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# What Public Comments During Rulemaking Do (and Why)

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## Abstract

Public comments on proposed federal regulations are thought to influence bureaucratic policy choices, but why? While reelection incentives give politicians straightforward reasons for catering to public preferences, regulators lack similarly direct incentives to accede to demands from stake-holders. We argue commenters may adopt several different tactics to try and persuade regulators. Broadly, they may either describe policy consequences or threaten the regulator with sanctions, especially by the Courts or Congress. But which tactics do members of the public – especially firms and interest groups – use during commenting, and why? We explore this question by extensive manual coding of comments submitted by strategic actors during high-stakes financial rulemaking. We find that the vast majority of comments have purely informational content, with very limited threats to involve political principals. These findings should be surprising to a literature that often presumes a model where interest group commenting is a form of bargaining in the shadow of the Courts or Congress. To assess whether this behavior is driven by the benefits of information versus the costs of threatening, we explore how the strategy of outside interests changes across the resource distribution, and analyze the litigation records of firms against these agencies. We conclude with a case study of a high-stakes policy where different kinds of interests used different strategies.

## Keywords

interest groups, bureaucratic politics, money and politics, rulemaking, regulation, lobbying, notice and comment

Corporations and interest groups make significant investments in influencing the regulations issued by executive agencies (Carpenter et al., 2020). It is estimated that about one half of reported lobbying expenditures are aimed at influencing a law's implementation phase (You, 2017). Organized interests and individual corporations can spend hundreds of thousands of dollars on professional comments because they believe that comments may lead to policy concessions (Stoll, 2011). This belief is certainly reasonable. When agencies issue a final rule, they must include an explanation of their decisions and process. This explanatory material sometimes identifies particular letters or collections of letters that influenced their decision.[1] While some have wondered if these shows of responsiveness are mere window-dressing (Elliott, 1992), more recent scholarship has shown that comments frequently change the content of regulations (Golden, 1998; Bertrand et al., 2021). Indeed, systematic evidence of comment influence has been found at the Federal Reserve Board (Libgober, 2020), the Environmental Protection Agency (Wagner et al., 2011), the Department of Transportation (Balla & Daniels, 2007), the Department of Labor (Yackee & Yackee, 2006), and OIRA (Haeder & Yackee, 2015).

While the scholarly literature has moved past doubts about whether comments ever matter, it has paid less attention empirically and theoretically to the mechanisms of commenter influence. Under what conditions do comments change policy? The question has both theoretical and empirical dimensions. Theoretically, what are the transactional goods that organizations' comment letters can provide the regulator to obtain beneficial policy changes? Empirically, what organizations *can* give is a separate question from what they *do* give. Why do organizations prefer to share some transactional goods with regulators and not others? By synthesizing prior theoretical work and carefully reading a large number of comment letters, we develop a conceptual scheme describing two broad categories of goods that comments can provide regulators: information and threats. Of course, in a certain ordinary language sense, threats are a kind of information and information might be a kind of threat. Yet as we argue, comments communicating hard scientific or

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technical data or descriptions of group preferences and attitudes give regulators very different reasons for making policy changes than warnings that an interest group will take the agency to Court or raise a fire-alarm to which Congressional allies may respond. The former kinds of communication are certainly more factual and informative and the latter more clearly threatening.

While our conceptual scheme for thinking about the mechanisms of comment influence is new to the literature, it nevertheless ties closely to longstanding debates about the nature of the regulatory process, and especially an important tension between earlier and later thinking about the design of administrative institutions. Notice-and-comment was developed in the United States initially as a procedural device for allowing agencies to learn about the unintended consequences of their proposed policies (Chen & Libgober, 2023; Davis, 1969). Earlier authors who were closer to the passage of the Administrative Procedure Act ("APA") often implicitly assumed that informational mechanisms would dominate. They expected that comments sharing hard data, revealing preferences, or staking positions would naturally influence agencies who were broadly public interest minded. More recent scholars of administrative policymaking have painted a considerably bleaker picture. In the view of some, notice-and-comment has devolved into a proving ground for future litigation, with meaningful information carrying far less currency with regulators than it should. The way commenting is supposed to work in this view is that agencies who fail to accede to commenter demands find themselves at the business end of a civil injunction (Stephenson, 2006; Gailmard & Patty, 2007). Add to the mix important narratives about notice-and-comment solving political principal's problems of monitoring rulemaking agencies (McNollgast, 1999), and it is no longer clear who the primary audience for these communications usually are, or how comment authors are trying to persuade. Ironically, notice-and-comment is one of the few significant policy fora in which "direct measures of informational flows" are actually observable (Bertrand et al., 2021). At least during commenting, the informational content in lobbying is preserved in writing in the public record. Yet relatively little work in political science or cognate disciplines has tried to systematically describe how the content of these letters fits with theories of lobbying or administrative policymaking.

Using a detailed and nuanced scheme for the various kinds of information and threats that interest groups may provide, we coded 300 representative comments on 30 rules from six federal agencies.[2] We focus on agencies that regulate the financial sector for a few reasons. First, we are interested in looking at variation in use of tactics across agencies that oversee similar policy areas and have similar stakeholders. Post 2008 financial crisis, the rulemaking of these agencies are even more related than they usually would be, because of their joint responsibility for implementing the Dodd-Frank Act. Second, understanding the tactics of firms in the financial sector is important in its own right as the financial sector represents over 7% of the US GDP ($1.4 trillion). The financial sector is also thought to have particular sophistication and expertise in lobbying as compared with other industrial sectors (Hacker & Pierson, 2010). At the same time, the financial regulators may receive a degree of deference from Courts and Congress that other agencies do not, with downstream consequences for the tactics interest groups decide to use in commenting. Therefore we will adopt a cautious approach to questions about the universality of our findings across all regulatory agencies and policy domains.

Using our coding scheme, we describe the distribution of tactics in commenting on post-crisis financial regulation by organized interest groups. We find that purely informational comments are the most common, encompassing 80% of all comments submitted to the agencies. Threats of any kind are rare. They are similarly rare across all agencies we study. Richer organizations are no more likely to threaten than poorer ones.[3] Interestingly, we find some evidence that particular *rules* have an increased propensity to receive legal threats. Using a case study, we suggest several rule-specific traits that increase the risk that organized interests will threaten the agency over the rule. While we do not exclude the plausibility of other explanations for why some rules have a high propensity to draw threats, we note that it is concerning that the key features our case raises were actually baked into the policy problem that Congress delegated to the agency. This is problematic from the standpoint of bureaucratic accountability. As a mechanism check for our findings, we analyze the comments from organizations that ultimately sued these agencies. Virtually every legal case was preceded by a comment, and every case that was preceded by a comment was preceded by a legal threat according to our scheme. Based on our exploration of the case law, it appears that a very small fraction of legal threats actually result in litigation.

Our findings describe variation in tactical use across agencies and across rules within agencies, as well as how that variation in tactical use relates to variation in interest group resources and textual change in rules. In turn, these facts suggest several puzzles, most notably the predominant use of "informational mechanisms" over "threat mechanisms." We also offer some discussion about how these facts contribute to understanding of regulatory processes more generally and how and why our findings might differ in other regulatory contexts, such as environmental regulation.

## Comments as Transactional Goods

Theories of comment influence over regulatory policy choice depend crucially on assumptions about the regulators that receive these comments. If regulators lack discretion in the making of public policy, for example, then they will make the same policy choice regardless of what any particular comment says or does. Commenting on regulations in cases where

the regulator lacks discretion is irrational, since it incurs certain costs and no benefit. Regulators generally do have the ability to make different policy choices, however, and the real question is not whether they can do something different than they initially set out to do, but rather why they would want to change course in any respect. The goals and constraints regulators face in making regulations are portrayed quite differently by various sources, and these differences have important consequences for under-standing the mechanisms of comment influence. Some accounts describe bureaucratic actors as animated primarily by the desire to make good policy for the broader public, however imperfectly and incompletely that public is understood (Libgober, 2020). Other accounts describe regulators as agents of a Congress that fear imperfect loyalty or work-ethic. Still others might emphasize the role of Courts as delegated overseers. In the latter two narratives, regulators and regulated have an adversarial relationship that emerges from playing a competitive game with one another. Conversely, in models where the interest group lacks effective access to an external mechanism of sanction, regulators and regulated have a more collaborative relationship that emerges from playing a cooperative game. Importantly, cooperation and competition are structural features of the games regulators and regulated play, not statements about the amount of divergence in preferences; allies can have adversarial relationships and enemies can cooperate. These thematic distinctions in the kind of strategic interaction between regulator and regulated unsurprisingly have implications for how comments look. In our parsimonious meta-model of how commenting works, we suggest that comments should take one of three forms: legal threats, Congressional fire-alarms, and private-information sharing. Below, we elaborate how these different kinds of comments cater to different bureaucratic motivations, and also connect these accounts of bureaucratic motivation to broader understandings of regulatory process.

### *Autonomous, Public-Interested Regulators*

Notice-and-comment rulemaking was developed in the United States by political actors who shared common, and to some extent, ideological assumptions about how regulation-making would and should work, and when and why public influence over regulation should be felt. Understanding these foundational assumptions is a good first step to thinking about the contemporary mechanisms of commenter influence. In the 1930s and 1940s, New Deal Democrats created numerous agencies to solve a vast array of policy problems. The administrative procedures that they designed, including and especially the commenting process, gave these agencies substantial autonomy and leeway in making public policy. There was very explicitly a desire to exclude Courts or Court-like institutions from the process, and formal mechanisms including Congress are a relatively recent phenomenon. Their understanding of the regulatory encounter was one primarily played between executive agencies and a relatively narrow set of stakeholders. The presumption of the New Deal-ers was that the agencies they had just created were going to be inclined toward making good public policy in the public interest. Given space, they would do that. At the same time, these New Deal-ers were not simply starry-eyed idealists. Indeed, their expectations were informed by some of the most comprehensive studies of administrative practice ever conducted in the United States. One of the major issues identified in these commission reports is that regulators have a hard time predicting the full consequences of what they plan to do. Regulation is complicated. There are a lot of edge-cases one can easily overlook. Sometimes one may not realize that there are alternative arrangements that are win-win, or very nearly so. Notice-and-comment was the process that New Dealers devised that fit their assumptions about why regulators would value public comments and what comments should do. For them, comments work because they allow interested parties to share private information about the impact of regulation on themselves. If these consequences were addressable without changing the overall regulator scheme, or were serious enough to cast the whole regulation into doubt, then the policy motivations of the regulator would lead the agency to doing the right thing.

As the theoretical literature on lobbying in political science and cognate disciplines has evolved, it has become increasingly clear that the sharing of private information is potentially fraught, contrary to the presupposition of the New Dealers that such information sharing would be easy. When is a lobbying group able to successfully transmit private information to a policymaker? Fairly abstract models typically tell two kinds of stories. First, there are models where the policymaker is interested in learning some abstract facts about the world, which the lobbyist knows but the policymaker does not. Yet the policymaker knows what the preferences of the lobbyist are, and the conflict between their respective interests casts a shadow of doubt over everything the lobbyist says. If the lobbyist has sufficiently similar preferences to the policymaker, the lobbyist can send an imperfectly informative "cheap talk" signal that results in better policy for both parties. Alternatively, if there are multiple lobbyists that the regulator can play off one another, that can also help encourage information about the truly best policy to emerge. A second story is that lobbying is not simply cheap talk, but rather a costly signal about the state of the world (see e.g., Gordon & Hafer, 2005). By investing in the writing of detailed reports, the mobilization of scientific data and policy experts, it is possible that the lobby can also overcome the obvious conflicts of interest and establish its own credibility. Judged from these models, one would expect comments to primarily focus on communicating policy relevant facts about how the world works.

While the previously mentioned theories of private information sharing are illuminating, they are also somewhat obscuring, for reasons largely related to their provenance.

Historically, such models originated in economics to explain how sellers of a good communicate with buyers. The analogy to lobbying has long been criticized for black-boxing the many internal procedural com-plexities of the lawmaking process, such as committees, parties, or multiple decision-makers with equal voting rights. One must admit that this line of criticism is considerably weaker when focusing on the comparatively simple rulemaking process. Indeed, the New Dealers arguably *hoped* to create a policymaking system that fits the typical assumptions of cheap talk or costly signaling models, where an autonomous agency with unlimited discretion makes policy after confronting a public whose only power is the right to provide information. Yet even with rulemaking, the disanalogies between commercial transactions and policymaking are important. The notion that the receiver of information knows the preferences of the sender is hardly heroic in many economic transactions. In commerce, both sides want to get the most value at least cost. But in politics, the trade-offs are often between incommensurable values and uncertain outcomes. Policymakers, even expert ones who engage in rulemaking, are unlikely to ever get to the bottom of what policy is "correct" from a welfare standpoint. Rather, what they *may* be able to clarify is how constituents and stakeholders see the tradeoffs. For this reason, some more recent models of lobbying have described the problem less as one of communicating private knowledge about some external state of the world, but rather private knowledge about what the lobbyist wants and how intensely. Under these models, one would expect commenters to invest less in describing the welfare or "global" consequences of various policies, and instead to focus on staking positions and directly communicating what it is that they want the regulator to do.

Regardless of whether one expects comments to describe policy relevant facts or merely to stake positions, the narratives have broad similarities in predicting *private information sharing* to prove the predominant form of commenter influence-seeking. The presumption that the regulator is usually highly autonomous leads to the expectation that comments must help the regulator get what it wants in order to prove effective, which means comments will only emerge when there is an opportunity for interest groups to collaboratively work toward a commonly beneficial solution.

## Delegated Oversight to Courts

In the decades that followed the creation of the notice-and-comment process, federal courts began to develop legal doctrines, notably "hard-look" review, that gave them some power to oversee the regulation-making process in agencies. The Supreme Court has approached these developments inconsistently, in some cases such as *Chevron* or *Vermont Yankee* discouraging lower courts from replacing their judgment about the policy or processes agencies use, while in other cases plausibly doing exactly what they told lower courts not to do.[4] While commentators differ on how involved Courts are or should be in regulation-making, few would deny that ex post review of regulation makes courts an important potential player in the regulatory policymaking game. Although courts require private interests to bring a case, once brought, they have potentially very wide discretion; "the records in administrative cases often are so extensive that reviewing courts can extract from them plausible grounds for either an affirmance or a remand" (Schuck & Elliott, 1990). Remands are very costly to agencies, as they can wreak havoc on an agency's plans regarding budget, enforcement, and the issuance of future rules related or unrelated to the issues at stake in litigation (Mashaw, 1994; Cross, 2000). Importantly, if regulators are primarily motivated by the desire to make good public policy, then the delays that litigation implies are a serious consequence. But even if regulators are not so strongly policy oriented, litigation makes the job tougher, and, therefore, heading off litigation provides a clear payoff even to less public interested bureaucracies.

Given these considerations, organized interests have strong incentives to threaten credible law-suits. The more credibly the commenter can threaten to sue an agency, the more bargaining power they thereby obtain. Indeed, it is for this reason that many scholars in the domain may have anecdotally assumed that comments should be thought of as roughly synonymous with threats to sue. However, it is important to recognize that the bargaining power an organized interest obtains through threatening suits are not without constraints. Firms do face real trade-offs in threatening litigation; for example, they could fear that their regulator is vindictive and will engage in reprisals (Carpenter, 2010). If the firm threatens litigation, but does not follow through because of the costs or a subjective low estimation of the probability of success, then it will have a diminished credibility in future interactions. And indeed, the baseline chances of success in taking on a federal agency making rules are low. The rulings in *Chevron* and its successors create the presumption that an agency operating in its zone of discretion has the right to make the rule it thinks best. Put differently, a litigant needs to convince a judge that the agency is acting beyond its purview or deciding capriciously, which is a tall order. Particularly in the financial regulatory context, lawsuits filed against agencies are relatively rare compared to the volume of rulemaking. For example, from 2005 through 2018, there were 246 opinions issued in 165 cases in the DC Circuit and Appeals courts (the venue for most suits against agencies) involving the rulemaking process at the financial regulatory agencies. By contrast, these agencies alone issued 1515 rules in this period.[5] Moreover, at the same time as credibility concerns give interest groups reasons not to make idle threats, agencies have similar credibility reasons not to cave. If an agency develops a reputation for responding to legal threats with policy concessions, they should expect more such threats than an agency that refuses to bow to threats to sue or does so only rarely.

### Fire-Alarm Oversight by Congress

For both Congress and judiciary-centric theories of administrative policymaking, interest groups serve a critical monitoring function. In the widely-cited terminology of McCubbins and Schwartz (1984), administrative procedures force agencies to reveal what they are doing to interested citizens and organizations, who act as "fire-alarms" by "bring [ing] alleged violations [of Congressional intent] to congressmen's attention." Congress possesses powerful tools to rein in bureaucrats; "Congress can abolish an agency or reorganize it, change its jurisdiction or allow its program authority to lapse entirely. Congress can cut its appropriations and conduct embarrassing investigations (Fiorina, 1981)." More subtly, Congress can embarrass and harass agencies and their leadership via hearings and subpoenas. More recently, Congress has enacted formal mechanisms such as the Congressional Review Act that allow Congress to abrogate any rulemaking process with a simple majority vote within 60 legislative days of the passage of the rule.

Commenters threatening Congressional action face significant obstacles for their threats to be taken seriously by both Congress and the agency. First, actually obtaining the attention of members of Congress is difficult as its members operate under severe attention constraints. Even if one gets the attention of someone in Congress, that is a far cry from getting the attention of the floor or the committee. The forces pulling toward inaction in Congress are enormously powerful (Baumgartner et al., 2009). Second, the agency may be acting according to Congresses' preferences.[6]

### How Comments Influence Regulators

For private actors to have influence over the policies regulators choose, their comments must speak to bureaucratic motivations and incentives. The discussion above poses three, non-exclusive channels for how this may occur: through information, legal threats, or threats to involve Congress. If bureaucrats are at least partially motivated by public interest, then that can explain why comments merely presenting facts about the world or staking positions or expressing preferences would have influence. By contrast, threats to trigger oversight and sanction by Courts and Congress can provide incentives for bureaucrats with relatively weak policy motivations to grant policy concessions as well as for bureaucrats with stronger policy interests. At the same time, there are constraints and tradeoffs involved in making either kind of threat, which perhaps have gone under-appreciated by the literature. The Post-New Deal resolution of the administrative process of the United States presumed a model of autonomous, public-interest minded regulation-making and commenter influence. As new mechanisms for oversight of regulation-making have developed in the United States, which make judicial or Congressional action affecting rulemaking more likely, they make it possible for comments to give further and perhaps stronger reasons for regulators to accede to policy demands.

## Data and Coding Strategy

Our analysis uses an original data set of 300 coded comments on 40 rules promulgated by the 6 U.S. financial regulatory agencies.[7] We focus on the 2010–2016 period when the agencies were engaged in extensive rulemaking related to the financial crisis and the Dodd-Frank Wall Street Reform Act. Commenter participation rates are highly skewed, with a small fraction of rules receiving thousands or even millions of comments, and the vast majority receiving at most a few hundred. This fact creates difficulties in making claims about the representative communication. The typical comment on all regulations is a form letter submitted by an ordinary citizen on one of a small set of rules, but the typical comment on a *typical* regulation is submitted by an interest group or firm and could pertain to virtually any rule. Even on the small subset of rules with high public attention, the number of actively engaged strategic influence-seeking groups is arguably much smaller. Other scholars have approached the problem of identifying the representative communication by focusing only on dockets that receive a "Goldilocks" level of commenting: not too much but not too little (Golden, 1998; Yackee & Yackee, 2006). Our sampling strategy is to select typical firm and interest group comments on financial rules. Our solution ignores the potential influence of citizens but addresses the representativeness issue and also narrows the focus to those actors who are particularly strategic in their behavior.

Procedurally, we sample comments by first picking a rule at random among all the rules issued by an agency after 2010. Then, once we have picked a rule, we randomize the order of the comments and pick the first 10 comments from firms and organized interests. If a rule had fewer than 10 comments, we coded all of the comments. We sampled rules without replacement until we had 50 comments per agency. This sampling strategy achieved a mix of high and low salience rules. Some rules, such as the Durbin Amendment and Regulation Z, received over 1500 comments, while others received fewer than five comments. In this way, our sampling scheme ensures that our estimates reflect the characteristics of the typical comment on the typical rule, which we consider the most meaningful quantity of interest.

To analyze the effect of resources on commenter behavior, we collect financial data from Com-pustat (for bank holding companies) and from Internal Revenue Service 990 forms for nonprofits. We match commenter names to the Compustat database by having RAs clean commenter names to match the commenter with the appropriate corporation. To match the IRS-990 data we use fuzzy matching and review each match to ensure it is correct.

## Coding Comments

To discern the tactics commenters use to influence regulators we code comments along 15 dimensions.[8] The scheme assumes the use of one tactic does not exclude the use of the other; that is, a comment making a legal threat may also invoke the specter of Congressional intervention and provide data to the prudential regulators. We define threats expansively, as the greater measurement threat to our conclusions is that the threats are *under-counted* rather than *over-counted*. An analysis of rules that end up in litigation in the Analysis section provides evidence for the construct validity of our expansive definition.

Comments can threaten bureaucrats in one of two ways: they can invoke the possibility of Con-gressional involvement in the rulemaking process or they can make legal threats. Since rulemaking is based on delegated authority from Congress, Congress can rescind that authority if they find that it has been misused. The Congressional Review Act exemplifies strong Congressional oversight of the rulemaking process-Congress can abrogate any rulemaking process by a simple majority vote within 60 days of a session after an agency publishes a Final Rule.

Congress is invoked in three ways: a Congressperson is explicitly CCed on the comment, the letter mentions actions undertaken by a Congressperson following passage that suggest ongoing Congressional attention or interest, and the letter describes outcomes that Congress wanted when it passed the law. While the first two definitions are precise enough that they can be used for measurement (in what follows, we use codes CC and CA), invoking Congressional intention is more ambiguous. It could indicate the sharing of policy perspective, a threat to go to Court, or a threat of Congressional sanction, all of which should produce influence for different reasons. In order to ensure the distinctness of our coding in regard to the mechanisms of influence, we use code CI to refer to descriptions of what Congress wanted where (1) the outcome Congress wanted is specific and not a broad unobjectionable principle, and (2) the section in which the Congressional intent is referenced is not part of a legal threat. For example, on a rule regulating swaps,[9] the Futures Industry Association (FIA) wrote the following:

> We also believe that such an interpretation is consistent with the legislative intent of Congress, as noted in a letter from Senate Banking Committee Chairman Dodd and Senate Agriculture Committee Chairman Lincoln to House Financial Services Chairman Frank and House Agriculture Committee Chairman Peterson on June 30, 2010.[10]

This passage satisfies our criteria. A comment asserting that "Congress wanted a fair deal for All Americans" would not satisfy criteria (1) (too vague). A more specific statement that fails (2) would be something like, "[i]f Congress had intended to do what the proposed rule does it would violate the takings clause."

Our goal in coding legal threats is to identify comment letters that raise legal arguments that the commenters could subsequently use in court. Practitioners sometimes emphasize that their goal in commenting is to lay the groundwork for arguments they intend to make in subsequent litigation (Scalia, 2017). To code a document as being a threat there are two elements the comment must satisfy:

1. The comment contains a citation to a legal authority, such as a statute, case law, or a specific constitutional provision.
2. The citation is followed by a claim that the agency is in violation of this legal authority.

The second prong is particularly important, since virtually every comment discusses a law or regulation, and the mere presence of some or even a lot of discussion of law does not necessarily imply a threat. An example of a legal threat is found in a comment by the American Council of Life Insurers on the rule regarding Margin and Capital Requirements:

> Section 4s(e)(3)(C) of the Commodity Exchange Act ("CEA") states that the Prudential Regulators "shall permit the use of non-cash collateral, as the regulator...determines to be consistent with (i) preserving the financial integrity of markets trading swaps; and (ii) preserving the stability of the United States financial system." In the Reproposed Rule, the Prudential Regulators permit only cash collateral for VM and do not provide an analysis that would support a determination that permitting non-cash collateral for VM would negatively affect the financial integrity of the swaps market or the stability of the U.S. financial system.[11]

We make no restrictions on the plausibility of these legal arguments, the extent of the research behind them, the number of alleged violations, whether the sender of the letter is a lawyer or law firm, or any other plausible criteria for ensuring that the threats are genuine and credible. We merely code whether there is an alleged violation of a specific legal authority, and consider that sufficient to be an explicit threat.

In considering our definitions, it is important to distinguish between comments that are litigation threats and comments that pose litigation risk. Practitioners' accounts suggest that firms may submit informative comments to the regulator if they plan to challenge the agency in Court on the grounds that the regulator has not actually made a reasoned decision or considered all the options (Stoll, 2011). In this sense, all comments might be viewed as raising some litigation risk. Identifying litigation risks is an important part of the job of the general counsel of an administrative agency, and it is natural that they would tend to view all comments in this light. At the same time, the risks posed by informational comments are obviously much lower because the commenter must convince a court that the agency's decision was irrational. Courts are loathe to replace their inexpert judgment for that of an administrative agency. An outside interest whose only grounds for challenge is that the

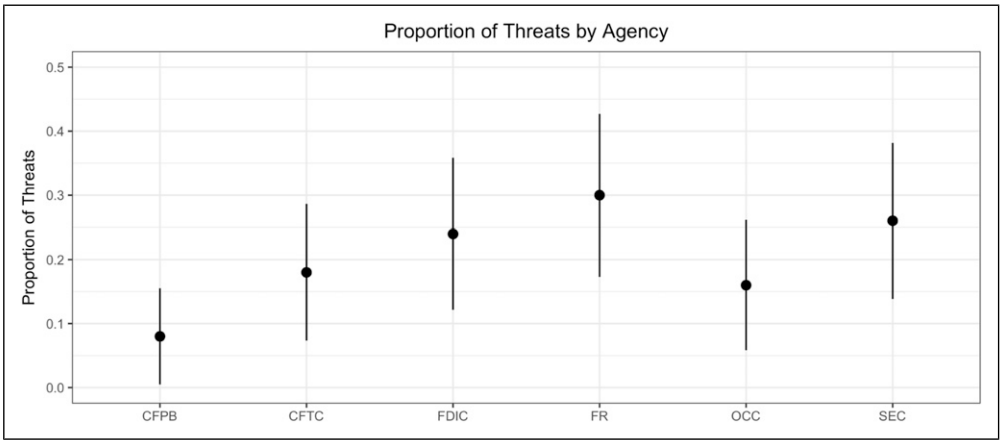


**Figure 1.** Proportion of comments broadly understood as raising the possibility of external sanction in the CFPB, CFTC, FDIC, Federal Reserve Board, and CFPB. Confidence intervals calculated using the bounds $\hat{p} \pm 1.96 * \sqrt{\hat{p}(1-\hat{p})/N}$.

agency has failed to come to a reasoned decision is certainly setting out on a rough path that is unlikely, in most cases, to lead to success. Nevertheless, as a robustness check of our coding scheme, the section after next canvasses the case law for challenges to financial regulation and codes the comments submitted by challengers. Commenters challenging the reasonableness of the agency's decision are often explicit that this is what they are doing, and will include citations to statutes or case law standing for the proposition that agency decisions must be reasoned in order to be lawful.

Threats need not be exclusive; commenters can invoke Congress and legal threats. While we take pains to separate claims about congressional intent from legal threats, as the latter often implies the former, we do allow for both to co-occur in our coding scene. For example, on a joint Federal Reserve, FDIC, and OCC rule on capital requirements for banks, TD Bank issued the following threat:

> Far from being required by the Collins Amendment, application of a Basel I floor to foreign banks would actually be inconsistent with its express language and intent. Section 171(b)(3) explicitly states that a "depository institution holding company" subject to the Collins Amendment's capital requirements includes US bank holding companies, including those owned by a foreign banking organization, but explicitly excludes the parent foreign banking organization.[12]

Here this comment involves not only a legal threat, because of the reference to the specific section, but also a specific invocation of Congress's intended policy goals.

## Analysis

Figure 1 presents a high-level overview of the prevalence of threats to involve Congress or the Courts. The estimates range from as high as 30% of the comments at the FRB and as low as 8% in the case of the CFPB. The uncertainty estimates are calculated assuming a binomial data generating process. In light of the confidence intervals, it is not clear that the tendency of commenters to engage in "threats" –broadly construed– differs by agency. If we understand the function of the remaining comments as providing the regulator with information of some kind, then the figure also implies that information provision dominates threat-making in each of the financial regulatory agencies.

Table 1 further breaks down the population level estimates for each of the kinds of tactics indi-vidually. Treating comments that use multiple kinds of threats as their own category, the threatening comments can be considered as belonging to one of five bins. Since threats are about 14 percent, the estimated proportions in some of the bins will be close to 0.[13] For each particular tactic, the credible intervals are overlapping, indicating that even on this finer level there do not appear to be significant agency level differences between tactical use. If we assume, reasonably based on our prior analysis, that the typical significant rulemaking receives about 100 unique comments from firms and interest groups, then just a few of each kind of threat will be observed in a significant rulemaking docket.

Taken together, Figure 1 and Table 1 suggest that there is little variation at the agency level. This leaves an important question - is there variation in comment tactics at the rule level? Table A2 in the Appendix shows significant variation in threats at the rule level; some comments receive a plethora of threats while other rules receive none. Possibly, this pattern occurs in our data because all the agencies we examine are financial regulators. As a result, these agencies have overlapping stakeholders, interest groups, and oversight institutions. Potentially, in policy domains with different actors and norms, the interactions might look different. We return to the question of why the meaningful variation in terms of threats versus information seems to be more about rules than agencies in the discussion.

Informational comments make up the vast majority of comments each agency receives. While there is substantial diversity in the content of these comments, they share a

**Table 1.** Distribution of Threats. 95% Bayesian Credible Intervals Formed Assuming a Binomial Likelihood and Weakly Informative Beta(1,1) Prior.

| Kind | CFPB | CFTC | FDIC | FRB | OCC | SEC |
|---|---|---|---|---|---|---|
| CC cong | 0.00 (0.001, 0.057) | 0.00 (0.001, 0.057) | 0.02 (0.007, 0.09) | 0.04 (0.016, 0.118) | 0.00 (0.001, 0.057) | 0.00 (0.001, 0.057) |
| Cong. attention | 0.04 (0.016, 0.118) | 0.10 (0.052, 0.195) | 0.04 (0.016, 0.118) | 0.10 (0.052, 0.195) | 0.04 (0.016, 0.118) | 0.06 (0.027, 0.145) |
| Cong. intent | 0.04 (0.016, 0.118) | 0.16 (0.095, 0.265) | 0.22 (0.142, 0.332) | 0.28 (0.191, 0.395) | 0.16 (0.095, 0.265) | 0.24 (0.158, 0.353) |
| Legal threat | 0.08 (0.039, 0.171) | 0.12 (0.066, 0.219) | 0.16 (0.095, 0.265) | 0.22 (0.142, 0.332) | 0.12 (0.066, 0.219) | 0.12 (0.066, 0.219) |
| Multiple | 0.08 (0.039, 0.171) | 0.18 (0.11, 0.288) | 0.24 (0.158, 0.353) | 0.30 (0.208, 0.416) | 0.16 (0.095, 0.265) | 0.26 (0.174, 0.374) |

number of common features. First, amongst the 300 comments only six do not provide some form of preference or facts to the regulators. Second, the comments focus primarily on a single industry rather than com-menter's firm. Seventy eight percent of comments focused on only the commenter's industry while 17 percent focused solely on the commenter's own firm.[14] Third, the tone of comments was typically negative; 77 percent of comments thought the agency went too far regulating the industry although there is some evidence that tone differs in other agencies.[15]

Informational comments seek to influence a regulator through providing regulators information about the consequences of a policy. Inspired by Yackee and Yackee (2006), we analyzed the com-menter's perspective on how regulated entities were treated under the proposal. In all agencies, the plurality response was that the proposal went too far. The results ranged from 64% at CFPB to 92% at the Fed. Interestingly, 20% of the sample argued that the rules did not go far enough; of these comments, half were from the interest group Better Markets – a non profit dedicated to promoting the "public interest" in financial markets.

The credibility of information a person offers is determined in part by the reasons he or she came to possess it. We coded for four, non-exclusive possibilities for the "qualifications" or "claim to authority" that seemed to back up the claims a comment made: personal experience, scientific or social scientific expertise, expertise in law, or expertise in the policy arena. Nearly all of the commenters claimed policy and subject matter expertise. Although there were few legal threats, 41% of the sample claimed legal expertise as the basis for their comments. These rates ranged from 32% at the CFTC and FDIC to 50% at the SEC.

## Tactics and Resource Constraints

Under the logic of revealed preferences, the choices of rational actors reflect their judgments about the marginal benefit of typical actions. Nevertheless, without more information, it is impossible to know whether the marginal benefit of choosing X is higher than choosing Y because X brings more benefit than Y or has higher costs. Alternatively, there might be constraints that prevent the choice of Y, although we usually do not lose much in thinking of hard constraints as sufficiently large costs. One approach to testing whether the decisions are benefit or cost driven is to examine whether choice changes as a function of features that are likely correlated with the constraints. Many would assume that the constraints that an actor faces in using a tactic are related to resource-endowments, in particular that wealthy actors have lower effective costs.For example, suppose that threatening litigation brings the most benefit, but also comes at significant costs that the many small firms cannot afford to incur. In such a world, one might find the few, well-resourced firms prefer to bully and the many, smaller firms prefer to beg, but that would reflect the comparatively high costs of bullying for small firms rather than the comparatively low benefit of litigation. In this section, we focus on evaluating how usage of bullying tactics relate to resources, in order to shed light on whether such tactics are more likely related to the benefits or constraints with their usage.

To examine how tactics relate to resource endowments, we collect data on non profit assets from Internal Revenue Service Form 990 Data. Figure 2 compares the year end assets of non profits for those that comment on rules to those that do not. Commenters, on average, posses significantly more assets than non-participators. The median assets for a commenter is $10 million while it is only $640,000 for non-commenters. This disparity amongst non-profits is not surprising - writing effective comments takes substantial resources. Hiring external council to write comments can cost over $100,000 (Dash, 2011). Further there are few restrictions on nonprofits compared to for profit corporations. This disparity, however, does not hold with corporate commenters.

This relationship, however, does not hold for banks. Table A3 in the Appendix compares the assets under management of banks by commenter status. The bimodal distribution is likely explained by the higher regulatory requirements of managing at least a billion dollars in assets relative to managing less than a billion dollars. The figure illustrates how the more assets a bank has, the more likely it is to participate in notice-and-comment. However, resources do not appear to be a barrier for most banks: for almost any part of the asset distribution one examines, there are examples of firms with that level of assets that did participate in notice-and-comment rulemaking sometime in the last 8 years.

Table 2 contains OLS regressions exploring the relationship between threats on log assets and log revenue. In none of the specifications does the size of the firm predict whether or not a commenter made a particular kind of threat. Nevertheless, it is important to recognize that the amount of power available to these regressions is limited by the rareness of threats in general. Table A4 in the Appendix shows that this relationship holds for bank holding companies too.

### *Threats versus Actions: The Case of Litigation*

The results presented thus far suggest that comments during financial rulemaking largely convey information about preferences, provide perspective on the values and facts that should govern policymaking, or offer illustrative case studies. Threats play a secondary, even minimal, role in most commenting for most financial agency rulemakings. Nevertheless, one reasonable concern is that our definitions of "threat" are too restrictive and that the financial regulators can observe threats we cannot, despite our best efforts. We have guarded against this possibility by defining legal and Congressional threat in as liberal a fashion as seems conceptually meaningful, nevertheless it is possible that threats are so subtle that we still cannot detect them. In order to assess the plausibility

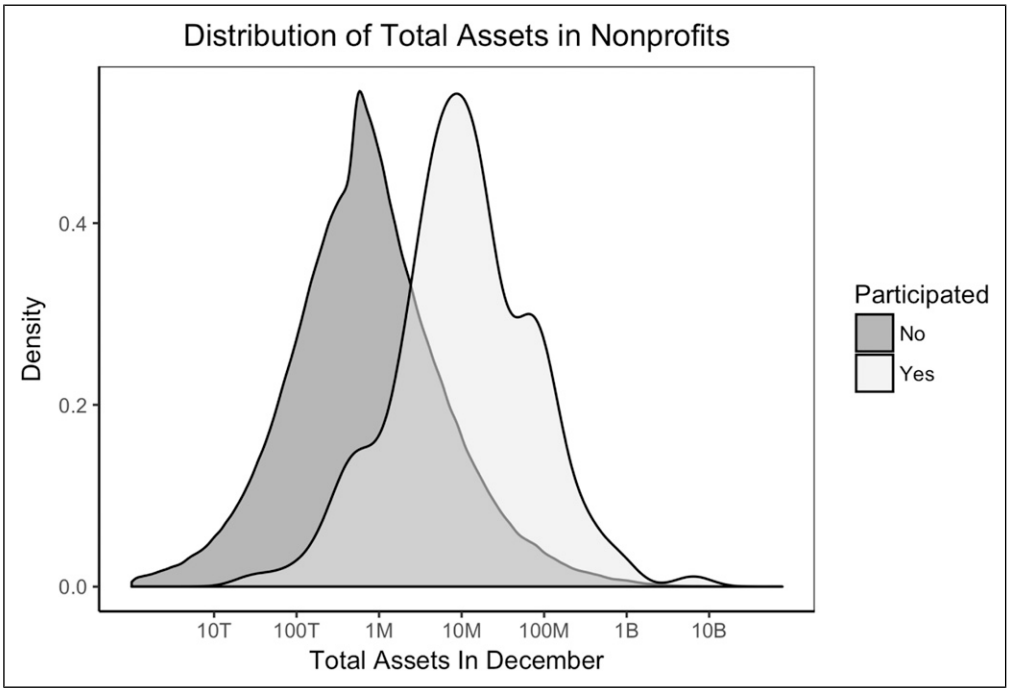


**Figure 2.** Density plot of non profit year-end assets of those that submitted comments on Dodd Frank rulemaking compared with ones that did not.

**Table 2.** This Table Presents Regressions Exploring the Relationship Between Commenter Size and the Propensity to Involve Congress in One of Several Fashions, Focusing on Non Profits. Threats and Non-Profit Assets.

| | Dependent Variable | | | | | |
|---|---|---|---|---|---|---|
| | Any Threat | Legal Threat | Fire Alarm | Any Threat | Legal Threat | Fire Alarm |
| | (1) | (2) | (3) | (4) | (5) | (6) |
| Constant | 0.49 (0.45) | 0.56 (0.37) | 0.44 (0.44) | 0.38 (0.48) | 0.33 (0.42) | 0.36 (0.48) |
| Log non-profit assets | −0.02 (0.06) | −0.05 (0.05) | −0.02 (0.06) | | | |
| Log non-profit total revenue | | | | −0.01 (0.06) | −0.02 (0.05) | −0.003 (0.06) |
| Year FE | Yes | Yes | Yes | Yes | Yes | Yes |
| Robust SEs | Yes | Yes | Yes | Yes | Yes | Yes |
| Observations | 113 | 113 | 113 | 113 | 113 | 113 |
| $_R2$ | 0.06 | 0.06 | 0.05 | 0.06 | 0.05 | 0.05 |

*Note.* $^{*}p < 0.1$; $^{**}p < 0.05$; $^{***}p < 0.01$.

of this concern, we conduct an additional content analysis of judicial decisions where a court reviewed financial agency rulemaking, as well as the comments from the plaintiffs that initiated the suit. If our coding scheme is valid, then judicial review of financial regulations should be rare, at least relative to the number of regulations. Further, if our scheme is valid, then the overwhelming majority of plaintiffs should submit a legal threat to the docket of the rule they eventually challenge. As we elaborate, our scheme passes both checks.

In order to identify cases of judicial review of financial rulemaking, we conducted a Lexis-Nexis search for judicial decisions where one of the financial regulators was a named party and containing any of the following terms: "rulemaking, "rule-making," "proposed rule", and "final rule." We conducted this analysis on the Federal Deposit Insurance Commission (FDIC), the Federal Reserve Board (FRB), the National Credit Union Administration (NCUA), the Securities and Exchange Commission (SEC), and the Department of the Treasury (TREAS).

We further refined this search by focusing on cases in the D.C. Circuit. Because so many federal agencies are headquartered in the District of Columbia, this particular circuit

has become the preeminent administrative law jurisdiction in the United States and the location where most instances of judicial review of rulemaking should occur.[16] For the resulting set of 175 decisions, we first identified whether the decision actually involved a challenge to an agency regulation. For decisions where a regulation was challenged, we identified the citation of that regulation, which agency issued that regulation, the website of the rulemaking docket and plaintiff comment associated with the decision, if available, and whether the plaintiff's challenge to the rule was successful.

We found that only about 40% of the decisions matching our search actually involved judicial review of a rule, which is to say 76 decisions published between 1947 and 2018. For many of the decisions, it was not possible to find the dockets containing comments electronically. Generally, only dockets relating to cases decided in the last decade were electronically available, with universal coverage only emerging for cases decided after 2010. For 25 of the decisions, we were able to identify the rulemaking dockets that corresponded to the regulations under challenge. A number of these decisions arose from the same legal controversy, in the sense they involved the same litigants challenging and defending the same final rule. In total, we have 15 unique disputes for which a docket was electronically available. In all but one of these disputes, the plaintiff preceded their legal challenge by a comment. The only exception was a suit by the New York Republican party challenging an SEC rule that prohibited donations by investment advisers to campaign committees (NY Repub. State Comm v. SEC, 70 F. Supp. 3d 362, (D.C.D. 2014)), and also the Republicans' appeal/refiling of the case in Circuit court (NY Repub. State Comm v. SEC, 799 F.3d 1126, (D.C. Circuit 2015)). In these cases, the New York Republicans attempt several variations on the argument that they had no actual notice of the rulemaking. Unsurprisingly, they did not submit a comment and their challenge was not successful.

For the 14 remaining disputes in which a docket was available, we collected and analyzed a total of 34 comments submitted by the litigants. Commenters that eventually sued may have a tendency to file multiple comments, which we also note is unusual. The National Association of Manufacturers submitted six letters to the SEC about the Conflict Mineral rule; the Business Roundtable and Loan Syndication Trading Associations submitted four comments regarding each of the rules they were challenging. In 13 out of 14 disputes, at least one of the comments submitted by the future litigant was an explicit legal threat according to the definitions we used in our paper. The only exception was a comment letter by the Florida Bankers Association which included a paragraph that claimed the agency was "abusing its regulatory authority and doing so in a manner that is contrary to Congress' intent and the last 90 years of legislative history."[17] Because the letter did not cite a specific authority anywhere in the document, it was not a legal threat according to our definition.

Overall, 23 of the comments were legal threats according to our definitions, while 11 were not. Two of these non-threats were requests for extension and two were recommendations that the regulator examine the attached academic or governmental studies. We consider these as incontrovertibly non-threatening. The remaining seven comments were offered on regulations that would eventually become challenged in one of the following cases: *Loan Syndications & Trad-ing Association v. SEC*, *Business Roundtable v. SEC, or National Association of Manufacturers v. SEC.*[18] Potentially, these letters may have been offered to help build support for a claim that the agency's decision-making was "arbitrary and capricious," but these were hardly sufficient to make out a claim of that on their own.

To get a better sense of how these non-threatening comments fit into the argument that the agency has come to an arbitrary decision, we focus on the letters of Business Roundtable, since theirs is the only case that was ultimately decided on these grounds. During Notice and Comment, Business Roundtable submitted four letters. The first letter argued that "the current 60-day comment period is inadequate under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(c)," which is an explicit legal threat in our definition. They followed with a 114-page single-spaced memorandum whose table of contents includes headers such as "The Proposed Election Contest Rules… Exceed the Commission's Section 14(a) Authority" and "The Proposed Election Contest Rules Raise Serious Constitutional Concerns." Both sections deliver many explicit legal threats. Notably, the majority of the memorandum is devoted to describing why the rules are unnecessary and why they are likely to have pernicious side effects that the agency had not considered. Section IV (B) in particular brings together the claims that the agency had not rationally evaluated the regulatory problem while including explicit references to the APA, the Regulatory Flexibility Act, and the Paperwork Reduction Act. The remaining letters were a cover letter introducing a SSRN study to the public record and a ten-page discussion of the merits, weaknesses, and conclusions of the social-scientific studies and reports in the docketing record. Our coding scheme would missed these two, since they appear as informative comments. However, the Business Roundtable's case for bureaucratic irrationality and over-reach was largely built in a letter that was easily a legal threat by our definition.

It is also worth noting that the 23 comments which led to lawsuits were remarkably unsubtle, especially when compared with most of the comments that we identified as "legal threats" in our main exercise. For example, the American Bankers Association begins its letter to the National Credit Union Administration by declaring that "[t]hroughout this proposal the Board sidesteps the Federal Credit Union Act requirements in the name of industry growth and replaces its own judgment for that of Congress… The ABA urges the Board to reconsider this egregious overreach and withdraw this proposal."[19] Phillip Goldstein, President of the Hedge

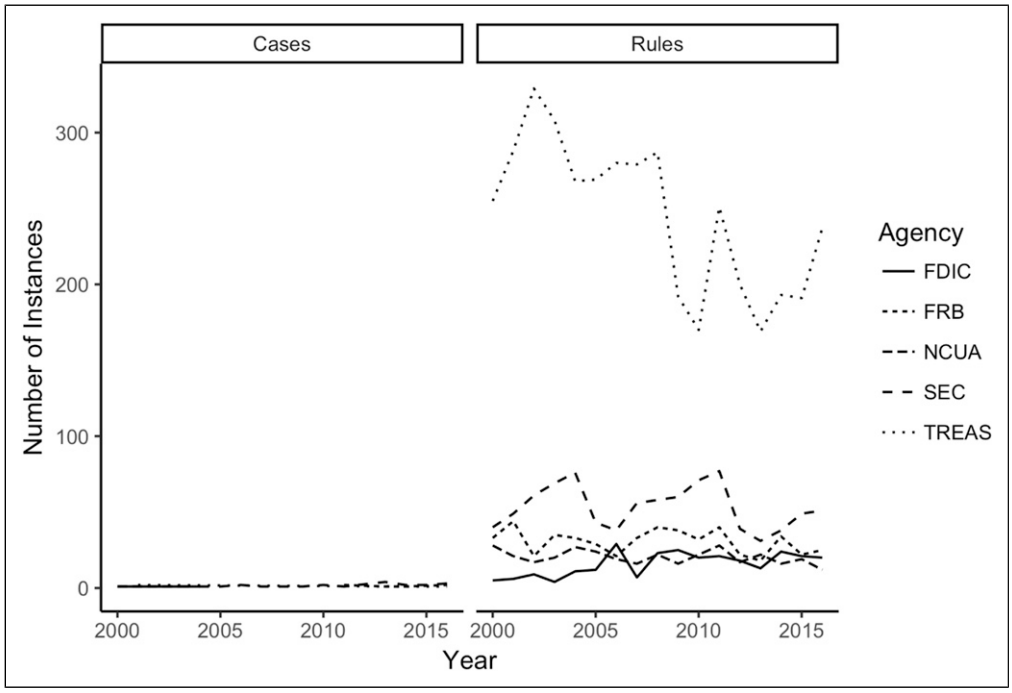


**Figure 3.** Number of cases of judicial review of rulemaking and number of rules issued per year in six financial agencies between 2000 and 2016. Over the entire 16 year period, there were 36 instances of judicial review of rulemaking by the six financial regulators.

Fund Kimball & Winthrop, was even more blunt in one[20] of the comment letters that preceded his eventual suit against the SEC:

> [W]e have taken the liberty of providing the Court's opinion in Lowe below so that the Commission's legal wizards can familiarize themselves with it. After reading it, we are confident they will see the wisdom of abandoning a misguided effort to redefine "client" and save itself the embarrassment of being rebuked by a reviewing court if the rule is adopted as proposed.

Figure 3 shows the comparison between the number of cases involving judicial review for each regulator and the number rules being issued for the period between 2000 and 2016. 20 of the 36 cases from a single agency, the SEC, which was not part of our original coding. Even at the SEC, the rate of lawsuits works out to about one per year, at the same time as the agency issued about 60 regulations per year. The ratio of cases to rules is small, and the ratio of cases to comments is a small fraction of that. Since 2010 the Federal Reserve has received about 7700 comments on 110 rules, although the median rule only received 10 comments. Comparing such figures with the estimated proportion of legal threats (between 2% and 6% of comments), it seems that most of what we call legal threats are at most bluffs. Even when plaintiffs do bring judicial challenges, it turns out they win only about a third, so even initiating a suit should hardly indicate to the agency that its position is precarious. One potentially worrying possibility, for our story at least, is that few legal threats turn into actual lawsuits because the financial regulators frequently capitulate to legal threats and so do not result in judicial decisions. However, if agencies were quick to capitulate to legal threats, we should expect more active threatening by opposing interests, especially given the fact that there are generally commenters on both sides of a proposal. As a result, if threats were frequently leading to capitulation, we should see a higher overall proportion of threats among all comments. The best explanation for this fact pattern is that recourse to lawsuits is highly constrained and does not typically offer sufficient marginal benefit among potential commenter strategies, especially as compared with other tactics.

## *Why Some Rules Generate So Many Legal Threats: A Case Study on the Durbin Amendment*

The results presented so far suggest that within our sample threats seem more a function of particular rules than agencies, at least among the agencies that regulate financial activity (see e.g., Figure A2 in the Appendix). We seek to understand possible mechanism for why some rules lead to such large numbers of threats relative to others, and therefore conduct a case study focused on one such highly litigated rule implementing the Durbin amendment. The Federal Reserve rule in question regulated fees on debit card transaction. As we shall see, the case provides evidence that legal threats and fire alarms are a function of the statutory language that gave rise to the rule. While the case study cannot rule out other

explanations, another of which we suggest toward the end of the section, we do think it is especially problematic if unclear statutory language is a major cause of administrative litigation. Judicial review of agency action is supposed to follow because of (bad) choices the agency made, not laziness or intentional vagueness by Congress.

The starting point for our analysis is the text instructing the Federal Reserve how to regulate debit card interchange fees:

> The amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction shall be reasonable and proportional to the cost incurred by the issuer with respect to the transaction.[21]

This portion of the law leaves a question as to what constitutes a "reasonable and proportional" fee. In the proposed rule, the Federal Reserve created a standard reimbursement rate of between 7 and 12 cents per transaction, far below the prevailing rate of 42 cents. These numbers reflected the costs that large debit card issuers typically incur in authorizing, clearing, and settling a debit transaction, which were three parts of a debit card transaction the amendment says the agency should consider. Capital One responded to the proposal noting:

> [The proposed rule's] interpretation is also completely at odds with the operative statutory mandate that the fee must be reasonable and proportional to costs incurred with respect to the transaction, which connotes a broad consideration of costs. To read paragraph 920(a)(4)(B)(i) as limiting the costs that may be considered in setting interchange fees is to effectively gut the overall statutory mandate.

Complaints were not unique to Capital One. Visa wrote that "[we] understand[] that Section 920 is ambiguously worded in many respects and was included in the broader Dodd-Frank Act with effectively no legislative history, no hearings, no findings, and no debate."[22] While many banks threatened to sue the agency for covering too few costs that were reasonable, the National Association of Convenience Stores (NACS) took the view that the agency was allowing too many costs that were not actually reasonable. Both banks that make money off debit-card fees and merchants that pay these substantial overhead costs ultimately sued the agency for failing to come to a reasonable decision. The agency's choices about what was reasonable was ultimately vindicated, however not without close calls. Indeed, a district court granted NACS's motion for summary judgement, vacating the interchange transaction fee and network non-exclusivity parts of the proposed rule by arguing that the Federal Reserve exceeded their statutory authority in allowing credit card issuers to recover "fixed" costs associated with debit card purchases, transactions-monitoring costs, and network processing fees (see NACS v. Bd of Governors of Federal Reserve System). The appellate court, however, reversed the ruling, and other suits by banks similarly went nowhere. The agency was clearly caught trying to make sense of ambiguous language in the cross-fire between interest groups. It is hard to see how the agency could have avoided these lawsuits or worked to head off these threats, when most of the legal problems were baked into this case by Congress.

We believe that unclear delegations, particularly when stakes are large, are not all that uncom-mon and may play an outsized role in explaining why some rules become mired in litigation and legal threats. Further work is necessary to see how frequently that is the case. One important doubt about this proposed mechanism is that perhaps statutory vagueness may have less to do with these threats than appears. It might be the case that, when the stakes are large enough, special interests that have a lot to win or lose will try their hand in court to see if they can reach a better outcome. To the extent that some rules create high stakes or draws in particularly litigious groups, that can explain why legal threats seem to be so much more of a particular rule story than an agency or broad policy area story. This mechanism, though distinct, presents similar theoretical issues as the statutory vagueness issue. Judicial review of agency action is meant to incentivize faithfulness to statutory language and effortful engagement with the policy problems involved in rulemaking. At least in the case of the Debit Card rule, we do not find much evidence of the agency deviating from the bounds of what is reasonable, nor any indication they did not take their task seriously, and the rule seemed headed for litigation no matter what the agency did.

## Discussion & Conclusion

The results and mechanism checks of the last three sections have developed a number of descriptive facts with rich theoretical significance. Despite the agencies having varying degrees of political insulation, and catering to differing kinds of interests, the use of tactics across financial agencies was remarkably similar. In each case, information-provision dominated all the threat mechanisms. In most cases, the information that the comments provided was about the preferences of the commenter or communicated facts within their knowledge. Surprisingly, from the perspective of credible signalling models of lobbying, very few of the comments portrayed themselves as offering quantitative data, scientific analysis, or other pieces of "hard data" that might overcome the credibility problems caused by the outside interests' obvious conflicts of interest.

In evaluating the rareness of threatening comments, we are confronted with a choice: either using these tactics does not bring sufficient benefit, or its usage is sufficiently constrained in ways we cannot observe. In our view, both explanations are probable. Principals may wield powerful sticks for disciplining agencies, but commenters can only access this power vicariously. In the case of Congress, getting the attention of a single Congressperson is hard enough, but to get Congress to

open its oversight toolbox requires concerted Congressional action. Even the Goldman Sachs of the world do not have the means to get all their regulatory matters at the top of the Congressional agenda given the competition from other actors and groups, and so they must focus their own Congressional lobbying efforts on only the most salient examples.

In the case of litigation, a Court can in theory force the agency back to square one in its rulemaking, but we know that most of the time that plaintiffs do bring their cases to judgment, they wind up with nothing more than expensive legal bills. Presumably, most of the cases that might exist, but do not reach the decision-stage, would be even weaker and have less probability of delivering the regulatory benefit than the ones that are brought. The financial agencies must understand that most of the legal threats confronting them are not going to end up in Court, so face little reason to cave to them, especially since capitulating today may lead to less valuable information tomorrow. On the constraint side, there must be numerous potential downsides that prevent firms and interests from resorting to threatening tactics: for example, damage to reputation or relationships, the possibility of retribution in unrelated areas, and also the direct costs of hiring counsel or lobbyists.

One unfortunate corollary of the rareness of threatening comments, especially by individual firms, is that it is difficult to achieve the large scale necessary to analyze the relationship between the use of these tactics and economic resources. With just a few positive examples of any particular kind of threat, detecting any relationship is difficult. Given the volume of commenting activity that occurs in the federal government, our estimates imply that there are surely enough comments out there to theoretically conduct such a study, the only problem is finding them. While computational text analysis or machine learning might help with sorting through such materials, truly effective usage of these methods requires substantial training data. If we had enough training data, we would already have what we need to detect a substantial effect.

In interpreting these findings, it is also important to consider the effect of the sample design. The typical comment is on one of a handful of rules that received a large number of comments. It is possible that hardball tactics are more common on such rulemaking dockets because businesses have greater stakes in these issues. We are doubtful of this supposition because, in our experience, the usual reason that a docket has upwards of several hundred comments is because many ordinary citizens or sole proprietorships have decided to become involved in rulemaking. Such commenters usually submit relatively short comments that we might describe as preferential or factual, but any threats they make would be particularly empty. Many rules appear to have large economic stakes and receive surprisingly few comments. Since our goal is to understand what drives administrative decision-making in most rulemakings, our approach to sample selection seems to be the right one. Our findings also shed substantial light on our understanding of the contemporary regulatory process. We noted at the outset that there are some scholars who have advanced the view that the rulemaking process has uniformly become far less dynamic, more legalistic, and less policy-oriented than it was in prior decades or was intended to be. As a corollary, the literature often explains "why comment" with the answer "to threaten litigation." At least implicitly, but sometimes explicitly, such claims support the view that agencies are intransigent and the regulatory process needs substantial reform to restore the more informational and dynamic process of the past (see, e.g., Elliott, 1992; McGarity, 1992). By exploring the tactics of commenters, we have learned that at least in the financial regulatory space the advocacy environment looks far less litigation-oriented and much more informational than the literature would expect. The vast majority of comments do not seem headed in a litigation direction, nor toward triggering Congressional oversight. At least in the financial regulatory space, information sharing seems to be empirically the preferred tactic of groups in rulemaking. Analysis of comment letters does not suggest that sussing out missing private data is the only way (or even a particularly good way) to achieve favorable regulatory outcomes. Fears that large-firms use qualitatively different tools to achieve better outcomes also does not find a strong foothold in the evidence we collect. To the extent that we do find some rules drawing a lot of legal threats and litigation, we argue that at least in some (and probably many if not most) cases this litigation is policy forum shopping and not really what judicial review of agency rulemaking is intended to achieve.

We do not regard our findings as necessarily invalidating prior claims that rulemaking has be-come ossified, judicialized, or litigation-bound, although we do think that these claims should be made a bit more circumscribed than they have been. We note that many of the scholars noting such trends in federal rulemaking have focused on the environmental policymaking context. Environmental policymaking may more frequently involve higher and clearer stakes for narrower interests than financial regulation. Broad public interest groups are typically better resourced in the environmental policy domain, and more closely aligned with social movements, than in the financial policy domain. Add to this the likelihood that the Environmental Protection Agency may receive substantially less deference than financial regulators in the eyes of federal courts, and there are more than a few good explanations for why environmental rulemaking is so frequently a precursor to litigation while financial rulemaking seldom works its way through a courtroom. By showing that rulemaking in an important area has a vastly different flavor, and seems to cater to very different bureaucratic motivations than have been assumed, our work establishes that many prior claims about how and why rulemaking works or does not have been made too readily, narrowly, and without clear evidence. We do not know at this point whether the environmental policy or financial policymaking case is more typical for rulemaking in general, in

terms of the dominance of information versus threats, however we should expect variation on this dimension. We have begun to sketch some explanations for why interest group conflict may have such a different flavor depending on the rule or agency. Future work will do well to build upon the hypotheses our exploratory and descriptive work has presented, which has large implications for defining the nature and scope of problems with our regulatory processes, as well as testing the arguments for reform.

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## Notes

1. To give just one example of thousands, financial companies sought, and won, a concession from the Commodities Future Trading Commission (CFTC), to exempt companies that made between $100 million and $8 billion from having to register as swaps dealers (Brush & Schmidt, 2013).
2. In the course of developing this coding scheme, we also read many hundreds more. To the extent possible, we will incorporate some of this additional data wherever feasible and appropriate.
3. We do not evaluate the quality of legal threats, so it is of course possible that organizations with more resources make threats that are more credible.
4. See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) and *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).
5. The rule count is from final rules on regulations.gov which does not have data prior to 2005.
6. In addition to the expost controls discussed here, Congress does possess formidable ex-ante controls they can use to "stack the deck" for a particular outcome (McCubbins et al., 1987). However, empirically, there is little evidence that ex-ante Congressional controls are effective in "deck-stacking." Balla (1998) and Nixon et al. (2002) find little evidence this occurs in health care reimbursement and SEC rules, respectively.
7. Specifically, we focus on rules that were issued by the Securities and Exchange Commission (SEC), the Com-modities Future Trading Commission (CFTC), the Federal Reserve Board (FRB or Fed), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Commission (FDIC), and the Consumer Financial Protection Bureau (CFPB).
8. A full description of the code is in Section A.1 in the Appendix.
9. A swap is a contract between two or more entities where the entities exchange cash flows or liabilities from two different financial instruments.
10. https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=26215.
11. https://www.federalreserve.gov/SECRS/2014/November/20141126/R-1415/R-1415_112414_129786_278794149594_1.pdf.
12. https://www.fdic.gov/regulations/laws/federal/2010/10c05dec30.pdf.
13. In this circumstance, frequentist confidence intervals for a binomial proportion have poor coverage and may violate boundary constraints. As a result, we here calculate Bayesian credible intervals using a weakly informative prior.
14. The remainder made general remarks about the rule's impact on the macro economy or multiple industries.
15. In an earlier coding scheme the plurality of commenters offered a mix of positive and negative comments sup-porting some but not other aspects of the proposal (NCUA: 47.8%; TREAS: 40.6%), the next largest block offered uniformly supportive comments (NCUA: 34.8%; TREAS: 37.5%).
16. Indeed, our basic search returned more than twice as many results in the D.C. Circuit as in the next most numerous jurisdiction, the 2nd Circuit, which had at least 50% more cases than the 9th circuit, which had at least 50% more cases than all the others.
17. https://www.regulations.gov/contentStreamer?documentId=IRS-2011-0001-0046&attachmentNumber=1&contentType=pdf.
18. See *Loan Syndications & Trading Association v. SEC*, 882 F.3d 220 (D.C. Cir. 2018), *Business Roundtable v. SEC* 905 F.2d 406 (D.C. Cir. 1990), and *National Ass'n of Manufacturers v. SEC,* 800 F.3d 518 (D.C. Cir. 2015).
19. https://www.ncua.gov/Legal/CommentLetters/cl-cfmm-20161208-kbrittany-aba.pdf.
20. Mr. Goldstein also submitted a second letter, a six page dialogue between himself and "Humpty Dumpty's great great grandson, Bumpty Dumpty," who "is a senior staff attorney at the SEC in the Division of Investment Management's Office of Expediency." The dialogue, a parody of a segment of Lewis Carol's Alice in Wonderland, accuses the SEC of intentionally violating the Lowe precedent and promulgating the regulation in order to drum-up business for the private legal services industry, in which "Bumpty Dumpty" eventually intends to work. It is interesting to note that, despite the "wondrous" tone of his letters, Mr. Goldstein would go on to win his challenge in the D.C. Circuit Court of Appeals.
21. https://www.law.cornell.edu/uscode/text/15/1693o%E2%80%932.
22. https://www.federalreserve.gov/secrs/2011/march/20110304/r-1404/r-1404_022211_67810_571316902268_1.pdf.

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