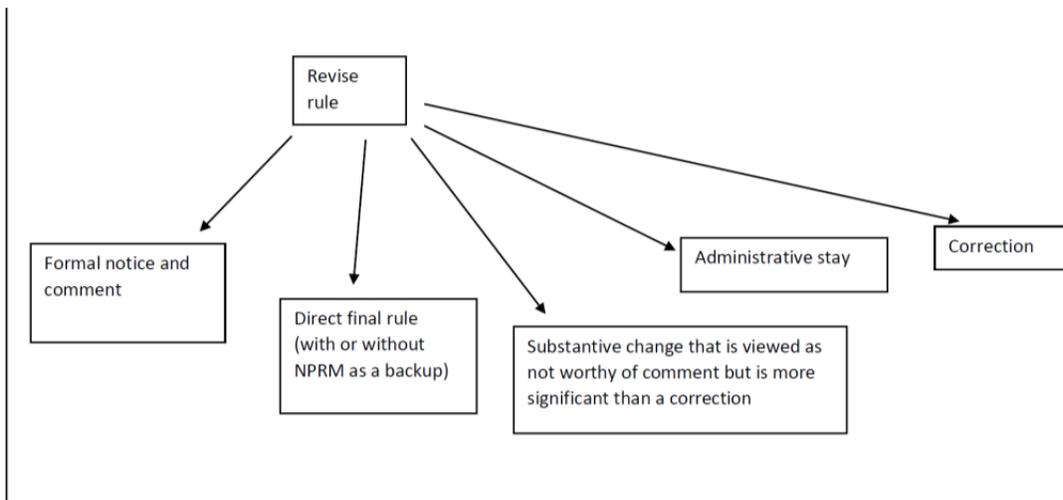
<sup>11</sup> See case studies, supra, available at <https://utexas.box.com/s/ntrinpdiwb5dhyyo1lqd>.

## 2. Nature of Revisions

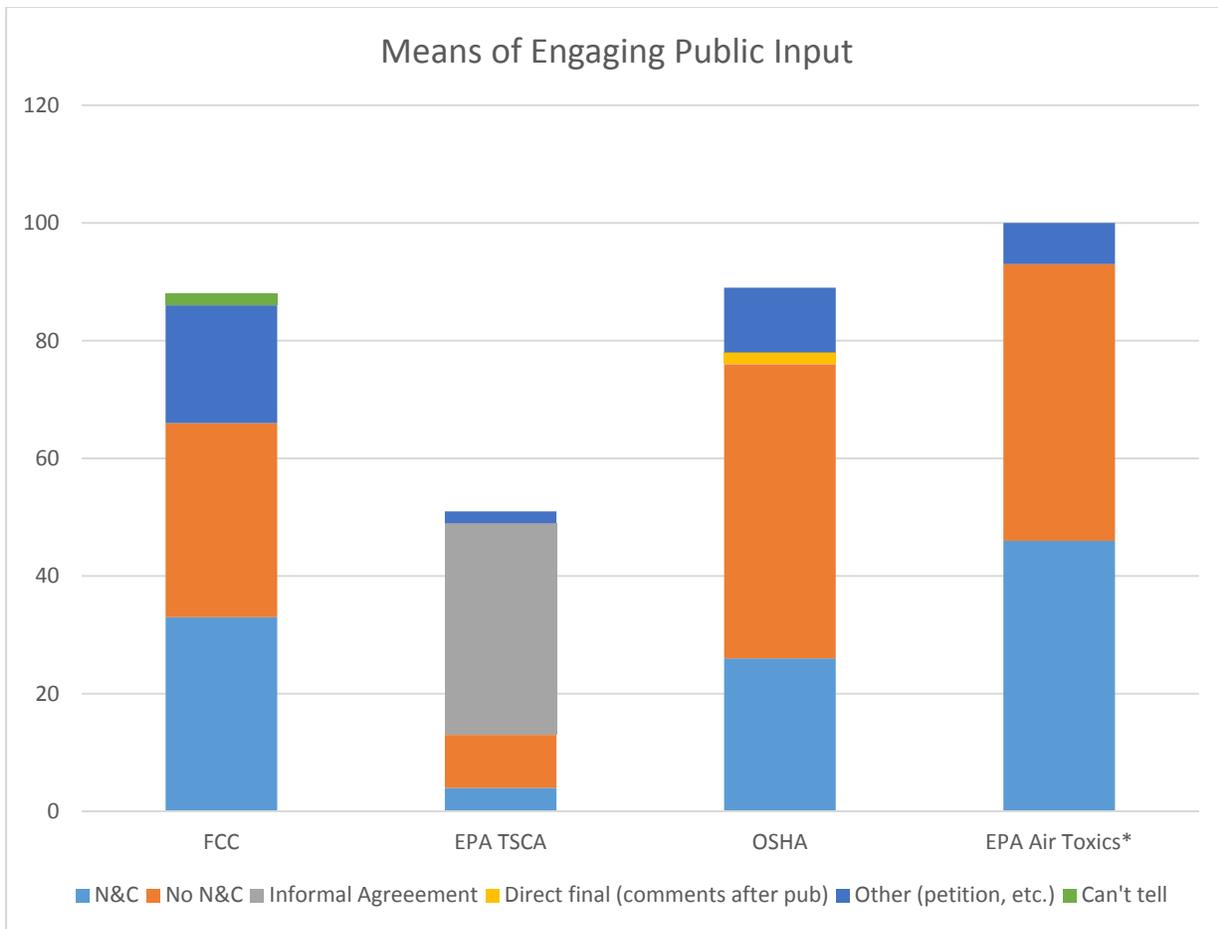
The variation in the size and scope of revisions suggests a natural second level of inquiry – namely an investigation of what this revision activity entails. We extracted information on several dimensions related to administrative process.

### a. Role of Public Comment

Since the revisions entail substantive changes to the original parent rule, at least some of the revisions involve notice and comment. The agency's decision about whether and how to include public comment also signals its view of the significance of the revision, at least at a crude level. The graphic below depicts the universe of approaches that agencies used to revise rules. Only the first two approaches involve some form of public comment as a condition to finalizing the rule.



The chart reveals that about two-thirds of the revisions to existing rules do not involve a formal notice-and-comment period, although the agencies solicited public participation, typically after the fact, for another 10-25 percent of the revised rules.



Between agencies there was considerable variation in the means and extent to which they solicited public input on their revised rules. 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 then memorialized as revisions to the original final rule.

In the air toxic revisions, EPA regularly deployed direct final rules – rules that take effect several months later unless the agency receives an adverse comment.<sup>12</sup> To prevent one adverse comment from completely derailing a revision, in some cases EPA also published a notice of proposed rule rulemaking (NPRM) simultaneously with publication of the direct final rule.<sup>13</sup> If adverse comments were received, EPA could then shift the rule into the formal notice and comment process without starting over.

<sup>12</sup> 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/ntrinpdw5dhyyo1lqd>; See 64 Fed. Reg. 56173 (1999) (Halogenating Cleaning Solvents Rule).

<sup>13</sup> [Secondary Aluminum case study](https://utexas.box.com/s/bsq7rs1z7wcjp3dpwv9) at 3, available at <https://utexas.box.com/s/bsq7rs1z7wcjp3dpwv9>.

FCC revisions, by contrast, were initiated by petitions nearly 20% of the time. Nearly 2/3 of the petitions (18/28), moreover, were filed from diverse groups that took diverging positions on the issues. While this form of deliberation was not as comprehensive as a comment process, it nevertheless provided FCC with diverse input that seemed to substitute for notice and comment.<sup>14</sup> For the remaining the rules, FCC solicited public comment through notice and comment for 40% of the rules and did not solicit public comment on the other 40%.

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

Our case studies of individual parent rules also confirmed our suspicion that the agency does make substantive changes in revised rules that are not subject to notice and comment.<sup>15</sup> The fact that a rule is revised without notice and comment does not necessarily mean that the change being made is inconsequential from the perspective of the public or the regulated community. In one revision of an air toxics standard for halogenated cleaning solvents, for example, EPA exempted a set of industries without notice and comment.<sup>16</sup> Our 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 rule 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 revised rule – at the end of the revision process – appeared more significant with respect to the significance of the net changes.<sup>17</sup>

#### b. Types of Revisions

Agencies labelled their revisions differently, but overall the types of revisions ranged from simple corrections to technical amendments to more radical overhauls of central features of the original rule.

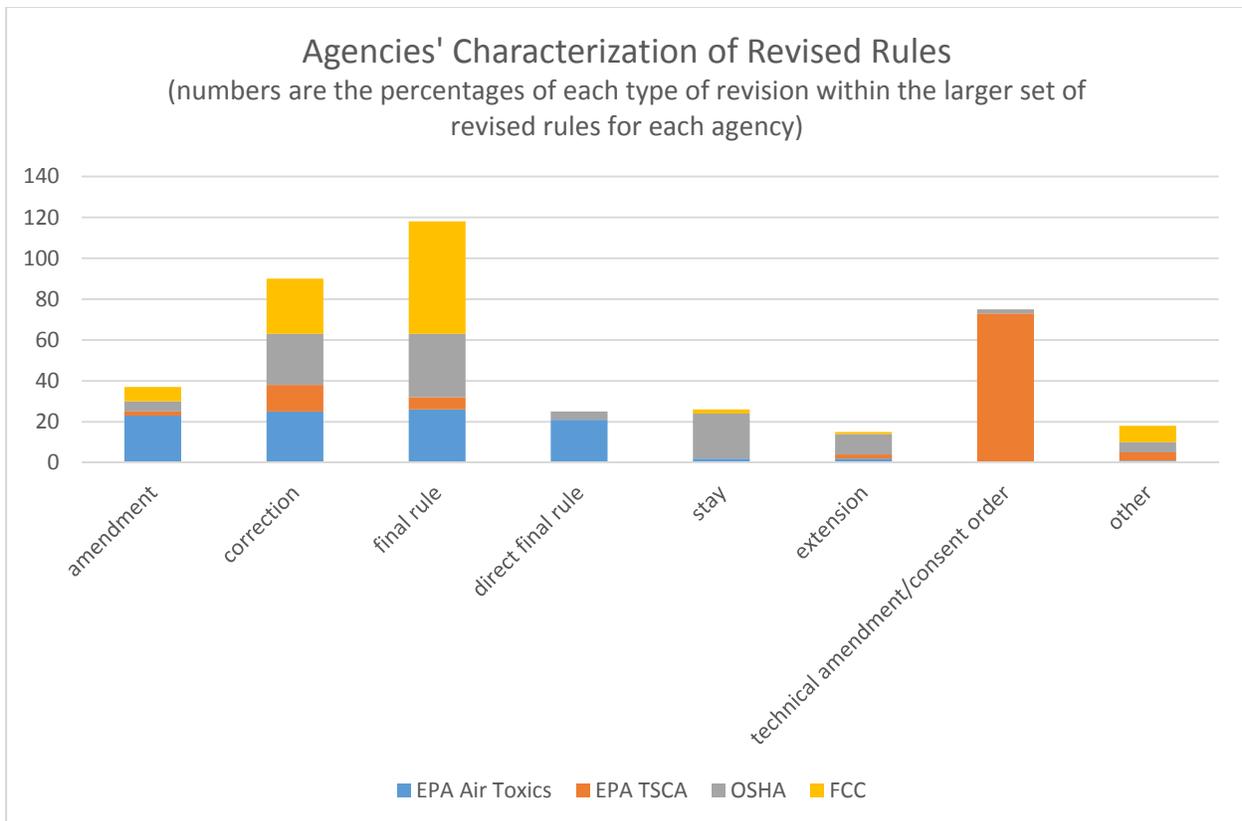
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<sup>14</sup> See [Financial Interest and Syndication Rule case study](https://utexas.box.com/s/bner5nzn7f6juimc9c3z) at 4, available at <https://utexas.box.com/s/bner5nzn7f6juimc9c3z>.

<sup>15</sup> 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/ntrinpdibw5dhyyo1lqd>.

<sup>16</sup> 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>

<sup>17</sup> That track copy – of the cumulative revisions – is available at <https://utexas.box.com/s/20avwul6wyxyavi6jsly>.



All of the agencies appeared to use “corrections” at roughly the same rate to make minor adjustments to the parent rule, sometimes multiple times. In the course of investigating some of these corrections in our case studies, we discovered that many corrections were truly minor. For example, in one revised correction rule published in the Federal Register, OSHA made a single correction to a typographical error, changing an “of” to an “or” in a table.<sup>18</sup> This was not always the case, however. In another revised “correction” rule, OSHA changed a “should” to a “shall” for its safety requirements governing certain concrete operations. Although OSHA considered this change simply a “technical error,” it had the legal effect of transforming a voluntary standard into a mandatory requirement for lift-slab operations.<sup>19</sup> A similar substantive change – yet labeled as a technical correction – occurred in a revised rule for the asbestos standard in which OSHA initially indicated it would allow disposal respirators but in a technical correction ultimately removed that option.<sup>20</sup> 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

<sup>18</sup> 54 Fed. Reg. 31765.

<sup>19</sup> See OSHA, Concrete and Masonry Construction Safety Standards, at 2, available at <https://utexas.box.com/s/zlv8wt93awecam6nn7am>

<sup>20</sup> Case Studies, supra, available at <https://utexas.box.com/s/ntrinpdibw5dhyyo1lqd>.

standard.<sup>21</sup> While we attempted to collect data specifically on whether each change in each revision subtracted from or added to the regulatory requirements, the dominant code was “can’t tell” and thus our findings are inconclusive on this issue.<sup>22</sup> Even in the qualitative case studies it was sometimes difficult to figure out the implications of a change. Given the limited explanation for corrections, understanding the implications of these changes was even more difficult.

Beyond the corrections category, there were differences between the types of revisions that the agencies made. Both FCC and OSHA issued somewhat the same proportion of revised rules as “corrections”, “amendments”, and “final rules” (with notice and comment). The one difference was OSHA’s more liberal use of “administrative stays” (22%) and “extensions” (10%) within its revision activity. Other agencies used the administrative stay and extension category less often.

In the TSCA test rules, EPA revised most of its test rules (73%) as “technical amendments/consent orders,” a category that in our study at least was wholly unique to TSCA. These revisions were based on negotiations with manufacturers that had been memorialized in a letter, usually well before the change was published in the Federal Register in an annual report of these cumulative “technical amendment/consent orders). The general public thus learned of the agreements generally after the deal had been struck and often after the terms of the revised requirement had already been met, mooted any substantive disagreements on test protocols.<sup>23</sup>

By contrast, in the air toxics rules (different than the TSCA rules), EPA categorized the majority of its revisions as either amendments (23%) or direct final rules (21%).<sup>24</sup> Presumably, the former category did not involve public input and the later activity may have involved more significant changes and thus did involve the solicitation of public input, albeit after the fact. EPA also issued quite a few notice and comment revisions (26%) for the rules promulgated under this air toxic program.

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<sup>21</sup> Secondary Aluminum case study at 7-8, available at <https://utexas.box.com/s/bsq7rs1z7wcjp3dpwvv9>

<sup>22</sup> We also attempted to code for whether each change in a revised rule made the rule weaker (less regulatory intervention) or stronger (more regulatory intervention), but in the majority of cases for all agency programs, making this type of categorization was difficult. The majority of changes in revised rule were thus coded as “can’t tell.” To the extent that decisions could be made on the implications of the requirement, moreover, it revealed a relatively constant 50-50 split across EPA’s test rules, OSHA, and FCC with regard to whether the revision changed the rule in way that appeared to increase or decrease regulatory engagement.

<sup>23</sup> See TSCA case studies, available at <https://utexas.box.com/s/1v1ok2u2up3h829zzy4d>.

<sup>24</sup> As mentioned, we collected more limited information on air toxics revisions since this program was not included in our NSF grant. We included this program because we had already collected basic information on revision activity for this set of rules.

Despite relatively sharp distinctions between the types of revised rules, the agencies' underlying conceptual and/or legal framework for making these choices was neither referenced nor articulated, assuming one exists at all. Rather, from reading the revisions it appears that agencies made the decisions somewhat ad hoc as the need for revisions presented themselves.

c. Extended Time for Compliance

Although OSHA signaled the role of time – stays and extensions – in the title of its revised rules, the other agencies did not. Yet some proportion of the revised rules issued by each of the three agencies involved time extensions. See table below.

**% of Revisions 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

Most notable are the time extensions involved in the EPA's TSCA revised test rules. Seventy-five percent of the TSCA revisions involved some type of extension of time for regulated parties (other changes were often made to the test rules as well). In some cases the initial extension was extended again, almost annually, with as much as five or six years of cumulative extensions. More typically, however, the extensions were only about a year in duration.<sup>25</sup>

Our qualitative case studies also revealed an interesting practice by both OSHA and EPA (but not FCC)<sup>26</sup> to make use of the administrative stay provision to break off a portion of a final

<sup>25</sup> 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>.

<sup>26</sup> FCC did not use stays to hold back portions of the rule but instead explicitly bracketed the more difficult or controversial issues for further discussion and study, which were often ultimately addressed in a later revised rule – taking on the issues sequentially in one revised rule at a time. This difference in FCC 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. FCC also was not

rule that is hotly contested after promulgation and stay compliance requirements pending further study. In the OSHA revisions of formaldehyde, for example, OSHA encountered some disagreements with the White House OIRA over the hazard communication requirements and their implications for paperwork requirements on regulated industries. To work through these issues, OSHA stayed this portion of the rule in eight separate stays published in the Federal Register that spanned over three years in duration.<sup>27</sup> OSHA also stayed a portion of the 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; EPA identified a subset of facilities covered by a final rule and stayed the requirements pending further research.<sup>28</sup> These more specific examples, moreover, are drawn from our select case studies – the possibility that was still more creative and extensive use of stays and extensions in the rules under study seems likely.

#### d. Accessibility of Agency’s Explanations

A final feature of the rules that differed between agencies was the accessibility of an agency’s explanation for why a rule was revised and the implications of that revision for the regulatory program. In the course of extracting the data, we ranked the clarity of the agency’s explanation regarding the nature of the revision and its implications over three categories – clear, unclear, and in-between.<sup>29</sup>

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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.

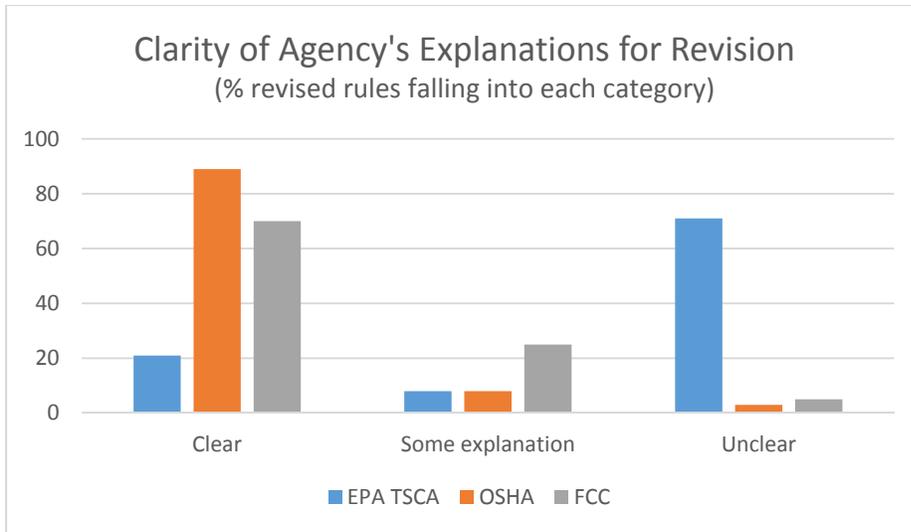
<sup>27</sup> OSHA Formaldehyde Health Standard case study at 4, available at

<https://utexas.box.com/s/zlv8wt93awecam6nn7am> .

<sup>28</sup> 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> .

<sup>29</sup> 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.



The differences between the agencies were striking. EPA’s revisions of the TSCA revised rules were particularly obtuse and difficult to understand. As just one example, in one TSCA rule, EPA volunteered that in its revision, “EPA 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.”<sup>30</sup> There was no mention of the prior requirements, why the changes were made, or what their implications were for the regulated parties or the public health research. By contrast, both FCC and OSHA provided relatively accessible explanations for their revisions.

### 3. Trigger for Revision

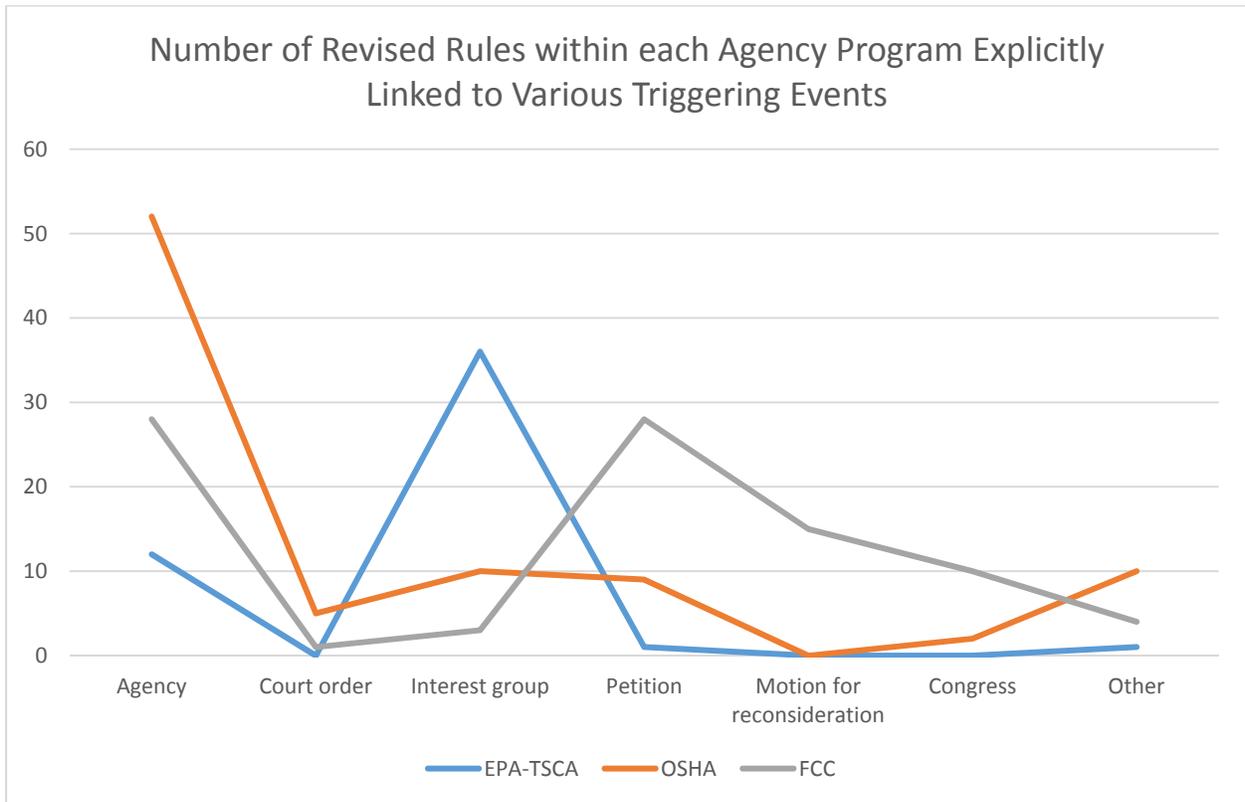
We also extracted the agency’s explanation for what triggered the revision from the summary of the revised rules. The primary catalysts – drawn not only from our aggregate data but from our case studies – were, in rough order, the agency itself, the courts, and pressure from interest groups.

In many cases the agency itself determined that a revision was needed. 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.<sup>31</sup> 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 draw sharp categories between revisions triggered by the agency versus interest groups based on the agency’s own articulated explanation for undertaking the revision, in practice we suspect that there is a large

<sup>30</sup> TSCA Fluoroalkenes case study at 5, available at <https://utexas.box.com/s/1v1ok2u2up3h829zzy4d> .

<sup>31</sup> OSHA Concrete and Masonry Construction Safety Standards case study at 2, available at <https://utexas.box.com/s/zlv8wt93awecam6nn7am> .

gray area in which the agency makes revisions based on interest input that runs the gamut from a helpful suggestion to a demand backed by the threat of litigation.



The courts played an important role as well. While our data suggests that the direct role of the court was not terribly significant in a proportionate sense for all revisions combined, our case studies revealed that courts were an important force behind some of the more significant revisions.<sup>32</sup> In four of the six FCC and OSHA case studies, for example, courts were the catalyst for at least some of the revisions, although the courts often entered the scene after a series of revisions had already been made to the parent. In three of these cases, the agency revised its rule in response to a judicial remand. In the last case, the agency’s revision was triggered not by a remand but by a judicial suggestion that some type of adjustment might be necessary.<sup>33</sup> In

<sup>32</sup> Cf. William F. West & Connor Raso, *Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control*, 23 J PUBLIC ADM RES THEORY 495, 504 (2013) (see chart showing that courts rarely initiated rulemakings, but when the courts did, 50% of those rules were economically significant).

<sup>33</sup> 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

the air toxic EPA rules, the courts' role was more indirect; 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 credible threats of litigation by regulated parties.<sup>34</sup>

The third most prevalent trigger was interest group pressure – either through formal channels or informal avenues. While the line between judicial influence and interest group pressure is a fine one (as is the line between agency and interest group triggers), many of the revisions that we consider "interest group-induced" did not involve negotiated settlements with industry. 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. In OSHA and FCC, by contrast, the interest groups typically used more formal methods of communication – filing petitions with the FCC and to a lesser extent OSHA.<sup>35</sup>

Both Congress and the President also triggered some revisions, although their influence from the written record appeared much less important for the vast majority of revisions. With respect to Congress, the case studies provide several concrete examples of Congress' role in sparking revisions. In the FCC rule governing low-power FM rules, for example, Congress intervened midway through FCC's longer rulemaking process to advance the interest of the full-power broadcasters by passing a new law. FCC's subsequent rule revisions were required by this new legislation.<sup>36</sup> 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 standard if the public health is not protected.<sup>37</sup> Some of the revisions in the air toxics set of rules – although certainly a minority – were the result of this congressionally triggered review activity

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capricious), available at <https://utexas.box.com/s/bner5nzn7f6juimc9c3z> ; See 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> .

<sup>34</sup> Secondary Aluminum case study at 2, available at <https://utexas.box.com/s/bsq7rs1z7wcjp3dpwvv9> .

<sup>35</sup> 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>

<sup>36</sup> FCC Low Power FM Rules case study at 7, available at

<https://utexas.box.com/s/bner5nzn7f6juimc9c3z> .

<sup>37</sup> 42 U.S.C. § 7412 (2012).

that takes place about once a decade.<sup>38</sup> And in at least one FCC and one OSHA revised rule, the agency took credit for instigating the legislation that in turn triggered the revision.<sup>39</sup>

Identifying links between Presidents and revisions is much more difficult given the deliberative process nature of many of the agencies' discussions with White House offices.<sup>40</sup> As a very crude effort, 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 investigate spikes in revisions following a new Administration. No observable increase in revision activity in the two years after a change in Administration, although the absence of a spike in revision activity does not mean that changes in political management are not important; for one set of revisions, a spike in revision activity in 1986 may in fact have been connected to a change in the OSHA Administrator who was particularly interested in toxic exposures in the workplace.<sup>41</sup> These findings do suggest, however, that at least for the rules we studied, changes in the President are not the primary or even necessarily an important explanatory factor for most revision activity.

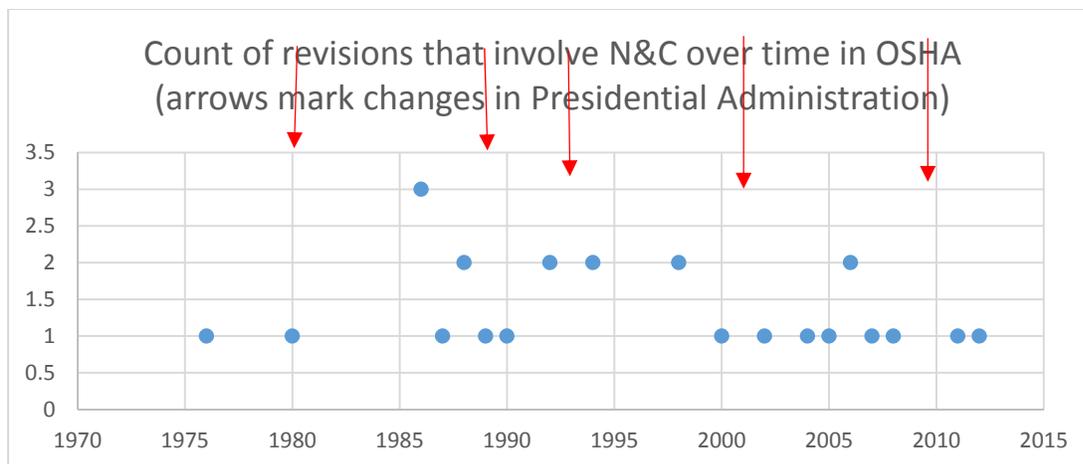
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<sup>38</sup> In the three case studies, this statutorily directed revision activity showed up only in the secondary aluminum case study. See Secondary Aluminum case study at 5, available at <https://utexas.box.com/s/bsq7rs1z7wcjp3dpwvv9>; See 42 U.S.C. § 7412(d)(6) (2012) (requiring review of emission standards at least every 8 years).

<sup>39</sup> 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).

<sup>40</sup> 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); see 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).

<sup>41</sup> 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](https://www.osha.gov/history/OSHA_HISTORY_3360s.pdf) at 19. See also Peter Perl, *Players; John A. Pendergrass: Hands on Experience in Workplace Health*, *THE WASHINGTON POST*, August 25, 1986, at A13.



#### 4. Major Differences between Revisions in Different 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 aggregate data reveals potentially significant differences between regulatory programs with respect to the nature and type of rule revisions. As compared with FCC and OSHA, EPA's revisions to its TSCA test rules appeared dominated by the concerns of regulated parties. The changes were more frequent, generally seemed minor in nature, and were less easy to understand in terms of their implications. The revisions were also usually triggered by the regulated parties without much involvement by other affected groups. EPA's revisions to its air toxic standards were more extensive than revisions to TSCA test rules, yet they tended to follow the pattern of the agency making changes that were generally responsive to regulated parties, with only the occasional intervention by public interest groups or changes made in response to congressional mandates.

OSHA's revisions tended to be the most numerous and varied – involving nearly triple the number of revisions/rule as compared to the other two agencies. In contrast to EPA's revisions, 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. The case studies indicate more diverse engagement by interest groups 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 study – also tended to include more significant revisions that went through notice and comment or resulted from a barrage of petitions lodged by diverse affected groups.<sup>42</sup> Many revisions also generated considerable

<sup>42</sup> See medium and major case study. 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

interest and comment from a wide range of interest groups.<sup>43</sup> Also, much like OSHA, FCC was clear about the nature of the changes it was proposing.

In both OSHA and FCC the need for a revision was often triggered by external events, at least at points in the revision process. In the case of one of the OSHA case studies, the revisions were triggered by a series of tragedies in the workplace in one case. FCC rules involved court remands in two of the three 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.<sup>44</sup>

## II. MAKING SENSE OF THE DATA: THE NEED FOR REVISIONS AND A PRELIMINARY TYPOLOGY

Our findings reveal that an important part of the rulemaking life cycle includes the revision process. Unlike the heavily studied informal rulemaking process, however, this territory is largely unexplored. This section begins with the most pressing questions emerging from the open-ended rulemaking phenomenon -- what do revisions accomplish with respect to regulation?

Agencies often spend several years formulating proposed rules, and a good deal more time and effort assessing and responding to public comment.<sup>45</sup> The extensive analysis that goes into administrative policy making is reflected in the detailed preambles that accompany many regulations. Why, then, is rulemaking such an iterative process if agencies take such care to make sound decisions in the first place?

Perhaps the most obvious answer to this question is that rulemaking takes place within a fluid environment. New technologies, products, and business practices, as well as changing political conditions, can require agencies to modify their policies over time. Yet many policy changes are also made relatively soon after the promulgation of a "parent regulation." Even within a static environment, the open-ended character of rulemaking can be explained in terms

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reconsideration that were not published as a Notice of Proposed Rulemaking), available at <https://utexas.box.com/s/bner5nzn7f6juimc9c3z>

<sup>43</sup> See all case studies, available at <https://utexas.box.com/s/ntrinpdibw5dhyyo1lqd>.

<sup>44</sup> 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>.

<sup>45</sup> Based on a sample of 42 regulations from across the domestic bureaucracy, for example, one study found that it took an average of 4.3 years to develop the NPRMs and another 2.1 years to promulgate the final rules. The former figure reflected the length of time from which agency officials said they received formal permission to begin working on a rule and the publication of an NPRM in the *Federal Register*. William F. West, "Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Analysis," *Public Administration Review* 64 (2004): 66-80.

of informational, political, and institutional constraints that have long been recognized as obstacles to comprehensive policy development.

### A. The Rulemaking Environment

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.” What she meant in the first instance is that rulemaking involves the resolution of empirical issues that are instrumentally related to a 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 tasks have always been inherent in bureaucratic policy making, they have become more challenging in recent decades as the result of institutional developments that have resulted in part from the expanded use of rulemaking, itself.

#### 1. *The Rulemaking Revolution*

There was once a near consensus that rulemaking was severely underutilized. Often with the qualification that the development of policy through *ad hoc* adjudication could be preferable in certain contexts,<sup>46</sup> administrative law scholars argued that rulemaking should be employed much more frequently because of its fairness to affected interests<sup>47</sup> and its forcefulness and effectiveness as a way of achieving programmatic objectives. Among the

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<sup>46</sup> 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.

<sup>47</sup> 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. A rulemaking approach 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 (Baton Rouge: Louisiana State University Press, 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,” *Harvard Law Review* 78 (1965) 921-72.

principal advantages claimed by its advocates was that rulemaking allowed policy makers go beyond the facts of individual cases to address issues holistically.<sup>48</sup>

Yet if rulemaking was advocated as a more comprehensive approach to implementation, it was precisely this characteristic that had discouraged its use. The reasons for this are familiar from the theoretical literature on administrative decision making.<sup>49</sup> One is that efforts to deal with problems in a comprehensive way are impeded in many contexts by limited information as well as by humans' limited capacity to process information that is available. Rules often involve disputed or complexly interrelated or otherwise unpredictable technical or economic considerations that make it difficult to define the problems being addressed, to assess the probable effects of proposed solutions to those problems, and to plan for future contingencies.<sup>50</sup> Accordingly, attempts to resolve such issues in a comprehensive way run the risk of making big mistakes. Writing the mid-1950s, for example, Warren Baker argued that the FCC's preference for case-by-case adjudication could be explained by its lack of experience with the relatively new industry it had been created to regulate.<sup>51</sup>

As is certainly the case with the FCC, moreover, rulemaking often takes place in an environment where statutory goals are ambiguous, where there is a lack of consensus among affected interests, and where agencies are subject to direct or anticipated pressure from the political principals who write their authorizing legislation, control their budgets, and appoint their leaders. The risk of making "political mistakes" under such circumstances lies in direct proportion to the precipitousness of an agency's actions. A prominent D.C. Circuit Court judge offered this explanation in response to the puzzlement some had expressed over the reluctance to issue rules.<sup>52</sup> Agencies avoided rulemaking as an impolitic commitment.

Of course, few would contend that rulemaking is underutilized today. Adopted voluntarily in some cases and required by Congress in others, its application grew dramatically

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<sup>48</sup> As one author described the frustrated efforts to regulate cigarette advertising through adjudication that eventually led the FTC to adopt a rulemaking strategy, "The Commission found itself putting out brush fires of deception while the inferno raged on." A. Lee Fritschler, *Smoking and Politics* (Englewood Cliffs, New Jersey: Prentice Hall, 1969) p. 75.

<sup>49</sup> Herbert A. Simon, *Administrative Behavior* (New York: The Free Press, 1947); Charles E. Lindblom, "The Science of Muddling Through," *Public Administration Review* 19 (1959), 79-88. Aaron Wildavsky, *The Politics of the Budgetary Process* (Boston: Little Brown, 1974).

<sup>50</sup> 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.

<sup>51</sup> "Policy by Rule or Ad Hoc Approach—Which should it Be?" *Law and Contemporary Problems* 22 (1957): 658-71.

<sup>52</sup> J. Skelly Wright, "Beyond Discretionary Justice," *Yale Law Journal* 81 (1972): 575-97.

in the 1970s. This development took place across much of the bureaucracy but was especially pronounced in the administration of health, safety, environmental, and consumer-protection programs. Some statutes in these expanding areas of social regulation required agencies to promulgate rules addressing certain issues within a set period of time. Such 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.”<sup>53</sup> They were informed by allegations that the case-by-case approach to program implementation was a symptom of the passivity widely alleged to afflict regulatory agencies.<sup>54</sup> Influential critics such as Marver Bernstein had characterized case-by-case adjudication as a way for agencies to look busy but accomplish relatively little that would alienate powerful business interests.<sup>55</sup>

## 2. *A Complex Environment*

Notwithstanding its prevalence, however, rulemaking is still subject to the constraints that had discouraged its use. The environment of rulemaking has become more complex and less stable in many areas with the acceleration of technological change and the development of new products, new services, and new ways of doing business. Whereas television broadcasting once involved the transmission of signals through the atmosphere and was dominated by three networks, for example, today it includes satellite TV, cable TV, and a multitude of networks and channels. The development of generally applicable standards has become more difficult as industries have become more diverse in terms of what they do and how they do things.

Moreover, the analytical and political challenges that are inherent in rulemaking have been reinforced by constraints intended to make the process more responsive to affected interests, more objective and comprehensive in its assessment of policy effects, and more accountable to each of the constitutional branches of government. It may be ironic that these developments can be viewed as systemic responses to the increased use of rulemaking. Described at much greater length elsewhere, they have alternatively been framed as efforts to cope with the problems of legitimacy posed by the exercise of delegated legislative authority or as reflections of the self-interest of groups and institutional actors who have a stake in the rulemaking process.

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<sup>53</sup> Bruce Ackerman and William Hassler, “Beyond the New Deal: Coal and the Clean Air Act,” *Yale Law Journal* 89 (1980) 1466-1556: p. 1474.

<sup>54</sup> Such allegations had approached the status of conventional wisdom by the mid-1970s, and were not confined to regulatory administration. In his broad and influential indictment of American government, Theodore Lowi argued that agencies had been captured by special interests across virtually the entire policy spectrum.

<sup>55</sup> *Regulating Business by Independent Commission* (Princeton, New Jersey: Princeton University Press, 1955).

One important development has been the expansion of interest representation in rulemaking. Congress has sometimes established opportunities for affected interests to participate in and influence decisions through various requirements in enabling legislation such as mandatory consultation with advisory committees and the provision of opportunities to sue agencies for their failure to promulgate regulations. Although there has been inconsistency and some retrenchment since the 1970s, the courts have also broadened participatory opportunities in rulemaking through a more liberal definition of standing.<sup>56</sup> A particularly important development has been the expectation that agencies base their rules on a record. Required by some enabling statutes that supersede the generic constraints of the APA<sup>57</sup> as well as by the courts' reinterpretation of that act, the imposition of heightened due process on rulemaking has been intended in part to ensure that agencies take public comment seriously.<sup>58</sup>

A related development has been the proliferation of groups and policy issues at the national level, and the creation of new programs and agencies to satisfy the demands this have placed on government. The environment of rulemaking thus has become more complex, more contentious, and more fluid as the sphere of bureaucratic activity has become more crowded and it has become more likely that decisions in one area will impinge on other areas of administration.<sup>59</sup> This is reflected in the fact that other agencies as well as state-and-local governments are sometimes among the most important participants in the rulemaking process. Their involvement is motivated in part by the need to ensure that policy initiatives do not duplicate or conflict with their own programs, but also by the political need to represent the constituencies they have been created to serve. For example, it is not uncommon for the Department of Commerce to weigh in on EPA or OSHA rules that are objectionable to business interests, just as EPA may weigh in on regulations by the Department of Interior or Commerce's National Oceanic and Atmospheric Administration.

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<sup>56</sup> Richard B. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88 (1975): 1669-1813.

<sup>57</sup> 60 Stat. 237 (1946)

<sup>58</sup> The fact that the APA's informal rulemaking requirements do not mention a record is generally considered to reflect its framers' belief that reviewing courts should be deferential to agency expertise in the exercise of delegated legislative authority. Much as congressional committees might hold hearings to gather information, public comment thus was intended as an aid that agencies could use as they saw fit. *The Administrative Procedure Act: A Legislative History* (Washington, D.C.: U.S. Government Printing Office, 1946). Senate Doc. 248, 79<sup>th</sup> Cong., 2d. Sess.

<sup>59</sup> 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. "Issue Networks and the Executive Establishment," in *The New American Political System*, Anthony King ed. (Washington, D.C.: American Enterprise Institute, 1978).

Another, related development in the rulemaking environment has been the requirement that agencies justify their decisions on the basis policy analysis.<sup>60</sup> This has resulted from enabling statutes as well as from generally applicable legislation such as the National Environmental Policy Act,<sup>61</sup> the Small Business Job Protection Act,<sup>62</sup> and the Paperwork Reduction Act.<sup>63</sup> It has also resulted from executive orders dating back to the Nixon administration that have required agencies to prepare cost-benefit analyses for some or all of their regulations subject to review by the Office of Management and Budget.<sup>64</sup> Although these requirements can be viewed in part as reactionary measures designed to hold regulation in check, they also reflect the developments described immediately above. Comprehensive analysis has at once become more appealing and more difficult as the bureaucratic policy-making environment has come include a more diverse array of actors and relevant concerns.

In addition to (or often in conjunction with) imposing various procedural constraints on agencies, Congress, the president, and the courts have also assumed greater influence over rulemaking in a direct sense. These developments might be viewed as efforts to hold an increasingly powerful administrative state accountable. They might also be viewed as efforts by the three constitutional branches to maintain or expand their systemic prerogatives as the rulemaking process has become increasingly important as a locus of governmental authority.

Although the “hard look doctrine” of judicial review may have eroded somewhat as the result of *Chevron* and other cases,<sup>65</sup> the level of deference that judges once accorded to the bureaucracy in areas of policy making has not reverted to anything approaching its pre-1970 level. The courts still expect rules to be supported by a record (which the APA does not mention).<sup>66</sup> This has reflected both procedural and substantive goals that have added to the

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<sup>60</sup> Thomas O. McGarity, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy* (Cambridge: Cambridge University Press, 1991).

<sup>61</sup> 83 Stat. 852 (1969)

<sup>62</sup> 110 Stat. 1755 (1996)

<sup>63</sup> 94 Stat. 2812 (1980)

<sup>64</sup> See, for example, William F. West, “The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA,” *Presidential Studies Quarterly* 35 (2005): 76-93. Since the Clinton administration, the requirement that agencies prepare formal cost-benefit analysis has been confined to “economically significant” regulations having a projected economic impact in excess of \$100 million per year.

<sup>65</sup> *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Also *Vermont Yankee Power Corp. v. natural Resources Defense Council*, 435 U.S. 519 (1978).

<sup>66</sup> See, for example, Colin S. Diver, “Policymaking Paradigms in Administrative Law,” *Harvard Law Review* 95 (1981): 393-434. Although there has been a modest retrenchment in judicial expectations as the result of *Chevron* (1984) and other decisions, the courts have not returned to anything approaching the level of deference to bureaucratic policy-making discretion that was contemplated by the framers of the APA and that existed in the two decades that followed the enactment of that statute.

complexity of the rulemaking environment. One has been to ensure that interested parties have viable opportunities to participate in and influence the process, as mentioned, and the other has been to ensure that administrative policy decisions are objective and instrumentally rational. Even where courts do not directly intervene by overturning regulations on substantive or procedural grounds, the threat of judicial review has reinforced the informational and political challenges that agencies face in rulemaking. In the first instance, heightened due process has increased the need to support policy decisions with sound and comprehensive analysis; in the second, it has augmented the leverage of affected interests who might contest agencies' decisions.

Congress obviously plays a critical role in the environment of rulemaking through its delegation of legislative authority to agencies and through its imposition of various procedural constraints that determine how that authority is to be exercised. As mentioned, the expansion of rulemaking as a means of policy development can be attributed in significant measure to statutes that require (and not merely authorize) its use. The legislature also influences rulemaking informally through committee-based oversight and other means. It is instructive in this regard that the rulemaking revolution was accompanied by a dramatic expansion in oversight during the 1970s.<sup>67</sup> It may go without saying that, although it sometimes reflects legislators' own policy views, the role Congress plays in rulemaking through legislation and oversight also frequently reflects the influence of groups with a direct stake in the process. Given the legislature's decentralized structure and the diversity of the constituents it represents, it is also not surprising that its influence can add to the complexity of the of the rulemaking environment. 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.<sup>68</sup>

Finally, the president's role in administrative policy making has also expanded in several ways. The White House exercises significant indirect influence over what agencies do through

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<sup>67</sup> By most measures, such as the number of oversight hearings or days of oversight hearings, the time and effort devoted to this legislative function roughly tripled. If not easy to demonstrate, it is reasonable to assume that this was accompanied by a like expansion in oversight of an informal nature. Joel D. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* (Washington, D.C.: Brookings, 1990); Christopher H. Foreman, *Signals from the Hill: Congressional Oversight and the Challenge of Social Regulation* (New Haven: Yale University Press, 1988.)

<sup>68</sup> 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. "The Neglected Question of Congressional Oversight of EPA: *Quis Custodiet Ipsos Custodes* (Who Shall Watch the Watchers Themselves)?" *Law and Contemporary Problems* 54 (1991): 205-39; Cindy Williams observes a similar fragmentation with regard to oversight of the Department of Homeland Security. *Strengthening Homeland Security: Reforming Planning and Resource Allocation* (Washington, D.C.: IBM Center for the Business of Government, 2008).

the appointment of roughly seven hundred political executives who manage the line bureaucracy on the president's behalf. This process has become increasingly centralized under recent administrations.<sup>69</sup> Although available evidence suggests that requests by the Executive Office for agencies to issue specific rules are highly selective,<sup>70</sup> the direct and anticipatory effects of reactive oversight in discouraging or altering agency initiatives is much more substantial.<sup>71</sup> The reliance on cost-benefit analysis as a criterion for regulatory review adds to the empirical burden agencies face, as mentioned, and the well-documented responsiveness of OMB to input from interest groups and other agencies adds to the complexity of the rulemaking environment.<sup>72</sup> The popular depiction of the president as a "unitary actor" notwithstanding,<sup>73</sup> reactive oversight often subjects agencies to multiple and conflicting viewpoints from within EOP and the line bureaucracy.<sup>74</sup>

## B. Forms and Functions of Open-Ended Rulemaking

In brief, rulemaking has become prevalent as a comprehensive approach to policy development just as its environment has changed in ways that have reinforced the analytical and political constraints that once discouraged its use. This tension provides some of the

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<sup>69</sup> For example, David E. Lewis, "The Personnel Process in the Modern Presidency," *Presidential Studies Quarterly* 42 (2012): 577-96. Although political scientists have given surprisingly little attention to the effects of these appointments in shaping the rulemaking agenda, they have found that regulatory enforcement behavior varies across presidential administrations. See, for example, Terry M. Moe, "Control and Feedback in Economic Regulation: The Case of the NLRB," *American Political Science Review* 79 (1985): 1094-1117; B. Dan Wood, "Principals, Bureaucrats, and Responsiveness in Clean Air Enforcement," *American Political Science Review* 82 (1988): 213-34; B. Dan Wood and Richard Waterman, "Modeling Federal Implementation as a System," *American Journal of Political Science* 36 (1992): 40-67; John Scholz and B. Dan Wood, "Controlling the IRS: Principals, Principles, and Public Administration," *American Journal of Political Science* 42 (1998): 141-62.

<sup>70</sup> William F. West and Connor Raso, "Who Shapes the Rulemaking Agenda? Implications for Bureaucratic Responsiveness and Bureaucratic Control," *Journal of Public Administration Research and Theory* 23(2013): 496-519; Lisa Schultz Bressman and Michael P. Vandenbergh, "Inside the Administrative State: A Critical Look at the Practice of Presidential Control," *Michigan Law Review* 105 (2006): 47-100.

<sup>71</sup> 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.

<sup>72</sup> George C. Eads and Michael Fix, *Relief or Reform: Reagan's Regulatory Dilemma* (Washington, D.C.: The Urban Institute, 1984); Eric Olsen, "The Quiet shift of Power," *Virginia Institute of Natural Resources Law* 4 (1984): 1-80;

<sup>73</sup> See, for example, Elana Kagan, "Presidential Administration," *Harvard Law Review* 114 (1978): 2246-2387.

<sup>74</sup> Lisa Schultz Bressman and Michael P. Vandenbergh, "Inside the Administrative State: A Critical Look at the Practice of Presidential Control," *Michigan Law Review* 105 (2006): 47-100.

context for examining the functions that open-ended rulemaking may perform. 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 objective as well as political changes in the regulatory environment.

### *1. Iterative Policy Development.*

Congress sometimes designs statutory schemes to be open-ended in the sense that they are consciously iterative. The door is not just open for change once the rulemaking is complete, but Congress requires the agency to consider changing the rule on a periodic basis. For example, Congress in the Clean Air Act has instructed 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.<sup>75</sup> 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.<sup>76</sup> Similarly, section 112 of the Clean Air Act requires that EPA revisit NESHAPs after 8 years in light of changes in emissions reduction technologies, and the Clean Water Act requires state governors to review and revise in light of changing scientific information every three years.<sup>77</sup>

The iterative process allows the agency to make changes necessitated by changes in knowledge, technology, or other matters of a factual nature, but it also allows the agency to make changes necessitated by changes in the policy environment, such as a change in administrations. Thus, EPA's re-examination of the Bush Administration's ozone standard during the Obama Administration resulted in a proposed tightening of the standard based in part on the accumulated scientific information, but also based on the agency's more precautionary policies during the Obama Administration.

Sometimes agencies engage in open-ended rulemaking on their own, as when the Nuclear Regulatory Commission revisits its fee recovery schedules or its list of approved fuel storage casks. The statutes governing Medicare and Medicaid require HHS to conduct an annual review of various fees and deductibles by HHS's Centers for Medicare and Medicaid Services and the Interior's Fish and Wildlife service and the NOAA's U.S. Marine Fisheries within the Department of Commerce must by statute undertake an annual revision of "take limits" for

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<sup>75</sup> 42 U.S.C. § 7409(d)

<sup>76</sup> 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)

<sup>77</sup> 42 U.S.C. § 7412; 33 U.S.C. § 1313(c)(1)

various species of fish. Open-ended 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.<sup>78</sup>

## 2. Incremental Policy Development

Incrementalism has fallen out of favor as a prescriptive model of policy making in recent decades. This has been manifested, not only in the emphasis on rulemaking, but in requirements that agencies justify their actions on the basis of cost-benefit analysis and related techniques<sup>79</sup> and that they engage in comprehensive planning as a way of rationalizing their activities.<sup>80</sup> An incremental approach to policy making may nevertheless be advantageous under conditions of limited knowledge and political conflict. In the first instance, it is a form of bounded rationality that can allow decision makers to address issues as they ripen or to deal with parts of problems and defer others pending the collection of additional information.<sup>81</sup> This can be especially appealing where issues are new or complex. In the second instance, incremental policy development can be preferable as a strategy that limits the scope of conflict and that may facilitate negotiation and compromise by focusing on relatively small issues sequentially. As already implied, agencies' former preference for case-by-case adjudication could plausibly be explained in these terms.

On some occasions agencies initiate the rulemaking process with the understanding that the project will be open-ended. For example, when an agency promulgates a "interim final" rule, it publishes the content of the final regulation in the *Federal Register* and invites the public comment on the regulation with the (perhaps unrealistic) expectation that the agency will change the rule if the comments persuade it that changes are merited. If reactions among important stakeholders is strongly negative, the agency can modify the final rule at the end of

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<sup>78</sup> 72 FR 96

<sup>79</sup> Thomas O. McGarity, *Reinventing Rationality: The Role of Regulatory Analysis in the Federal Bureaucracy* (Cambridge: Cambridge University Press, 1991).

<sup>80</sup> Beryl A. Radin, *Challenging the Performance Movement: Accountability, Complexity, and Democratic Values* (Washington, D.C.: Georgetown University Press, 2006); William F. West, *Program Budgeting and the Performance Movement: The Elusive Quest for Efficiency in Government* (Washington, D.C. Georgetown University Press, 2011).

<sup>81</sup> Herbert A. Simon, *Administrative Behavior* (New York: The Free Press, 1947). Also Lindblom and Wildavsky, *supra* note 4.

the rulemaking process.<sup>82</sup> In other words, the agency can float a “trial balloon” that may or may not come back to earth during the comment process.

Although rulemaking is, by definition, a relatively comprehensive approach to the development of policy, its open-ended character may still reflect the advantages of proceeding incrementally. One way in which this can occur is through the codification of precedent. Some parent rules contain provisions that allow officials to grant exemptions from or modify their requirements on a case-by-case basis in the interest of fairness and flexibility. As agencies gain knowledge in the course of dealing with such issues, they may promulgate subsequent rules that confine their own discretion in determining the types of individuals or activities that are subject to regulation or that are eligible for services, benefits, contracts, and the like.

One can cite illustrations of this from across the bureaucracy. In 2007, Treasury’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.”<sup>83</sup> In 2002, the Mine Safety and Health Administration of the Department of Labor issued a rule that proscribed the use of high-voltage continuous mining machines but that allowed operators to request exceptions to this policy. After reviewing fifty-two Petitions for Modification, it issued a rule in 2010 that established criteria for the use of such machines.<sup>84</sup> As the Board of Coal Mine Safety recently noted:

In developing the final rulemaking, the MSHA considered the experience of mine operators who had been using high-voltage continuous mining machines in underground coal mines. The MSHA also considered the comments, hearing testimony and its previous experience in reviewing and issuing PFMs in its development of the final rulemaking.<sup>85</sup>

Provisions within rules that allow for *ad hoc* discretion are intended as temporary solutions in some cases. This was true of the most controversial issues surrounding the FCC’s 2008 Low-Power FM Rule. One was the question of whether the Commission should allow improvements to full-power stations that might interfere with existing LPFM broadcasters; the

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<sup>82</sup> Interim final rules are “typically issued in conformity with statutory provisions allowing agencies to publish a final rule that becomes effective soon after publication, without going through the proposed rule stage.” Office of Information and Regulatory Affairs, Office of Management and Budget, Frequently Asked Questions, available at <http://www.reginfo.gov/public/jsp/Utilities/faq.jsp>. The interim final rulemaking process “typically allows for public comment after the rule is published so that the agency still has an opportunity to consider public input and revise the rule accordingly.” *Id.*

<sup>83</sup> 72 FR 51707

<sup>84</sup> 79 FR 17529.

<sup>85</sup> PA Bulletin, Doc. No. 14-1342. Saturday, June 28, 2014. p. 2.

other 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.<sup>86</sup> In dealing with each of these issues, the Commission stated that the primacy generally accorded 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.<sup>87</sup>

Incremental rulemaking can also involve the resolution of issues that are tractable and the deferment of others. 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 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.<sup>88</sup> For example, OSHA dropped “lift-slab operations” from proposed revisions of its concrete and masonry standards in the wake of new evidence that became available after the close of the comment period. It revisited this issue in a separate proceeding that culminated a little more than two years later.<sup>89</sup> As another illustration, the National Highway Traffic Safety Administration dropped a fuel economy provision from a rule on tire quality that was proposed in the 1990s in response to opposition from industry and members of Congress.<sup>90</sup> Years later, it revisited the issue in a regulation that required tire manufacturers to disclose such information to consumers.<sup>91</sup>

The FCC’s efforts to regulate LPFM illustrate these dynamics, although 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. This was followed by a series of orders (rules) combined with further notices that resolved some policy issues and that refined and deferred others pending the collection of more information and (one suspects) more consensus building. In one of these, 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

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<sup>86</sup> The second-adjacent frequencies for FM 98.6 would be FM 98.4 and FM 98.8.

<sup>87</sup> 73 FR 3202

<sup>88</sup> 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.

<sup>89</sup> 53 FR 22612, 53 FR 35972, 55 FR 42306

<sup>90</sup> William F. West, “Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis,” *Public Administration Review* 64 (2004): 66-79.

<sup>91</sup> 74 FR 29542

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.

As demonstrated by the comments filed on this issue, the LPFM and FM translator services are each valuable components of the nation's radio infrastructure. We agree with the advocates of each of these services regarding the important programming that these stations can provide to their local communities. We do not reach the merits of the priority rules between these two services here. Instead, we seek further comment in the attached *Second Further Notice of Proposed Rulemaking* to develop a better record on whether and how our current rule affects our core goals of localism, diversity, and competition.<sup>92</sup>

### 3. Policy Correction

The limits on comprehensive policy making that can be conducive to incremental policy development also ensure that rules must frequently be changed once they are promulgated. Because policy decisions are often based on incomplete information, because they impose costs on certain groups or otherwise have implications for the allocation of scarce resources, and because agencies are subject to feedback from their environments, the most common function of open-ended rulemaking is to address issues that arise during implementation. In a sense the inverse of or alternative to incremental policy development, policy correction can take a variety of forms that range from minor or even trivial changes to adjustments that have significant implications for the effects of agency policy.

Rules are frequently issued to correct typos and other inadvertent errors contained in earlier rules. Such mistakes are understandable when one considers the length and complexity of many regulations coupled with the competing demands on agency staff. In fact, most of the EPA, OSHA, and FCC examples that we examined involved multiple corrections of this nature. Although these kinds of changes are seldom controversial and are usually made without notice and comment, they can occasionally have significant substantive implications. In one case, EPA discovered that a misplaced semicolon had extended the reach of regulations on the processing of secondary aluminum in ways that the agency had not intended.<sup>93</sup> In another, OSHA's replacement of the word "should" with "shall" had potentially important legal implication of

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<sup>92</sup> 73 FR 3209.

<sup>93</sup> 70 FR 57513

transforming a provision in its Concrete and Masonry Rule from a voluntary to a mandatory standard.<sup>94</sup>

On occasion, an agency realizes that a parent rule may need corrections after it became final, but before judicial review has run its course. This realization may come in response to the briefs that the challengers filed in the 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.<sup>95</sup> While the case was pending, EPA asked the court to remand the standard that governed modifications of existing plants to provide a better explanation for its decision.<sup>96</sup> 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.<sup>97</sup> EPA later withdrew the standard altogether, thereby leaving major modifications of existing power plants subject to the existing 1979 NSPS for NOx.<sup>98</sup>

In a related vein, many rules define terms or criteria for application that were ambiguous or unintended in earlier regulations. The need to do this often reflects the difficulty of articulating generally applicable standards, even within what seem to be narrow policy domains. In one case, EPA issued a rule, the primary purpose of which was to clarify the intent of an earlier regulation concerning the production of hydrochloric acid. Included among its provisions was a more precise definition of “equipment” and clarifications of several reporting and maintenance requirements that had proven to be confusing to industry. The agency also removed language from its earlier rule that had been intended 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.<sup>99</sup> These changes were made pursuant to an NPRM in which the EPA offered to hold public hearings if requested.<sup>100</sup> It elicited only two written comments from industry.

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<sup>94</sup> 55 FR 42306

<sup>95</sup> *Lignite Energy Council v. EPA*, 198 F.3d 930 (D.C. Cir. 1999), at 932; Final Rule Sets Fuel Neutral NOx Standard For New or Rebuilt Utility, Industrial Boilers, 29 ER 957 (09/18/1998)

<sup>96</sup> Industry Wants New Source Standards For NOx Vacated; Agency Seeks Remand, 30 ER 745 (08/13/1999)

<sup>97</sup> Federal Appeals Court Strikes Down Performance Standard for Modified Boilers, 30 ER 1013 (10/01/1999)

<sup>98</sup> RESPONDING TO 1999 RULING, EPA WITHDRAWS NOX EMISSIONS STANDARD FOR MODIFIED BOILERS, 32 Env't Rep. Cur. Dev. (BNA) 1616 (August 17, 2001)

<sup>99</sup> 71 FR 17738

<sup>100</sup> 70 FR 49530

One can draw a conceptual distinction (if not always a practical one) between open-ended rulemaking that clarifies policy intent and open-ended rulemaking that changes policy. The latter takes a variety of forms but typically results from feedback concerning unanticipated consequences of requirements that are brought to agencies' attention by affected groups or that are identified by officials "in the field" who are responsible for applying regulations. Extensions are very common in response to claims by regulated entities that it is infeasible to comply with a rule's requirements by the date specified in an original rule. All three of the TSCA test rules we examined involved multiple extensions of compliance dates, for example, and in one case the deadlines were deferred by at least five years. Extensions often take the form of interim rules or direct final rules that do not require notice and comment.

Finally, perhaps the most significant corrections are those that modify coverage of parent rules. For example, the EPA stayed the effectiveness of and then eventually 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 open-ended rules, 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 thus would have been to maintain an uneven economic playing field.<sup>101</sup> As another illustration, OSHA published a series of stays in the effectiveness of a health standard in so far as it applied to non-asbestiform tremolite, anthophyllite, and actinolite in order to determine whether those substances should be regulated in the same way as asbestos.<sup>102</sup>

Our cases as well as other data suggest that corrections 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 that 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. Congress also frequently plays a role in corrective rulemaking through the enactment of legislation. In response to the FCC's initial LPFM rule<sup>103</sup> and lobbying by full-power broadcasters and translators, for example, it

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<sup>101</sup> 64 FR 37683, 64 FR 67793, 64 FR 69637

<sup>102</sup> 51 FR 22612, 51 FR 37002, 52 FR 15722, 53 FR 27345, 54 FR 30704, 55 FR 50685, 56 FR 43699, 57 FR 7877.

<sup>103</sup> 65 FR 7616

passed a law less than a year later requiring the Commission to change its policy ways that favored those interests (at the expense of LPFM).<sup>104</sup>

Corrective rulemaking can be explained in part by the informational and political challenges to comprehensive policy development alluded to earlier. Notwithstanding the time that goes into the formulation of parent rules, it is difficult to anticipate all of the ramifications those decisions will have and all of the reactions they will provoke. Even a policy environment that may seem narrow to an outside observer can be quite complex. This is illustrated by the diversity of applications, technologies, and businesses that define the regulatory environment for halogenated cleaning solvents. The fact that original rules often if not typically overlook the full complexity of the policy environment is hardly surprising when one considers that a small handful of agency staff bear primary responsibility for developing most rules.

The frequency of corrections to parent rules also speaks to the limitations of notice-and-comment procedures in providing information to agencies about the prospective effects of their decisions. Changes often address problems that could have been identified in advance by affected interests who were sufficiently attentive. An obvious reason that this does not always happen is that monitoring and participating in the rulemaking process is costly, and that some stakeholders may not be aware of agency initiatives until those policies take effect. Given that many adjustments are made without notice and comment, another possibility is that it may sometimes be strategically advantageous to wait until a rule has been promulgated before attempting to secure changes that would reduce its coverage.

#### *4. Policy Adaptation*

No matter how well-crafted regulations might be when they are issued, open-ended rulemaking may also occur in response to environmental changes. These are often objective changes in the conditions that programs are intended to address. For example, many of the Federal Aviation Administration's Airworthiness Directives are issued in response to technological developments in the airline industry ranging from new types of engines or navigational systems to new ways of preparing in-flight meals. Evolving commercial practices, such as new advertising claims or the invention of new financial instruments, may also provide the impetus for open-ended rulemaking.

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<sup>104</sup> The Radio Broadcasting Preservation Act was included in a Washington, D.C. bill passed in December of 2000. The FCC issued a new rule in May of 2001 that implemented the act's requirements. Its most important provision was to establish minimum-separation-distance requirements between LPFM and both full-power and translator stations.

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 CFTC's net capital rule.<sup>105</sup> 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.<sup>106</sup>

Open-ended rulemaking can also reflect changes in the political environment. The EPA rule that precipitated the landmark *Chevron*<sup>107</sup> 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,<sup>108</sup> it modified a rule that had been issued at the end of the Carter administration at the urging of environmentalists. 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.<sup>109</sup> The rule it amended had, in turn, revised earlier EPA regulations that defined a "source" more broadly as an entire plant.

Perhaps the most frequent example of open-ended rulemaking as adaptation to changes in the political environment is the attempt by a new administration to review and revise "midnight" regulations promulgated by a the previous administration governed by a different party.<sup>110</sup> Typically, the president or a high-level White House official issues a

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<sup>105</sup> 71 FR 60636

<sup>106</sup> FR 72 69288

<sup>107</sup> *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>108</sup> 46 FR 50766

<sup>109</sup> 45 FR 52676

<sup>110</sup> [Citation to articles on midnight regulations] Copeland, Curtis W. 2008. Midnight Rulemaking:

Considerations for Congress and a New Administration. Washington, D.C.: Congressional Research

Service. Order Code RL34747.

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 that rules in light of the new administration's policies.<sup>111</sup>

Admittedly, there is not always a clear distinction between correction in response to political reaction and adaptation in response to political change. With this qualification, the former can be conceived of as addressing a political miscalculation while the latter type of open-ended rulemaking occurs in response to a significant reconfiguration of the environment as new coalitions emerge, as issues are redefined, as new presidential administrations assume office, or as 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 with other forms of open-ended rulemaking but can also produce the most important 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 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 within the broadcast industry. One suspects that these reservations were reinforced by the growing influence of "Chicago School" thinking which took a relatively sanguine view of market concentration more generally. These 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 rule in December of that year<sup>112</sup> that sought to strike a compromise between these coalitions, the regulation was overturned by the Seventh Circuit in 1992.<sup>113</sup> A subsequent rule issued in 1993 all but eliminated restrictions syndication ownership.<sup>114</sup>

### **C. Summary and General Thoughts**

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<sup>111</sup> 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)

<sup>112</sup> 56 FR 24642 and 56 FR 64207

<sup>113</sup> *Schurz Communications v. FCC* 982 F.2d 2043 (1992).

<sup>114</sup> 58 FR 28927

The fact that open-ended rulemaking can take different forms and perform different functions raises a number of questions. From a descriptive standpoint, it is interesting to ask how its character might vary across agencies. Although the earlier overview of the rulemaking environment was framed in general terms, agencies obviously do different things and rely on different kinds of information in developing policy. They also operate within very different political environments that help determine the character of participation and oversight.<sup>115</sup> Whereas much FCC rulemaking involves conflict among well-organized industry groups that stand to win or lose in an intense way as the result of agency decisions, for example, EPA rulemaking tends to pit intense and well-organized industry groups against public interests that benefit from regulation in a more diffuse way and that are often less well-organized and attentive. Other areas of rulemaking, such as that involving the administration of loans and subsidies by the Department of Agriculture or occupational licensing at the state level, may confer concentrated benefits on well-organized groups at expense of diffuse interests such as taxpayers or consumers. How might factors such as these help determine patterns of open-ended rulemaking?

As a form of incremental policy development, moreover, open-ended rulemaking may be salutary as a way of resolving conflict or gathering information needed to make intelligent decisions. And as a form of policy adaptation, it can allow agencies to respond to changing objective needs as well as to changes in their political environments. In the latter regard, it can be a manifestation of dynamics that open-up administrative policy making to a broader range of interests.

### III. **Taking Stock**

The foregoing analysis of data taken from the subsequent regulatory history of 183 parent final rules suggests that open-ended rulemaking is ubiquitous and that agencies engage in open-ended rulemaking for a number of reasons, most of which are entirely consistent with sound and accountable public policymaking. We suspect, however, that agencies sometimes employ open-ended rulemaking for reasons that are in some sense illegitimate in that they run counter to the agencies' statutes or are inconsistent with broader norms of administrative law like transparency, efficiency, accountability, and fidelity to the rule of law. In this section of the article, we explore the positive and negative aspects of open-ended rulemaking in anticipation of offering some tentative suggestions for how agencies go about open-ended rulemaking in the future.

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<sup>115</sup> Theodore Lowi, "Four Systems of Policy, Politics, and Choice," *Public Administration Review* 32 (1972): 298-310; James Q. Wilson, *The Politics of Regulation* (Washington, D.C.: Brookings, 1981).

## A. Virtues of Open-ended Rulemaking.

We suspect that most agencies most of the time do not approach a rulemaking project with the expectation that the rulemaking exercise will be open-ended. Informal rulemaking initiatives on issues that matter a lot to stakeholders demand large amounts of time and resources. The staff that the agency leadership assigns to a rulemaking project probably assumes that the project will be completed with the publication of the final rule in the *Federal Register*. As the above analysis and case studies demonstrate, however, rulemaking exercise does not always end that way. After the final rule is published, the agency finds itself revisiting the rule one or more of many entirely legitimate reasons. On other words, agencies engage in open-ended rulemaking because they see advantages in it that are unavailable under a rulemaking model that assigns a degree of permanence to the outcome of a rulemaking initiative that is not easily disturbed.

### 1. *Administrative Efficiency.*

In some situations, open-ended rulemaking can conserve precious agency resources by allowing the agency to make minor changes in regulations without complying all of time- and resource-consuming requirements of an ordinary rulemaking. The clearest example of this advantage of open-ended rulemaking is the use of direct final rules to correct typographical errors or other inadvertent mistakes in previously promulgated rules. It makes little sense for an agency to go to the effort of performing detailed analyses, publishing a notice of proposed rulemaking, establishing an administrative record taking and analyzing public comments, and publishing a notice of final rulemaking when the purpose of the exercise is to change a typographical error. The case studies, however, contain many examples of agencies making substantive changes through direct final rulemaking. This may or may not conserve agency resources. As we saw in the secondary aluminum smelter rulemaking, a single objection to a direct final rule from any member of the public can force the agency to employ notice-and-comment rulemaking to accomplish the substantive change.

### 2. *Clarity.*

Open-ended rulemaking allows agencies to clarify aspects of regulations that raise interpretational questions subsequent to the promulgation of the final rule. For example, in its response to petitions for reconsideration of its financial interest and syndication rules, FCC found no reason to reconsider the regulation, but took the occasion to clarify the definition of co-production, the distinction between foreign and domestic production entities, and the application of the syndication safeguards to new networks, all three of which were no doubt

raised in the motions to reconsider. The agency could have attempted achieve the same clarification by issuing an interpretative rule that might or might not have been widely circulated, but this way the agency was able to incorporate the clarification into the text of the regulation where it would be obvious to any reader of the Code of Federal Regulations. The agency accomplished this without engaging in notice-and-comment rulemaking. EPA did employ notice-and-comment when, after having promulgated a hazardous emission standard for hydrochloric acid production facilities in 2003, it promulgated another rule three years later, the primary purpose of which was to clarify the meaning of the words “equipment” and “emission standards” and to clarify several reporting and maintenance requirements that had proven to be confusing to industry. Such clarifications provide an added degree of certainty to regulate concerns about running afoul of vague rules.

### *3. Accuracy.*

Sometimes information becomes available after the publication of the notice of final rulemaking that reveals that an important fact that the agency found, an assumption that the agency made, or a prediction upon which the agency relied was erroneous. The error might not undermine the integrity of the entire rule, but correcting the error might demand a modification in some aspect of the rule. Open-ended rulemaking allows the agency to modify the rule in a limited proceeding without reopening the entire regulation to re-examination. In cases where the correction is uncontroversial, the agency can accomplish the correction without notice and comment in a direct final rule. The change yields a rule that more accurately represents the agency’s assessments of the facts and policy considerations. For example, [example from the case studies]

### *4. Adaptability.*

Many observers of the administrative process have criticized agencies for their bureaucratic unwillingness to adapt to changing circumstances or to their experience with their regulations. Having gone to the great effort of promulgating a regulation, they argue, agencies want to move on to other things. [citations] A related critique focuses on the “ossification” of the rulemaking process that discourages agencies from changing rules once they have been promulgated because it is so difficult to promulgate a major rule in the current rulemaking environment. [citations] Our data and case studies, however, suggest that agencies seem quite willing to adapt to relevant change, to learn from experience, and to change their regulations accordingly. Moreover, they sometimes adapt quite flexibly by avoiding notice and comment rulemaking to change their rules.

a. Correcting Mistakes and Misunderstandings.

Agencies frequently rely on the open-ended nature of rulemaking to correct mistakes or misunderstandings that the agency (perhaps inadvertently) included in the parent rule. As discussed above, the hydrochloric acid rulemaking demonstrates how an agency can employ a subsequent rulemaking soon after it promulgated the parent rule to adjust the rule's coverage to exclude activities or operations that the agency realizes it should not have included (e.g., activities or operations already governed by previously existing rules) or include operations or activities that it should not have excluded (e.g., narrowing exemptions). Although the mistakes and misunderstandings that precipitated the second rulemaking were (and probably had to be) accomplished through notice-and-comment procedures, that rulemaking experience demonstrated that such changes can be accomplished very rapidly (about 8 months) if they are modest enough to attract few comments. EPA had a similar experience with its halogenated cleaning solvents rule when it promulgated a direct final rule four years after publication of the parent rule providing a temporary stay of its applicability to certain kinds of cleaning machines because it had misunderstood how they operated when it promulgated the parent rule. Later in the evolution of that rule, EPA engaged in notice-and-comment rulemaking to amend the parent rule to exempt certain nonmajor sources from the rule's permit requirement, because there was no way for facilities in "Indian country" to obtain permit exemptions on a case-by-case basis.

If someone brings a potential mistake or misunderstanding before the effective date of the rule, it can avoid the necessity of initiating a new notice-and-comment rulemaking initiative by staying the effective date of the rule with respect to the aspect of the rule that was the subject of the mistake or misunderstanding and re-open the former rulemaking docket to receive notice and comment on that aspect of the regulation. Thus, when OSHA received a number of letters and petitions for rulemaking from entities that had participated in the asbestos rulemaking and entities that had not participated in the rulemaking challenging the agency's inclusion of non-asbestiform tremolite, anthophyllite and actinolite in the standard, OSHA recognized that it may have made a mistake in including those substances in the parent rule. It reacted to this situation by staying the effective date of the rule several times with respect to those substances to permit further notice and comment. The stays were accomplished without opportunity for comment in direct final rules. The parent rule went into effect for the asbestiform versions of those minerals.

b. Experience with the Parent Rule.

Open-ended rulemaking allows an agency to learn from the experience of implementing a rule and to improve the rule in light of that experience. Sometimes the agency can adapt to prior experience with modest additional effort. For example, upon discovering that testing rules are more complex and time-consuming than estimated at the time that it promulgated them, EPA has frequently extended deadlines and made numerous technical changes through a generic “final rule” in which the agency publishes only the changes to the text of many test rules annually or biannually. Similarly, when after only two years experience with its hydrochloric acid NESHAPS demonstrated that two aspects of hydrochloric acid were already adequately regulated under another rule and that some exemptions in the parent rule were overly broad, EPA amended the rule through notice-and-comment rulemaking. And when EPA received feedback from the industry in the secondary aluminum smelter rulemaking six months after it promulgated the parent rule indicating that the information and assumptions it had relied on in including aluminum foundries and die casting facilities were incomplete or erroneous, it initiated a new rulemaking to modify the recently promulgated rule to treat them differently.

c. Gathering Additional Information.

Having initiated a large rulemaking and receiving comments, an agency may discover that it still needs essential information before it can make a supportable decision on one or more aspects of the proposed rule. Open-ended rulemaking allows the agency to bring to closure aspects of the regulation for which it has sufficient information and put off for another day the resolution of issues for which it lacks information. FCC did exactly that in its LPFM rulemaking. At the end of the day, the agency should reach a better, or at least better informed decision.

d. Changes in the Factual or Technical Setting.

When an agency promulgates a regulation, it typically bases the standard or requirements in the regulation on scientific facts, empirical observations of business practices, estimates, predictions, modeling exercises and the like, the basis for which are located in the rulemaking record. As discussed above, agencies frequently have to adapt to changes in their understanding of the factual underpinnings of regulations as more research is undertaken, business practices change, estimates and predictions are not borne out in the real world, and better models become available. FCC’s financial interest and syndication rules are a good example as changes in technology and other aspects of the commercial setting gradually undermined the technical and policy underpinnings of the original 1970 regulation.

When the technical underpinnings for important aspects of a rule no longer reflect reality, sound public policymaking demands that the agency consider changing the rule to reflect the newer understandings. The open-ended nature of informal rulemaking allows the agency to consider changing the rule in light of changes in the factual or technical setting by initiating a fresh rulemaking initiative aimed at modifying or repealing the rule. As mentioned above, Congress has explicitly made rulemaking open-ended in some regulatory programs to ensure that they periodically reconsider the former regulation in light of changed empirical understandings. When Congress has not required an agency to revisit a rule, it still makes good sense for agencies to adapt to important changes in critical factual or technical underpinnings of a rule when someone brings those changes to the agency's attention.

e. Developments in Other Rulemakings and in Other Agencies.

As noted above, developments in other agencies can precipitate a change in a final rule. Experiences with unrelated rulemakings within the same agency can also induce the agency to make changes in final rules. For example, EPA used notice-and-comment rulemaking to "correct and clarify" the startup, shutdown, and maintenance provisions of its secondary aluminum smelter rule when the D.C. Circuit vacated identical provisions in another rule addressing the same subject matter. Likewise, OSHA initiated a new notice-and-comment rulemaking to amend its asbestos standard after the D.C. Circuit rejected the agency's rationale for declining to promulgate a short-term exposure limit in a rulemaking involving another chemical. As with changes in the factual or technical settings, it makes good sense for an agency to adapt changes in the legal environment brought about by regulatory changes in other agencies that may render a final rule obsolete in one or more regards. It is also sensible for agencies working in fragmented areas like financial regulation or food safety regulation where harmonization can result in more efficient and effective compliance by regulatees. Open-ended rulemaking allows agencies to adapt by initiating a new rulemaking initiative to modify an existing rule that is inconsistent with newer regulations promulgated by other federal or international agencies.

f. Changes in the Political or Intellectual Environment.

Open-ended rulemaking is the vehicle through which agencies adapt in response to changes in the political or intellectual environment. Agencies that are adept at adapting to political change can avoid political conflict with its attendant risk to agency budgets and its drain on the energies of agency leaders and resources. Open-ended rulemaking also allows an incoming administration to address what is usually a large outpouring of regulations at the end of the previous administration aimed at locking in the previous administration's policy goals. To

the extent that final rules have not been published in the Federal Register, the rulemakings that yielded them have not reached a conclusion, and the newly arrived administration is free to change them without an additional round of notice and comment.<sup>116</sup> To the extent that they have been finalized, however, the incoming administration may postpone the effective date only through another rulemaking.<sup>117</sup> But the agency may attempt to effectuate the postponement expeditiously by promulgating it as a direct final rule in the hope that no one will challenge it.

g. Summary.

In sum, when agencies view rulemaking as open-ended they are comfortable with changing even recently promulgated rules to reflect changes in circumstances. This can lend a kind of nimbleness to regulatory policymaking that belies the commonly held belief that regulatory agencies move at a glacial pace and are resistant to change.

h. Binding Agency Discretion.

While open-ended rulemaking can free up agencies to adapt to changing circumstances, it also allows agencies to bind the discretion that they exercise in case-by-case adjudications by codifying precedent. After an agency gains sufficient experience with applying a statute or parent regulation to individual regulatees on a case-by-case basis, it can write a rule specifying or clarifying the criteria that its employees use in those cases. The experiences of the Alcohol and Tobacco Tax and Trade Bureau and the Mine Safety and Health Administration related above are good examples of this use of open-ended rulemaking, as is FCC's experience in reducing ad hoc case-by-case resolutions of the question whether subscription TV should be classified as broadcasting to a single rulemaking in which it resolved the question generically. Binding agency discretion in this fashion should provide additional certainty to regulatees and the beneficiaries of the regulatory program as to how the agency will rule in future cases. Binding discretion through a rulemaking in which regulatees and beneficiaries participate should reduce the risk of arbitrary case-by-case decisionmaking, thereby enhancing the legitimacy of the relevant regulatory program.

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<sup>116</sup> See *Kennecott Utah Copper Corp. v. Dept. of Interior*, 88 F.3d 1191, 1200-01 (D.C. Cir. 1996).

<sup>117</sup> *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752 (3d. Cir. 1982) (indefinite suspension of a published regulation is rulemaking that must follow notice-and-comment rulemaking procedures). See also *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 716 F.2d 915 (D.C. Cir. 1983) (attorney fee recovery case in which court noted that "[t]he suspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under the APA"); *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 816 (D.C. Cir. 1983) ("an agency action which has the effect of suspending a duly promulgated regulation is normally subject to APA rulemaking requirements")

i. Strategic Policymaking.

Open-ended rulemaking allows an agency to proceed cautiously and incrementally in addressing a controversial regulatory problem with limited knowledge of the relevant facts or of how various regulatory solutions will impact important constituencies. As the agency gains more knowledge and experience in working with a parent regulation, it can modify the regulation incrementally to reflect knowledge that it has gained after the regulation went into effect. FCC used the open-ended nature of informal rulemaking to great advantage in the LPFM rulemaking when it published a series of final rules, each of which resolved some issues in the large parent rulemaking that it had initiated in 2000, but reserved other issues for another stage in the ongoing rulemaking process. By allowing an agency to make progress toward fulfilling statutory goals without all of the information and analysis synoptic decisionmaking would require, open-ended rulemaking allows an agency to fight one battle at a time as it makes progress toward its statutory goals.

**B. Cautionary Notes.**

Although open-ended rulemaking has many virtues, it is not an unalloyed good. The open-ended nature of rulemaking can be abused by agencies and stakeholders to undermine the participatory values underlying informal rulemaking and to frustrate agency attempts to use rulemaking to achieve statutory goals in a rational fashion with some degree of permanence.

*1. Instability and Uncertainty.*

The most obvious downside to open-ended rulemaking is that the very fact that it is open ended renders the resulting rules unstable. Neither the regulatees nor the beneficiaries of a rulemaking exercise can be confident that the resulting rule 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 needs to be confident that the requirements of a recently promulgated environmental regulation will not change over the time that it takes for it to install an expensive technology or comply with a 10-year contract for coal with a prescribed sulfur content. Having gone through the excruciating process of preparing state implementation plans to attain a recently promulgated NAAQS, state environmental protection agencies do not relish the prospect of having to repeat the process in another five years when EPA revises the NAAQS.

At the same time, when an agency amends a rule soon 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, members of the public who are not avid readers of the Federal Register who thought they were receiving protection from the parent rule, accounts of which may have appeared in the press, may never learn of the exemptions or reductions in coverage or stringency, which often do not attract the media's attention. The parent may have given the public the illusion of protection that the subsequent actions have whittled away.

## 2. *Administrative Efficiency*

Open-ended rulemaking can prevent an agency from employing its limited resources efficiently. Having completed a resource-intensive rulemaking exercise, it is not necessarily a wise use of the agency's resources to reinvent the wheel in another rulemaking exercise devoted to the same regulatory issue. For example, EPA has frequently complained about having to go through the exceedingly resource-intensive process of revising each of the NAAQS every five years.<sup>118</sup> Yet the APA does not 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."<sup>119</sup> 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 a motion for reconsideration. Responding to such petitions takes time and resources that the agency could be employing more productively.

## 3. *Fidelity to Statutory Goals.*

When an agency writes a substantive rule, it is exercising power vested by a statute to produce a result that is consistent with the statute's policies. When the agency employs open-ended rulemaking to accomplish substantive change to the rule at the behest of rent-seeking interest groups, it runs a great risk of achieving a result that is inconsistent with the statute's goals. One or two brief extensions of the deadline for complying with a regulatory requirement are not likely to undermine statutory policies, but a continuing progression of extensions to a rule can run contrary to the statutory design, especially when the statute empowers the agency to address serious risks to businesses or the public. The decade-long sequence of deadline extensions and outright exemptions that characterized EPA's halogenated solvents rulemaking shows that open-ended rulemaking is a vehicle through which agencies can effectuate policy erosion as regulatees nibble away at statutory protections.

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<sup>118</sup> [Citation to Administrator Johnson complaining about having to revise NAAQS during the George W. Bush Administration]

<sup>119</sup> 5 U.S.C. § 553(e)

#### 4. *Delay.*

While agencies can use open-ended 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 will to resolve the conflict. In addition to kicking the can down the road for no good reason, this use of open-ended rulemaking can run counter to statutory goals, especially in the case of a statute that Congress intended to protect potential victims from risks posed by unregulated businesses. For example, EPA's multiple deferred deadlines for complying with the requirement of its halogenated cleaning solvents rule that sources obtain operating permits for a decade was arguably inconsistent with the Clean Air Act's goal of subjecting major emitters of hazardous air pollutants to the statute's Title V operating permit program. Similarly, OSHA's multiple stays of the hazard communication provisions of its formaldehyde standard arguably left employees in workplaces where they were exposed to that carcinogenic chemical without the information that the statute required on the risks it posed to their health.

#### 5. *Inconsistency with Comprehensive Analytical Rationality.*

By permitting agencies to proceed incrementally, open-ended rulemaking can discourage agencies from paying sufficient attention to how a rule will affect stakeholders and overall economic well-being. When an agency decides drop a distinctive portion of a rule as when OSHA dropped a the lift-slab portion of its concrete and masonry standard or when NHTSA dropped a fuel economy provision from its rule on tire quality, there is little loss of value that comprehensive analytical rationality can lend to decisionmaking because that the agency most likely examine the economic and/or environmental impacts of the dropped provision in the subsequent rulemaking on the dropped provision. When, however, an agency adopts the strategy that FCC employed in the LPFM rulemaking (i.e. promulgating a series of rules that resolve some policy issues and defer others pending the collection of further information), there is a danger that the agency will head down an irreversible path toward a destination that a more comprehensive examination of the problem at the outset would have avoided.

#### 6. *Transparency.*

Agencies can affect substantive policy change in a non-transparent way by characterizing a change made after publication of the final rule as correcting an "error" or "inadvertent mistake." When EPA corrected a punctuation "error" to reduce the reach of its secondary aluminum rule and OSHA changed "should" to "shall" in the concrete and masonry

construction safety rulemaking and added a respirator option for employers in the formaldehyde rulemaking without undertaking full notice-and-comment rulemaking, the agencies arguably accomplished important substantive 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 changes were essentially invisible to the public at large. A careful reader of the indexes to the *Federal Register* might have discovered this change but concluded that it was of little consequence. Similarly, extensions of effective dates often take the form of interim rules or direct final rules that do not require notice and comment.

Perhaps the most troubling employment of open-ended rulemaking in a fashion that lacked transparency that we identified in our case studies was EPA’s use of annual “interim rules” to publish vague descriptions of changes to test rules with little or no explanation after the changes had long ago been implemented by the manufacturers who were subject to the rules. It may be true that the members of the public are not generally 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 workers who are exposed to them in the workplace. And it may be that the agency is in a hurry to make the changes because many involve ongoing testing regimes, but that should not allow the agency to make a mockery of the rulemaking process.

#### *7. Public Participation and Balanced Access.*

While clarification of a vague term in a regulation via a response to a motion to reconsider or a direct final rule can provide greater certainty to regulatees, this is only true when the change is in fact a clarification and does not effectuate a substantive change in the rule. When accomplished in a response to a motion to reconsider or in a direct final rule, a “clarification” that is in reality a change in the scope or applicability of the regulation (perhaps in response to ex parte pressures to change the substance of the rule) allows the agency to avoid the public participation requirements of the Administrative Procedure Act. Extensions of effective dates, which invariably favor regulatees, are inconsistent with public participation and balanced access to the decisionmaking process when they are accomplished through direct final rules. When a change is accomplished as part of an “interim rule” that is published long after the rule 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.

## 8. *Avoiding Centralized Review.*

Presidents since Richard Nixon have issued executive orders requiring executive branch agencies to send major rules to the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget for review by OIRA and other departments and agencies.<sup>120</sup> Although the nature and propriety of such centralized review is a controversial subject, to the extent that it is perceived as a public good, open-ended rulemaking can run counter to that perception. 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, it probably does not send the revised regulation back to OIRA prior to promulgating it because the change by itself is unlikely to be major. When an agency proceeds incrementally by promulgating a series of rules that resolve some policy issues and defer others pending the collection of further information, it may be able to avoid OIRA review if none of the individual rules is a major rule.

## 9. *Implications for Judicial Review.*

[fill in]

# IV. Recommendations.

## A. Revisiting Previously Promulgated Rules.

As noted above, Congress sometimes requires agencies to engage iterative rulemaking by requiring them to revisit rules periodically. When Congress has not required iterative rulemaking, presidents have occasionally required executive branch agencies to undertake a “look-back” at previously promulgated rules with an eye toward repealing or revising unnecessary regulations.<sup>121</sup> The open-ended aspect of informal rulemaking means that no final rule is final forever. Even when not required by statute or executive order, agencies should occasionally revisit previously promulgated regulations to determine whether they are still performing their intended functions. And they should not be reluctant to revise regulations in response to changes in facts, in industry practices, or in the policy environment generally to ensure that they achieve statutory goals efficiently and effectively.

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<sup>120</sup> [Citation to the relevant executive orders and articles about OIRA review]

<sup>121</sup> [Citations to presidents Clinton, Bush and Obama look-back requirements]

## **B. Backups for Direct Final Rules.**

When an agency is quite confident that no one will challenge a direct final rule or that it can defend the direct final rule in court as a proper exercise of the good cause exception to notice-and-comment rulemaking, direct final rulemaking is a good way to conserve agency resources. When the agency is not confident on either count, it would be well advised to publish a notice of proposed rulemaking simultaneously with the direct final rule as a backup as EPA did in extending the compliance date for a change to the secondary aluminum smelter rule. That way, any objectors will have to respond to the NPRM with arguments and analysis justifying their objections, and the agency can withdraw the direct final rule and respond to their arguments and analysis in a notice of final rulemaking. If no one objects, the direct final rule will go into effect, and the agency can withdraw the NPRM. In addition to saving the time between the publication of the direct final rule and the objection, this approach should discourage objections from those who have nothing to add to the rulemaking process.

## **C. Prescribed Lifetimes.**

One way that an agency could avoid upsetting settled expectations and permit long-range planning is to give the parent rule a lifetime by stating in the rule itself that the agency will not on its own volition initiate a rulemaking to amend the rule prior to a date certain in the future and will erect a presumption against granting petitions to initiate rulemaking to change the rule prior to that date. Giving rules a presumptive lifetime could also spare the agency the administrative burden of addressing in detail rulemaking petitions filed prior to the specified lifetime.

## **D. Accomplish Policy Adaptation Through Rulemaking.**

When an agency uses open-ended rulemaking as a vehicle for adapting to changes in the political or ideological environment, it should always initiate a new round of notice and comment. The new head of an agency at the outset of a new 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, even if they have not yet been finalized. Similarly, agencies should not avoid notice and comment by changing the substance in response to a motion to reconsider without giving the public an opportunity to comment on the motion to reconsider. Agencies should reserve direct final rules for typographical errors and other clear mistakes, and they should not employ direct final rules to

correct misunderstandings or to reflect changes in the factual or technical setting or developments in other agencies.

**V. Summary**

[to be filled in]