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WHEN WILL THEY LISTEN?  
Public Comment and Highly Salient Regulations

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by Stuart Shapiro



The opinions expressed in this Working Paper are the author's and do not represent official positions of the Mercatus Center or George Mason University.

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## **Abstract**

In this paper, I examine whether federal regulatory agencies are more likely to respond to comments on highly salient regulations. Literature looking at less-salient regulations has found mixed and limited responsiveness to public comments. I find that agencies make changes in response to comments on highly salient rules (as defined by the regulation's economic impact) on 42 percent of the issues raised by commenters. However, there are some revealing patterns in the type of comments that agencies respond to. Comments merely requesting clarifications in language, without requesting policy changes, lead to agency changes more than half the time, whereas substantive comments lead to changes at a significantly lower rate. Moreover, while agencies produce much more detailed responses to comments on the legal foundation for the rule than to other comments, agencies rarely make policy changes in response to these comments.

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# When Will They Listen? Public Comment and Highly Salient Regulations

Stuart Shapiro

## I. Introduction

Since the early days of rulemaking, there have been efforts to imbue the decision-making process with public participation (Kerwin 2003). Participation helps bring legitimacy to a policymaking tool that has massive effects on American society. It gives the process of creating regulations, where decisions are largely made by unelected officials, a sense of democratic oversight. Virtually everyone agrees that participation in the creation of regulation is a good thing. The main vehicle for participation in regulatory policy is the notice-and-comment rulemaking outlined in the Administrative Procedure Act (APA) of 1946.<sup>1</sup>

The notice-and-comment process requires agencies to solicit public input on their regulatory decisions. Agencies are then required to consider the comments. Judicial interpretation of the APA has evolved to require agencies to respond to public comments in order to demonstrate that their decisions are not arbitrary and capricious. Despite the great hopes for notice-and-comment rulemaking (Davis 1971), there is considerable skepticism about whether regulatory agencies listen to comments, and even more skepticism over whether the comments play any role in agency decisions (Elliott 1992; West 2004).

As the oldest procedural requirement in the regulatory process,<sup>2</sup> notice and comment has also been one of the most examined. Empirical examinations have largely found that comments have limited influence on regulatory policy. This influence varies by the political context of the rulemaking and by the nature of the commenter, but in any case, the primary role of comments

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<sup>1</sup> Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

<sup>2</sup> By “procedural,” I mean a requirement that agencies must follow while promulgating a regulation. Judicial review is certainly older and is not characterized as “procedural” for this analysis.

has been symbolic (Elliott 1992; West 2004). However, some recent studies with more observations have found some impact from public comments (Yackee 2006). Adding a sense of participation to a process that is often criticized as opaque is important. If Elliott (1992) and West (2004) as well as Golden (1998) are correct, and all the public-comment process accomplishes is performance of this symbolic function, then the process falls far short of the hopes of those who created notice-and-comment rulemaking.

Two aspects of public-comment rulemaking have received comparatively little attention. Most empirical work in this area has used rulemakings that are out of the public spotlight (rules that received few comments or were not “significant” as defined in Executive Order 12866).<sup>3</sup> And few studies have focused on the nature of the comment,<sup>4</sup> particularly whether the comment raises economic or legal concerns. This article is an attempt to fill these gaps. By examining some of the regulations with the largest economic impacts between 2008 and 2010, I attempt to see if agency behavior in response to public comment is any different when the attention on their actions is the greatest. I also attempt to see if certain comments are more effective in gaining agency attention in this context.

I find evidence that agencies are more responsive than is typically assumed on the more consequential regulations. This finding differs somewhat from the literature that cites agency response as limited (Golden 1998; West 2004) but agrees with some of the more recent work by Yackee (2006). Agencies appear to make numerous changes to their proposed rules in response to public comments. However, the type of comments that they respond to shows some revealing

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<sup>3</sup> Executive Order 12866, 58 Fed. Reg. 51735 (October 4, 1993). Economically significant rules are defined in E.O. 12866 as rules with an economic impact of at least \$100 million in any given year.

<sup>4</sup> Jewell and Bero (2007) note that businesses and public-interest groups submit different types of comments. Businesses submit more technical and information-based comments, while public-interest groups tend to focus more on narrative. See also Farina et al. (2012), who note that individual commenters also tend to use the narrative form.

patterns. Comments merely requesting clarifications in language, without requesting policy changes, lead to agency changes more than half the time, whereas substantive comments lead to changes at a significantly lower rate. And while agencies produced much more detailed responses to comments on the legal foundation for the rule than to other comments, agencies rarely made policy changes in response to these comments. Commenters likely submit them without anticipating changes, instead preparing for an argument before the courts, and agencies respond to them also with judicial review in mind.

This article is organized as follows. In the next section, I review the empirical literature on the public-comment process. I describe the data collected in section III and report the results of the analysis in section IV. I offer concluding thoughts in section V.

## **II. The Role of Public Comments**

At the dawn of the era of the modern regulatory state, hopes for notice-and-comment rulemaking were high. The process was designed to imbue a fundamentally administrative process with democratic input. Since the public could not express dissatisfaction with agency leaders through the ballot box, the opportunity to comment on proposed rules gave the public a chance that it otherwise lacked to influence regulatory decisions. Notice-and-comment rulemaking was widely praised, with some calling it one of the great innovations in governance in the 20th century (Davis 1971). Even today, some tout the value of the process. Cass Sunstein, the administrator of the Office of Information and Regulatory Affairs from 2009 through 2012, has argued that in his experience, public comments are critically important to agency decision-making.<sup>5</sup>

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<sup>5</sup> See Zach Rausnitz, “Cass Sunstein on What Law Professors Don’t Get about Government,” *FierceGovernment*, April 9, 2013, accessed May 9, 2013, [http://www.fiercegovernments.com/story/cass-sunstein-what-law-professors-dont-get-about-government/2013-04-09?utm\\_source=rss&utm\\_medium=rss](http://www.fiercegovernments.com/story/cass-sunstein-what-law-professors-dont-get-about-government/2013-04-09?utm_source=rss&utm_medium=rss).

Rulemaking exploded in the 1970s with the passage of many statutes empowering agencies to protect public health (Eisner 2000). With this explosion came increased scrutiny and increased cynicism about the public-comment process. From a theoretical standpoint, political scientists have described notice-and-comment rulemaking as a way for politicians to ensure that regulatory decisions mirrored their preferences (McCubbins, Noll, and Weingast 1999). Comments alerted legislators to dissatisfaction with executive-branch decisions. Alerting political overseers of regulatory agencies, it can be argued, also facilitates democratic oversight of rulemaking, but it deviates from the more idealistic expectations that originally surrounded the public-comment process. Practitioners have been even more skeptical, with one former Environmental Protection Agency (EPA) general counsel describing the process as “Kabuki theater” where agencies do little to respond to the public’s concerns (Elliott 1992).

This deviation between initial expectations for a process that would give rulemaking democratic input (Davis 1971) and the reality described by Elliott (1992) created a demand for closer empirical examinations of the public-comment process. A number of increasingly sophisticated empirical analyses of agency response to public comments have been published over the past 15 years. Some of these analyses were largely case-study based, and they found widely varying results. Balla (1998) looked at a rulemaking from the Health Care Financing Administration and found that the agency made few changes in response to public comments. Shapiro (2007b) looked at one highly salient rulemaking and found that the agency (the Occupational Safety and Health Administration) did make changes in response to public comments. Cuellar (2005) looked at three regulations and with high comment volumes and found that (1) agencies were more likely to listen to sophisticated commenters and (2) individual commenters raised different issues than interest groups.

Several researchers expanded on the case-study literature to look at multiple rulemakings. These works did not look at individual comments but instead combined examinations of the agency preambles with interviews with agency officials. They are largely negative about the influence of public comments. Golden (1998) reviewed 11 rules from three agencies and found that in these cases, public comments were unlikely to lead to significant changes. She also considered whether the commenters' identities affected whether agencies changed their regulations, and found that they did not. She noted that although changes were unlikely, they did seem to occur when commenters concurred that a particular change was needed.

West (2004) looked at 42 rules and found that comments' key role was to provide information to political overseers about constituents' views. He noted that because the comment period comes so late in the regulatory process, it is of limited usefulness. Perhaps for that reason, the agencies he studied made few changes in response to public comments. Of the 42 rules that West examined, only 16 had "significant" (but not "fundamental") changes, and he found that it was not clear that even these were the result of comments.

Yackee performed perhaps the most sophisticated examinations of the role of public commenting, and she is considerably more positive than many other scholars about the attentiveness of agencies to public comments. In a study of 40 rulemakings across four regulatory agencies, Yackee (2006) concluded that "interest group comments can and often do affect the content of final government regulations." She acknowledged that she studied only low-salience regulations and that her conclusion may not be generalizable to regulations with a higher political profile. Shapiro (2007a), looking at a larger dataset of more than 900 regulations promulgated during the Clinton and George W. Bush administrations, found that agencies make

changes in response to comments nearly half of the time, but also frequently do not receive comments or use direct or interim final rules to bypass the public-comment process.

Yackee has also done several studies with coauthors examining the question of which comments get the most attention from regulatory agencies. Using the same dataset (of lower-salience regulations), she found that when comments are submitted on both sides of an issue, the side that submits more substantive comments often is more likely to gain agency changes in its direction (McKay and Yackee 2007). Not surprisingly, she found that businesses are more likely to gain changes from agencies than are other types of interest groups (Yackee and Yackee 2006). This conclusion is supported by another recent study of 90 EPA air-toxicity regulations, which found that changes in final rules from initial proposals were four times as likely to favor businesses as other parties (Wagner, Barnes, and Peters 2010).<sup>6</sup> In a study of the Securities and Exchange Commission, however, Nixon, Howard, and DeWitt (2002) found little evidence for businesses having more influence than other parties. Still, a rough consensus exists that organized interests tend to dominate the public-comment process and businesses have the best chance of being heard at most agencies (West and Raso 2012).

This literature leaves numerous open questions. The studies reach different conclusions about whether agencies meaningfully respond to public comments, and they provide little basis for determining when response is more likely. There seems to be some agreement that agencies are more responsive to businesses and organized interests than to individuals. This behavior might occur for numerous reasons. Businesses could be “capturing” agency officials. Businesses could (because of greater access to information) provide more useful comments. Or agencies,

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<sup>6</sup> See also Wagner (2010), who argued that the business community, because it has the capacity to overwhelm agencies with information, has dominated the public-comment process and thereby corrupted its original intent.



anticipating business opposition, could propose overly restrictive regulations in order to appear responsive to the eventual comments.

To add to the understanding of agency responsiveness, this article looks at two aspects of the public-comment process that have been given less attention. First, I examine some of the most salient regulations.<sup>7</sup> In part because of the difficulty of collecting data on regulations with large comment volumes, most of the above studies examine regulations that are not highly politically salient.<sup>8</sup> One could see these very political rules as being different from other rules, but it is not clear in which way the difference would run. Agencies may be more responsive to comments because there are more comments and there is more political pressure to be responsive. Or agencies may feel pressure to produce a proposal that reflects the preferences of their political overseers and hence may be less likely to change the proposal when receiving comments.

The second question this article examines involves the type of public comment. Are agencies more likely to respond to comments that ground their opposition in legal arguments? I hypothesize that agencies are more likely to make changes if they see a comment that would make a compelling argument before a judge in post-promulgation litigation and could lead to the regulation being overturned. I also look at comments that give an economic basis for their opposition. As described below, the rules in this dataset have large economic impacts, so if comments raising economic concerns are ever to have an impact, then one would expect that it would be on these rules.

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<sup>7</sup> The concept of issue salience is used often in political-science literature to categorize issues (see, e.g., Price 1978; Gormley 1989). Ways to operationalize salience for regulations have included media mentions (Shapiro 2008) of an issue and number of comments (Yackee 2006).

<sup>8</sup> Although these studies all examine rules of some salience, there are thousands of regulations each year that receive no comments or just one or two comments (Shapiro 2007a). These rules would be characterized as “not salient,” while the ones examined by Yackee and others are better described as being of moderate salience.

### III. Data

To examine the most politically salient rules, we (research assistants and the author) looked at those rules deemed by agencies to be “economically significant” under Executive Order 12866. While economic significance and political salience do not match up perfectly, there is reason to believe that they are strongly correlated. When regulations have large economic costs, the regulated industry will try to avoid those costs. Meanwhile, regulations with large benefits are likely to engage the public-interest community and be a high priority for public-interest groups. While there are regulations that are not economically significant but are politically significant (think about regulations on contraceptive use, for example), the reverse is unlikely to be true.

The Mercatus Center has gathered data on economically significant regulations covered in the Office of Management and Budget (OMB) Reports to Congress on the Costs and Benefits of Federal Regulations of 2009, 2010, and 2011.<sup>9</sup> In this period, there were 23 regulations with good data on the costs and benefits. (I excluded rules without these data, believing that it would be impossible to analyze comments on the economic impact of the rule if the agencies did not provide these data.) Within this group, we analyzed 12 of the regulations. I excluded 11 of the 23 regulations as follows:

- One rule from the Drug Enforcement Administration was excluded because it was used as a calibration between the two research assistants, as described below.<sup>10</sup>
- One rule from the Federal Railroad Administration was excluded because the agency only received one comment.<sup>11</sup>

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<sup>9</sup> The OMB is required to submit a report to Congress annually on this subject. That report details all of the economically significant rules from the previous year.

<sup>10</sup> The rule was titled “Electronic Prescriptions for Controlled Substances” and was published on March 31, 2010.

<sup>11</sup> The rule was titled “Positive Train Control” and was published on September 27, 2010.

- Four rules were excluded because there were more than 2,500 comments on them and data collection was too burdensome. This decision excludes arguably some of the most high-profile rules in the database, but the 12 rules in the database were all sufficiently salient to make this a legitimate examination of the public-comment process on very political rules.<sup>12</sup>
- Because the dataset was dominated by EPA and Department of Energy regulations, I randomly excluded four rules from these agencies in order to get a cross section of agencies to examine.<sup>13</sup> Many of the rules excluded are on similar subjects to the rules in the dataset. I also excluded one Department of Transportation rule on a subject similar to that of another rule in the database: pipeline integrity management.

The 12 rules in the dataset are listed in the appendix. They represent regulations from seven different agencies: the only agency with a rule that was excluded that did not have one in the final dataset is the Department of Housing and Urban Development. The rules received an average of 1,126 comments.

Two research assistants collected data on agency responses from the preambles to the 12 final rules. They each collected the responses to the Drug Enforcement Administration rule mentioned above. In going over the differences between their results on this rule, I decided that the instructions for collection were too vague. I then revised the instructions for data gathering and had them each collect data on a second rule. The agreement between them was much higher on this rule.<sup>14</sup> The remaining rules were then split between the two researchers. The

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<sup>12</sup> The four rules were a rule on greenhouse gases from the EPA and the Department of Transportation; a nondiscrimination rule from the Department of Justice (another Department of Justice rule on this subject is in the database); a rule from the Department of Housing and Urban Development on real-estate settlement procedures; and an EPA rule titled the “Transport Rule (CAIR Replacement Rule).”

<sup>13</sup> These included two energy-efficiency rules (for fluorescent lamps and small electric motors), since three energy efficiency standards were included in the database, and EPA rules on vehicle-emission standards and recordkeeping on lead emissions.

<sup>14</sup> The agreement was approximately 90 percent.

data-collection process was cumbersome—hence the exclusion of the rules with extremely high numbers of comments.

For each rule, we collected data on each issue raised by commenters. Agencies divide the comments and their responses by issue in the preambles to their final rules. The agency will describe the issue raised, usually indicate how many commenters raised it (and occasionally include their affiliations), and then describe its response. So each observation in our dataset is an issue raised by one or more commenters. For each issue, we collected the following information:

- Whether the commenter(s) wanted more regulation, less regulation, or merely a clarification of the regulation. In collecting these data, we looked at the issue from the commenters' perspective, asking whether they wanted less regulation for themselves (which could be an exception to a provision, a loosening of the overall regulation, or fewer recordkeeping requirements). We categorized as “clarifications” all comments that the agency characterized as describing confusion about the meaning of the proposed rule. All other issues were placed in one of the “substantive” categories (more regulation or less regulation).
- How many commenters raised the issue (if the agency disclosed this in the preamble).
- Whether the commenters were supportive or critical of the agency (if comments of each type were received, we recorded the comments as two separate issues).
- If critical, whether the comment criticized the agency for mistaking its legal authority to issue the rule.
- Whether the comment addressed economic concerns. These included a desire to increase the rule's benefits, reduce the rule's costs (to the commenter or to the industry as a whole), or correct the economic analysis.
- Whether the agency responded positively or negatively to the issue raised.

- When it responded positively, whether the agency changed the proposal.
- The length (in words) of the agency’s response to the issue.

The 12 rules yielded 708 issues that served as observations in the dataset.

#### IV. Analysis

The summary statistics from the dataset are as follows. Of the 708 issues, 660 were critical of the agency proposal and the remainder were supportive. Of the issues where commenters criticized the agency, table 1 shows the direction of the criticism.

**Table 1. Nature of Critical Comments**

Commenter wanted more regulation	Commenter wanted less regulation	Other (usually a clarification)
291 (44%)	210 (32%)	159 (24%)

Forty-five of the issues raised could be characterized as legal in nature, while 347 could be described as economic (using the broad definition of economic issues described above).

Agencies agreed with the commenters on 42 percent of the issues (for a small number of the issues, our data collectors were unable to categorize the agency response). This level of agreement is more significant than has commonly characterized the public-comment process.<sup>15</sup> From this number alone, one is led to conclude that agencies do pay attention to public comments, at least on the salient rulemakings. This finding is dissected further below. Of the issues on which agencies agreed with the public, there were only 9 percent on which they did not

<sup>15</sup> West (2004) found that agencies made nontrivial changes to only 39 percent of rules (note the difference in the level of measurement—West used rules, we used issues. Agencies in our study made some changes on all of the rules involved). Shapiro (2007a) found changes in approximately 30 percent of rules that received comments. Yackee (2006) found a level of change more in line with what was observed in this study.

make changes. According to agency responses to comments, they did not make changes because either the agencies felt that the rule as proposed already addressed the commenter’s concern or they were statutorily prohibited from making the change requested.

There are numerous possible hypotheses as to why agencies might be more responsive to commenters on highly salient regulations. Oversight of agencies by the political branches may be strongest on these issues, prompting agencies to satisfy commenters who may complain to Congress or the president. If so, then for these regulations, notice and comment does serve the purpose described by McCubbins, Noll, and Weingast (1999) and others (see McCubbins and Schwartz 1984). Agencies may also be more likely to get useful information from commenters when they receive many comments. Finally, agencies may, anticipating judicial review, go out of their way to appear responsive on regulations surrounded by controversy.

When were agencies more likely to agree with commenters? The clearest pattern that emerged was that agencies were happy to clear up confusion in their proposals but less willing to make substantive changes to their rules. Table 2 compares the agency’s reaction to the comment with the commenter’s request.

**Table 2. Agency Agreement with Comment vs. Nature of Comment**

	More-stringent regulation	Less-stringent regulation	Clarification
Agree	95 (35%)	83 (41%)	81 (54%)
Disagree	173 (65%)	119 (59%)	68 (46%)

Agencies agreed with commenters that clarification was necessary more than half the time they received a comment requesting clarification. When receiving a request for a substantive change, they agreed less than 40 percent of the time. This difference (between clarifications and requests for substantive changes) is statistically significant at the 1 percent level (using a two-sided

t-test). While agencies were slightly more likely to agree with requests for less-stringent regulation than more-stringent regulation, this difference was not statistically significant.

There was also a difference between agency responses to comments that used a legal justification and to comments that used an economic justification. The definition of an economic comment is broad; it includes any comment that suggests a change that would alter the rule's economic impact. Table 3 shows this distinction.

**Table 3. Agency Agreement by Type of Comment**

	Legal comment	Economic comment
Agree	6 (14%)	99 (29%)
Disagree	36 (86%)	242 (71%)

Agencies were much less likely to agree with comments with a legal basis than with any other type of comment. The difference between the agreement with legal comments and with economic comments is significant at the 5 percent level (using a two-sided t-test).

This finding is contrary to my initial hypothesis, which was that agencies would respond to legal threats with accommodation in order to minimize the chance of their regulation being invalidated in court. After reading a number of comments that used a statutory justification, however, I think there is a plausible alternative explanation. The comments that cited a law generally argued that either the entire agency regulation was invalid or that a substantial portion of the regulation was invalid. Such arguments are unlikely to sway agencies, which likely considered the legality of their actions before making the proposal. Furthermore, even in the unlikely event that an agency agreed with a commenter on this type of argument, the discussion would not show up in the preamble to the final rule, because there would be no final rule. Instead of issuing a final rule, agencies would withdraw their proposals.

One other statistically significant factor correlated with the likelihood that an agency would change its regulation. While only three rules in the dataset were finalized during the Bush administration (see the appendix), a potentially interesting trend emerged among these three rules: Agencies agreed with commenters more frequently than in the other nine rules. Possible interpretations of this finding are numerous. The Obama administration was faced with many more comments requesting stricter regulations (48 percent of comments on the nine rules finalized after January 21, 2009, as opposed to 29 percent on the three rules finalized before then). The comments may also have varied in other, unobserved ways. The result could also be an artifact of the small number of rules in the dataset that were finalized during the Bush administration. Caution should be taken in interpreting this difference between administrations, given the small number of the rules in the dataset that were finalized during the Bush administration. Table 4 shows the data by administration. The difference between the two administrations is significant at the 1 percent level of confidence.

**Table 4. Agency Agreement by Presidential Administration**

	Bush	Obama
Agree	86 (61%)	173 (34%)
Disagree	54 (39%)	331 (66%)

The other two differences I examined showed no relationship with the propensity of an agency to agree with an issue raised by a commenter. It did not make a difference if the issue was raised by only one commenter or by multiple commenters. It also did not make a difference if the agency was the EPA, Department of Energy, or another agency.



I also examined the depth of the agencies' responses to comments using word counts of agencies' responses to each issue.<sup>16</sup> The first difference I tested was whether agencies justified their disagreements with comments that wanted more regulation using more or fewer words than when they justified their disagreements with comments that wanted less regulation. While responses to comments that requested less regulation were 80 words longer than responses to comments that requested more regulation, the difference was not statistically significant.

The most significant difference in the depth of agency responses was between legal and nonlegal issues raised by commenters. When commenters raised a legal issue, the average agency response (when the agency disagreed) was 552 words. When a nonlegal issue was raised, the average response was 207 words. The difference between these two word lengths was significant at the 5 percent level (using a two-sided t-test). Whether it is the nature of legalistic argument, or the threat posed by questions of an agency's legal standing, comments on the legal basis for a regulation provoke a more detailed agency response. The standard deviation for the length of responses was much higher for legal issues than for all other issues. Nearly all the longest responses in the database (those of more than 1,000 words) addressed legal concerns. If the observations with these longest responses are eliminated, then the difference between legal and other responses disappears.

The only other difference in the length of agency response that was statistically significant was whether the issue was being raised by one commenter or by more than one commenter. Agency responses to single-commenter issues were a scant 154 words on average, whereas issues raised by multiple commenters prompted an average agency response of 341

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<sup>16</sup> Word count is admittedly an imperfect measure of the seriousness with which agencies take arguments raised by commenters. After experimenting with other measures, however, I found that subjective measures of the depth of the agency response varied too much to be of use.

words. The difference was significant at the 1 percent level. Single commenters are probably more likely to raise issues that are easy for the agency to dismiss with a brief response.

## **V. Conclusion**

The public-comment process is frequently criticized (Golden 1998; West 2004; Wagner 2010). Some critics have gone so far as to analogize it to Kabuki theater (Elliott 1992). According to these critics, regulatory agencies go through the motions of soliciting comments and responding to them without really engaging stakeholders or making substantive changes to their proposals. The preponderance of the academic literature supports this argument. Much of this literature has focused on less-salient rules, however.

For the most salient rules examined in this article, the results are more complex than those who dismiss public comment out of hand have argued; the results are more in line with Yackee's (2006) findings. Agencies did make changes in response to comments on 42 percent of the issues raised by commenters. However, changes were more likely when the changes requested were minor clarifications. Agencies were more reluctant to make substantive changes than clarifications. Still, given that agencies agreed with 38 percent of requests for substantive changes, it is clear that the public-comment process can produce changes, and thus may have substantive (as opposed to merely symbolic) value, particularly on highly salient regulations.

One way to minimize the probability that an agency approves your change is to question the legal authority on which the agency bases its regulation. Agencies were far less likely to respond positively to legal arguments than to other types of arguments. And the agencies backed up their responses to legal arguments with lengthy responses defending their negative reactions. Many commenters who cite the legal basis for a regulation as their justification likely don't

expect changes, and instead are gearing up for a lawsuit against the regulation. Given this dynamic, the negative agency response and its length are not surprising.

Why agencies do respond positively to a nontrivial portion of substantive comments on salient rules is an open question. One explanation is that for salient rules, where political oversight is likely plentiful, the public-comment process is most likely to work as intended. This explanation is consistent with the explanation supplied by political economists, who have argued that procedures are intended to enhance political oversight (McCubbins, Noll, and Weingast 1999), although it should be noted that the coalitions engaging in oversight are not those that put the procedures in place (Horn and Shepsle 1989). Agencies with Congress, the OMB, and interest groups looking over their shoulders are more likely to defer to commenters and to make concessions where feasible. When the glare of the spotlight is not as bright, the ability to ignore commenters is greater.

It is also possible that agencies concentrate more on strategic behavior for highly salient rules. Agencies may overpropose rules (Shapiro 2007b) so that they can appear responsive when the public uproar over their proposal emerges. They may also search for issues from commenters that don't cut at the heart of the rule, so that they can appear responsive while keeping their initial proposals intact. Further case-study research on individual high-profile rules could shed light on the motivations behind agency changes in response to comments. Further research could also clarify the findings about differences between presidential administrations and between legal and nonlegal comments. In any case, comments do clearly get agency attention on highly salient rules.

## **Appendix: Rules Studied**

Pipeline and Hazardous Materials Safety Administration, “Maximum Operating Pressure for Gas Transmission Pipelines,” December 1, 2008.

Environmental Protection Agency, “National Ambient Air Quality Standards for Lead,” December 19, 2008.

Department of Health and Human Services, “HIPAA Electronic Transaction Standards,” January 16, 2009.

Environmental Protection Agency, “Emission Standards, Reciprocating Internal Combustion Engines,” March 3, 2010.

Department of Energy, “Energy Efficiency Standards for Pool Heaters,” April 16, 2010.

Environmental Protection Agency, “Primary National Ambient Air Quality Standard for Sulfur Dioxide,” June 22, 2010.

Occupational Safety and Health Administration, “Cranes and Derricks in Construction,” August 9, 2010.

Department of Justice, “Nondiscrimination in State/Local Government Services,” September 15, 2010.

Environmental Protection Agency, “Portland Cement NESHAP,” January 18, 2011.

Food and Drug Administration, “Cigarette Warning Label Statements,” June 22, 2011.

Department of Energy, “Energy Efficiency Standards for Commercial Clothes Washers,” November 8, 2011.

Department of Energy, “Energy Efficiency Standards for Residential Refrigerators and Freezers,” November 16, 2011.

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